

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 Reports indicate that the number of families separated may have been much higher.⁶ The victims of this cruel and unconstitutional policy include Patricia and her then six-year-old son Alessandro, whose forced separation lasted for thirty-seven days.

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

² *Id.*

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

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

⁵ Joint Status Report at 9, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-cv-428 DMS MDD, (S.D. Cal. Dec. 12, 2018); *see also* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE at 11 (Jan. 17, 2019) [hereinafter HHS OIG REPORT].

⁶ *See* HHS OIG REPORT, *supra* note 5, at 1, 6, 13 (reporting that “thousands of children may have been separated during an influx that began in 2017, before the accounting required by [the court in *Ms. L. v. Immigration and Customs Enforcement*], and HHS has faced challenges in identifying separated children.”).

A. The Forced Separation of Patricia from her then Six-Year-Old Son, Alessandro

1. Patricia and Alessandro Are Detained

At or around 4:00 p.m. on June 5, 2018, Patricia, a Honduran national, entered the United States with her then six-year-old son, Alessandro, after fleeing Honduras in fear for their safety in May 2018. Later that day, Patricia and Alessandro were apprehended by U.S. Customs and Border Protection (“CBP”) agents who took them into custody, where Patricia and Alessandro immediately claimed asylum. At the *hielera*,⁷ officers threw away almost all of Patricia and Alessandro’s belongings, and forced Patricia and Alessandro into a crowded cell of other immigrants. The *hielera* was full of other families with very small children, some only a few months old. The cell was freezing, and Patricia and Alessandro had to sleep on the cold floor. They were not provided anything to keep them warm aside from a thin foil sheet. Patricia and Alessandro were given little to eat or drink. Alessandro was very cold and cried throughout the night. It was very painful for Patricia to watch her son suffer.

2. The Government Takes Alessandro Away From Patricia

Around sunrise the next morning, several officers came into the cell and told Patricia that she had to say goodbye to Alessandro and that they were taking him away.⁸ Patricia was very confused, and desperately pleaded with the officers not to take Alessandro or, at the very least, give her more information about how long they would be separated or where they were taking him. The officers did not take any information from Patricia about how to care for Alessandro, such as information about whether he had any special needs, allergies, or medical conditions. Patricia and Alessandro both sobbed as Patricia kissed him goodbye. She watched in fear and horror as many other young children were also separated from their parents.

Patricia sat in a cell, trembling in fear, for an unknown period of time. The next thing Patricia remembers is an officer calling her name and telling her that she would be taken to a new location, where she would “go to court.” Several officers told Patricia that Alessandro would be returned to her after she went to court, leading Patricia to believe that she would shortly be reunited with her son. Officers then shackled Patricia’s hands, waist, and feet, forced her onto a large bus, and transported her to a federal courthouse.

Patricia pleaded guilty to a first-time violation of 8 U.S.C. 1325(a), and was sentenced to time served — the two days she had been in U.S. custody — and a special assessment of ten

⁷ It is common parlance to refer to a short-term immigration detention and processing center like the one where Alessandro and Patricia were detained as an “*hielera*,” which means “icebox,” because of the freezing temperatures in these facilities.

⁸ At all times described in this claim, Patricia and Alessandro did not speak English. Unless otherwise indicated, all conversations took place in Spanish.

dollars. After her appearance in court, Patricia was transported to another detention facility and put in a cell. Despite her many requests, officials continued to refuse to give her any information about her son. As more hours passed, Patricia grew increasingly anxious waiting for Alessandro, and cried for hours.

The next day, Patricia was transported by bus to the Port Isabel Detention Center (“PIDC”) with a large group of other women, many of whom had also been forcibly separated from their children. The bus was filled with the sound of women crying in fear and anxiety because they did not know when, if ever, they would see their children again.

3. Patricia Goes Weeks Without Information About Alessandro

Every day at PIDC, Patricia repeatedly asked officers where her son was and when she would see him again. When asked, most officers assured Patricia that Alessandro was “being well taken care of,” but would not give her any additional information. One female officer told Patricia that the government was going to deport Patricia back to Honduras and keep Alessandro in the United States, scolding Patricia and the other parents by saying it was “nobody’s fault but their own” that they were separated from their children. The officer’s threat terrified Patricia, and she felt disoriented and afraid, since she had no idea where Alessandro was and no one would give her any information. She does not remember exactly how long it was before she knew anything about Alessandro’s whereabouts. For at least ten nights, Patricia cried all night and was unable to sleep. She had never felt such debilitating fear.

Patricia passed daylight hours in a large room with approximately seventy-five other women. Since she had a hard time sleeping, she constantly felt groggy, and would attempt to take short naps. She spent most of the day crying, missing her family, and agonizing about Alessandro’s whereabouts. Because of her anxiety, she did not have an appetite and rarely ate.

