

## 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 Leticia and her five-year-old daughter, L.E.A., whose forced separation lasted for 124 days.

### A. **The Forced Separation of Leticia from Her Five Year-Old Daughter**

Leticia is from Guatemala. She is twenty-five years old and the mother of a five-year old girl, L.E.A. After gang members physically assaulted Leticia on two occasions and threatened to kill her and L.E.A., Leticia and L.E.A., fearing for their lives, fled Guatemala for the United States. On or about May 11, 2018, they crossed the border into Arizona, where they were apprehended by U.S. Customs and Border Protection (“CBP”) agents and taken into immigration custody.

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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.”).

Immigration officers brought Leticia and L.E.A. to a short-term detention center where the officers locked them in a cell with about 30 mothers, plus their children. The cell was very cold—so cold that some people called it *la hielera*, which means, “the cooler.” Leticia had a bag of clothing that would have helped keep her and L.E.A. warm, but immigration officers confiscated the bag and provided only foil sheets, which did not keep them warm. The only food Leticia and L.E.A. were given all day was two bowls of cold, instant soup that was barely edible.

Shortly after they arrived, immigration officers took Leticia and L.E.A. from the locked cell and ushered them into another room where they met with two other uniformed immigration officers, both men. L.E.A. was asked to move about 10 steps away from Leticia so that she would not hear what the immigration officers were about to tell her mother.<sup>7</sup> The officers then informed Leticia that L.E.A. would be taken away from her and sent to another facility for a couple of days. Leticia at first insisted that the officers could not take her daughter from her. The officers responded that in fact they could take L.E.A. away because Leticia had committed a crime.<sup>8</sup> Leticia then begged them not to separate L.E.A. from her and she offered to leave the United States so long as she could go with Leticia. The officers refused and reacted to Leticia’s increasing distress by becoming hostile and screaming at her to be quiet.

L.E.A. was not far enough away from the conversation and could hear the officers berating her mother. She understood that the officers were going to take her away and she began to cry. Leticia and L.E.A. were brought back to the locked cell with the other detainees. Leticia tried to calm her daughter, but she would not stop crying.

That night, Leticia and L.E.A. barely slept. There were no beds in the cell. There were some mats, but not nearly enough for everyone. Leticia lay down on a trash bag, the only thing separating her from the cold, concrete floor. L.E.A. lay on her mother’s arm, the two nearly touching the strangers laying next to them in the packed cell.

In the morning, Leticia and L.E.A. were still lying on the floor when Leticia heard the immigration officers open the door and begin calling out children’s names. Leticia was terrified. When a child’s name was called, the child would desperately clutch his or her mother as the two cried. The officers, both men, would then order the child to line up against the wall with the other called children. The officers said they were bringing the children to take a shower. Leticia watched in horror, waiting for L.E.A.’s name to be called. As they waited, Leticia tried to calm her daughter, telling her she would get to play with other kids and have something better to eat than the cold soup.

L.E.A.’s name was called. She grabbed Leticia tightly and said, “mommy, please don’t let them take me away.” Leticia again tried to soothe her daughter, saying, “Honey, it’s going to be ok, you’re just going to play.” The immigration officer called L.E.A.’s name again, this time yelling, “can’t you hear that we are calling your daughter’s name?” Two officers, both men, then approached Leticia and L.E.A. They roughly grabbed L.E.A.’s arm and pulled her away

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<sup>7</sup> Neither Leticia nor L.E.A. speaks English. Unless otherwise stated, all conversations referenced in Sections 8.A - 8.E of this claim occurred in Spanish.

<sup>8</sup> To this day, Leticia has not been charged with a crime in the United States.

from her mother. Leticia begged the officers to let her give L.E.A. some juice before they took her away because her lips were dry from thirst. The officers told her no, yelling that they needed to hurry up because an airplane was waiting for the children. Until that moment, Leticia had assumed L.E.A. would be moved to a facility nearby. It was the first time she realized that her five-year-old daughter, who did not speak English and had never been on an airplane, would be taken far away from her. Leticia asked where L.E.A. was being sent. The officers did not answer her.

