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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

R.J.P. on behalf of himself and on behalf of  
his minor child, O.R.J.J.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. \_\_\_\_\_

**COMPLAINT**

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R.J.P. on behalf of himself and on behalf of his minor child, O.R.J.J., by and through their attorneys, Lowenstein Sandler LLP, bring this action under the Federal Tort Claims Act (the “FTCA”), 28 U.S.C. §§ 1346(b)(1), 2671-80, against Defendant United States of America, and hereby allege as follows:

### **INTRODUCTION**

1. This action concerns an inhumane, destructive, ill-conceived, and recklessly executed policy the Government deliberately designed and administered to forcibly separate parents and children who entered the United States together, many, like Plaintiffs, in search of humanitarian protection (the “Family Separation Policy”). The Government created and implemented this policy to punish and inflict emotional distress upon vulnerable immigrant families as a deterrent for future migrants seeking protection in the United States.

2. The Family Separation Policy caused acute and long-term emotional trauma as well as physical harm to Plaintiffs and thousands of other families whom the Government tore apart without lawful cause. The Government caused further harm and trauma to these families by failing to give them any information about the whereabouts or well-being of one another while they were forcibly separated. For those families who eventually were able to get some information about each other’s whereabouts, the Government continued to cause harm and trauma by failing to facilitate adequate communication between family members during their prolonged detention in separate facilities.

3. The Government’s intent to harm immigrant families seeking protection in the United States, and to use that harm to deter and intimidate future asylum-seekers, is well documented. Leading up to the policy’s execution, several senior Government officers, including former President Donald Trump and other Trump Administration officials, made repeated public

statements acknowledging the policy's purpose to deter other migrants and asylum-seekers from entering the United States.

4. Further, Government documents reveal that the Government implemented the Family Separation Policy with near total disregard for its obligation to reunify the families. Government agents generally placed parents and children in facilities thousands of miles apart and failed to initiate or maintain tracking procedures that would ensure it could successfully reunite them. Indeed, senior immigration officials advocated for and took steps designed to prevent swift family reunification. For example, officials directed the expedited transfer of parents into adult detention or rushed to move children into juvenile facilities for the purpose of avoiding reunifying families after a parent's quick release from criminal custody. In other cases, like this one, officials did not reunify parents and children even though U.S. Customs and Border Protection ("CBP") held both the parent and the child after resolution of the parent's criminal proceeding.

5. On June 15, 2018, Plaintiffs crossed the U.S.-Mexico border (the "Southern Border") near the Bridge of Americas Port of Entry in El Paso, Texas, and presented themselves to CBP agents as a family unit seeking protection from persecution in their native country of Guatemala. Over the course of the next two days, Plaintiffs were subjected to appalling conditions and verbal abuse and threats by Government agents, who told detained families that they would "take [their] children away to a shelter." On Plaintiffs' third day in custody, Government agents ordered Plaintiffs to exit their frigid hold room and told R.J.P.<sup>1</sup> ("Rafael") to say goodbye to his twelve-year-old son, O.R.J.J. ("Orlan"), "because [they] were not going to see each other again." The agents were indifferent to Plaintiffs' cries as they embraced.

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<sup>1</sup> R.J.P. files a Motion to Proceed Under Pseudonym with this Complaint, and O.R.J.J. files this Complaint using his initials as prescribed by Federal Rule of Civil Procedure 5.2(a). Plaintiffs use the pseudonyms Rafael and Orlan in the text of the Complaint for ease of reading.

6. After separating Rafael and Orlan, the Government prosecuted Rafael for misdemeanor illegal entry and transferred Orlan to another CBP facility about a half-hour drive away. Orlan remained at the CBP facility while Rafael awaited trial, attended his hearing, was sentenced to time served, and was transferred back to immigration custody. In all, Rafael was in U.S. Marshal Service custody for approximately thirty-six hours.

7. On information and belief, the Government did not make a determination that continued separation would serve Orlan's best interest, or that Rafael was unfit or presented any danger to Orlan. Nevertheless, when Rafael's misdemeanor criminal case concluded, the Government did not reunify him with his son even though CBP held both of them in facilities that were only a few miles apart. Instead, the Government loaded each of them onto buses and transported them in opposite directions to facilities almost 1,000 miles apart. They were separated for approximately thirty-seven days. As a result of the Government's failure to keep accurate records of Rafael's whereabouts and facilitate adequate communication, Plaintiffs spoke to each other on the telephone only twice during the period of forced separation.

8. When the Government was ordered to reunite Plaintiffs, it sent Orlan on a day-long journey that involved multiple flights and long car rides. However, when they arrived at the purported reunification facility after an exhausting day of travel, his father was not there. Second only to the day they were separated, this was the worst day of Orlan's life, reigniting his fear that he would never see his father again.

9. As a result of the Government's deliberate wrongful actions under its unlawful Family Separation Policy, Rafael and Orlan suffered, and continue to suffer, severe and ongoing mental, emotional, and physical trauma.

10. Rafael now seeks redress for himself and his son Orlan under the FTCA for the extraordinary harm they suffered and continue to suffer at the Government's hands.

### **PARTIES**

#### **A. Plaintiffs**

11. Rafael is forty-seven years old and was forty-three years old when the Government forcibly separated him from his son. He is married to Orlan's mother, M.C.J.A. ("Mariela"<sup>2</sup>), with whom he has five other children. Rafael and Orlan have lived in Trenton, New Jersey, since they were reunited in July 2018. Rafael, who was born in Guatemala, was granted asylum on September 12, 2021.

12. Orlan is the sixteen-year-old son of Rafael and Mariela. Orlan was twelve years old when the Government forcibly separated him from Rafael. He resides with his father in Trenton, New Jersey. Like his father, Orlan was born in Guatemala. Orlan was granted asylum on May 11, 2021.

13. Rafael is a class member in *Ms. L v. United States Immigration and Customs Enforcement*, No. 18-cv-0428-DMS-MDD (S.D. Cal.), filed by the American Civil Liberties Union (the "ACLU") in February 2018 on behalf of separated parents to challenge the Family Separation Policy. On June 26, 2018, the court preliminarily enjoined the Family Separation Policy, holding that the "practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their

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<sup>2</sup> This is a pseudonym.

due process claim.”<sup>3</sup> The court ordered the swift reunification of class members with their children; for those over five years old, like Orlan, the deadline was July 26, 2018.

**B. Defendant**

14. Under the FTCA, 28 U.S.C. § 2671, the United States is the proper defendant to answer for the acts of “federal agencies” and their employees, officers, and agents. Such agencies include, without limitation, the U.S. Department of Homeland Security (“DHS”) and its component agencies, U.S. Immigration and Customs Enforcement (“ICE”) and CBP; the U.S. Department of Justice (“DOJ”) and its component agencies; the U.S. Department of Health and Human Services (“HHS”) and its component agency, the Office of Refugee Resettlement (“ORR”). At all relevant times, federal officers referenced in this Complaint were employees of the United States working within the scope and course of their employment in these federal agencies.

15. DHS employees, officers, and officials were responsible for detaining and separating Rafael and Orlan, as well as denying them information about and communication with each other. DHS employees were responsible for supervising and managing detained individuals at CBP and ICE facilities, including those located in Texas, where Rafael and Orlan were initially detained and separated, and for overseeing the contract detention centers in New Mexico where Rafael was later transferred.

16. HHS employees, officers, and officials, including but not limited to those working in ORR, are responsible for supervising and managing the detention of children the Government classifies as “unaccompanied.” These employees, officers, and officials are responsible for

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<sup>3</sup> *Ms. L v. ICE*, 310 F. Supp. 3d 1133, 1145 (S.D. Cal. 2018).

overseeing the detention of unaccompanied children in contract facilities, such as the one in Texas where the Government sent and monitored Orlan during his forced separation from Rafael.

**JURISDICTION AND VENUE**

17. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1346(b).

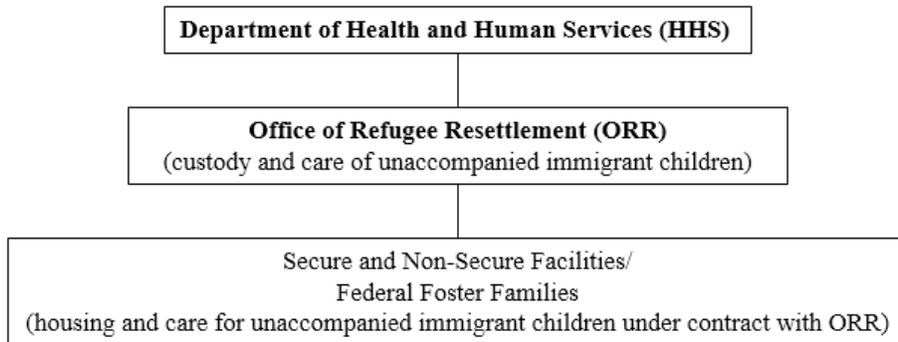
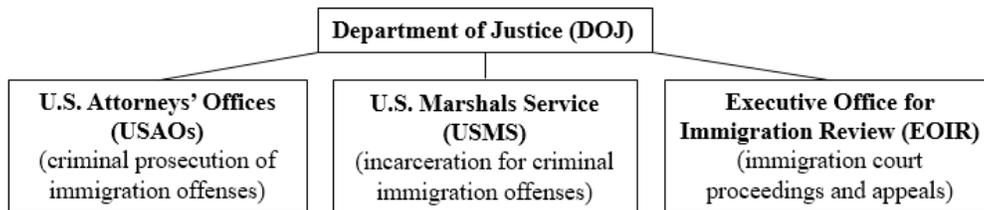
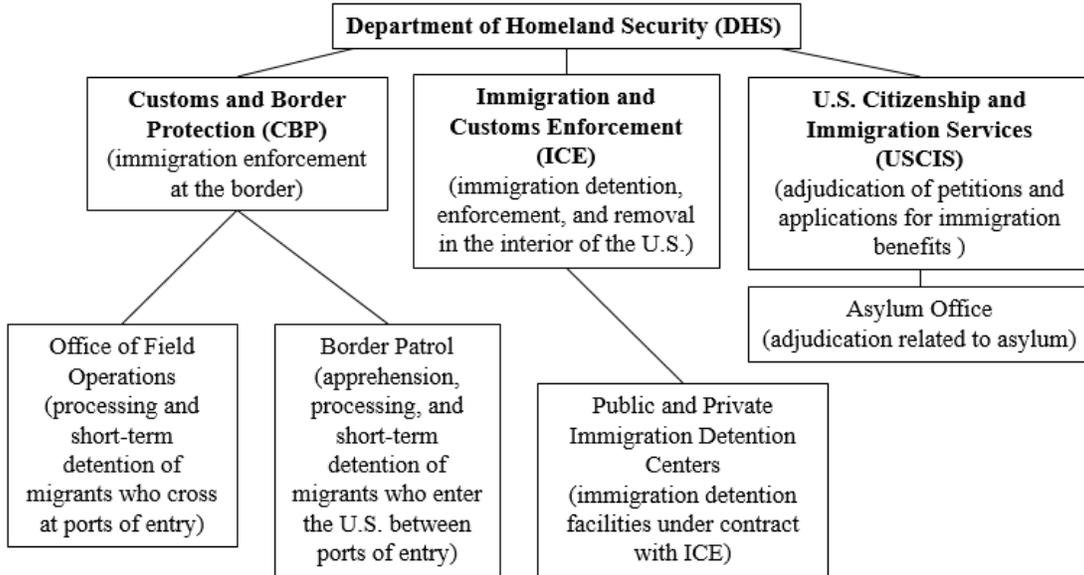
18. On June 9, 2020, Plaintiffs submitted administrative claims to DHS, ICE, CBP, and HHS. On March 11, 2021, DOJ informed Plaintiffs that it had named DHS as the designated lead agency in the matter pursuant to 28 C.F.R. § 14.2(b)(2). Neither DHS nor any of the agencies has responded to, or made a final disposition of, Plaintiffs' administrative claims. Because more than six months have passed since submission of the claims, they are deemed finally denied. 28 U.S.C. § 2675(a). Accordingly, Plaintiffs have exhausted all available administrative remedies.

19. Venue is proper in this District pursuant to 28 U.S.C. § 1402(b) because Plaintiffs reside in this District. Rafael has legal work authorization and works for a roofing company in New Jersey. He resides in Trenton, New Jersey with Orlan and intends to remain in New Jersey indefinitely. Orlan attends a public high school in Trenton, and also intends to remain in New Jersey indefinitely.

[CONTINUED ON NEXT PAGE]

**TAXONOMY OF THE FEDERAL AGENCIES INVOLVED**

20. The following organizational charts identify the federal departments and agencies that were the primary actors in conceiving or implementing the Family Separation Policy.



## FAMILY SEPARATION

### A. Overview

21. In early 2017, senior officials in the Trump Administration began to explore the possibility of separating migrant parents and children at the Southern Border. The goal was to cause the families intense trauma, focus public attention on the forcible separations, and thereby deter other migrants, predominantly Central American families, from seeking protection in the United States.

22. From mid-2017 through the remainder of the Administration, various federal agencies implemented different aspects and phases of the Family Separation Policy. Their execution of the policy betrayed a level of callousness and cruelty with few counterparts in modern American history. Federal officers abused and terrorized parents and children when tearing them apart, refused to provide them information about one another's welfare and whereabouts, defaulted on the legal obligations to track the separated families and facilitate communication between the parents and their children, and failed to prepare to reunify the families.

23. Some officials tried to defend the Family Separation Policy by dressing it in the language of law enforcement and stressing that many of the families entered the United States illegally. But prosecutions and convictions for immigration offenses (mainly misdemeanors) were never the point. A significant percentage of parents were not prosecuted at all but still had their children taken from them. Like Rafael, most parents charged with illegal entry were sentenced to time served but nonetheless remained separated from their children for several weeks or months. Criminal proceedings were a pit stop on the road to prolonged family separation; if the Government's intent was solely to increase prosecution of immigration offenses, it could have reunified parents with their children after prosecuting the parents. The real deterrent — the one the Government believed would stop parents cold — was the threat of losing their children. In the

service of the goal of deterring immigration, the Government caused indelible harm to thousands of families who came to this country seeking safety.

**B. The El Paso Family Separation Pilot**

24. Until Defendant began forcibly separating families in 2017, parents arriving in the United States with their children generally remained together. Agencies within DHS would either detain the family together during removal proceedings or release them on their own recognizance pending removal proceedings in immigration court.<sup>4</sup> When parents and children were separated before 2017, it was typically because immigration officials had determined that the parent presented a threat to the child's safety; the parent had an injury or illness that precluded caring for the child; the parent had a criminal history or outstanding warrant; or immigration officials could not confirm the familial relationship.<sup>5</sup>

25. When President Trump assumed office in early 2017, his Administration began pursuing immigration policies to curtail the number of asylum-seekers and migrants entering the United States at the Southern Border.<sup>6</sup>

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<sup>4</sup> U.S. Dep't of Justice, Off. of Inspector Gen., 21-028, *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services* 1–2 (Jan. 2021) (“DOJ OIG Rep. 1/21”), [https://oig.justice.gov/sites/default/files/reports/21-028\\_0.pdf](https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf); U.S. Dep't of Homeland Sec., Off. of Inspector Gen., OIG-20-06, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* 5 (Nov. 25, 2019) (“DHS OIG Rep. 11/19”), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf>; U.S. Gov't Accountability Off., GAO-19-163, *Unaccompanied Children: Agency Efforts To Reunify Children Separated from Parents at the Border* 13 (Oct. 2018) (“GAO Rep. 10/18”), <https://www.gao.gov/assets/700/694918.pdf>; U.S. Dep't of Health and Hum. Servs., Off. of Inspector Gen., OEI-BL-18-00511, *Separated Children Placed in Office of Refugee Resettlement Care* 3 & n.6 (Jan. 2019) (“HHS OIG Rep. 1/19”), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

<sup>5</sup> *DHS OIG Rep. 11/19* at 5; *GAO Rep. 10/18* at 13; *HHS OIG Rep. 1/19* at 3 & n.6.