Some of the officers in PIDC spoke with Patricia and other detainees. One female officer told Patricia that her son was okay and that they would be fine. This officer also told Patricia that she should stop crying or she would make herself sick. However, when Patricia asked her for specific information about Alessandro, the officer had no information about where he was.

4. Patricia Learns About Alessandro’s Whereabouts

Several weeks after the government separated Patricia and Alessandro, Patricia received a note from the man in charge of Alessandro’s foster facility, and learned that Alessandro had been put in foster care. The note also included a phone number. However, phone calls in the detention facility were very expensive unless they were to the detainee’s emergency contact number, and Patricia did not have any money. Patricia reached out to her brother, who was her emergency contact person, and asked him to call Ernesto. Several hours later, her brother called back and told her that he had spoken to Alessandro and Ernesto. Her brother told Patricia that

Alessandro had said he missed his mother a lot and asked many times when Patricia was coming to get him.

Approximately three weeks after Patricia and Alessandro were forcibly separated, Patricia was finally able to speak to Alessandro by phone. Patricia borrowed money from another detained mother to place the call. After this initial call, Patricia spoke to Alessandro about once a week. Alessandro missed Patricia very much and often asked when he was going to see her and why she would not come pick him up, simple questions she could not answer.

Patricia later learned that Alessandro spent an unknown amount of time in a second *huelera* before being transferred to a large foster care facility in San Antonio, Texas. The foster care housed at least 100 other children. It was often filled with the sounds of crying children, and Alessandro felt depressed and sad. He was frequently unable to sleep. Alessandro felt upset that he could not speak with his mother and that when he was eventually allowed telephone calls with Patricia, he could only talk to his mother with Ernesto present.

5. *Patricia Is Released From Detention*

The last week in June, Patricia was informed that her asylum claim had been found credible. On that same date, Patricia's attorney, Maggy Krell, notified ICE and the detention facility that Patricia had passed her credible fear interview, and requested Patricia's immediate release and reunification with Alessandro based on the Order issued by the U.S. District Court for the Southern District of California's in *Ms. L., et al., v. U.S. Immigration and Customs Enforcement, et al.*

Several days later, Patricia's immigration bond was set at \$1,500. Patricia remained detained, not knowing how she would ever pay this amount. Several attorneys helped secure Patricia's release on bond, and Patricia was released soon after. Although Patricia was relieved to leave detention, she was still worried about Alessandro and wanted to see him as soon as possible. To her disappointment, Patricia learned that she needed an appointment to see her son, and that the earliest appointment at the foster facility was the following Monday.

Early on the morning of July 9, 2018, Patricia arrived at the foster facility, optimistic that the month-long nightmare of her separation from Alessandro was finally ending. Instead, Patricia was told by facility officials that until they processed more paperwork, she and Alessandro were only permitted short, monitored visits. Over the next week, Patricia pled with officials for Alessandro's release and visited him at every opportunity that she was allowed. She spent hours sitting in a small waiting room at the foster facility, hoping that her presence would remind the staff of her desperation to see her child. On one occasion, officials told Patricia that they would permit her to see Alessandro later in the afternoon, "after lunch." When Patricia arrived back at the facility, the door to the waiting room was locked and Patricia was refused entry because she had not scheduled an appointment to see her own son.

Numerous times, Patricia was assured by facility staff and government officials that Alessandro would be released from the foster facility “that day,” only to have to wait another day. Neither Patricia nor her attorney could understand the reasons provided for the continuous delays, which were frequently nonsensical and contradicted explanations given earlier in time or by other officials. The uncertainty of their reunion was tortuous to both Patricia and Alessandro. Patricia felt hopeless and was overwhelmed by fear that the government was never going to give Alessandro back.

6. *Patricia And Alessandro Are Reunited After Five Weeks of Forced Separation*

On or around July 12, 2018, Patricia was finally reunited with Alessandro. They were overcome with emotion, and could not stop crying and hugging. When Patricia and Alessandro were finally reunited, Alessandro sobbed. Patricia continually apologized to Alessandro, feeling guilt-ridden for their separation. They spent two more days in San Antonio, and then flew to the East Coast to stay with family.

7. *Patricia and Alessandro Continue to Experience the Trauma of Their Separation*

To this day, Alessandro does not like to discuss his experiences in foster care or the *hielera*, and does not like to be apart from his mother. When people ask Alessandro to talk about his experience in the *hielera* and in foster care, he grows angry and states that it is “too sad to talk about.” When Patricia and Alessandro first arrived in their new home, it was very difficult for Alessandro to attend school, and he would get very upset and cry every morning. He would sometimes refuse to leave the house. Alessandro still has anxiety and fears being away from his mother even for a short time.

