

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 C.M. and her then-five-year-old son, B.M., whose forced separation lasted for approximately two and a half months.

A. **The Forced Separation of C.M. from Her Five Year-Old Son**

On or around May 9, 2018, C.M., a twenty-eight-year old Guatemalan national, entered the United States with her then-five-year-old son, B.M., after fleeing life-

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., OEL-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.”).

threatening violence in Guatemala. When they crossed the border at or near San Luis, Arizona, immigration officers apprehended C.M. and B.M. and took them to a type of short-term detention center so notoriously frigid that it is called *la hielera* or “the icebox.”

C.M. and B.M. arrived at the *hielera* late that night. When they arrived, a female immigration officer told C.M. and three other women who arrived with her that the law had changed, and that immigration officers would take away their children and send the women back to Guatemala. C.M. was horrified. The officer laughed at the women’s shocked reaction and said, mockingly, Happy Mother’s Day.⁷

Another immigration officer then asked C.M. to sign papers written in English that she did not understand. Unable to read or write, she told the officer that she did not know how to sign her name. He told her to put an x on the signature line. He then confiscated what few belongings she had, including extra articles of clothing that could have helped C.M. and B.M. stay warm in the freezing *hielera*, and locked them in a cell with many other women and children. There were no beds in the cell, and they received nothing to eat except watered down broth. Other distraught mothers detained in the same cell told C.M. that the immigration officers had taken away their children, and that they would take B.M. away as well. C.M. was terrified.

At some point during the first night in the *hielera*, an immigration officer called C.M.’s name and asked B.M.’s age. C.M. told the officer that B.M. was only five years old. A short while later, the same officer again called C.M.’s name and again told her that immigration officers would take B.M. away from her and send him to a shelter. The officer said B.M. was old enough to go, and that only mothers with children under four might be released with their children. The officer asked for C.M.’s consent to take her child. Sobbing and beside herself with fear, C.M. did not consent.

Even though C.M. had not consented, less than two days later, on or around May 11 at approximately 5:00 in the morning, an immigration officer told C.M. to wake her son up because the government would be taking him to a shelter that morning. When she woke him up, B.M. saw the officer and began to cry. The officer tried to take B.M. to another room to give him a bath but, because he was crying so hard, the officer told C.M. that she would have to bathe him. The officer took C.M. and B.M. to a room where there was a shower, and ordered her to bathe and dress B.M. Believing she had no choice, she complied.

Once B.M. was dressed, the officer took them to a different room and told C.M. that she had to say good-bye to her son. C.M. begged the immigration officer not to take her son away, stating over and over that he was only five years old and he only spoke Mam, and would not be able to understand what anyone said to him. The officer did not relent. Desperate to keep her son, C.M. then asked the officer to send her back to

⁷ C.M.’s native language is Mam. She speaks and understands some Spanish and she does not speak English. Unless otherwise stated, all referenced conversations took place in Spanish except for conversations between C.M. and B.M., which took place in Mam.

Guatemala with B.M. rather than separate them. C.M. and B.M. had fled to the United States after suffering horrific abuse in Guatemala, based, in part, on their indigenous identity. She was terrified to return, but the thought of losing her son was inconceivable. The officer laughed. He made fun of her indigenous accent and said, laughingly, “it’s not that easy.”

Undeterred, C.M. continued to refuse to let her son go. Eventually, another immigration officer came over and told her to hurry up because they were putting B.M. on a plane, and the plane was about to take off. When C.M. continued to resist, the two officers threatened to throw her son in a cell without her if she did not let them take him. Finally, recognizing that the officers would take her son no matter what she did, C.M. explained to the five-year old that he would be going away for a few days. Despite her anguish, she tried to be positive for him and told him that he would go to a shelter to play with lots of other children and that she would see him in a few days. B.M. asked her if she would go back to Guatemala without him. She assured him that she would never leave without him. He sobbed and clutched her. The immigration officers came over to them and pried B.M. away by force as he cried and grabbed at her clothes.

Without her child, C.M. fell apart. The government kept her in the *hielera* for approximately two more weeks.⁸ She was freezing and heartbroken and she cried constantly. She could not sleep because she was so sad. The government gave her *no information* about B.M. She became disoriented, unable to gauge the passage of time, had no appetite, and began to suffer chronic headaches. Approximately five days after they took B.M. away, an immigration officer asked her why she was losing weight.