Shortly after the officers ripped L.E.A. from her mother's arms and brought her to the showers, an officer called Leticia out of the cell. L.E.A. had refused to let anyone but her mother shower her. Leticia went into the showers, washed her daughter, quietly gave her some juice, and said goodbye. Once the children were showered, a man and a woman, whom Leticia understood to be social workers, told a group of the mothers that they would now be taking the children away. The social workers tried to allay any concerns, telling the mothers not to worry because the children would be taken care of and given toys to play with. A female social worker also told the mothers that their children would be boarding an airplane. Leticia asked her where the children were going, but the woman did not respond. During this conversation, the children were in the area, off to the side. It was the last time Leticia saw L.E.A. for four months and one day.

After officers forcibly separated Leticia and L.E.A., Leticia spent two more days at the short-term detention center, sleeping on the floor at night. She asked immigration officers several times about her daughter, but she received no answer. Leticia was then moved to the Santa Cruz County Detention Center in Arizona, where she was held for about two weeks. During that time, despite Leticia's repeated questions, no one told her about L.E.A.'s whereabouts or well-being.

### **B. Leticia Tracks Down L.E.A. at a New York Facility**

Leticia was next transferred to the Nevada Southern Detention Center in Pahrump, Nevada, where immigration officials held her for approximately two months. Again, Leticia asked officers about her daughter but she received no information. About two weeks after her transfer, Leticia had a conversation with another detainee whose granddaughter had been separated from her. The woman gave Leticia the telephone number of a social worker who might be able to help Leticia find L.E.A. Leticia gave the number to her brother, who was living in Florida, and asked him to contact the social worker, whom Leticia understood to be in New York. The social worker was able to locate L.E.A. at a Cayuga Center in New York.<sup>9</sup> About one month after being forcibly separated from her daughter, Leticia and L.E.A. were finally able to speak to each other on the telephone. L.E.A. cried and said she did not want to be there. She asked her mother where she was, too young to understand that her mother was in Nevada, approximately 2,500 miles away.

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<sup>9</sup> According to its website, Cayuga Centers contracts with the U.S. Office of Refugee Resettlement ("ORR") to provide foster care programs for unaccompanied children, and it is "the largest provider of transitional foster homes for Central American children taken into custody while crossing the U.S. southern border." <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/>

During this entire period, no immigration officer provided Leticia with any information about her daughter's whereabouts or well-being or assisted her in locating her daughter. Instead, Leticia located L.E.A. only as the result of information learned from another detainee and the help of her brother and a social worker. As far as Leticia is aware, no federal officer ever even tried to help her find L.E.A.

### **C. Leticia is Nearly Deported Before Being Reunited with L.E.A.**

On or about July 2, 2018, while at the Nevada Southern Detention Center, Leticia had her initial credible fear interview with an asylum officer. The interview was conducted in English through an interpreter. The asylum officer, claiming they were out of time, ended the interview before Leticia finished explaining why she feared for her life in Guatemala. Rather than continue the interview, the asylum officer concluded that Leticia's explanation was not credible. An immigration judge sustained the asylum officer's finding on or about July 17, 2018. When Leticia received notice that she had not passed the credible fear interview, an officer informed her that she would be deported as a result. Leticia conveyed this to the social worker who had helped her locate L.E.A. The social worker informed Leticia that after she was deported, L.E.A. potentially could remain at the Cayuga Center for two more months before being returned to Guatemala. Frightened of the idea of L.E.A. being left in the U.S. alone, Leticia arranged to have her brother pick up L.E.A. from the Cayuga Center and bring her to live with him in Florida.

In late July or early August 2018, DHS informed Leticia that she would soon be transferred to Arizona for immediate removal to Guatemala. On [REDACTED], Leticia's immigration attorney filed a habeas corpus petition and emergency request to stay her deportation (the "Petition") in [REDACTED]

The requested relief was based on the June 26, 2018, class-wide preliminary injunction issued by Judge Sabraw of the U.S. District Court for the Southern District of California prohibiting the deportation of any detained parent before reunification with his or her separated children. *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1149-50 (S.D. Cal. 2018).<sup>10</sup> Judge Sabraw had also ordered the government to reunite children age five years and older with their separated parent by July 26, 2018. *Id.*<sup>11</sup>

[REDACTED] ordered the government to respond to Leticia's Petition [REDACTED]. However, on or about the night of [REDACTED] 2018—before the government responded to the Petition—immigration officers woke Leticia in