Patricia continues to experience powerful symptoms of the trauma caused by her separation from Alessandro. She is constantly afraid and struggles both to fall and stay asleep. When she does sleep, it is usually for only three to four hours at a time at most, and she often experiences violent nightmares. She avoids watching, reading, or listening to the news because it often mentions immigration policy issues, which remind her of her experiences and fear of being deported. Patricia often feels hopeless and wracked with guilt for Alessandro’s experiences during the separation. She spends much of her time crying, but tries her best to hide her tears and anguish from Alessandro. She also experiences debilitating headaches that last for two to three days at a time.

Patricia also finds it very difficult to concentrate, and describes her mental state as disoriented, “spaced out,” and “cold.” Once while riding a bus near her new home, her mind went “blank” and Patricia rode all the way to the end of the route without noticing. When the bus driver came back to ask her if she was okay, Patricia had no idea where she was.

After the many painful experiences that Patricia has endured, including the horrifying events and threats that led she and Alessandro to flee Honduras, she describes the night in the *hielera* and her separation from Alessandro as the hardest experiences in her life. She recalls her overwhelming pain and anguish when she thought she would never see Alessandro again, and her humiliation and despondency when she had to go before a judge in chains, when all she had wanted was refuge for herself and her child.

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

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>.

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 government custody.¹⁵ A recent report issued by the Department of Health and Human Services’ (“HHS”) Office of Inspector General, 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 the Department of Justice (“DOJ”) and DHS, the officials proposed a “Policy Option” of “Increased

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).

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>.

Prosecution of Family Unit Parents.”¹⁹ Under the proposal, “parents would be prosecuted for illegal entry . . . and the minors present with them would be placed in HHS custody as [unaccompanied alien children].” The memorandum asserted that “the increase in prosecutions would be reported by media and it would have substantial deterrent effect.”²⁰

When asked about the policy by NPR on May 11, 2018, John Kelly, President Trump’s Chief of Staff, responded that “a big name of the game is deterrence . . . It could be a tough deterrent—would be a tough deterrent.” 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 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 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

More recently, Secretary of the Department of Homeland Security Kevin McAleenan (while serving in an Acting role) stated that the family separation policy “does deter behavior,” but added that from “an enforcement perspective, it’s not worth it” due to the public outcry.²⁴

And President Trump himself has indicated that deterrence was the motivation behind his Justice Department’s “Zero Tolerance” policy. When speaking with reporters at the White House on October 13, 2018, he said “If they feel there will be separation, they don’t come.”²⁵ On

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

²⁰ *Id.* at 1.

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

²² Bump, *supra* note 1.

²³ *Id.*

²⁴ Caitlin Oprysko, *Acting DHS chief says family separation ‘not worth it’*, POLITICO, April 23, 2019, <https://www.politico.com/story/2019/04/23/kevin-mcaleenan-dhs-family-separation-1288260>.

²⁵ David Shephardson, *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>.

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

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.”²⁷ But DHS failed to take even the most basic steps to record which children belonged to which parents, highlighting the government’s utter indifference to the dire consequences of the policy on the separated families. The DHS Office of Inspector General (“DHS OIG”) noted that the “lack of integration between CBP’s, [U.S. Immigration and Customs Enforcement (“ICE”)]’s and HHS’ respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance policy” and that “[a]s a result, DHS has struggled to provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.”²⁸

Generally, CBP officers—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.²⁹ When the “Zero Tolerance” policy went into effect, ICE’s system “did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child.”³⁰ As a result, when ICE was processing detained

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

²⁷ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SECURITY, OIG-18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 3 (Sept. 27, 2018) [hereinafter DHS OIG REPORT].

²⁸ *See id.* at 9-10 (noting, among other things, that agencies’ incompatible computer systems erased data that connected children with their families); *see also* HHS OIG REPORT, *supra* note 5, at 2, 13 (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’s identification of separated children).

²⁹ DHS OIG REPORT, *supra* note 28, at 2.

³⁰ *Id.* at 9-10.

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.”³¹ 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 “increase[ed] the risk that a child could become lost in the system.”³²

As emphasized by Judge Sabraw in *Ms. L. v. Immigration and Customs Enforcement*, the agencies’ failure to coordinate tracking of separated families was a “startling reality” given that:

[t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee’s release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.³³

The government’s inhumane treatment of separated families described by Judge Sabraw was not merely the result of indifference or incompetence. Commander Jonathan White, a former senior HHS official, testified before Congress that he repeatedly warned those devising the policy that separating children from their parents would have harmful effects on the children, including “significant potential for traumatic psychological injury to the child.”³⁴ But those in charge willfully disregarded Commander White’s warnings. Imposing trauma on these parents and children was their very goal.

