

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 children from their parents, 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 E.O. and her eighteen-year-old son J.O., whose forced separation lasted for three-and-a-half months.

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

² *Id.*

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

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

⁵ Joint Status Report at 9, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428 DMS MDD (S.D. Cal. Dec. 12, 2018); *see also* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 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”).

A. The Forced Separation of E.O. from Her Son Caused Claimants to Suffer Severe Physical and Emotional Distress

1. E.O. and Her Son Were Forcibly Separated By CBP in McAllen, Texas

On June 5, 2018, E.O., a citizen of Guatemala, and her then-17-year-old son, J.O., crossed the Rio Grande into southern Texas. E.O. feared for her and J.O.'s life and safety in Guatemala. On their apprehension near the border, Claimants temporarily were detained at a U.S Customs and Border Patrol ("CBP") immigration processing center. On information and belief, Claimants were held at the CBP immigration processing center in McAllen, Texas—a facility so notorious for its cold temperature and caged rooms that it is known as *la hielera* ("the icebox") and the "dog pound."

At the CBP facility, Claimants were kept locked in *la hielera* with approximately 35 other mothers and their children. Because the room was so crowded, Claimants and the other people in the room had to take turns standing, sitting and lying down. When they asked to use the restroom, they were told to hold it. Despite the cold temperatures, they were given only aluminum foil to use as blankets, and they were not given anything to eat or drink.

At one point, the CBP officers told E.O. and J.O., and a group of other mothers and their children, that the children would be separated from their mothers and that the children would be sent to a facility for military training to prepare them for war. Upon hearing this, J.O. feared for his safety. E.O. and J.O. were not told how long they would be separated or when they would see each other again, if ever. Both J.O. and E.O. were terrified.

On June 6, 2018, E.O. and J.O. were escorted into a large room where approximately 20 CBP officers were interviewing individuals apprehended near the border. E.O. was interviewed, while J.O. sat elsewhere in the room. E.O. advised the officer who interviewed her that she feared for her life and safety in Guatemala. The officer did not ask her any follow-up questions concerning the reasons for her fears. During his time in the custody of the U.S. government, J.O. also told an officer that he and his mother left Guatemala because they feared for their safety.

While E.O. was being interviewed, unbeknownst to E.O. and without her consent, J.O. was taken out of the interview room. That was the last time that E.O. and J.O. saw each other throughout their detention in the United States. J.O. was not allowed to say goodbye to his mother or otherwise speak to her before leaving the interview room. He was not told when or whether he would see her again. He was given no explanation as to why he was being separated from his mother. When E.O. completed her interview, she asked an immigration officer where J.O. had been taken. The officer responded that the children would be sent away to war. Over the next several days—during which E.O. was held at the CBP immigration processing facility in McAllen—she asked numerous officers for information about her son's whereabouts. Most of the officers told her that they did not know where J.O. had been taken; a few officers said they would find out but none reported any information to E.O. It was an agonizing fifteen days before E.O. received any information about her son, and almost four months before she saw him again.

2. E.O. Experienced Severe Physical and Emotional Distress Due to the Separation from Her Son

Throughout her detention in McAllen, E.O. had no idea what had happened to her son. She did not know whether J.O. was dead or alive, in relative safety or in a warzone as the CBP official had suggested. She was terrified, distraught, and haunted by the thought that in her attempt to give her son a better, safer life, she had lost him.

At the McAllen facility, while forced to cope with being separated from her son, E.O. was given no opportunity to shower. She slept on the floor without blankets. She was not given adequate food to eat and was hungry throughout her time at the facility. The guards made fun of her and the other detainees and told her she would “pay” for having crossed the border. After three days, on June 8, 2018, E.O. was brought to court and was told that she would be deported. Thereafter, upon information and belief, she was moved to the Port Isabel Detention Center, a facility run and managed by ICE. The officers at that facility punished detainees for alleged misbehavior by forcing them to do pushups. During her detention at the Port Isabel Service Detention Center, E.O. received no information about J.O. and was not able to communicate with him.