<sup>10</sup> The order reads in pertinent part: "Defendants, and their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them, are preliminarily enjoined from removing any Class Members without their child, unless the Class Member affirmatively, knowingly, and voluntarily declines to be reunited with the child prior to the Class Member's deportation, or there is a determination that the parent is unfit or presents a danger to the child." *Id.*

<sup>11</sup> The order reads in pertinent part: "[u]nless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child: . . . (b) Defendants must reunify all Class Members with their minor children age five (5) and over within thirty (30) days of the entry this Order." *Id.*

her cell and instructed her to pack her belongings. The officers informed her that she was being transferred to Arizona for immediate removal from the country. They shackled Leticia's hands and ankles and put her on a bus with other detainees. Leticia was initially brought to a facility in Las Vegas. There, she pleaded with a male officer not to deport her because her daughter was still in the country. The officer responded, "who told you to bring your daughter here?" An officer handed Leticia documents with her picture attached and asked if it was her. After Leticia said yes, the officer told her to sign the documents. An officer removed Leticia's handcuffs so that she could sign the documents, but Leticia refused because she did not know what the documents said, as they were written in English. A female officer, armed with a Taser, pushed Leticia, still shackled at the ankles, against a wall and threatened to tase her if she did not sign. Instead of her signature, Leticia drew a straight line above the signature line. Officers then put Leticia on a bus to the airport where she was escorted onto a flight to Arizona.

On or about [REDACTED], Leticia arrived in Arizona. U.S. Immigration and Customs Enforcement ("ICE") officers transported her to the Eloy Detention Center and then, shortly after, to the Florence Correctional Center. At Florence, officers brought Leticia and other detainees to a trailer and told them they would spend the night there before being deported in the morning. Again, Leticia pleaded with the officers not to deport her without L.E.A. After her persistent pleas, one of the immigration officers finally allowed her to call her brother in Florida, who contacted Leticia's attorney in [REDACTED]. Leticia's attorney promptly filed an emergency motion for a preliminary injunction seeking a stay of Leticia's removal. [REDACTED]

[REDACTED] granted the emergency motion, temporarily stayed Leticia's removal, and set a hearing date. On [REDACTED], the government responded to Leticia's original Petition. The government conceded that Leticia was a Class Member for the purposes of the nationwide injunction in *Ms. L.*, but that it still had not reunited Leticia and L.E.A.<sup>12</sup> (This was [REDACTED] after the court-imposed deadline in *Ms. L.* for the government to reunite separated families. *See* p. 4 above). The government agreed that it would not remove Leticia prior to the two being reunited. [REDACTED]

Thus, it was only a result of Leticia's attorney's emergency filing and the [REDACTED] Court's prompt actions that prevented the government from violating Judge Sabraw's orders precluding Leticia's deportation prior to reunification.<sup>13</sup>

#### **D. Leticia's Detention in a Local Jail**

While Leticia's Petition was being litigated, she was transferred to the Eloy Detention Center in Arizona. She stayed there for approximately one week before she was transferred to the Henderson Detention Center, in Henderson, Nevada. In addition to housing detainees on behalf of ICE, this facility is also a local jail housing criminal arrestees. Thus, even though Leticia had never been charged with a crime, ICE locked her up at Henderson for approximately

<sup>12</sup> [REDACTED]

<sup>13</sup> [REDACTED]

two weeks with women facing criminal charges. Leticia was terrified and treated harshly. At one meal, an inmate pushed her causing her to drop her tray. A prison guard communicated that she would be tased if she dropped her tray again. After a visit from her immigration attorney one day, a jail guard strip-searched Leticia, ordering her to remove all her clothing—including her underwear—bend over, and cough. Leticia was humiliated.

#### **E. After Four Months, Leticia and L.E.A. Are Finally Reunited**

On or about September 13, 2018, DHS transferred Leticia to the South Texas Family Detention Center in Dilley, Texas (“Dilley”). The same day Leticia arrived at Dilley, Leticia’s brother brought L.E.A. to be with her. Four months and one day after the government forcibly separated them, Leticia and L.E.A. were finally reunited and able to hug each other. When L.E.A. entered the room, she turned to an officer and said, “please don’t take my mommy away.” Leticia knew they would continue to be detained, but she was happy they would be together. Being with her daughter again gave her a strength she had not felt in the prior four months without her.<sup>14</sup>

In the fall of 2018, Leticia received another credible fear interview on the grounds that her first interview was cut off before she finished explaining the basis of her fear. This time, after having the opportunity to tell her entire story, the asylum officer determined that her fear of returning to Guatemala was credible. Leticia and L.E.A. were released from Dilley on or about November 15, 2018, more than six months after they arrived in the United States.