<sup>6</sup> See, e.g., Kevin Lemarque, *U.S. Judge Bars Trump Administration from Enforcing Asylum Ban*, CNBC (Nov. 20, 2018), <https://www.cnbc.com/2018/11/20/immigration-policy-judge->

26. The Trump Administration designed these policies in part to target Central American migrant families. For example, on February 20, 2017, then-DHS Secretary John F. Kelly issued a memorandum outlining a comprehensive plan to block and deter migration at the Southern Border.<sup>7</sup> In the memo, Secretary Kelly noted that most “unaccompanied alien children” come from El Salvador, Honduras, and Guatemala, and their parents “who reside illegally in the United States” often pay “smuggler[s] . . . several thousand dollars” to bring their children here.<sup>8</sup> The memo ordered ICE and CBP to initiate removal proceedings against such parents, who had typically arrived before their children and had not been apprehended at the border.<sup>9</sup> Alternatively, the memo directed ICE and CBP to refer parents for criminal prosecution for “smuggling” their

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[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/>; Maria Sacchetti, Felicia Sonmez, & Nick Miroff, *Trump Tightens Asylum Rules, Will Make Immigrants Pay Fees to Seek Humanitarian Refuge*, Wash. Post, Apr. 30, 2019, [https://www.washingtonpost.com/politics/trump-issues-memo-calling-for-changes-to-handling-of-asylum-cases/2019/04/29/df41b5f2-6adb-11e9-be3a-33217240a539\\_story.html](https://www.washingtonpost.com/politics/trump-issues-memo-calling-for-changes-to-handling-of-asylum-cases/2019/04/29/df41b5f2-6adb-11e9-be3a-33217240a539_story.html); Glenn Thrush, *U.S. To Begin Blocking Asylum-Seekers from Entering over Mexican Border*, N.Y. Times, Jan. 24, 2019, <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html>; Yeganeh Torbati & Kristina Cooke, *Trump Administration Moves To Curb Migrants’ Asylum Claims*, Reuters, Nov. 8, 2018, <https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-moves-to-curb-migrants-asylum-claims-idUSKCN1ND35K>.

<sup>7</sup> U.S. Dep’t of Homeland Sec., *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *Id.* at 11.

children into this country. The memo explicitly instructed immigration officers to take these actions “[r]egardless of the desires for family reunification.”<sup>10</sup>

27. Three weeks later, in early March 2017, Secretary Kelly confirmed that DHS was considering another policy—to separate migrant families at the Southern Border. From the first mention, he made clear that the purpose of the Family Separation Policy under consideration was to deter migration. Presuming that families would not come to the United States if they faced the intense trauma of forcible separation,<sup>11</sup> he stated, “Yes, I’m considering [separating families] in order to deter more movement along this terribly dangerous network. I am considering exactly that. [Children] will be well cared for as we deal with their parents.”<sup>12</sup>

28. In line with Secretary Kelly’s statement, CBP launched a pilot project to separate families in the El Paso Sector of the Southern Border in March 2017. The plan was that CBP would separate parents and children, refer the parents for prosecution for immigration offenses, and transfer them to the custody of the U.S. Marshals Service during prosecution and any associated incarceration. Meanwhile, CBP would designate the children as “Unaccompanied Alien Child[ren]” under 6 U.S.C. § 279(g)(2) (defining term to include children under 18 who have no parent or legal guardian present in the United States or “available to provide care and physical custody” in the United States). CBP would then transfer the children to the custody of

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

<sup>11</sup> The Family Separation Policy did not in fact achieve its anticipated goal: “The number of apprehensions of family units continued to rise throughout the Zero Tolerance period. Border Patrol apprehended nearly 400 additional families along the Southwest Border during the 2 months Zero Tolerance was in place, during May and June 2018, as compared with the 2 months prior to the policy’s implementation, from March to April 2018.” *DHS OIG Rep. 11/19* at 34.

<sup>12</sup> Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN, Mar. 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

the Office of Refugee Resettlement in the Department of Health and Human Services, which is legally charged with the care of unaccompanied children. 6 U.S.C. § 279; 8 U.S.C. § 1232(b), (c).

29. Pursuant to this plan, the El Paso Sector suspended what Border Patrol officials referred to as the “family unit policy,” under which they had avoided referrals for prosecution of immigration offenses if the prosecution would result in family separation.<sup>13</sup>

30. The U.S. Attorney’s Office (“USAO”) in the Western District of Texas initially resisted the about-face and the resulting referrals of parents for prosecution, noting in internal emails that “[h]istory would not judge [prosecuting family units] kindly.”<sup>14</sup> Nevertheless, the USAO soon agreed to prosecute parents who arrived with their children.<sup>15</sup>

31. On April 11, 2017, then-Attorney General Jefferson Beauregard Sessions issued a memorandum to all federal prosecutors directing them to increase immigration prosecutions.<sup>16</sup> A Border Patrol official then reached out to the USAO in New Mexico urging prosecution of parents as a deterrent to migration: “Although it is always a difficult decision to separate these families, it is the hope that this separation will act as a deterrent to parents bringing their children into the harsh circumstances that are present when trying to enter the United States illegally.”<sup>17</sup>

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<sup>13</sup> *DOJ OIG Rep. 1/21* at 14.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 13–14.

<sup>16</sup> Memorandum from Att’y Gen. Jefferson B. Sessions to All Federal Prosecutors, *Renewed Commitment to Criminal Immigration Enforcement* (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>.

<sup>17</sup> *DOJ OIG Rep. 1/21* at 15 n.30.

32. As it implemented the El Paso Sector pilot, CBP separated an increasing number of families.<sup>18</sup> In October 2018, the Government Accountability Office reported that CBP separated 281 “individuals in families” from July to November 2017.<sup>19</sup>

33. CBP’s electronic systems did not have the functionality to track these early family separations; instead, Border Patrol manually created spreadsheets. These spreadsheets contained a significant number of errors.<sup>20</sup> Moreover, the use of spreadsheets in the field meant that the information was shared neither with other CBP offices nor with the other agencies that would be involved in the detention and possible removal or reunification of the parents and children.<sup>21</sup> The use of error-prone manual data entry, the reliance on spreadsheets, and the lack of information-sharing among agencies meant that officials could not identify which children belonged to which parents after separating them.<sup>22</sup>

34. The actual number of children separated in this early period appears to have been far higher than initial reports suggested. A January 2019 report from the Office of the Inspector General at HHS warned that “thousands of children may have been separated during an influx that began in 2017.”<sup>23</sup> Subsequent lengthy investigation led the Government to conclude that it had separated 1,556 children from their parents after July 1, 2017, and released these children from Government custody before June 26, 2018. The Government had ignored these children when it undertook to reunify the thousands of *additional* children still in its custody on that date under the

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<sup>18</sup> *Id.* at 16.

<sup>19</sup> *GAO Rep. 10/18* at 14–15.

<sup>20</sup> *DHS OIG Rep. 11/19* at 14–15.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *HHS OIG Rep. 1/19* at 1.

preliminary injunction issued in *Ms. L v. ICE*, the ACLU class action challenging the Family Separation Policy.<sup>24</sup>

35. The El Paso Sector separations prompted concern and criticism. The Deputy Criminal Chief in the USAO in the Western District of Texas emailed the U.S. Attorney for that office in August 2017:

We have now heard of us taking breast feeding defendant moms away from their infants, I did not believe this until I looked at the duty log and saw the fact we had accepted prosecution on moms with one and two year olds. The next issue is that these parents are asking for the whereabouts of their children and they can't get a response . . . .<sup>25</sup>

U.S. Magistrate Judge Miguel Torres signaled the same concern in an order for additional briefing on the issue of the separations:

In a number of recent illegal entry cases over the last several months, the Court has repeatedly been apprised of concerns voiced by defense counsel and by defendants regarding their limited and often non-existent lack of information about the well-being and whereabouts of their minor children from whom they were separated at the time of their arrest.<sup>26</sup>

36. ORR also sounded an early alarm. From November 2017 through early 2018, the then-Deputy Director for Children's Programs contacted senior officials at CBP and ICE to express concern about the increased number of separated children coming into ORR custody. He warned these and other officials that ORR would not have sufficient bed capacity if DHS implemented a larger-scale separation program and, in particular, would not have the resources to care

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<sup>24</sup> 310 F. Supp. 3d at 1149–50. Defendants in *Ms. L* arrived at the number 1,556 after convening a team of data scientists and others to compare several databases in response to a court order expanding the class to include the parents of these earlier-separated children. Order Granting Pls.' Mot. to Modify Class Definition, *Ms. L*, No. 3:18-cv-428 (Mar. 8, 2019), ECF No. 386; Order Following Status Conf., *id.* (Apr. 25, 2019), ECF No. 405; Joint Status Rep., *id.* (Nov. 6, 2019), ECF No. 495.

<sup>25</sup> *DOJ OIG Rep. 1/21* at 16.

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

appropriately for very young children. Further, he cautioned that separation would harm children and undermine ORR’s obligation to safeguard their best interests.<sup>27</sup>

37. DHS responded by advising ORR *not* to plan for continued increases in the number of separated children because DHS “did not have an official policy of separating parents and children.”<sup>28</sup>

38. In November 2017, shortly after ORR raised concerns, CBP headquarters instructed the El Paso Sector to halt the family separation pilot.<sup>29</sup>

39. After the pilot ended, the El Paso Sector provided an after-action report to Border Patrol’s Acting Chief of Operations calling for greater coordination among the various agencies.<sup>30</sup> In addition, the USAO for the Western District of Texas briefed high-level officials at the DOJ in late December 2017.<sup>31</sup> The USAO’s notes on the briefing referred to “significant ‘pushback’ from the local community, the press, and other stakeholders with regard to family separations.”<sup>32</sup> In particular, the notes cited Judge Torres’s concerns about the parents’ lack of information on the fate or whereabouts of their children, as well coverage in the *Houston Chronicle* of the Judge’s remarks and other serious concerns raised by federal defenders and advocates about family

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<sup>27</sup> U.S. Dep’t of Health and Hum. Servs., Off. of Inspector Gen., OEI-BL-18-00510, *Communication and Management Challenges Impeded HHS’s Response to the Zero-Tolerance Policy* 15–16 (Mar. 2020) (“*HHS OIG Rep. 3/20*”), <https://oig.hhs.gov/oei/reports/oei-BL-18-00510.pdf>; see also 6 U.S.C. § 279(b)(1)(B).

<sup>28</sup> *GAO Rep. 10/18* at 14.

<sup>29</sup> *DHS OIG Rep. 11/19* at 15.

<sup>30</sup> *Id.*

<sup>31</sup> *DOJ OIG Rep. 1/21* at 18.

<sup>32</sup> *Id.*

separation and the Government's lack of tracking procedures.<sup>33</sup> Thus, by the end of 2017, high-level officials in both CBP and DOJ were on notice that the El Paso Sector pilot had caused public outrage, harmed parents and children, and raised serious concerns about whether the Government was prepared to track and reunify the families it had separated.

### C. Launching the Family Separation Policy Along the Whole Southern Border

40. In December 2017, while continuing to receive reports of problems in the El Paso Sector, senior DOJ and DHS officials jointly prepared a memorandum entitled "Policy Options to Respond to Border Surge of Illegal Immigration," which outlined proposed policies for suppressing family migration at the Southern Border.<sup>34</sup> The first proposal was to "Increase Prosecution of Family Unit Parents."<sup>35</sup> Noting that "CBP is currently executing this policy on a limited basis in the El Paso Sector," the plan was to "[i]nstruct CBP and ICE to work with DOJ to significantly increase the prosecution of family unit parents when they are encountered at the border."<sup>36</sup> "The parents would be prosecuted for illegal entry (misdemeanor) or illegal reentry

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<sup>33</sup> *Id.*; see also Lomi Kriel, *Trump Moves To End "Catch and Release," Prosecuting Parents and Removing Children Who Cross Border*, Houston Chronicle, Nov. 25, 2017, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>.

<sup>34</sup> *DOJ OIG 1/21* at 12. The original memo, in marked-up form, is available at <https://s3.documentcloud.org/documents/5688664/Merkleydocs2.pdf>; see also Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children*, NBC News (Jan. 17, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811> (explaining that Senator Jeff Merkley's office made the December 2017 policy memorandum public); Anne Flaherty & Quinn Owen, *Leaked Memo Shows Trump Administration Weighed Separating Families at Border, Sen. Merkley Wants Nielsen Investigated for Perjury*, ABC News (Jan. 18, 2019), <https://abcnews.go.com/Politics/leaked-memo-shows-trump-administration-weighed-separating-families/story?id=60459972>.

<sup>35</sup> *DOJ OIG 1/21* at 12.

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

(felony) and the minors present would be placed in HHS custody as UACs [‘unaccompanied alien children’]. Because the parents would be criminally prosecuted, they would be placed in the custody of the U.S. Marshal to await trial.”<sup>37</sup>

41. The goals were deterrence and publicity: “Because of the large number of violators, not all parents could be criminally prosecuted. However, the increase in prosecutions would be reported by the media and it would have substantial deterrent effect. A public announcement of the policy could be made before implementation.”<sup>38</sup> The memo called for “close coordination with DOJ, to ensure there are sufficient prosecutors at the border and sufficient U.S. Marshal’s detention space.”<sup>39</sup>

42. The second recommendation, distinct from the first, was to “Separate Family Units.” Here again, deterrence and publicity were key: “Announce that DHS is considering separating family units, placing the adults in detention, and placing the minors under the age of 18 in the custody of HHS as unaccompanied alien children.”<sup>40</sup> To accomplish family separation, the memo urged “close coordination with HHS, to ensure that sufficient capacity is available to detain the UACs.”<sup>41</sup> Once “legal coordination between DHS, HHS, and DOJ is complete,” the memo instructed, “begin separating family units as stated above.”<sup>42</sup> Thus, the Government explicitly

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Policy Options to Respond to Border Surge of Illegal Immigrants 1* (Dec. 2017), <https://s3.documentcloud.org/documents/5688664/Merkleydocs2.pdf>.

contemplated separating families regardless of whether the parents were prosecuted, a practice it in fact implemented.

43. In the early months of 2018, as the Government considered expanding family separation to the whole Southern Border, it “focused solely on the increase in illegal entry prosecutions resulting from the El Paso Initiative” while ignoring the warning signs and the “readily available information” that underscored the problems with family separation.<sup>43</sup>

44. Despite documented problems with the El Paso Sector pilot and in disregard of its “Policy Options” memo,<sup>44</sup> the Government failed to initiate coordination among or planning within the agencies that would be responsible for the separated parents and children. DHS remained unprepared to “identify, track, and reunify families separated under Zero Tolerance<sup>45</sup> due to limitations with its information technology systems, including a lack of integration between systems.”<sup>46</sup> Not only did the subsidiary agencies within DHS have incompatible systems, but there was “no ‘direct electronic interface’ between DHS and HHS tracking systems,” such as they were.<sup>47</sup>

45. Similarly, despite warnings from its own staff about the “shortage . . . of beds for babies” and the harms that family separation was causing to children,<sup>48</sup> HHS senior officials did

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<sup>43</sup> *DHS OIG Rep. 1/21* at ii.

<sup>44</sup> *Supra* ¶¶ 40–42.

<sup>45</sup> *See infra* ¶ 48 for an explanation of Zero Tolerance.