On June 13, 2018, E.O. boarded a government flight to be removed back to Guatemala, not knowing whether J.O. would also be returned to Guatemala, and when or whether she would see him again. After making a stop in Honduras, the plane could not land in Guatemala as a result of the Volcán de Fuego volcano eruption and returned to the United States. Upon her return to the United States, on information and belief, E.O. was taken to the Central Texas Detention Facility in San Antonio. Upon arrival at the facility, one of the guards told E.O. and the other detainees that they had three minutes to shower and retrieve the mattress on which they would sleep. In her attempt to comply with the unreasonably short timeframe, E.O. slipped on the wet bathroom floor and badly injured her arm and shoulder. She complained to a staff member about the pain in her arm and shoulder, but was ignored. She received no medical attention or treatment for her arm.

On June 15, 2018, E.O. was removed to Guatemala without her son, who remained detained in the United States for over three more months. At the time of her deportation, E.O. had still received no information about her son’s whereabouts. She was petrified that she would never see him again.

E.O. was finally able to speak to J.O. approximately fifteen days after she was removed to Guatemala. J.O. had been given access to a telephone at the detention facility where he was housed and was allowed to call her. E.O. was not expecting the call and was overjoyed to hear J.O.’s voice; she thought she had lost him. She would do anything to get him back.

In the months that followed, E.O. feared her son would be treated differently as an adult after turning 18 years of age. After months of uncertainty and fear, E.O. and J.O. were told that J.O. would finally be sent back to Guatemala on September 16, 2018, but only after he was transferred to an adult detention facility. E.O. was very concerned about her child being put into a prison with adults. After approximately three weeks of being detained at Port Isabel Detention Center as an adult, and at the insistence of local pro bono counsel, the government finally

scheduled the flight for J.O. to be voluntarily returned to his home country. Through the assistance of the Texas Civil Rights Project, E.O. was informed of the date on which J.O. would arrive, and so she traveled several hours to the airport in Guatemala City to meet him after months of desperately awaiting his return. E.O. was accompanied at the airport by a human rights defender in Guatemala. At the airport, E.O. stood at the arrival gate and watched as the passengers, one by one, came off of the plane. After the last passenger disembarked, E.O. realized to her horror that J.O. was not on the plane. She was left devastated and sobbing in the airport. Later, E.O. learned that J.O. had not been allowed to board the plane because the necessary paperwork was not in order.

J.O. finally arrived back in Guatemala on September 21, 2018. E.O. again traveled to the airport in Guatemala City to meet his plane. The same human rights defender again accompanied E.O. at the airport. Seeing J.O. again filled E.O. with immense joy. She hugged him and, for a brief period, was so overcome with emotion that she was unable to speak. Instead, she simply thanked God for her son's return.

E.O. suffered severe emotional distress following her separation from J.O., and she continues to experience symptoms of her distress today. She worried about her child constantly. She cried every day throughout her detention in McAllen, at the Port Isabel Detention Center, and at the Central Texas Detention Facility. She experienced intense headaches. She suffered from anxiety and, shortly after she was separated from J.O., began to experience extreme depression. She was terrified that J.O. had been sent to war or was dead. The pain, sadness, and anxiety that she experienced on a daily basis was so horrific that it is indescribable. E.O. continues to suffer from severe anxiety and depression today as a result of her separation from J.O. and the fact that she was provided no information concerning his safety, wellbeing, or whereabouts throughout her detention. She is finding it difficult to recover emotionally from the trauma of the separation and return to her normal life. The memories of being separated from J.O. come rushing back to her at times, and she experiences extreme sadness. She has difficulty sleeping and continues to be plagued by headaches. E.O. has not seen a mental health professional about these problems because she cannot afford to do so.

E.O. also continues to suffer from severe pain in her arm and shoulder as a result of her fall in the Central Texas Detention Facility. E.O. sought medical treatment for her arm after she returned to Guatemala. A physician in Guatemala determined that an MRI is needed to assess E.O.'s injury, but until recently she has been unable to afford the MRI scan. She will soon receive an MRI to determine the nature of her injury and a course of treatment. During the last seven months of saving up for the cost of an MRI scan, however, her physician has been prescribing her medication and administered paracetamol injections to help ease the pain in her arm.