Only after the family separation policy garnered widespread condemnation and became bad politics did President Trump, on June 20, 2018, sign an executive order (“EO”) purporting to end it. The EO states that it is the “policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.”³⁵ The EO, however, did not explain whether or how the federal

³¹ *Id.* at 10.

³² *Id.*

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

³⁴ *Stahl*, *supra* note 19.

³⁵ *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.³⁶

It was not until a federal judge ordered the government on June 26, 2018 to reunify families that the government began taking steps to do so.³⁷ What followed was chaos. DHS claimed that DHS and HHS had created a centralized database containing all relevant information regarding parents separated from their children; however, the DHS OIG found “no evidence that such a database exists.”³⁸ According to the DHS OIG, whatever data was collected was incomplete, contradictory, and unreliable.³⁹ Because no single database with reliable information existed, the Government Accountability Office found that agencies were left to resort to a variety of inefficient and ineffective methods to determine which children were subject to Judge Sabraw’s injunction.⁴⁰ These methods included officers hand sifting through agency data looking for any indication that a child in HHS custody had been separated from his or her parent⁴¹ and calling in the Office of the Assistant Secretary for Preparedness and Responses, an HHS agency whose normal prerogative involves response to hurricanes and other disasters, to review data provided by CBP, ICE, and ORR.⁴² The method for determining which family units required reunification changed frequently, sometimes more than once a day, with staff at one ORR shelter reporting that “there were times when [they] would be following one process in the morning but a different one in the afternoon.”⁴³ Judge Sabraw harangued the agencies for their lack of preparation and coordination at a status conference proceeding on July 27, 2018: “What was lost in the process was the family. The parents didn’t know where

³⁶ See *Ms. L.*, 310 F. Supp. 3d at 1140–41. See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 21 (Oct. 2018) [hereinafter GAO REPORT] (“HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order.”). The only procedure in place capable of reuniting children with their parents was the procedure developed to place unaccompanied children with sponsors in compliance with the Trafficking Victims Protection Reauthorization Act. Under this procedure, however, a parent could only be reunited with his or her child if the government deemed them eligible to be a sponsor. *Id.* Judge Sabraw noted that this procedure was inadequate because it was created to address “a different situation, namely what to do with alien children who were apprehended without their parents at the border or otherwise,” and further, that the procedure was not developed to address situations such as this one where family units were separated by government officials after they crossed the border together. *Id.* at 27, (quoting Order Following Status Conference, *Ms. L.*, No. 18-0428 DMS MDD (S.D. Cal. July 10, 2018)).

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

³⁸ DHS OIG REPORT, *supra* note 28, at 10.

³⁹ *Id.* at 11-12.

⁴⁰ GAO REPORT, *supra* note 37, at 23-25.

⁴¹ *Id.* at 24.

⁴² *Id.* at 23.

⁴³ *Id.* at 27.

the children were, and the children didn't know where the parents were. And the government didn't know either.”⁴⁴

The government's cruel policy of separating children from their parents, and its failure to track the children once they were separated, violated the claimants' Constitutional right to family integrity.⁴⁵ The government instituted and implemented 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 Patricia and Alessandro.

⁴⁴ Transcript of Joint Status Report at 58, *Ms. L.*, No. 18-cv-00428 DMS MDD (S.D. Cal. July 27, 2018).

⁴⁵ See *Ms. L.*, 302 F. Supp. 3d at 1161-67 (finding that plaintiffs had stated a legally cognizable claim for a violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations that the Government had separated them from their minor children while they were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children); *Ms. L.*, 310 F. Supp. 3d at 1142-46 (finding that plaintiffs were likely to succeed on their substantive due process claim when assessing their motion for a preliminary injunction). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (liberty interest in family relationships has its source in “intrinsic human rights”). DHS employees are responsible for supervising and managing detainees at CBP and ICE facilities, including those located in California. And HHS employees are responsible for supervising and managing the detention of unaccompanied children, including at facilities in New York. The Bureau of Prisons (“BOP”) is responsible for supervising and managing detainees at BOP facilities and, in some circumstances, directing operations at federally contracted facilities, including those located in California. See, e.g., *Edison v. U.S.*, 822 F.3d 510, 518-19 (9th Cir. 2016); *Greenland v. United States*, 661 F. App'x 210, 214 (3d Cir. 2016). BOP, DHS and HHS employees are federal employees for the purposes of the Federal Tort Claims Act. Contractors are subject to the Federal Tort Claims Act where the Federal Government retains the power “to control the detailed physical performance of the contractor.” *Logue v. United States*, 412 U.S. 521, 528 (1973).