<sup>46</sup> U.S. Dep’t of Homeland Sec., Off. of Inspector Gen., OIG-18-84, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy 1* (Sept. 27, 2018) (“*DHS OIG Rep. 9/18*”), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *HHS OIG Rep. 3/20* at 15–16.

not take or direct steps to prepare for “a future situation in which DHS routinely separated families” and did not raise its staff’s concerns about family separation in existing interagency forums.<sup>49</sup> Instead, HHS leaders suppressed discussion of family separation by repeatedly warning ORR staff “to be cautious about putting information in writing” and to reserve “certain matters” for “verbal-only briefings.”<sup>50</sup>

46. Likewise, the Office of the Attorney General, which was “a driving force” behind family separation,<sup>51</sup> did not coordinate in advance of the launch with the USAOs that would be responsible for prosecutions, the U.S. Marshals Service that would be responsible for processing and incarcerating prosecuted parents, or HHS that would be responsible for the care and custody of the separated children.<sup>52</sup>

47. These failures occurred despite explicit prior acknowledgement that interagency coordination would be necessary.<sup>53</sup>

48. Frustrated that the rate of immigration prosecutions was not rising faster,<sup>54</sup> Attorney General Sessions publicly announced the Government’s “Zero-Tolerance Policy for Criminal Illegal Entry” on April 6, 2018, directing the USAOs along the Southern Border to

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<sup>49</sup> *Id.* at 17.

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *DOJ OIG Rep. 1/21* at 34.

<sup>52</sup> *Id.* at 25–26.

<sup>53</sup> *Id.* at 12–13 (citing *Policy Options to Respond to Border Surge of Illegal Immigration* (Dec. 16, 2017)).

<sup>54</sup> *Id.* at 11.

prosecute all persons who commit or attempt to commit unlawful entry under 8 U.S.C. § 1325(a) (the “Zero Tolerance Policy”).<sup>55</sup>

49. Key officials in DHS, HHS, and their subsidiary agencies learned of the Zero Tolerance Policy for the first time when the Attorney General announced it publicly.<sup>56</sup>

50. The prosecution and family separation strategies were overlapping, but never synonymous. From the summer of 2017 through the summer of 2018, the Government pursued these strategies both separately and together. In fact, the Attorney General’s announcement of the Zero Tolerance Policy, which focused on prosecution, did not result in an immediate jump in the number of family separations because the U.S. Attorneys at the Southern Border did not read the Zero Tolerance Memorandum as necessarily pertaining to family units.<sup>57</sup>

51. The steep escalation in family separations began about a month later, on May 4, 2018, when Secretary of Homeland Security Kirstjen Nielsen signed a memorandum implementing the Zero Tolerance Policy by instructing field personnel at CBP to refer parents for prosecution regardless of whether they had arrived with their children.<sup>58</sup> In a stark

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<sup>55</sup> U.S. Dep’t of Justice, Off. of Pub. Affs., *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>; see also Memorandum from Att’y Gen. to Federal Prosecutors Along the Southwest Border, *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (Apr. 6, 2018) (“Zero Tolerance Memorandum”), <https://www.justice.gov/opa/press-release/file/1049751/download>.

<sup>56</sup> *GAO Rep. 10/18* at 12 (“DHS and HHS officials told us that the agencies did not take specific planning steps because they did not have advance notice of the Attorney General’s April 2018 memo.”).

<sup>57</sup> *DOJ OIG Rep. 1/21* at 22–23, 27.

<sup>58</sup> *DOJ OIG Rep. 1/21* at 27; *DHS OIG Rep. 11/19* at 18; U.S. Gov’t Accountability Off., *GAO-20-245, Actions Needed to Improve DHS Processing of Families and Coordination Between DHS and HHS* 13 (Feb. 2020) (“GAO Rep. 2/20”), <https://www.gao.gov/assets/gao-20-245.pdf>.

acknowledgement that family separations would proceed despite inadequate tracking, Secretary Nielsen's memo simultaneously advised CBP to continue using spreadsheets to record separations because improvements to the agency's electronic system were "still pending."<sup>59</sup>

52. After the May 4th memo, Attorney General Sessions increased the pressure on the USAOs to prosecute all parents referred by DHS. The U.S. Attorney for the Western District of Texas explained: "[E]ven with respect to age of the child, it was a categorical, 'We're prosecuting all.'"<sup>60</sup> The U.S. Attorneys along the Southern Border took notes on a May 11th call with the Attorney General, memorializing his direction to them: "[W]e need to take away children; if care about kids [sic], don't bring them in."<sup>61</sup>

53. The Zero Tolerance Policy never came close to achieving a 100% prosecution rate. In April 2018, CBP apprehended 24,299 adults without children and 4,536 adults with children, and referred 8,298 adults for prosecution, for a prosecution rate of 28.8%.<sup>62</sup> ("Virtually every CBP referral results in prosecution."<sup>63</sup>) In May 2018, CBP apprehended 24,465 adults without children and 4,458 adults with children, and referred 9,216 adults for prosecution, for a prosecution rate of 31.9%.<sup>64</sup> Because it apprehended a total of 48,764 adults without children in these two months, CBP could have made all 17,514 referrals out of this population and maintained exactly the same prosecution rate without referring a single one of the 8,994 adults with children it apprehended.

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<sup>59</sup> *DHS OIG Rep. 11/19* at 18.

<sup>60</sup> *DOJ OIG Rep. 1/21* at 41.

<sup>61</sup> *Id.* at 39.

<sup>62</sup> TRAC Immigration, "Zero Tolerance" at the Border: Rhetoric vs. Reality, Table 1, <https://trac.syr.edu/immigration/reports/520/>.

<sup>63</sup> *Id.* n.4.

<sup>64</sup> *Id.* Table 1.

“The Administration has not explained its rationale for prosecuting parents with children when that left so many other adults without children who were not being referred for prosecution.”<sup>65</sup>

54. More than 15% of separated parents were *not* referred for prosecution at all.<sup>66</sup>

55. The overwhelming majority of parents who were referred for prosecution and charged with misdemeanor illegal entry under 8 U.S.C § 1325 pled guilty in advance and were sentenced to time served (i.e., the time in detention between the defendant’s arrest and sentencing), including Rafael.<sup>67</sup> Instead of reunifying the parents and children after the parent’s short stint in the custody of the U.S. Marshals Service,<sup>68</sup> the Government kept them separated for weeks or months. Rafael and Orlan were one of those parent-child pairs.

56. The Attorney General and other high-level DOJ officials represented to the public that families would be reunited immediately after parents were released from jail.<sup>69</sup> But that was never the plan. The Government had always intended to designate the children as unaccompanied and place them in the custody of ORR,<sup>70</sup> and in fact, CBP transferred the overwhelming majority to ORR rather than reuniting families, either in family detention or on release, when the U.S. Marshals Service turned the parents back over to DHS custody.<sup>71</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *DHS OIG Rep. 11/19* at 33.

<sup>67</sup> *DOJ OIG Rep. 1/21* at 4–5.

<sup>68</sup> The average time a defendant remained in the custody of the U.S. Marshals Service for an illegal entry prosecution was three to seven days. *Id.* In this case, Rafael was in U.S. Marshals Service custody for approximately thirty-six hours.

<sup>69</sup> *Id.* at 50.

<sup>70</sup> *See supra* ¶¶ 28, 40, 42.

<sup>71</sup> *DOJ OIG Rep. 1/21* at 50.

57. Between May 5 and June 20, 2018, the Government separated more than 3,000 children from their parents.<sup>72</sup>

58. During this expanded phase of the Family Separation Policy, as during the El Paso Sector pilot, the Government did not effectively track the parents and children it had separated. In June 2018, when separations were at a high point, DHS announced that it had “a central database which HHS and DHS can access and update when a parent(s) or minor(s) information changes.”<sup>73</sup> Upon inspection, however, the DHS Office of the Inspector General found “no evidence that such a database exists.”<sup>74</sup>

59. Because of the absence of effective data collection, storage, and tracking, the Government’s reported numbers of affected families shifted constantly in the years following the implementation of the Family Separation Policy. The most recent total reported in the *Ms. L* litigation is “5,648 children known to have been separated between July 1, 2017 and Jan. 20, 2021.”<sup>75</sup> This number, like others before it, results from extensive efforts to reconstruct what happened.<sup>76</sup>

60. As of October 25, 2022, four-and-a-half years after the initial preliminary injunction ordering reunification, a special steering committee convened by the ACLU to locate

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<sup>72</sup> *Id.* at first unnumbered page; *see also id.* at 24.

<sup>73</sup> U.S. Dep’t of Homeland Sec., *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification* (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.

<sup>74</sup> *DHS OIG Rep. 9/18* at 10.

<sup>75</sup> Decl. of Marc Rosenblum, *Ms. L*, No. 3:18-cv-428 (Sept. 22, 2021), appended to Joint Status Rep., ECF No. 616.

<sup>76</sup> *Id.*

and reach out to class members in the *Ms. L* litigation was still attempting to identify and contact the missing parents of 134 separated children.<sup>77</sup>

**D. Knowledge of and Intent to Cause Severe Trauma**

61. The Government knew its Family Separation Policy would cause enormous trauma to families entering the United States along the Southern Border. The Government intended this harm and trauma to the separated families so that other families would be deterred from seeking asylum or otherwise migrating to the United States in the future.

62. Before implementing the Family Separation Policy, Government officials had received, or had knowledge of, warnings from credible sources that the policy would inflict severe harm and trauma on those subject to it, including, among others:

a. A DHS Advisory Committee on Family Residential Centers report concluded, “The best interests of the child should be paramount in all custody decisions regarding family members apprehended by DHS,” and warned that “the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.”<sup>78</sup>

b. In Senate testimony, Commander Jonathan White, the former Deputy Director of ORR for the Unaccompanied Children Program, stated that during the months leading up to the launch of the Family Separation Policy, he had cautioned the

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<sup>77</sup> Joint Status Rep. 3, *Ms. L*, No. 3:18-cv-428 (Oct. 25, 2022), ECF No. 660.

<sup>78</sup> U.S. Dep’t of Homeland Sec., *Report of the DHS Advisory Committee on Family Residential Centers 2*, 10 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

Administration, “There’s no question that separation of children from parents entails significant potential for traumatic psychological injury to the child.”<sup>79</sup>

c. The American Academy of Pediatrics publicly warned: (1) “Proposals to separate children from their families . . . to deter immigration are harsh and counterproductive.”<sup>80</sup> (2) Policymakers should “always be mindful that these are vulnerable, scared children” and “exercise caution to ensure that the emotional and physical stress children experience as they seek refuge in the United States is not exacerbated by the additional trauma of being separated from their siblings, parents, or other relatives and caregivers.”<sup>81</sup> (3) Family separation “can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health.”<sup>82</sup> (4) “Separation of a parent or primary caregiver from his or her children should never occur, unless there are concerns for safety of the child at the hand of parent. Efforts should always be made to ensure that children separated from other relatives are able to maintain contact with them during detention.”<sup>83</sup>

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<sup>79</sup> Jeremy Stahl, *The 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>.

<sup>80</sup> Fernando Stein, President & Karen Remley, CEO, Am. Acad. Pediatrics, *AAP Statement Opposing Separation of Mothers and Children at the Border* (Mar. 4, 2017), <https://web.archive.org/web/20200301051118/https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/immigrantmotherschildrenseparation.aspx>.

<sup>81</sup> *Id.*

<sup>82</sup> Colleen Kraft, President, Am. Acad. Pediatrics, *AAP Statement Opposing Separation of Children and Parents at the Border* (May 8, 2018), <https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf>.

<sup>83</sup> Julie M. Linton et al., Am. Acad. Pediatrics, *Detention of Immigrant Children*, 139 *Pediatrics* No. 4, at 7 (Apr. 2017), [http://publications.aap.org/pediatrics/article-pdf/139/5/e20170483/1062683/peds\\_20170483.pdf](http://publications.aap.org/pediatrics/article-pdf/139/5/e20170483/1062683/peds_20170483.pdf).

63. Knowing that family separation was inhumane and would result in significant harm to vulnerable families, several high-level Government officials publicly admitted that the purpose of the Policy was to deter future asylum-seekers.

64. For example, on May 11, 2018, when asked about family separation, then-Chief of Staff John Kelly responded that those coming from Central America could not “easily assimilate into the United States into our modern society. They’re overwhelmingly rural people in the countries they come from—fourth, fifth, sixth grade educations are kind of the norm. They don’t speak English, obviously that’s a big thing. They don’t speak English. They don’t integrate well, they don’t have skills.” In light of these detriments, he said, “a big name of the game is deterrence.” Asked directly about family separation, he admitted, “It could be a tough deterrent—would be a tough deterrent.”<sup>84</sup>

65. Like other officials in his Administration, former President Trump also repeatedly reinforced the intended deterrent effect of family separation. For example:

a. On October 13, 2018, when speaking with reporters at the White House, former President Trump said, “If they feel there will be separation, they don’t come.”<sup>85</sup>

b. On December 16, 2018, former President Trump tweeted, “[I]f you don’t separate, FAR more people will come.”<sup>86</sup>

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<sup>84</sup> Nat’l Pub. Radio, *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, May 11, 2018, <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

<sup>85</sup> David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, Reuters, Oct. 13, 2018, <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>.

<sup>86</sup> U.C. Santa Barbara, *The American Presidency Project*, Donald J. Trump Tweets of Dec. 16, 2018, <https://www.presidency.ucsb.edu/documents/tweets-december-16-2018>.

c. On April 28, 2019—after the Family Separation Policy had purportedly ended—former President Trump told Fox News host Maria Bartiromo that family separation had been an effective “disincentive.” Greatly exaggerating the increase in family migration after the *Ms. L* court enjoined the Policy, the President continued, “Now you don’t get separated, and while that sounds nice and all, what happens is you have literally . . . ten times as many families coming up because they’re not going to be separated from their children[.] . . . It’s a disaster.”<sup>87</sup>

66. Accordingly, senior Government officials made an intentional decision to cause parents and children extraordinary pain and suffering to deter the migration of Central American families seeking asylum.

#### **E. Deliberately Inhumane Implementation**

67. The Government’s execution of family separations made an inherently inhumane policy even crueler.

68. Before separating the families, CBP generally detained them together in holding areas infamously referred to as *hieleras* or “iceboxes” (named for the frigid temperature inside) that were overcrowded such that the families lacked sufficient room to sit or to lie down to rest.<sup>88</sup> The Government failed to provide these families access to safe and sanitary restrooms, proper food and clean drinking water, clothing, bedding, and hygiene products.

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<sup>87</sup> Kimberly Kindy, Nick Miroff, & Maria Sacchetti, *Trump Says Ending Family Separation Practice Was a ‘Disaster’ that Led to Surge in Border Crossings*, Wash. Post, Apr. 28, 2019, [https://www.washingtonpost.com/politics/trump-says-ending-family-separation-practice-was-a-disaster-that-led-to-surge-in-border-crossings/2019/04/28/73e9da14-69c8-11e9-a66d-a82d3f3d96d5\\_story.html](https://www.washingtonpost.com/politics/trump-says-ending-family-separation-practice-was-a-disaster-that-led-to-surge-in-border-crossings/2019/04/28/73e9da14-69c8-11e9-a66d-a82d3f3d96d5_story.html).

<sup>88</sup> *DHS OIG Rep. 11/19* at 35–36 (“OIG reported that overcrowding and prolonged detention represent an immediate risk to . . . health and safety . . .”).

69. When separating families, CBP agents misled, verbally abused, and physically manhandled them. Agents accused parents of having kidnapped and smuggled their own children, despite the children's obvious connection to the parent. When parents and children would not let go of each other, the agents grabbed the children and tore them away. In many cases, parents begged the agents not to take their children, but the immigration officials separated them anyway and often with open contempt for the parents' and children's anguish. As they did with Plaintiffs, agents regularly told parents to say goodbye to their children because they would never see them again.

70. Many parents waited in terror as they watched agents take other children from their parents, knowing that their children's names might soon be called. Witnessing other parents and children forcibly separated compounded the trauma. Other parents knew that parents and children were being forcibly separated through word of mouth at CBP facilities, which created an atmosphere of terror and anxiety among detainees. Parents had to watch the agents walk or carry their own screaming, crying children out of the cells and out of their sight. The last words many parents heard were their children's calls for their help.