3. J.O. Experienced Severe Physical and Emotional Distress Due to the Separation from His Mother

After J.O. was taken from the room in which E.O. was being interviewed, J.O., along with approximately twenty other boys around his age, was taken to another room within the building. The room was very cold. The boys stayed in that room for approximately eight hours. They were given only a sandwich and one bottle of water during the eight hours. J.O. was not

told how long he would be separated from his mother or whether he would ever see her again. The boys talked among themselves about whether they would ever see their mothers again.

After a night in which some of the boys slept on the floor because there were not enough mattresses, J.O. and the other boys were taken to another facility in McAllen where they were held for approximately three days. Most of the other children being held there were J.O.'s age, but about twenty of the children were only five or six years old. They were kept in cage-like metal fence enclosures. Throughout the three days, J.O. was not allowed to speak to his mother and was not told anything about her whereabouts or whether they would be reunited.

From this facility, J.O. was taken to another facility in Harlingen, Texas, which, upon information and belief, was known as "BCFS." J.O. stayed at that facility for several weeks until he turned eighteen. J.O. was unable to speak to his mother for the first fifteen days he spent at BCFS, before E.O. returned to Guatemala. During this period, J.O. was given no information regarding his mother's whereabouts or wellbeing. Throughout J.O.'s detention at BCFS, he was not told whether or when he would see his mother again. Although J.O. asked the officers repeatedly for information, they told him that they did not know whether he would be reunited with his mother; initially, they could not even tell J.O. where his mother was. Once E.O. returned to Guatemala, J.O. was allowed one ten-minute phone call with her per week.

On September 4, 2018, the day before J.O. turned eighteen, he was brought before a judge in a courtroom. The courtroom proceedings were held in English. Although there was an interpreter who spoke Spanish, J.O. was unable to understand what was happening during the proceedings. At the conclusion of the proceedings, he was told that he was going to be transferred to an adult detention center and then returned to Guatemala. J.O. was afraid to be taken to an adult detention center because it was a completely unfamiliar environment.

After J.O. turned eighteen on September 5, 2018, he was transferred to Port Isabel Detention Center, an adult immigration detention center run by ICE. J.O. was able to speak with his mother while in Port Isabel only because E.O. had contacted a local attorney who paid for J.O.'s calls to E.O.; initially, J.O. was unable to speak with his mother at all because he did not have money to pay for the calls.

After being held at Port Isabel Detention Center for nearly two weeks, J.O. was told that he would be returning to Guatemala. On the day of the scheduled flight, however, he was told that he could not board the plane. J.O. became very upset when he learned that he was not going to be returning home that day. J.O. ultimately was returned to Guatemala on September 21, 2018. J.O. was relieved and ecstatic to finally be reunited with his mother.

During the period of separation from E.O., J.O. suffered severe emotional distress. J.O. had never spent a night away from his mother prior to their detention. J.O. became very anxious and sad when he was taken away from his mother because he did not know if or when he would see her again. He worried constantly about his mother. He frequently woke up crying. He also experienced headaches, stomach aches, and changes in appetite and sleep patterns while he was separated from his mother. When J.O. saw other people leave the detention facilities to return home to their parents, but he was left behind, he became extremely depressed. He played sports and exercised whenever possible to distract himself from the pain of being separated from his

mother. Since J.O.’s return to Guatemala, E.O. has observed that J.O. continues to experience regular episodes of sadness and depression caused by the trauma of having been separated from his mother. J.O. feels extremely sad whenever he thinks about what he went through and his time apart from his mother.

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.⁷ 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.”⁸ 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.”⁹ “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.¹⁰

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.¹¹ Through this policy, the United States intentionally inflicted trauma on immigrant parents and their children who crossed the border, by separating

⁷ See, e.g., *US Judge Bars Trump Administration From Enforcing Asylum Ban*, CNBC, Nov. 20, 2018, <https://www.cnn.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>.