While C.M. stayed in the *hielera*, she watched immigration officers take other children away from their parents. Through the interior window of her cell, she could see fathers crying.

About two weeks after immigration officers took B.M. from her, officers moved her to the Florence Detention Center, and, one day later, to the Eloy Detention Center, where she spent approximately one night.

In Eloy, immigration officers finally allowed C.M. to speak to her son for the first time in more than two weeks—but for just three minutes. B.M. repeatedly asked his mother when she was coming to get him. He told her he was all alone and did not know what anyone was saying to him because he could not speak Spanish. Not knowing the answer, or even where he was, C.M. was unable to comfort B.M. He was terrified and heartbroken, which left C.M. more traumatized than before they had spoken. She still did not know where he was being held.

After she spent one night in Eloy, immigration officers transferred C.M. by plane to a detention center outside of Las Vegas, Nevada. During this transport, officers handcuffed her and shackled her around her waist, feet and wrists. C.M. could not stop crying. In Nevada, another woman being held with her brought C.M. some water and

⁸ C.M. had a hard time keeping track of time and this timeframe is based on her best estimate.

tried to put water to her cracked and dry lips. Another woman tried to get her to eat and encouraged her to sleep. The woman also translated for her when immigration officers walked past and said in English: “What’s wrong with you?”

Approximately two weeks after she arrived in Nevada, C.M. was finally able to speak to B.M. again. A male officer called C.M.’s name and led her to a small room with a telephone. When the phone rang, he told her to answer it. When she did, she heard B.M.’s voice for only the second time since they had been separated more than a month earlier. C.M. was crying so hard that she could barely speak. B.M. could not speak very well and, to C.M., he seemed utterly lost. He could only keep asking again and again, when are we going back home? After they spoke, a social worker who was with B.M. got on the phone and told C.M. that B.M. was in a shelter in New York, thousands of miles away. The social worker told C.M. that she had to fight her immigration case and that she should not give up. She impressed upon C.M. the urgency of the situation and told her that, if you don’t fight your case, the government may deport you and you might never see B.M. again. The possibility of never seeing her child again was paralyzing.

While C.M. was later allowed additional phone calls with B.M. during her detention in Las Vegas, he was so traumatized by his mother’s seeming abandonment that he was unable to say much. As soon as he heard his mother’s voice, he would become very upset, sobbing and repeatedly asking C.M. when they would be able to go back home. Listening to B.M. cry like this was excruciating for C.M. She could do nothing to take care of her child beyond pleading with the social worker to make sure he was all right.

B.M. turned six while he was in the shelter in New York. C.M. spent his birthday crying in the detention center, wishing she could be with him. One of the other women in the detention center tried to calm her down, but C.M. could not be consoled. Even today, C.M. is traumatized by the thought of her son spending his sixth birthday scared and alone.

On or about the night of July 24, immigration officers transported C.M. and several other mothers to Port Isabel, in Texas. They locked her again in an *hielera*. Some of the other parents at Port Isabel told C.M. that they thought they were getting their children back but C.M. did not believe them. By this time, C.M. believed that immigration officers would never return her son. She spent the next day and night in the freezing *hielera*, which was filthy and so cold that she and the other women could not sleep.

On or around July 26, an immigration officer called C.M.’s name and escorted her into a small room. She waited there for approximately thirty minutes. The officer told her to sign a form that she could not read. A few minutes later, C.M. saw B.M. and several other children appear. She called his name and, when he saw her, he threw his bag to the side, ran toward her and threw himself in her arms. They sobbed with relief.

After they were reunified, immigration officials transferred C.M. and B.M. by bus to the South Texas Family Residential Center in Dilley, Texas (Dilley). As soon as they boarded the bus, B.M. began crying again. C.M. tried to comfort him, but B.M. was terrified that they would be separated again. DHS finally released C.M. and B.M. from the Dilley Detention Center in November 2018, more than six months after they arrived in the United States.

DHS's forced separation of C.M. and B.M. caused C.M. severe emotional distress. From the moment of the separation, when an officer laughed at her while she cried in desperation, her trauma has been palpable. For more than a month, immigration officers told C.M. nothing about her son's well-being or whereabouts, causing her acute anxiety and distress. She worried about her son constantly. She was so consumed that she was frequently unable to sleep, had no appetite, and suffered from chronic headaches. During her forced separation from B.M., immigration officers did not help her locate him. This cruelty compounded C.M.'s distress.