71. In some cases, CBP intentionally subverted potential reunifications. At the large CBP Central Processing Center in McAllen, Texas, for example, CBP officers stated that if parents were prosecuted for misdemeanor illegal entry and returned to the facility while their children were still there, CBP would cancel the children's transfers and reunite the families. Senior officials decided, however, to have the adults transferred directly from court to ICE custody, rather than readmitting them where they might be reunified with their children.<sup>89</sup> The decision-makers

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<sup>89</sup> *DHS OIG Rep. 9/18* at 15.

explained that CBP made this change to avoid the “paperwork” involved in readmitting the parents.<sup>90</sup>

72. High officials at ICE appear also to have been involved in the decision to prevent swift reunification. After learning that some families had been reunited immediately after the parents were released from criminal custody, Matthew Albence, then the head of Enforcement and Removal Operations at ICE, reportedly wrote to colleagues, “We can’t have this.”<sup>91</sup> He argued that immediate reunification “obviously undermines the entire effort.”<sup>92</sup> His proposed “solutions” included transferring parents who had completed their sentences directly to ICE custody, rather than risking their reunification with their children in CBP custody, or sending children to HHS “at an accelerated pace” to make them unavailable for reunification with their parents.<sup>93</sup>

73. The Government systematically failed to inform parents about where their children were going and what was happening to them; children were also left in the dark about the whereabouts of their parents.<sup>94</sup> Moreover, the entities responsible for detaining the parents and children frequently themselves lacked critical information about the separations. “ICE personnel reported,” for example, that “they were often unaware that adults in their custody had been separated from children.”<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> Caitlin Dickerson, “*We Need To Take Away Children*”: *The Secret History of the U.S. Government’s Family-Separation Policy*, *The Atlantic*, Aug. 7, 2022, at ch. 6, <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *DHS OIG Rep. 9/18* at 12–13 (documenting inconsistent and inaccurate information CBP gave parents about their children).

<sup>95</sup> *Id.* at 15.

74. Similarly, the ORR shelters where children were detained reported difficulties identifying parents, especially those of young children who were unable to provide their parents' full names and contact information.<sup>96</sup> Even after ORR learned the identity and location of the parent, caseworkers often could not reach anyone at the immigration detention centers where the parents were held: “[O]f 371 attempts [to contact detained parents] on a given day, 159 had been unsuccessful; the most common reason given was the detention center did not answer the phone.”<sup>97</sup> Outreach efforts were even less successful if the parent was in the custody of the U.S. Marshals Service, which maintained that it did not have the same obligation as DHS to share information about parents with ORR.<sup>98</sup>

75. The Government regularly failed to facilitate parent-child communication. Official reviews found that CBP, ICE, and ORR all lacked sufficient and consistent mechanisms for establishing and maintaining communication between separated parents and children.<sup>99</sup> In hundreds of cases, parents were removed to their home countries without having had any contact with their children since the separation.<sup>100</sup> The communication barriers meant that parents could not coordinate with their children regarding removal. For example, the Government Accountability Office found that separated parents held in ICE custody were not “able to make arrangements for their children, including being removed with them.”<sup>101</sup> The children, typically

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<sup>96</sup> *HHS OIG Rep. 3/20* at 25.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 26; *DOJ OIG Rep. 1/21* at 65.

<sup>99</sup> *E.g., DHS OIG Rep. 9/18* at 13–15; *HHS OIG Rep. 3/20* at 25–27.

<sup>100</sup> *HHS OIG Rep. 3/20* at 26.

<sup>101</sup> *GAO Rep. 2/20* at second unnumbered page.

subject to their own separate removal proceedings, lacked the advice and counsel of their parents about how to manage their cases.

76. Parents separated from and unable to communicate with their children suffered physically, mentally, and emotionally. As the Federal Public Defender’s Office in McAllen, Texas, noted in a May 29, 2018, email to local federal judges and prosecutors: “[O]ur clients are enduring the punishment of separation from their children which is greater than any jail time they can have imposed upon them.”<sup>102</sup> Separated parents experienced profound desperation, anguish, and guilt when the Government tore their children away, told the parents they would never see them again, and withheld information about the children.

77. Children separated from and unable to communicate with their parents also suffered physically, mentally, and emotionally. Program directors and mental health clinicians in the shelters reported that “separated children exhibited more fear, feelings of abandonment, and post-traumatic stress than did children who were not separated. Separated children experienced heightened feelings of anxiety and loss . . . . For example, some separated children expressed acute grief that caused them to cry inconsolably.”<sup>103</sup> Children who did not understand why they had been taken from their parents “suffered elevated levels of mental distress.” For example, some who “believed their parents had abandoned them were angry and confused.”<sup>104</sup>

78. Lawyers for the separated children confirmed the intense trauma of their clients:

Most children were unable to concentrate during legal screenings, the majority erupting into sobs, frequently wailing for their parents. When discussing his

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<sup>102</sup> DOJ OIG Rep. 1/21 at 44.

<sup>103</sup> HHS OIG Rep. 3/20 at 21–22.

<sup>104</sup> U.S. Dep’t of Health and Hum. Servs., Off. of Inspector Gen., OEI-09-18-00431, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* 10 (Sept. 2019) (“HHS OIG Rep. 9/19”), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf>.

separated parent, one child clutched his heart and described to us how it hurt to breathe. Some children refused to speak about anything other than a separated parent. Some refused to speak at all. Others exhibited an instant and intense attachment to the lawyer they had just met, begging not to be separated after the conclusion of a legal appointment.<sup>105</sup>

79. Because any data the Government collected about separated families were incomplete, contradictory, and unreliable,<sup>106</sup> the Government's reunification efforts were defined by chaos. Before issuing the preliminary injunction in *Ms. L*, Judge Sabraw confirmed with the Government that "there was no procedure in place for the reunification of these families."<sup>107</sup> Nine months later, as of March 2019, "the working group [on family reunification] still did not have a formal reunification plan in place."<sup>108</sup>

80. ORR shelter staff responsible for the children reported pervasive "uncertainty around how or when reunification would happen. For example, case managers in facilities were not always able to let children know when, or even if, they would be reunified with their parents, or whether that reunification would happen in the United States."<sup>109</sup> Moreover, logistical issues plagued the process. "Facilities reported that some reunifications were scheduled with little advance notice, or suddenly canceled or delayed, which increased the levels of uncertainty and

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<sup>105</sup> Decl. of Anthony Enriquez, Esq., ¶ 8, *Ms. L*, No. 3:18-cv-428 (Nov. 2, 2018), ECF No. 292-1.

<sup>106</sup> *DHS OIG Rep. 11/19* at 11–12.

<sup>107</sup> 310 F. Supp. 3d at 1140–41.

<sup>108</sup> *DHS OIG Rep. 11/19* at 24.

<sup>109</sup> *HHS OIG Rep. 9/19* at 11.

anxiety in separated children and other children in the facility.”<sup>110</sup> Reunifications were also delayed long past the court-imposed deadlines.<sup>111</sup>

81. The *Ms. L* court criticized the agencies for their callous treatment of families: “[W]hat was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know, either.”<sup>112</sup>

82. Through its statements about the Family Separation Policy’s purpose to deter asylum-seekers, refusal to provide separated parents and children any information about each other’s whereabouts and well-being, disregard for its duty to track separated families, indifference to its obligation to facilitate communication between separated parents and children, and failure to prepare for family reunification in any meaningful way, the Government evinced an intent to harm and inflict emotional distress upon the parents and children it separated.

### **SEPARATION OF RAFAEL AND ORLAN**

#### **A. Plaintiffs’ Migration and Forcible Separation**

83. In late 2017, Rafael and his family faced escalating death threats in Guatemala because of his public opposition to the local governing body’s attempts to deprive his family of their right to ancestral indigenous lands. In or around December 2017, Rafael’s wife, Mariela, found an anonymous note, which threatened death by decapitation to Rafael and their youngest son, Orlan. They took this threat seriously because Rafael’s father and uncle, who were also involved in the land dispute, had been murdered in the same way. Rafael and Mariela made the difficult decision to use their scarce immediate resources to pay for Rafael and Orlan, who was

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<sup>110</sup> *Id.*; see also *HHS OIG Rep. 3/20* at 31 (documenting delayed, botched, and failed reunifications).

<sup>111</sup> *GAO Rep. 10/18* at 33.

<sup>112</sup> Tr. of Status Conf. at 58, *Ms. L*, No. 18-cv-428 (July 27, 2018), ECF No. 164.

twelve years old at the time, to make the arduous journey to the United States to seek humanitarian protection.

84. Rafael and Orlan traveled from Guatemala to the United States through Mexico, a journey that took more than four months by car and on foot. On June 15, 2018, Rafael and Orlan entered the United States near the Bridge of Americas Port of Entry in El Paso, Texas, by crossing the Rio Grande at a dry riverbed. Intending to request permission to enter the United States and to seek asylum, Rafael and Orlan began walking towards the first two CBP officers they saw after crossing the river.

85. As Rafael and Orlan approached the officers, one of the CBP officers began questioning Rafael in Spanish: “Why did you enter here? Don’t you know you could have just entered by the bridges?” He shouted at both Rafael and Orlan, “You know I can shoot you, because this is as if you were entering my home through a window when there is a door. I can shoot you like a thief because that is what you are doing here.”

86. Rafael told the CBP officers that he was fleeing from danger in his country. The officer responded, “Now I am going to take you to jail and take your son from you.” Rafael was frightened. It was difficult for him to comprehend that his young son could be taken away from him in the place they had come for protection.

87. The CBP officers took Rafael and Orlan in a patrol car to the El Paso Service Processing Center (the “El Paso Processing Center”). Once they arrived at the El Paso Processing Center, the officers took them to a hold room, where air conditioners blasted cold air and approximately ten migrants, all fathers and sons, were detained together. Rafael and Orlan heard CBP officers and other detainees call the hold room a *hielera* (icebox) due to its frigid temperature. Other than a few benches and several large plastic containers (apparently intended for the children

to sleep in), the *hielera* was devoid of any furniture. The *hielera* and the only bathroom within it were filthy.

88. Children in the *hielera* ranged in age from three or four years old to teenagers nearing adulthood. There were several other hold rooms in the building, which was one of several buildings at the El Paso Processing Center. The officers in El Paso Processing Center wore two different colored uniforms: green and black. As the officers in the green uniforms roamed the halls of the building, they boasted that they were the “bad ones” and shouted at the migrants. Although Rafael and Orlan did not know what the officers meant, they felt intimidated, uneasy, and anxious.

89. Rafael and Orlan were hungry when they arrived at the El Paso Processing Center. About two hours after they arrived, the CBP officers gave them something to eat—their first meal since they had arrived in the United States. The officers gave Rafael and Orlan each one small, cold, snack-sized burrito. After finishing his burrito, Orlan quickly became hungry again. No more food was provided to Rafael or Orlan until the next morning.

90. The next morning, the CBP officers gave Orlan and the other children a cup of instant noodle soup. Orlan’s soup was meager and tepid. The CBP officers gave Rafael and the other adults each a single burrito – identical to the ones they served the day before. After breakfast that day, the CBP officers offered both adults and children in the *hielera* cold burritos during mealtime. Orlan did not eat a single hot meal during his time at the El Paso Processing Center. Each meal was accompanied by a small juice box. CBP officers did not offer water to Rafael or Orlan.

91. Despite the frigid temperature in the *hielera*, the officers gave Rafael and Orlan a single foil blanket to share. Rafael slept on the ground, while Orlan slept with another child in one of the plastic containers on the floor. The lights were so bright they had the effect of daylight.

The continuous glow disoriented Rafael and Orlan and confused them as to whether it was day or night.

92. Worse than their physical discomfort, Rafael and Orlan were terrified of being separated from each other. A barrage of threats from CBP officers fomented these fears. The CBP officers yelled at the detained families, both adults and children, threatening that they would deport them and “take [their] children away to a shelter.” CBP officers also told Rafael they would send him to jail. The harassment occurred both while they were awake and when they tried to sleep. Other than the taunts and threats, the CBP officers did not speak to Rafael and Orlan and did not give them any information about when, or if, they would be free to go.

93. Throughout Rafael and Orlan’s confinement at the El Paso Processing Center, CBP officers repeatedly barged into the *hielera*, removed some of the parents and children, and brought new families to take their place. Because of the officers’ constant threats, Rafael and Orlan believed that the parents and children were being separated from one another. The other detainees in the *hielera* also feared that parents and children were being separated. The adults were constantly on edge and spoke to each other anxiously about the possibility of being separated from their children. Fearful that CBP officers would take Orlan away, Rafael got little sleep, keeping watch as CBP officers came to the *hielera* and making sure that he was aware of what was going on around him.

94. After their first night in the *hielera*, a CBP officer took Rafael and Orlan to a desk in the hallway, where they were asked biographical questions. When the CBP officers were done with their questioning, they took Rafael and Orlan to a different hold room where they spent their second night at the El Paso Processing Center, again surrounded by other fathers and sons. The new hold room was nearly identical to the first one, but only contained benches. There were no

beds, sleeping mats, or plastic containers like the one Orlan slept in the first night. Again, Rafael slept on the floor, and this time, Orlan—with nowhere else to sleep—joined him.

95. On or about June 17, 2018, their third day at the El Paso Processing Center, Rafael and Orlan’s worst fears came to pass. That morning, CBP officers told Orlan and the other children that they would soon be taken to a shelter and advised them against escaping. The officers then showed the children a video. The video frightened Orlan, warning that children might be deported, jailed, or kidnapped if they tried to leave the shelter. After showing the video, CBP officers escorted Orlan and the other boys back to the *hielera*, where the families waited in shock and fear for the separation. Later that day, CBP officers ordered Rafael and Orlan and the other migrants in their *hielera* to exit the room and stand in the hallway. Dozens of other parent-and-child pairs from other hold rooms spilled out in the hallway, approximately forty people in total. The CBP officers told the parents to remove their shoelaces and belts and leave their personal belongings with the officers.

96. A CBP officer then told Rafael to say goodbye to Orlan “because they were not going to see each other again.” Rafael felt a surge of emotions—anger, fear, sadness, and discouragement. He did not know if he would go to jail or be deported to Guatemala. He had no idea where Orlan would be taken or what would happen to his son without the care and protection of his family. Rafael desperately wondered if there was anything he could do to stop them from taking his son away. Recognizing the futility of the situation, Rafael hugged his young son goodbye and whispered words of encouragement. He told Orlan to “keep his spirits up,” “put God first,” and “stay strong.” Rafael and Orlan both cried as they tightly embraced. Rafael continued to cry silently after the separation; he was heartbroken that Orlan was scared and alone.

97. This was the last time Rafael saw his son, and Orlan saw his father, for thirty-seven days. It would be more than two weeks before Rafael and Orlan would hear each other's voices and know that the other was okay.

98. The CBP officers escorted the children back into the *hielera* that they had been in previously, leaving their parents in the hallway. Orlan shared his *hielera* with two other boys who had also been separated from their parents. For the first time in his young life, Orlan had no family with him, and he thought he would never see his father again. He was scared, angry, and sad.

99. Orlan has always been close to his father. When not attending school in Guatemala, he would often accompany his father to work or help him run errands for the family. Wherever Rafael went, Orlan wanted to follow. Until the forcible separation, he had never spent a single night without at least one of his parents or another close family member. A naturally stoic child, Orlan was overwhelmed by sadness and cried that night as he fell asleep alone on the cold floor.

100. Immediately after separating Rafael and Orlan, CBP transferred Rafael to the custody of the U.S. Marshals Service, which loaded him onto a bus and took him to the El Paso County Jail where he awaited trial for the misdemeanor of illegal entry.