As a result of the government’s actions described above, Leticia suffered, and continues to suffer, severe emotional distress. The terrifying circumstances of the forced separation, not knowing L.E.A.’s whereabouts or well-being for approximately one month, and the four-month separation—during which she narrowly escaped being deported without L.E.A.—have tormented her significantly. Leticia was so consumed with worry while she was detained that she was frequently unable to sleep, and suffered nightmares when she did. Her appetite diminished and she lost weight. She suffered from chronic headaches, experienced dizzy spells, and started losing her hair. While Leticia received an occasional physical check-up from detention center medical staff, she filled out paperwork on at least two occasions to see a doctor about her particular symptoms. Her requests were never answered.

L.E.A. also has experienced similar fear and mental anguish as a result of being forcibly separated from her mother for over four months. After the separation, L.E.A. was flown to New York where she was detained for approximately two months at a Cayuga Center with other children. During that time, L.E.A. was not told when she would be reunited with her mother, and she was treated harshly.

L.E.A.’s suffering has continued since her release. She has nightmares. Leticia is often woken by her daughter in the middle of the night, still asleep and sweating, screaming, “mama, mama.”

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<sup>14</sup> [REDACTED]

Sometimes, unprompted, L.E.A. will say to her mother, “don’t let them take me away again.” When L.E.A. drops something at home she starts crying and says, “don’t get mad at me, don’t hit me.”

## **F. 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>15</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>16</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>17</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>18</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>19</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>20</sup> The U.S. Government has admitted to forcibly separating more than 2,700 children from their parents and

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<sup>15</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>16</sup> 83 Fed. Reg. 16,179 (Apr. 13, 2018).

<sup>17</sup> *Id.*

<sup>18</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>19</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>20</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).



placing them in government custody.<sup>21</sup> A recent HHS OIG report, however, indicates that the actual number is “thousands” higher.<sup>22</sup>

Administration officials at the highest levels knew well before implementing the policy that it would harm the people it affected.<sup>23</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>24</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>25</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>26</sup> As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”<sup>27</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

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<sup>21</sup> Joint Status Report, *supra* note 5, at 9; HHS OIG REPORT, *supra* note 5, at 11.

<sup>22</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>23</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>24</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>25</sup> *Policy Options to Responder to Border Surge of Illegal Immigration*, (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

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

<sup>27</sup> *Transcript of White House Chief of Staff John Kelly’s Interview with NPR*, *supra* note 3 (emphasis added).



people will get the message and come through the border at the port of entry and not break across the border unlawfully.”<sup>28</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>29</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>30</sup> On December 16, 2018, the President tweeted, “[I]f you don’t separate, FAR more people will come.”<sup>31</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>32</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 CBP’s, 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>33</sup>

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<sup>28</sup> Bump, *supra* note 1.

<sup>29</sup> *Id.*

<sup>30</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>31</sup> Donald Trump, *supra* note 4 (emphasis in original).

<sup>32</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>33</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).

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>34</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>35</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>36</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>37</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>38</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>39</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>40</sup> The EO, however, did not explain whether or how the federal

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<sup>34</sup> DHS OIG REPORT, *supra* note 32, at 2.

<sup>35</sup> *Id.* at 9-10.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.*

<sup>38</sup> *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

<sup>39</sup> Stahl, *supra* note 23.

<sup>40</sup> Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

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>41</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>42</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>43</sup> According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.<sup>44</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>45</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>46</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>47</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>48</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>49</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

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<sup>41</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>42</sup> *Ms. L.*, 310 F. Supp. 3d at 1149-50.

<sup>43</sup> DHS OIG REPORT, *supra* note 32, at 10.

<sup>44</sup> *Id.* at 11-12.

<sup>45</sup> GAO REPORT, *supra* note 41, at 23-25.

<sup>46</sup> *Id.* at 24.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> *Id.* at 27.

<sup>49</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).

integrity.<sup>50</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 Leticia and L.E.A.

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<sup>50</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 Nevada. 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.