C.M. continues to suffer as a result of the separation from her son. A psychological evaluation confirms that C.M. suffered, and continues to suffer, severe trauma tied directly to that separation, and the failure of immigration officers to provide her with information about her son. The clinical social worker who evaluated C.M. during her detention in Dilley found that she exhibits symptoms consistent with Post Traumatic Stress Disorder (PTSD). C.M.'s concern about her son's well-being dominates her every waking hour, and she worries that their relationship may never recover. She continues to suffer from chronic headaches and every time she talks about the separation, she becomes very emotional. When she describes what it felt like when immigration officers ripped B.M. from her arms, she feels like she is losing all control.

B.M. experienced similar fear and mental anguish when he was taken from his mother. After DHS separated him from C.M., he was put on a plane and taken to New York, where he was detained with other children. He did not know what was happening or when he would see his mother again. He was constantly afraid, and he ate almost nothing. After they were reunited, B.M. told his mother that he thinks she brought him to the United States to give him away. During his time in Dilley, B.M. continued to be extremely sad and repeatedly asked his mother why they were there and why they were locked up. He continued to have very little appetite and suffered from nightmares.

The severe emotional distress B.M. suffered during the separation continues today. He refuses to talk about his time in the shelter in New York. He eats very little. Every time C.M. leaves the house, B.M. asks whether she is coming back. She tells him that he does not need to worry anymore but he does not seem to believe her.

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.⁹ 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."¹⁰ 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."¹¹ "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.¹²

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.¹³ 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.¹⁴ The U.S. Government has admitted to forcibly separating more than 2,700 children from their parents and placing them in

⁹ 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>.

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

¹¹ *Id.*

¹² 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>.

¹³ *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).

¹⁴ 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).

government custody.¹⁵ A recent HHS OIG report, however, indicates that the actual number is “thousands” higher.¹⁶

Administration officials at the highest levels knew well before implementing the policy that it would harm the people it affected.¹⁷ 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.¹⁸ 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.”¹⁹

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.”²⁰ As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”²¹

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

¹⁵ Joint Status Report, *supra* note 5, at 9; HHS OIG REPORT, *supra* note 5, at 11.

¹⁶ 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.

¹⁷ 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.*

¹⁸ 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>.

¹⁹ *Policy Options to Responder to Border Surge of Illegal Immigration*, (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

²⁰ *Id.*

²¹ *Transcript of White House Chief of Staff John Kelly’s Interview with NPR*, *supra* note 3 (emphasis added).

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.”²²

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.”²³

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.”²⁴ On December 16, 2018, the President tweeted, “[I]f you don’t separate, FAR more people will come.”²⁵

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.”²⁶ 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

²² Bump, *supra* note 1.

²³ *Id.*

²⁴ 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>.

²⁵ Donald Trump, *supra* note 4 (emphasis in original).

²⁶ 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].

provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.”²⁷

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.²⁸ 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.”²⁹ As a result, when ICE was processing detained individuals for removal, “no additional effort was made to identify and reunite families prior to removal.”³⁰ 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.”³¹

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.³²

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.”³³ But those in charge willfully disregarded Commander White’s warnings. Imposing trauma on these parents and children was their very goal.

²⁷ 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).

²⁸ DHS OIG REPORT, *supra* note 26, at 2.

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 10.

³¹ *Id.*

³² *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

³³ Stahl, *supra* note 17.

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.”³⁴ 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.³⁵

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.³⁶ 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.”³⁷ According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.³⁸ 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.³⁹ 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 parent⁴⁰ 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.⁴¹ 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.”⁴² Judge Sabraw harangued the

³⁴ Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

³⁵ 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)).

³⁶ *Ms. L.*, 310 F. Supp. 3d at 1149-50.

³⁷ DHS OIG REPORT, *supra* note 26, at 10.

³⁸ *Id.* at 11-12.

³⁹ GAO REPORT, *supra* note 35, at 23-25.

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 23.

⁴² *Id.* at 27.

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.”⁴³

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.⁴⁴ 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 C.M. and B.M.

⁴³ 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).

⁴⁴ *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, Nevada 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.