**B. Rafael and Orlan are not Reunited after Rafael is Sentenced to Time-Served**

101. Early the next morning, a CBP officer woke Orlan and the other boys and, without warning or explanation, told them to get into the back seat of a CBP car. Orlan felt uneasy during the car ride. He was scared because he did not know where the CBP officers were taking him, and he was hungry because the CBP officers had not offered him food since before he went to sleep the night before.

102. The CBP bus arrived at the Clint Border Patrol Station in Clint, Texas ("Clint Station") after about an hour of driving. There, CBP officers gave him his first meal since the night before, a cup of instant noodles. Upon information and belief, CBP officers also screened

Orlan under the Trafficking Victims Protection Reauthorization Act (“TVPRA”), which included asking him whether he feared returning to Guatemala. He answered affirmatively.

103. Orlan’s first night at Clint Station was harrowing. He was too scared to sleep, and he kept worrying about what would happen to him and his father. Orlan shared a room with three or four other boys. The room was filled with portable canvas bunk beds. Orlan and the other children were confined to their room all day and only allowed out to use the bathroom. Without anywhere else to go, Orlan lay in his bunk bed all day. Saddened by the separation from their parents, Orlan and the other boys did not play or talk to each other.

104. When Orlan asked one of the officers what was going to happen to him next and if he would ever be able to leave Clint Station, the officer told him that he did not know.

105. On June 18, 2018, while Orlan navigated a new CBP facility and wondered if he would see his father again, the U.S. Marshals Service transported Rafael to the United States District Court for the Western District of Texas, El Paso Division. At the criminal court, an attorney advised Rafael and other migrants that, to speed up their release, they should plead guilty to the misdemeanor of illegal entry into the United States.<sup>113</sup> Rafael was anxious to be reunited with Orlan, and so when he appeared before the judge, Rafael pled guilty and was sentenced to time served. After Rafael’s short court appearance, ICE officers took him back to the CBP El Paso Processing Center, where he spent the night in a hold room.

106. On the day of Rafael’s criminal proceeding, Orlan was at the Clint Station, also a CBP facility, approximately a half-hour drive from the federal district court in El Paso where Rafael entered his plea. The Government could have immediately reunited father and son and released them or returned them to immigration detention together after the approximately thirty-

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<sup>113</sup> See 8 U.S.C. § 1325.

six hours it took for Rafael to be released from the custody of the U.S. Marshals. On information and belief, the Government did not make a determination that continued separation would serve Orlan's best interest, or that Rafael was unfit or presented any danger to Orlan. Indeed, the Government had confirmed before the forcible separation that Rafael had no criminal history. Instead of swiftly reunifying them, the Government used Rafael's misdemeanor prosecution as a pretext for keeping him from his twelve-year-old boy for more than five weeks.

107. The day after his federal court appearance, several armed ICE officers loaded Rafael and approximately thirty other detainees onto a bus, and, without telling them where they were going, drove them to an unidentified location, near an airfield. During the drive, Rafael's hands and feet were shackled.

108. When Rafael saw that he was approaching an airfield, his heart sank because he believed that he was being sent home to Guatemala—without Orlan. Instead, ICE officers told Rafael and the other migrants to get off the bus and took them to a bathroom in the facility. There, Rafael was permitted to shower. After his shower, ICE officers gave him a new uniform to put on, and then the officers ushered him onto another bus.

109. Rafael walked onto the bus as he was told, though he had no idea where it was headed or how far it would take him from his son. After several hours, the bus arrived at the Cibola County Correctional Center (the "Cibola Jail") in Milan, New Mexico. This county jail contracted with ICE to hold migrant detainees. It is located more than 300 miles from El Paso, where Rafael had last seen his son.

110. Approximately two days after Orlan arrived at Clint Station, once again without warning or explanation, officers loaded him and about thirty other children—ranging in age from approximately eight years old to sixteen years old—into a white bus and began driving across

Texas. As the bus traversed the state, Orlan bonded with two other young Guatemalan boys who had also been taken from their parents. The boys discussed their fears and worries about where they were going and what would happen to them. One of the boys cried throughout the long journey.

111. After the bus made several stops to drop off other children, officers loaded Orlan and the remaining children, including his new friends, into a van, which brought them to their final destination. In the middle of the night on June 20, 2018, Orlan arrived at the Southwest Key Casa Houston shelter for unaccompanied minors (“Southwest Key”), more than 730 miles from where they had started that morning.

**C. Orlan’s Terror, Confusion, Despair, and Repression in ORR Custody**

112. At Southwest Key, Orlan was separated from his new friends, whom he never saw again. The shelter conducted an initial intake meeting with Orlan, in which he told one of his case managers that he and his father had been separated. Orlan also told the case manager that he had never been harmed, in any way, by his caretakers, including his father. Staff at Southwest Key gave him fresh clothes and an opportunity to shower for the first time since leaving the El Paso Processing Center days earlier.

113. One of Orlan’s case managers attempted to locate Rafael using the Online Detainee Locator System on the ICE website, but the initial search did not produce any findings. Orlan was alone in the shelter with no way of contacting his father, no way of knowing whether he would ever see him again, and no familiar adult caregiver to help him process his trauma.

114. That night, as he lay in bed, he could not stop thinking about what his father had told him—“keep your spirits up.” He wanted to be strong for his family, but Orlan slept very little and spent the night wondering where his father was, whether he had been sent back to Guatemala without Orlan, and if he would ever see him again.

115. According to the notes in Orlan's ORR file, Orlan's case managers at Southwest Key again looked for Rafael on the ICE website the next day, and this time it showed that he was in the El Paso Processing Center. Their attempts to contact him there were fruitless, however, because Rafael had been transferred to the Cibola Jail.

116. Approximately two days after Orlan arrived at Southwest Key, the ICE website indicated that Rafael was at the Cibola Jail. According to the notes in Orlan's ORR file, between June 22, 2018 and June 28, 2018, Orlan's case managers attempted to contact staff at the Cibola Jail on at least four separate occasions.<sup>114</sup> Cibola staff did not pick up the phone and did not return Orlan's case managers' messages. While Orlan was able to call his mother in Guatemala and his cousin who resides in New Jersey and whom Orlan had never met, Orlan did not know where his father was or whether he was safe.

117. On the outside, Orlan presented a strong front to his case managers and clinicians at Southwest Key. However, at night, when he was alone, Orlan lay awake crying in his bed, careful that no one would hear him. Keeping busy allowed him to get through the day without causing problems for the staff, but as soon as his mind was quieted, deep anxiety and sadness took over.

118. This was the first time Orlan was in an unknown environment, and until the separation, he had never been cared for, physically or emotionally, by anyone other than his parents. When Orlan reflects back on his time at Southwest Key, he remembers not feeling well or like himself.

119. Nighttime at Southwest Key was especially difficult. Orlan spent each night worrying about whether his father had been taken to jail and whether his father would be deported,

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<sup>114</sup> Orlan ORR File, Social Solutions Response Report, p. 2 (June 28, 2018).

which made it difficult to fall asleep. Many of his sleepless nights were spent thinking about his father, crying silently, wondering whether his father was safe and whether he would see him again. This exhausting cycle of worry and fear was most pronounced during Orlan's first two-plus weeks at the shelter, during which no staff member established contact between Orlan and his father. To make matters worse, when out of sight of the staff at Southwest Key, older boys, between the ages of thirteen and fourteen, would tease and push Orlan, which only made him retreat further into himself.

120. Though he tried as best as he could to make it through each day at the shelter, Orlan felt as though he was watching himself in a movie. His body and emotions did not feel like his own.

121. Orlan did not tell his clinicians or case managers at Southwest Key how empty and numb he felt. On the rare occasions that he attempted to share his true feelings with someone, he could not find the words to express himself and found himself physically unable to speak. When his case managers spoke to Orlan about Rafael, Orlan felt like he did not have enough air to breathe, let alone talk, so he said nothing.

**D. Rafael's Confusion, Despair, and Pain at the Cibola Jail in New Mexico**

122. Rafael was given no information about Orlan when he arrived at the Cibola Jail. Officers took him to a holding cell that he shared with another migrant, and, except when he ate, Rafael stayed in his cell for the majority of the day.

123. While at the Cibola Jail, Rafael could not stop thinking about the separation. At night he struggled to sleep because he was beleaguered by worries about his son, his immigration case, and what would happen to him and Orlan. Unable to quiet his thoughts, Rafael would stare out the window near his holding cell and imagine what would happen once he was released.

Deprived of any information about where Orlan was and whether he was safe, Rafael was trapped in the same vortex of worry his son was experiencing.

124. Officers came to Rafael's holding cell periodically to count the detainees, but they left before Rafael and the other detainees could ask any questions. Most of the staff he encountered at Cibola Jail spoke only English, which Rafael could not speak or understand.

125. Moreover, personnel at Cibola Jail did not permit Rafael to make calls. Rafael asked a staff member if he could make a call, but the staff member denied Rafael access because he did not have money to purchase a calling card. Personnel at the Cibola Jail also did not give Rafael the messages from staff at Southwest Key or give him an opportunity to return the calls.

126. Another detainee took pity on Rafael and allowed him to use the detainee's calling card for one minute. Rafael called his nephew in New Jersey and spoke to him very briefly. During the short call, Rafael learned that Orlan and his case manager had contacted Rafael's nephew, and the case manager had asked the nephew to be Orlan's sponsor. Rafael was confused about why Orlan would need a sponsor while Rafael was still in the United States and his claim for asylum was still pending, but the call was too short for Rafael to ask questions.

127. After the call, Rafael fixated on the possibility that his son might stay in this country while he was deported. He was worried about what would happen to Orlan and terrified that he might never see his son again.

**E. Rafael and Orlan Finally Speak After More Than Two Weeks of Separation**

128. According to Orlan's ORR records, on or about July 2, 2018, fifteen days after he was separated from his father, Orlan's case managers at Southwest Key were finally able to make contact with a social worker at the Cibola Jail.<sup>115</sup>

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<sup>115</sup> Orlan ORR File, Social Solutions Response Report, p. 5 (July 2, 2018).

129. Rafael and Orlan spoke on the phone later that day. The call lasted for a few minutes. Rafael was relieved to finally learn where his son was being held. The two discussed their experiences while in custody and the possibility that Rafael would be sent back to Guatemala. Despite his uncertainty about his immigration proceedings, Rafael tried to comfort Orlan, telling him to “keep [his] spirits up and be strong” and that they would be together soon.

130. Initially, Orlan felt happy to have heard his father’s voice, but his relief was short-lived. Immediately following the call, Ms. Zuniga, one of Orlan’s case managers, told him that his father was going to be deported and that they were looking for a sponsor for Orlan in the United States. Orlan learned that one such potential sponsor was his cousin in New Jersey, whom he had spoken to briefly on the phone from the shelter but never met.

131. Upon hearing the news, Orlan burst into tears. The case manager tried to reassure him by telling him that things might change. But Orlan did not believe that anything would change. He believed that the people who had separated him from his father and detained them hundreds of miles apart would send his father back to Guatemala and leave him stranded in the United States without anyone he knew and loved.

132. Rafael’s joy at hearing his son’s voice was similarly short-lived. After he spoke with Orlan, Rafael spoke to Ms. Zuniga, Orlan’s case manager, who pressed Rafael to designate his nephew as Orlan’s sponsor. If Rafael agreed, Orlan would be sent to Trenton, New Jersey, to live with his cousin. Rafael’s options, as he understood them, were that Orlan could go to Trenton without Rafael, or they could be deported to Guatemala together. Rafael was not provided with a third option—to be reunited with his son and await the outcome of his immigration case in the United States. Rafael asked Ms. Zuniga for time to think about his options and to speak with Orlan.

133. Rafael and Orlan spoke to each other again about two weeks later. Like the first phone call, the second phone call lasted less than five minutes. Rafael and Orlan only spoke to each other twice during their thirty-seven-day separation. Staff at the Cibola Jail never told Rafael how he could make phone calls and did not facilitate any phone calls with his son other than the two times that they accepted incoming calls from Orlan's case manager. Although he had finally made contact with his son, Rafael continued to worry about being sent back to Guatemala without Orlan. He still did not know what was going to happen to him, and he was worried about Orlan's future in the United States if he remained without Rafael.

**F. The Government Compounds the Harm to Orlan Through a Callous and Inept Reunification Process**

134. Upon information and belief, Rafael was transferred from Cibola to the Otero County Processing Center ("Otero") in Chaparral, New Mexico sometime after his second phone call with Orlan. Rafael did not receive any phone calls from Orlan at Otero, and officers and staff at Otero made no attempt to facilitate any communication between Rafael and Orlan.

135. Several days after he arrived, officers asked Rafael if he wanted to reunite with his son in the United States. Shocked and confused, but happy, Rafael said yes.

136. According to notations in Orlan's ORR file, on or around July 21, 2018, more than a month after Orlan had been separated from his father, Orlan's case manager informed him that "preparations for the reunification process [were] starting."<sup>116</sup> The case manager told Orlan that Rafael had already been transferred from the Cibola Jail to another facility for reunification, and that he would meet his father there.

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<sup>116</sup> Orlan ORR File, Social Solutions Response Report, p. 13 (July 21, 2018).

137. Orlan was elated to hear that he was going to see his father again and waited for the staff to release him from Southwest Key. The night before Orlan was set to reunite with his father, Southwest Key staff told him that a van would come the next morning at 2 a.m. to pick him up. Orlan woke up shortly before 2 a.m., but the Southwest Key staff told him to go back to sleep because his itinerary had changed. Orlan hardly slept that night because of the anticipation of seeing his father again and the interruption of his sleep.

138. Upon information and belief, at approximately 6 a.m. on July 23, 2018, a van picked Orlan up from Southwest Key. The driver of the van was a man he had never met before. The man did not speak to Orlan except to point out that they were driving through downtown Houston. They drove for about an hour until they reached another ORR shelter. Once there, the man told Orlan to get out of the van and wait in the shelter. After a few minutes, a woman Orlan did not recognize joined Orlan in the shelter's waiting area. Upon information and belief, Orlan's travel escort was ORR care provider staff (the "ORR travel escort").<sup>117</sup> Orlan's ORR travel escort led him to another van, which she drove to an empty parking lot where a small white bus was parked. Orlan and his ORR travel escort boarded the bus, and a male driver (whom the escort spoke to familiarly) drove them to the airport.

139. When Orlan and the ORR travel escort arrived at the airport, she told him that they were going to a different state to meet his father. They boarded the plane after waiting in the

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<sup>117</sup> U.S. Dep't of Health & Hum. Servs., Off. of Refugee Resettlement, *ORR Unaccompanied Children Program Policy Guide* § 2.8.2 (rev. Jan. 10, 2022) ("Unaccompanied children who are under the age of 14 years old traveling via air may only be escorted by [ORR] care provider staff, unless an ORR/FFS Supervisor has approved the use of an airline escort in advance."), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2#2.8.2>.

airport for about an hour. Orlan was left alone in the front of the plane while his ORR travel escort took a seat in the back of the plane.

140. Orlan was nervous and confused. He had never been on a plane before and struggled to put on his seatbelt. During the nerve-wracking plane ride, Orlan anxiously looked forward to seeing his father again. The flight was short—only about one hour long—but the day of travel had just begun for Orlan. Once they landed, Orlan and his ORR travel escort walked to a different gate and waited for another plane to take them to their final destination. By this time, Orlan was extremely tired.

141. Upon information and belief, approximately one hour after take-off, the second plane landed at an airport somewhere in the Southwest. Orlan and his ORR travel escort got off the plane and were picked up by an individual in a van. Orlan's ORR travel escort did not provide him any information about their location, telling him only that they were going to meet his father. Although the ORR travel escort and the driver understood and spoke Spanish, they spoke to each other in English while in Orlan's presence.

142. The van drove for several hours and, upon information and belief, arrived at a detention facility somewhere in the Southwest. Orlan was hungry because, other than a bag of chips, cookies, and two pieces of fruit, which he received at Southwest Key early that morning, no one offered him food all day.