⁸ 83 Fed. Reg. 16,179 (Apr. 6, 2018).

⁹ *Id.*

¹⁰ 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>.

¹¹ *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).

the children from their parents in violation of the United States Constitution.¹² The U.S. government has admitted to forcibly separating more than 2,700 children from their parents and placing them in government custody.¹³ A recent U.S. Department of Health and Human Services (“HHS”) Office of Inspector General (“HHS OIG”) report, however, indicates that the actual number is “thousands” higher.¹⁴

Administration officials at the highest levels knew well before implementing the policy that it would harm the people it affected.¹⁵ 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.¹⁶ 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 the U.S. Department of Justice and DHS, the officials proposed a “Policy Option” of “Increased Prosecution of Family Unit Parents.”¹⁷ 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.”¹⁸

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.” As for the children affected, he said: “[t]he children will be taken care of—put into foster care *or whatever*.”¹⁹

¹² 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).

¹³ Joint Status Report, *supra* note 5, at 9; HHS OIG REPORT, *supra* note 5, at 11.

¹⁴ 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.

¹⁵ 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.*

¹⁶ 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>.

¹⁷ *Policy Options to Respond to Border Surge of Illegal Immigration* (Dec. 16, 2017), <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

¹⁸ *Id.* at 1.

¹⁹ *Transcript of White House Chief of Staff John Kelly’s Interview with NPR*, *supra* note 3 (emphasis added).

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."²⁰

Steven Wagner, Assistant Secretary of 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."²¹

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."²² On December 16, 2018, the President tweeted, "[I]f you don't separate, FAR more people will come."²³

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 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."²⁴ 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

²⁰ Bump, *supra* note 1.

²¹ *Id.*

²² 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>.

²³ Donald Trump, *supra* note 4 (emphasis in original).

²⁴ 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].

a result, DHS has struggled to provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.”²⁵

Generally, CBP officers—usually 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.²⁶ 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.”²⁷ As a result, when ICE was processing detained individuals for removal, its system did not indicate whether those individuals had been separated from their children, and “no additional effort was made to identify and reunite families prior to removal.”²⁸ Even more alarming, ICE’s system for keeping track of the children who had been separated from their parents involved ICE officers manually entering a child’s identifying information into a Microsoft Word document and e-mailing that document to HHS, a process described by the DHS OIG as particularly “vulnerable to human error,” and one which “increas[ed] the risk that a child could become lost in the system.”²⁹

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.³⁰

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.”³¹ But those in charge willfully disregarded Commander White’s warnings. Imposing trauma on these parents and children was their very goal.

²⁵ 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).

²⁶ DHS OIG REPORT, *supra* note 24, at 2.

²⁷ *Id.* at 9-10.

²⁸ *Id.* at 10.

²⁹ *Id.*

³⁰ *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

³¹ Stahl, *supra* note 15.

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.”³² 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.³³

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.³⁴ 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.”³⁵ According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.³⁶ 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.³⁷ 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 parent³⁸ 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.³⁹ 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.”⁴⁰ 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

³² Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018).

³³ 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.*, No. 18-0428 DMS MDD (S.D. Cal. July 10, 2018)).

³⁴ *Ms. L.*, 310 F. Supp. 3d at 1149-50.

³⁵ DHS OIG REPORT, *supra* note 24, at 10.

³⁶ *Id.* at 11-12.

³⁷ GAO REPORT, *supra* note 33, at 23-25.

³⁸ *Id.* at 24.

³⁹ *Id.* at 23.

⁴⁰ *Id.* at 27.

children were, and the children didn't know where the parents were. And the government didn't know either."⁴¹

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.⁴² 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 E.O. and J.O.

⁴¹ Transcript of Joint Status Report at 58, *Ms. L.*, No. 18-cv-00428 DMS MDD (S.D. Cal. July 27, 2018).

⁴² 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.