143. Orlan waited in the van while his ORR travel escort and the driver of the van spoke to individuals at the facility through an open window in the vehicle. Eventually, the ORR travel escort told Orlan that his father was not there. Orlan was instantly filled with despair and desperation. He had spent several hours traveling and was looking forward to seeing his father for the first time in over a month—only to learn that the officials in charge appeared not to know

where his father was. Orlan was confused, scared, and worried about his father. He relived the trauma of the initial separation as the adults shuttled him around without finding his father.

144. Orlan observed his ORR travel escort making frantic telephone calls in English. She eventually told Orlan that she was trying to find a place where he could sleep that night. Orlan, the ORR travel escort, and their driver, then drove to another ORR shelter, approximately one to two hours away. The ORR travel escort did not tell Orlan the name of the shelter or its location. She did tell him, however, that he would be reunified with his father the following day.

145. It was late at night when they arrived at the shelter, and the staff sent Orlan straight to bed without offering him anything to eat. Orlan spent the night at the shelter with several other children, all much older than he, approximately fifteen or sixteen years old. He was lonely and scared.

**G. Rafael and Orlan are Finally Reunited After Thirty-Seven Days of Separation and a Failed Attempt at Reunification**

146. On or about July 24, 2018, after a restless, anxiety-filled night with strangers at the shelter, Orlan ate his first real meal since dinner on July 22nd, the evening before he left Southwest Key in Houston. After breakfast on July 24, at approximately ten or eleven a.m., the ORR travel escort, who returned to the shelter that morning, told him she would take Orlan to his father.

147. Orlan and the ORR travel escort boarded a van and drove for several hours. During the long ride, his ORR travel escort did not offer Orlan anything to eat, so he ate only the snacks he had received at the shelter that morning.

148. Upon information and belief, Orlan's ORR travel escort accompanied Orlan into an unfamiliar building at the El Paso Processing Center. The ORR travel escort and Orlan sat in a large waiting room. Inside the room, there were several other children waiting for their parents and several parent-child pairs who had recently been reunified, approximately twenty people in

total. While he was waiting, Orlan heard another boy say that he had been waiting many hours for his parent to arrive. Orlan began to worry that Rafael was not there and Orlan would, again, be forced to return to a shelter.

149. On information and belief, on the same day, ICE officers loaded Rafael and approximately thirty other detainees onto a bus and drove them from Otero to the El Paso Processing Center, less than an hour away.

150. When they arrived at the El Paso Processing Center, the officers ordered all the detainees off the bus and told them to wait for their name to be called. An ICE officer called Rafael's name and asked him to sign documents reflecting his humanitarian release and stating that he agreed to be Orlan's caretaker while in the United States.

151. Upon information and belief, after Rafael signed the documents, ICE officers took him to another building on the other side of the El Paso Processing Center and sent him into the big room where Orlan had been waiting for several hours.

152. As Rafael entered the room, Rafael and Orlan spotted each other, and after a grueling thirty-seven days of separation, they were finally reunited. Rafael and Orlan hugged each other tightly, and Rafael silently thanked God for bringing them together.

153. Volunteers from Annunciation House, an organization that provides short-term housing and other assistance to migrants in El Paso, escorted Rafael and Orlan to Annunciation House shortly after they were reunified. Although it was very late by the time they arrived, they ate dinner with several reunited families and prepared for travel to New Jersey. Upon information and belief, the next day, Rafael and Orlan flew from El Paso, Texas, to Philadelphia, Pennsylvania. From there, they continued on to Trenton, New Jersey, where they now permanently reside.

**IRREVOCABLE HARM TO RAFAEL AND ORLAN**

154. As a result of the Government's forced separation of Orlan and then-twelve-year-old Orlan, Rafael and Orlan suffered and continue to suffer significant emotional distress and physical symptoms.

**A. Rafael Suffers Emotional Trauma from the Separation**

155. After being forcibly separated from his son, Rafael suffered, and continues to suffer, extreme emotional distress, which has manifested partly in physical symptoms.

156. While he was separated from Orlan, especially given his inability to speak with him and confirm his well-being for more than two weeks, Rafael experienced severe headaches, stomachaches, gastrointestinal distress, deep worry, tenseness, sadness, anxiety, difficulty sleeping, nightmares, and a loss of weight and appetite.

157. He could not escape his thoughts and fears, and images and memories of the separation played over and over again in his mind.

158. The lack of communication between father and son made the forcible separation more traumatic and difficult for Rafael to process.

159. While in detention, Rafael was constantly on guard and easily startled. He experienced difficulty falling asleep and was preoccupied with worries about Orlan and what would become of them. Rafael's time in the Cibola Jail was particularly difficult. He was anxious and depressed as a result of being separated from his young son and uncertain about his future. The lack of information about Orlan's well-being deepened his distress.

160. These symptoms persisted even after reunification. The separation has had lasting physical and emotional effects on Rafael.

161. At present, Rafael experiences flashbacks, fear, worry, and preoccupation as a direct response to the trauma of separation from Orlan. Rafael worries incessantly about Orlan

any time they are apart. When Orlan is running errands or is late returning home from school, Rafael worries that something has happened to him and relives their separation. He constantly fears that Orlan will be taken from him.

162. Rafael also continues to struggle with the physical manifestations of the stress of separation. He regularly suffers from gastritis, which began while he was detained in the Cibola Jail, and takes medication to treat the discomfort. Nor has the insomnia that took hold at Cibola abated. At night, his mind races with thoughts about his son, which prevent him from falling asleep.

**B. Orlan Suffers Emotional Trauma and Depression from the Separation**

163. Orlan suffered, and continues to suffer, extreme emotional distress. Like his father, Orlan experienced fear, sadness, and mental anguish as a result of being forcibly separated from his father for thirty-seven days, and these feelings persisted even after he and Rafael were reunited.

164. The period of forced separation was the first time Orlan was separated from his parents. He had little support in processing the separation. Despite his best efforts and his stoic façade, Orlan felt lost and numb in the unfamiliar shelter, and in the absence of his father with whom he has always enjoyed a close relationship and special bond.

165. Although he was able to temporarily distract himself with school, sports, and activities, Orlan struggled with feeling sad and anxious when he was alone or unoccupied, especially at night. His mind would repeatedly wander to how alone he felt and how anxious he was about whether he would ever see his father again.

166. While at Southwest Key, Orlan felt down, depressed, irritable, and hopeless. He had a lack of interest or pleasure in doing activities he used to enjoy. He experienced a significant loss of appetite. He had trouble concentrating, and his sleep was disrupted.

167. Orlan's trauma was magnified when he was taken to a shelter to be reunified with his father, but learned he was not there and could not be located. Other than the forcible separation itself, this was the most traumatic event of his life.

168. Immediately after being reunified with his father, Orlan continued to experience recurrent, involuntary, intrusive, and distressing memories of being separated from his father. He also had frequent bad dreams about the separation and his experiences. He continued to fear that Rafael might be taken away from him again, or that he and Rafael might get hurt. At times, Orlan would feel sad or angry for no apparent reason.

169. Even at present, Orlan continues to respond to traumatic reminders. He is often reminded of the separation at unexpected times, by otherwise innocuous incidents. On humid days, for instance, the weather reminds him of Texas and he instantly recalls the separation, his time in the shelter, and the desperation he felt while being driven through the southwest searching for his father.

170. The experience of being separated from his father at a young age also permanently changed Orlan's demeanor. He was more outgoing and trusting before the separation.

171. He also struggles in unfamiliar social settings with new people. When entering a room filled with unfamiliar people, he desperately feels the need to leave and tries to seek out familiar people. If he is unable to locate a familiar face, Orlan has trouble breathing and has to restrain himself from leaving. Orlan never had this reaction to being in an unfamiliar setting until after he was separated from his father.

172. Orlan tries not to think about or have feelings about the separation. He also tries to stay away from people, places, or things that remind him of what happened. The few times he has tried to talk with friends about his experience of being separated from his father, Orlan felt self-

conscious and isolated because even those who have immigrated to the United States cannot fully understand his experience.

**C. Expert Opinion on the Irreparable Harm Caused by Family Separation**

173. Scientific and medical evidence establish that the trauma caused by separating a child from his parent is likely to have extraordinarily harmful and long-lasting effects. One review of the medical-legal psychological evaluations of thirty-one parents and children who had fallen victim to the Family Separation Policy reported that “most individuals met diagnostic criteria for at least one mental health condition such as post-traumatic stress disorder (PTSD), major depressive disorder (MDD), or generalized anxiety disorder (GAD). While several people did not meet all diagnostic criteria for these conditions, nearly everyone exhibited hallmark features and symptoms of these three major conditions.”<sup>118</sup>

174. Separated parents and children exhibited common symptoms of trauma, including “feelings of confusion, general upset to severely depressed mood, constant worry/preoccupations, frequent crying, difficulty sleeping, difficulty eating (loss of appetite), recurring nightmares, and overwhelming anxiety.”<sup>119</sup> Many also displayed physical symptoms associated with panic, such as “racing heart, shortness of breath, and headaches,” as well as hopelessness and despondency. Some parents considered suicide while separated from their children.<sup>120</sup> Children tended to

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<sup>118</sup> Kathryn Hampton et al., *The Psychological Effect of Forced Family Separation on Asylum-Seeking Children and Parents at the US-Mexico Border: A Qualitative Analysis of Medico-Legal Documents*, Plos One, Nov. 24, 2021, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0259576>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

become aggressive and to regress, with symptoms including “bed wetting, loss of language, return to thumb sucking, and inability to control bowel movements and urination.”<sup>121</sup>

175. Extensive research supports particular and persistent impairment of child development, including permanent emotional and behavioral problems and brain damage.<sup>122</sup> The American Academy of Pediatrics has explained the effects of separation on children: “[H]ighly stressful experiences, like family separation, can . . . disrupt[] a child’s brain architecture and

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<sup>121</sup> Hajar Habbach et al., Physicians for Hum. Rts., “*You Will Never See Your Child Again*”: *The Persistent Psychological Effects of Family Separation* (Feb. 2020), <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>.

<sup>122</sup> See, e.g., Allison Abrams, *Damage of Separating Families: The Psychological Effects on Children*, Psychol. Today (June 22, 2018) (noting that children who are separated from a parent “develop insecure/disorganized attachment and persisting high levels of stress.”), <https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201806/damage-separating-families>; *id.* (“[T]he effects of mother-child separation on children’s aggressive behavior are early and persistent.”); Sarah Reinstein, *Family Separations and the Intergenerational Transmission of Trauma*, Clinical Psychiatry News (July 9, 2018) (“[C]hildhood trauma is associated with emotional dysregulation, aggression against self and others, difficulties in attention and dissociation, medical problems, and difficulty with navigating adult interpersonal relationships.”), <https://www.mdedge.com/psychiatry/article/169747/depression/family-separations-and-intergenerational-transmission-trauma>; Jeremy Raff, *The Separation Was So Long. My Son Has Changed So Much: U.S. Border Guards Took a 6-Year-Old Honduran Boy from His Mother, and Ultimately Returned a Deeply Traumatized Child*, The Atlantic (Sept. 7, 2018) (“The trauma of separation ‘can disrupt the architecture of a child’s brain[.]’ . . . Prolonged separation weaponizes a child’s fight-or-flight response, elongating it into toxic stress that can damage health in both the short and long term[.]”), <https://www.theatlantic.com/politics/archive/2018/09/trump-family-separation-children-border/569584/>; Olga Khazan, *Separating Kids From Their Families Can Permanently Damage Their Brains: A Pediatrician Explains How the Trauma of Family Separation Can Change Biology*, The Atlantic (June 22, 2018) (Separating a child from his or her parents “can permanently affect . . . children’s brains, especially if it occurs early in childhood. . . . Studies show that high levels of cortisol [a stress hormone] . . . can suppress the immune system and change the architecture of a developing brain . . . . Another stress chemical, corticotrophin-releasing hormone, can damage the hippocampus, which plays a major role in learning and memory.”), <https://www.theatlantic.com/health/archive/2018/06/how-the-stress-of-separation-affects-immigrant-kids-brains/563468/>.

affect[] his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.”<sup>123</sup>

176. Thus, keeping parents separated from their children with “little or no direct access to basic information about their health or general well-being, plainly causes irreparable harm.”<sup>124</sup>

### **JURISDICTIONAL FACTS**

177. Defendant has waived its sovereign immunity with respect to the claims Plaintiffs assert in this action.<sup>125</sup> This court therefore has jurisdiction over this case.

178. The FTCA contains exceptions that preclude liability for certain claims.<sup>126</sup>

179. The “due care exception” shields the Government from liability for “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.”<sup>127</sup> This exception does not apply in this case.

180. The “discretionary function exception” shields the Government from liability for [a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on

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<sup>123</sup> See Kraft, *supra* note 82; see also Abrams, *supra* note 122 (noting that because a child’s “secure attachment comes from the child’s perceptions of his or her caregiver’s availability (physical accessibility) . . . separations as brief as one week in duration could negatively impact the quality of attachments”).

<sup>124</sup> *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 502 (D.D.C. 2018).

<sup>125</sup> 28 U.S.C. § 1346(b)(1).

<sup>126</sup> 28 U.S.C. § 2680.

<sup>127</sup> 28 U.S.C. § 2680(a).

the part of a federal agency or an employee of the Government, whether or not the discretion be abused.”<sup>128</sup> This exception does not apply in this case.

**A. The Due Care Exception Does Not Apply**

181. Defendant was not executing any statute or regulation when it devised and implemented the Family Separation Policy. Defendant did not separate Plaintiffs pursuant to any statute or regulation. Nor did Defendant exercise “due care” at any point in devising or implementing the Family Separation Policy, in general or as to Plaintiffs in particular. Therefore, the due care exception does not apply, and this Court has jurisdiction.

**B. The Discretionary Function Exception Does Not Apply**

182. Defendant had no discretion to implement the Family Separation Policy, particularly not in the cruel way it did, because the actions of its officers and employees violated binding obligations under the United States Constitution, federal statutes, court orders, and agency standards. Prohibited acts cannot be discretionary. Because Defendant had no discretion to separate Rafael and Orlan nor to treat them with cruelty, the discretionary function exception does not apply, and this Court has jurisdiction.

**1. Defendant’s Separation and Treatment of Rafael and Orlan Violated the Constitution**

183. The Due Process Clause of the Fifth Amendment protects the right to family integrity and applies to all persons present in the United States.<sup>129</sup> “The fact that [families are]

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<sup>128</sup> *Id.*

<sup>129</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98, & n. 5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

lawfully detained in immigration custody does not eliminate [their] due process right to family integrity.”<sup>130</sup>

184. At the core of this constitutional guarantee is children’s right to remain with their parents and vice versa.<sup>131</sup> The Supreme Court has explained, “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>132</sup>

185. Rafael and Orlan had a constitutional right to remain together as a family, and both the separation itself and the way it was effectuated violated the Due Process Clause of the Fifth Amendment.

186. The Government had no legitimate, let alone compelling, reason to separate Rafael and Orlan. On information and belief, the Government made no individualized determination that separation would serve Orlan’s best interest, that Rafael was unrelated to Orlan, or that Rafael was unfit or presented any danger to Orlan. To the contrary, the Government confirmed prior to separation that Rafael has no criminal background. Nevertheless, the Government forcibly separated Rafael and Orlan and needlessly kept them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities following Rafael’s brief criminal proceeding in order to punish Plaintiffs and advance the Government’s goal of preventing asylum-seekers and other migrants from coming to the United States.

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<sup>130</sup> *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 502.

<sup>131</sup> *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

<sup>132</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (explaining that the liberty interest in family relationships has its source in “intrinsic human rights”).

187. The Government's actions, including separating Rafael and Orlan, impeding their ability to communicate while separated, and declining to reunify them after Rafael's misdemeanor proceeding was complete, shock the conscience and demonstrate more than deliberate indifference toward and reckless disregard for Plaintiffs' right to family integrity.

188. The Due Process Clause of the Fifth Amendment also protects the right of every person in the United States to a fair hearing in connection with the deprivation of life, liberty, or property.

189. The Government violated Plaintiffs' procedural due process rights by forcibly separating them without notice or an opportunity to be heard.

190. The denial of notice and an opportunity to be heard was not supported by a legitimate or compelling Government interest.

191. The Fifth Amendment guarantee of equal protection protects the right to be free from Government action that is motivated by a racially discriminatory intent or purpose. Even facially neutral policies and practices will be held unconstitutional when they reflect a pattern unexplainable on grounds other than race or national origin, or other indicia of discriminatory intent.<sup>133</sup>

192. As with the fundamental right to family integrity, the constitutional right to equal protection under the law, and to freedom from invidious discrimination by the Government on the

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<sup>133</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (holding that facially neutral policy maintaining a county-wide at-large electoral system violated the Equal Protection Clause because it was “being maintained for the invidious purpose of diluting the voting strength of the black population”).

basis of race or national origin, have long been recognized as “extend[ing] to anyone, citizen or stranger, who is subject to the laws of a State.”<sup>134</sup>

193. The separation and treatment of Rafael and Orlan violated their constitutional right to equal protection because the Government’s actions were motivated by discriminatory animus towards Central American migrants.

194. The Government targeted Central American migrants, like Plaintiffs, for separation and harsh treatment as a means to deter others like them from pursuing legitimate immigration claims and from seeking humanitarian protection in the United States.

195. Defendant’s Family Separation Policy disproportionately affected individuals from Central America—more than ninety-five percent of the members in the *Ms. L* certified class are from Central American countries.<sup>135</sup>

196. The constitutional violations involved in separating parents and children without justification were obvious and palpable given the long history of constitutional protection for family integrity and the equally long constitutional condemnation of Government policies and actions motivated by ethnic and racial animus.

197. Defendant had no discretion to violate the Fifth Amendment to the United States Constitution.

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<sup>134</sup> *Plyler*, 457 U.S. at 215.

<sup>135</sup> ACLU, *Family Separation by the Numbers* (Oct. 2, 2018) (reporting that of the then-known separated children between the ages of five and seventeen, ninety-six percent were from El Salvador, Guatemala, and Honduras), <https://www.aclu.org/issues/family-separation>.

## 2. Defendant's Separation and Treatment of Rafael and Orlan Violated Federal Law

198. The TVPRA, enacted by Congress in 2008, governs whether a migrant child may be designated as unaccompanied and transferred to the custody of HHS. The Government may designate a child as unaccompanied if the child has “no parent or legal guardian in the United States” or “no parent or legal guardian in the United States is available to provide care and physical custody.”<sup>136</sup> Federal law mandates the swift transfer of an “unaccompanied alien child” (“UAC”) in federal custody to HHS.<sup>137</sup> The purpose of a UAC designation is to protect especially vulnerable children who enter the United States without a parent or guardian.<sup>138</sup>

199. Twelve-year-old Orlan arrived in the United States with his father. Rafael was available to provide his son care and physical custody, whether on release or in family detention, both before and immediately following his brief time in U.S. Marshals custody. Orlan was in a nearby CBP facility when Rafael was released from criminal custody and transferred back to CBP custody. The Government could have reunified Plaintiffs at that time. Instead, it needlessly transferred Orlan to an HHS facility almost 750 miles away from where he first entered the United States, and nearly 1,000 miles away from his father.

200. For these reasons, Orlan did not meet the definition of an “unaccompanied alien child.” The Government therefore violated federal law in designating him as such and transferring

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<sup>136</sup> 6 U.S.C. § 279(g).

<sup>137</sup> 8 U.S.C. § 1232(b)(3).

<sup>138</sup> See generally 8 U.S.C. § 1232. Such children are entitled to an array of protections including, among others, swift transfer out of the custody of federal agencies other than ORR, 8 U.S.C. § 1232(b)(3), prompt placement in “the least restrictive setting that is in the best interest of the child,” *id.* § 1232(c)(2), special efforts to connect them with counsel, *id.* § 1232(c)(5), and eligibility for the appointment of a child advocate, *id.* § 1232(c)(6). In addition, they are not subject to expedited removal proceedings under 8 U.S.C. § 1225 but are entitled to a full hearing before an immigration court under 8 U.S.C. § 1229a. 8 U.S.C. § 1232(a)(5)(D).

him to HHS custody hundreds of miles away from his father. Because federal law prohibited the separation and transfer, the Government’s acts were not discretionary.

**3. Defendant’s Separation and Treatment of Rafael and Orlan Violated the *Flores* Consent Decree (the “*Flores* Agreement” or the “FSA”)**

201. The *Flores* Agreement is a class-action consent decree entered in 1997 between the Government and “[a]ll minors who are detained in the legal custody of the [Government’s immigration agencies],”<sup>139</sup> including those, like Orlan, who arrived in the United States with their parents to seek protection.<sup>140</sup> The FSA sets national standards for the detention, release, and treatment of immigrant children in the Government’s custody, and its mandates are binding on the Government’s “agents, employees, contractors and/or successors in office.”<sup>141</sup> DHS, CBP, ICE, HHS, and ORR, as successor organizations to the Immigration and Naturalization Service (“INS”), must comply with the FSA’s requirements.<sup>142</sup>

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<sup>139</sup> *Flores v. Reno*, FSA ¶ 10, No. 85-CV-4544 (C.D. Cal. Jan. 17, 1997), <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf>.

<sup>140</sup> *Flores v. Lynch*, 828 F.3d 898, 907–08 (9th Cir. 2016) (holding that *Flores* Agreement “unambiguously applies to accompanied minors”); see also *Bunikyte ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at \*3 (W.D. Tex. Apr. 9, 2007) (“[T]he *Flores* Settlement, by its terms, applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.”).

<sup>141</sup> FSA ¶¶ 1, 9; see also *E.O.H.C. v. Sec’y U. S. Dep’t of Homeland Sec.*, 950 F.3d 177, 192 (3d Cir. 2020) (noting that as “the District Judge overseeing the *Flores* Settlement Agreement in the Central District of California has repeatedly recognized, the settlement is a ‘binding contract’” (quoting *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019)); *Bunikyte, ex rel. Buikiene v. Chertoff*, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 WL 1074070, at \*8 (W.D. Tex. Apr. 9, 2007) (“The [*Flores*] Settlement Agreement is, in essence, a Court-approved contract binding on ICE and DHS.”).

<sup>142</sup> *Flores v. Rosen*, 984 F.3d 720, 727 n.1 (9th Cir. 2020) (“Although the [*Flores*] Agreement refers to ‘INS,’ the Immigration and Naturalization Service’s obligations under the Agreement now apply to the Department of Homeland Security (‘DHS’) and the Department of Health and Human Services (‘HHS’)); *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017) (“[T]he [*Flores*] Settlement continues to govern those agencies that now carry out the functions of the

202. The TVPRA partially codified the *Flores* Agreement and created standards for the treatment of unaccompanied minors in the Government’s custody. Together, the *Flores* Agreement and the TVPRA significantly limit the circumstances, duration, and manner of immigration detention of minor children.

203. The FSA “creates a presumption in favor of release and favors family reunification.”<sup>143</sup> The Government intentionally designed the Family Separation Policy to circumvent and frustrate its obligation under the FSA to keep families together. Pursuing a policy of deterrence by way of separating parents and children undermines an overriding purpose of the FSA, which is to maintain family integrity.

204. Lacking the authority to designate Orlan as an unaccompanied child and transfer him to HHS custody, DHS had two other alternatives.

- It could have released Orlan “without unnecessary delay.”<sup>144</sup> The first preference under the FSA is release to a parent; the third preference is release to an “adult relative (brother, sister, aunt, uncle, or grandparent).”<sup>145</sup> Federal regulations then in effect authorized DHS in certain circumstances to release a child “with an accompanying relative who is in detention.”<sup>146</sup> Further, the *Flores* district court

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former INS.”); *Ruiz ex rel. E.R. v. United States*, No. 13-1241, 2014 WL 4662241, at \*7 (E.D.N.Y. Sept. 18, 2014) (applying the *Flores* Agreement to CBP).

<sup>143</sup> *Flores v. Lynch*, 828 F.3d at 903.

<sup>144</sup> FSA ¶ 14.

<sup>145</sup> *Id.*

<sup>146</sup> *See Flores v. Sessions*, 394 F. Supp. 3d at 1064 (citing 8 C.F.R. § 212.5(b)(3) as then in effect), *appeal dismissed sub nom. Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019).

had held that the FSA and the regulation required DHS to make an individualized assessment of whether release was appropriate.<sup>147</sup>

- If DHS had determined that release was inappropriate under the FSA, the alternative was to detain Orlan for up to twenty days in an unlicensed facility<sup>148</sup> or transfer him within that period to a “licensed program,” defined as a non-secure facility “licensed by an appropriate State agency” to provide services for “dependent children.”<sup>149</sup>

205. On information and belief, DHS undertook no “individualized review of the facts” to determine whether it would be in Orlan’s “best interests” as an “*accompanied* minor”<sup>150</sup> to be released “with an accompanying relative [his father] who is in detention”<sup>151</sup> or “to remain [even if only temporarily] with a parent who is in detention.”<sup>152</sup> On information and belief, DHS also failed to make an individualized determination of whether Orlan’s best interests would be served by release to “an available adult [not in detention] under Paragraph 14 of the Agreement,” such as his adult cousin who lived in New Jersey.<sup>153</sup> Instead of following the course of action applicable to an accompanied child, DHS designated Orlan as unaccompanied, transferred him to HHS

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<sup>147</sup> *Id.* at 1066–67.

<sup>148</sup> The FSA requires expedition in releasing children from an unlicensed facility, FSA ¶¶ 12A, 19, but permits an extension of the detention period “in the event of an emergency or influx of minors into the United States,” *id.* ¶ 12.A. The courts have held that this generally permits detention in such a facility for up to 20 days. *Flores v. Sessions*, 394 F. Supp. 3d at 1070–71.

<sup>149</sup> FSA ¶ 6.

<sup>150</sup> *Flores v. Sessions*, 394 F. Supp. 3d at 1067 (emphasis added).

<sup>151</sup> *Id.* at 1064 (citing 8 C.F.R. § 212.5(b)(3) as then in effect).

<sup>152</sup> *Id.* at 1067.

<sup>153</sup> *Id.*

custody, and placed him at Southwest Key. These actions were unlawful because Orlan’s physical transfer occurred *after* his father had entered his misdemeanor plea and was available to take custody of and care for Orlan. DHS had no discretion to violate the FSA in this way.

206. The FSA requires the relevant agencies to hold minor children in conditions that are “safe and sanitary” and that recognize “the particular vulnerability of minors.”<sup>154</sup> In addition, facilities where immigrant children are detained “will provide access to toilets and sinks, . . . adequate temperature control and ventilation, . . . and contact with family members who were arrested with the minor,” among other things.<sup>155</sup> By failing to provide adequate temperature control and sanitation in the facility where Orlan was held, CBP violated this provision. ICE and ORR violated the same provision by failing to facilitate adequate communication between Orlan and Rafael after their separation.

207. The Government implemented the family separation policy along the entire Southern Border without complying with the requirement that it “make and record the prompt and continuous efforts . . . toward family reunification,”<sup>156</sup> even after the El Paso Sector pilot made clear that the Government lacked adequate systems to identify and track separated families. The Government’s failure to record, or to record accurately or timely, Rafael’s location and transfers, frustrated and delayed Plaintiffs’ ability to communicate with each other. Further, the Government’s failure to implement reliable systems for recordkeeping and information-sharing resulted in a day-long odyssey for Orlan, involving multiple flights and long car rides, only to discover that his father was not at the purported reunification facility when he arrived. On

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<sup>154</sup> FSA ¶ 12.A.

<sup>155</sup> *Id.*

<sup>156</sup> FSA ¶ 18.

information and belief, ICE and ORR also failed to make and record any efforts to reunify Orlan and Rafael until a federal court ordered their reunification.

208. Defendant had no discretion to implement the Family Separation Policy in violation of the *Flores* Agreement.

**4. Defendant's Separation and Treatment of Rafael and Orlan Violated Binding Agency Standards That Govern CBP**

209. CBP violated binding agency standards in its execution of the Family Separation Policy.

210. CBP's Short-Term Custody Policy ("Short-Term Custody Policy") establishes national policy for the short-term custody of individuals detained at facilities under the control of CBP.<sup>157</sup> The Short-Term Custody Policy governs noncitizen detainees' custody and care prior to their transfer to longer-term ICE detention facilities.

211. In 2015, CBP promulgated its National Standards on Transport, Escort, Detention, and Search (the "TEDS Standards" or "TEDS") to govern CBP officers' and employees' interaction with detained individuals.<sup>158</sup> Under the TEDS Standards, "[t]he safety of CBP employees, detainees, and the public is paramount during all aspects of CBP operations."<sup>159</sup>

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<sup>157</sup> See Memorandum from David V. Aguilar, Chief, U.S. Border Patrol, to All Chief Patrol Agents 2 (June 2, 2008) ("Short-Term Custody Policy"), <https://nomoredeaths.org/wp-content/uploads/2014/10/Hold-Rooms-Short-Term-Custody-Policy.pdf>; see also U.S. Dep't of Homeland Sec., U.S. Customs and Border Protect., *Short-Term Detention Standards and Oversight, Fiscal Year 2015 Report to Congress* (Dec. 8, 2015), [https://www.cbp.gov/sites/default/files/assets/documents/2022-Jan/Short-Term%20Detention%20Standards%20and%20Oversight\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-Jan/Short-Term%20Detention%20Standards%20and%20Oversight_1.pdf).

<sup>158</sup> See U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., *National Standards on Transport, Escort, Detention, and Search* 3 (2015) ("TEDS"), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>.

<sup>159</sup> TEDS § 1.1.

212. Together, the Short-Term Custody Policy and the TEDS Standards govern CBP's required conduct and standards of care for both adult and child detainees in their custody. They supplement, but do not displace or otherwise alter, the Government's obligations under the FSA and TVPRA concerning the custody and care of minor children. These agency standards were in place at the time the Government devised, tested, and carried out its Family Separation Policy.

**a. CBP Violated Nondiscretionary Agency Standards and Policies That Require the Preservation of Family Unity**

213. The TEDS require CBP to prioritize family unity, separating children from their parents only when "necessary."<sup>160</sup>

214. No legal requirement or safety or security concern required Plaintiffs' prolonged separation. During the thirty-six hours that Rafael was in criminal custody, CBP held Orlan in a nearby facility. When Rafael returned to CBP custody, the Government could have immediately reunified him with his son; instead, the Government put them on buses headed in opposite directions. On information and belief, the Government had no cause to believe that Rafael posed any threat or danger to Orlan or that he was otherwise unfit to care for him, either at the time CBP forcibly separated Orlan from Rafael or at the time it decided to place them in separate, distant detention facilities. Indeed, the Government had already concluded that Rafael had no criminal background.

215. Because there was no legitimate or compelling reason for the separation, and no law required the separation, CBP violated the applicable TEDS Standards by separating Orlan from Rafael, designating him an "unaccompanied" minor, and sending them to facilities 1,000 miles apart.

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<sup>160</sup> TEDS §§ 1.9, 4.3, 5.6.

216. CBP had no discretion to violate agency standards.

**b. CBP Failed to Provide Orlan and Rafael with the Adequate Shelter and Sanitary Conditions Required by its Nondiscretionary Agency Standards and Policies**

217. CBP policy mandates that “[a]ll detainees will be held under safe and humane conditions” and that “[a]ll detainees will be held under humane conditions of confinement that provide for their well being and general good health.”<sup>161</sup> CBP officers are required to provide detainees with access to clean toilets, sinks, showers, and bedding, as well as basic toiletries.<sup>162</sup> CBP must provide adult detainees with access to snacks and juice every four hours.<sup>163</sup> Minors must be provided with meal service three times a day and “two of the three meals must be hot.”<sup>164</sup> CBP must maintain temperatures “within a reasonable and comfortable range” and may not use temperature controls “in a punitive manner.”<sup>165</sup> Juveniles, in particular, must be given “basic hygiene articles, and clean bedding.”<sup>166</sup> In addition, CBP officers are required to make clean drinking water available along with clean drinking cups.<sup>167</sup>

218. CBP officers violated agency standards and their own clear, unequivocal, and nondiscretionary policies by detaining Orlan and Rafael in an over-air-conditioned hold room at the El Paso Processing Center. CBP officers violated such standards and policies by forcing

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<sup>161</sup> Short-Term Custody Policy ¶¶ 7, 7.2.

<sup>162</sup> Short-Term Custody Policy ¶¶ 5.1, 6.10, 6.11, 6.24, 7, 7.2; TEDS § 4.11.

<sup>163</sup> Short-Term Custody Policy ¶ 6.8.

<sup>164</sup> *Id.*; TEDS § 5.6.

<sup>165</sup> TEDS § 4.7.

<sup>166</sup> TEDS §§ 4.12, 5.6.

<sup>167</sup> Short-Term Custody Policy ¶ 6.9; TEDS §§ 4.14, 5.6.

Plaintiffs to sleep on the floor without any mattress, bedding, or blankets, other than a single aluminum foil sheet that failed to protect them from the frigid temperature.

219. CBP officers failed to adhere to their own policies and procedures by exposing Orlan and Rafael to deplorable, unsafe, and unhygienic conditions while they were held at the El Paso Processing Center. The only restrooms available for their use were filthy and unsanitary.

220. CBP officers at the El Paso Processing Center further violated their own policies and procedures by failing to provide Orlan with access to two hot meals a day while he was detained with his father and failing to provide drinking water to Rafael and Orlan.

221. CBP had no discretion to fail to comply with its obligations under CBP's Short-Term Custody Policy and the TEDS Standards.

**c. CBP Degraded and Humiliated Rafael and Orlan in Violation of Nondiscretionary Agency Standards and Policies**

222. CBP employees “must treat all individuals with dignity and respect” and must carry out their duties “in a nondiscriminatory manner, with respect to all forms of protected status under federal law” and with “full respect for individual rights including equal protection under the law [and] due process.”<sup>168</sup> They must “speak and act with the utmost integrity and professionalism” and “conduct themselves in a manner that reflects positively on CBP at all times.”<sup>169</sup>

223. With respect to children, CBP officials must “consider the best interest of the juvenile at all decision points beginning at the first encounter and continuing through processing, detention, transfer, or repatriation.”<sup>170</sup> Officers and agents “should recognize that juveniles

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<sup>168</sup> TEDS § 1.4.

<sup>169</sup> TEDS § 1.2.

<sup>170</sup> TEDS § 1.6.

experience situations differently than adults” and treat them as an “at-risk population” who may require additional care or oversight given their “particular vulnerability.”<sup>171</sup>

224. CBP officers violated these standards by committing gratuitous acts of cruelty, including but not limited to telling Rafael that they would take away his son and send him to jail, that he would never see his son again, that they could shoot him “like a thief,” and by taunting Rafael and Orlan and other detainees by calling themselves the “bad ones.”

225. CBP officers further violated these standards by failing to consider Orlan’s “best interest[s]” entirely, let alone “at all decision points” as required by TEDS Section 1.6. Transferring Orlan hundreds of miles away from his father when Rafael was available and able to care for him was neither “necessary” nor in Orlan’s “best interest.”

226. CBP officers further violated these standards by not only disrespecting but wholly disregarding Rafael’s and Orlan’s “individual rights including equal protection under the law, due process,” and the right to family integrity implicit in these protections.<sup>172</sup>

227. CBP had no discretion to fail to comply with these mandatory obligations under CBP’s Short-Term Custody Policy and the TEDS Standards.

**5. Defendant’s Failure to Facilitate Contact Between Rafael and Orlan Violated Binding Standards That Govern ICE**

228. ICE violated binding agency standards by failing to ensure contact between Rafael and Orlan during their prolonged separation.

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<sup>171</sup> TEDS §§ 1.6, 5.1.

<sup>172</sup> TEDS § 1.4.

229. ICE is governed by the Performance-Based National Detention Standards (“PBNDS”),<sup>173</sup> established in 2011, which “are designed to ensure a safe and secure detention environment that meets detainees’ basic needs and is consistent with applicable legal requirements.”<sup>174</sup> The PBNDS regulate ICE officers’ conduct and set standards of care for individuals detained within ICE’s network of dedicated immigration facilities.

230. The PBNDS “Telephone Access” detention standard “ensures that detainees may maintain ties with their families and others in the community, legal representatives, consulates, courts and government agencies.”<sup>175</sup> In service of this goal, the PBNDS require detention facilities to “permit detainees to make direct or free calls” to “immediate family or others,” when there is a personal or family emergency or “compelling need (to be interpreted liberally).”<sup>176</sup> The PBNDS also require facilities to “take and deliver telephone messages to detainees as promptly as possible.”<sup>177</sup>

231. Further, the PBNDS mandate that “[d]etainees shall have reasonable and equitable access to reasonably priced telephone services.”<sup>178</sup> Moreover, indigent detainees, who lack sufficient funds in their accounts for ten days, “may request a call to immediate family or others in personal or family emergencies or on an as-needed basis” and may make a free return emergency phone call.<sup>179</sup>

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<sup>173</sup> U.S. Immigr. and Customs Enf’t, *Performance Based National Detention Standards* (rev. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

<sup>174</sup> *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1272 (11th Cir. 2020).

<sup>175</sup> PBNDS § 5.6(I).

<sup>176</sup> PBNDS § 5.6(E).

<sup>177</sup> PBNDS § 5.6(J).

<sup>178</sup> PBNDS §§ 5.6(I), 5.6(II)(1).

<sup>179</sup> PBNDS §§ 5.6(V)(E)(3), 5.6(J).

232. Following his separation from Orlan, Rafael was detained at the Cibola Jail and Otero. Although governed by the PBNDS, neither of these facilities made it possible for Rafael to communicate with his son by telephone, other than when the Cibola Jail accepted two calls from ORR on Orlan's behalf. During extended periods, Rafael lacked sufficient funds to make calls, but the facilities did not enable free calls. Further, personnel at the Cibola Jail failed to inform Rafael of the many additional calls placed by Orlan's case manager and did not timely facilitate any return phone calls. For an extended period, Rafael also lacked information about Orlan's whereabouts.

233. ICE did not have the discretion to violate its own regulations and standards of conduct.

### **CLAIMS**

234. Plaintiffs plead all causes of action under Texas law.

#### **FIRST CAUSE OF ACTION** **FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

##### **Intentional Infliction of Emotional Distress**

235. Plaintiffs incorporate the allegations in all previous paragraphs.

236. By engaging in the acts described in this Complaint—including, but not limited to, forcibly separating Rafael and Orlan and needlessly keeping them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities following Rafael's brief criminal proceeding; intimidating, screaming at, and threatening Rafael and Orlan at the time of apprehension and while they were in CBP custody; withholding information from Rafael and Orlan about each other's whereabouts, well-being, or whether they would ever be reunited; failing to facilitate adequate communication between Rafael and Orlan while they were separated; and transporting Orlan to the wrong facility for reunification—the federal officers, officials, and

employees referenced above engaged in extreme and outrageous conduct that is intolerable in a civilized society.

237. These federal officers, officials, and employees undertook this outrageous conduct with an intent to cause, or with at least reckless disregard for the probability of causing, Plaintiffs to suffer severe emotional distress.

238. As a direct and proximate cause of the federal officers', officials', and employees' conduct, Plaintiffs suffered and continue to suffer severe emotional distress, as well as physical manifestations of this trauma.

239. Under the FTCA, the United States is liable to Plaintiffs for intentional infliction of emotional distress.

**SECOND CAUSE OF ACTION**  
**FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

**Negligence**

240. Plaintiffs incorporate the allegations in all previous paragraphs.

241. The federal officers, officials, and employees referenced herein had a duty to Plaintiffs to act with ordinary care and prudence so as not to cause harm or injury to Plaintiffs. They also had mandatory, nondiscretionary duties of care, including but not limited to those imposed by the United States Constitution, federal statutes, the *Flores* Agreement, and agency standards and regulations.

242. By engaging in the acts described in this Complaint, the federal officers, officials, and employees referenced above, at the direction of Defendant, failed to act with ordinary care and breached the duty of care they owed to Plaintiffs. These breaches arose from conduct including, but not limited to, forcibly separating Rafael and Orlan and needlessly keeping them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities

following Rafael's brief criminal proceeding; intimidating, screaming at, and threatening Rafael and Orlan at the time of apprehension and while they were in CBP custody; failing to provide Rafael and Orlan with adequate food, shelter, and care while they were detained together; withholding information from Rafael and Orlan about each other's whereabouts, well-being, or whether they would ever be reunited; failing to facilitate adequate communication between Rafael and Orlan while they were separated; and failing to implement sufficient mechanisms to track separated families, which caused officials to transport Orlan to the wrong facility for reunification.

243. As a direct and proximate result of the referenced conduct, Plaintiffs suffered substantial damages stemming from their mental anguish, emotional and psychological trauma, physical manifestations of anxiety and stress, and impairment of their parent-child relationship.

244. Further, as migrants fleeing life-threatening persecution and seeking humanitarian relief and refuge in the United States, Plaintiffs were particularly susceptible to emotional distress, and a special relationship was formed between them and the Defendant when the Defendant took them into custody. Defendant knew or should have known of Plaintiffs' susceptibility when Plaintiffs expressed fear of returning to their country. The inherent vulnerability of migrants seeking humanitarian protection and their reliance on Defendant for such protection is one of the reasons that Defendant is subject to the many nondiscretionary duties of care described above. All of these facts gave rise to a special relationship between Plaintiffs and Defendant, as a result of which Plaintiffs are entitled to damages for emotional distress and mental anguish.

245. Under the FTCA, the United States is liable to Plaintiffs for negligence.

**THIRD CAUSE OF ACTION**  
**FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

**Negligent Supervision**

246. Plaintiffs incorporate the allegations in all previous paragraphs.

247. Defendant has a duty to supervise the federal officers, officials, and employees who engaged in the misconduct alleged in this Complaint.

248. At all material times, Defendant, either directly or through its agents, negligently supervised its officers, officials, and employees when Defendant knew or should have known that failure to appropriately supervise these officers, officials, and employees in the performance of their duties would likely result in harm to Plaintiffs.

249. Defendant's negligent supervision proximately caused the unlawful conduct described herein, including the violations of nondiscretionary duties of care imposed by the United States Constitution, federal statutes, the *Flores* Agreement, agency standards and regulations, and other sources establishing binding obligations.

250. As a proximate result of this failure to supervise, Rafael and Orlan suffered the harm described herein.

251. Further, as migrants fleeing life-threatening persecution and seeking humanitarian relief and refuge in the United States, Plaintiffs were particularly susceptible to emotional distress, and a special relationship was formed between them and the Defendant when the Defendant took them into custody. Defendant knew or should have known of Plaintiffs' susceptibility when Plaintiffs expressed fear of returning to their country. The inherent vulnerability of migrants seeking humanitarian protection and their reliance on Defendant for such protection is one of the reasons that Defendant is subject to the many nondiscretionary duties of care described above. All

of these facts gave rise to a special relationship between Plaintiffs and Defendant, as a result of which Plaintiffs are entitled to damages for emotional distress and mental anguish.

252. Under the FTCA, the United States is liable to Plaintiffs for negligent supervision.

**FOURTH CAUSE OF ACTION**  
**FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

**Negligent Undertaking**

253. Plaintiffs incorporate the allegations in all previous paragraphs.

254. Defendant voluntarily undertook to perform services that were necessary for Plaintiffs' well-being by taking Rafael and Orlan into immigration custody when they presented themselves to CBP agents as a family unit seeking protection from persecution in their native country of Guatemala. By taking Plaintiffs into immigration custody, Defendant voluntarily undertook responsibility for their safety and general well-being. At minimum, Defendant was required to exercise reasonable care in performing that undertaking.

255. Plaintiffs relied upon Defendant to exercise the undertaking with reasonable care.

256. Defendant breached its duty of care to Plaintiffs by conduct including, but not limited to, forcibly separating Rafael and Orlan and needlessly keeping them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities following Rafael's brief criminal proceeding; intimidating, screaming at, and threatening Rafael and Orlan at the time of apprehension and while they were in CBP custody; failing to provide Rafael and Orlan with adequate food, shelter, and care while they were detained together; withholding information from Rafael and Orlan about each other's whereabouts, well-being, or whether they would ever be reunited; failing to facilitate adequate communication between Rafael and Orlan while they were separated; and failing to implement sufficient mechanisms to track separated families, which caused officials to transport Orlan to the wrong facility for reunification.

257. As a proximate result of Defendant's lack of due care in designing and implementing the Family Separation Policy, subjecting Plaintiffs to the cruelty and incompetence described above, Plaintiffs were exposed to an increased risk of harm, and indeed, suffered harm, including their mental anguish, emotional and psychological trauma, physical manifestations of anxiety and stress, and impairment of their parent-child relationship. Alternatively, Plaintiffs suffered the forgoing harm as a result of their reliance on Defendant.

258. Further, as migrants fleeing life-threatening persecution and seeking humanitarian relief and refuge in the United States, Plaintiffs were particularly susceptible to emotional distress, and a special relationship was formed between them and the Defendant when the Defendant took them into custody. Defendant knew or should have known of Plaintiffs' susceptibility when Plaintiffs expressed fear of returning to their country. The inherent vulnerability of migrants seeking humanitarian protection and their reliance on Defendant for such protection is one of the reasons that Defendant is subject to the many nondiscretionary duties of care described above. All of these facts gave rise to a special relationship between Plaintiffs and Defendant, as a result of which Plaintiffs are entitled to damages for emotional distress and mental anguish.

259. Under the FTCA, the United States is liable to Plaintiffs for negligent undertaking.

**FIFTH CAUSE OF ACTION**  
**FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

**Tortious Interference with the Parent-Child Relationship**

260. Plaintiffs incorporate the allegations in all previous paragraphs.

261. The federal officers, officials, and employees referenced herein forcibly separated Rafael and Orlan and needlessly kept them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities following Rafael's brief criminal proceeding, resulting in interference with the parent-child relationship.

262. On information and belief, at no time did Defendant investigate or make any finding that Rafael presented a danger to Orlan or was in any way unfit to maintain care and custody of his son.

263. On information and belief, no federal officer, official, or employee ever contested or had any basis to contest Rafael and Orlan's parent-child relationship. The federal officers, officials, and employees were aware that Rafael did not consent to have his child taken away from him.

264. In addition to taking and retaining possession of Orlan, these federal officers, officials, and employees deprived Rafael and Orlan of adequate contact with each other. On information and belief, Rafael and Orlan only spoke to each other twice during their thirty-seven-day separation.

265. As a direct and proximate result of Defendant's conduct described herein, Plaintiffs suffered substantial damages stemming from their mental anguish, interference with their parent-child relationship, emotional and psychological trauma, and physical manifestations of anxiety and stress.

266. Under the FTCA, the United States is liable to Plaintiffs for tortious interference with the parent-child relationship.

**SIXTH CAUSE OF ACTION**  
**FEDERAL TORT CLAIMS ACT—28 U.S.C. § 1346(b)**

**Breach of Fiduciary Duty**

267. Plaintiffs incorporate the allegations in all previous paragraphs.

268. Plaintiffs migrated to the United States to seek humanitarian protection in the United States and Defendant took them into custody. Plaintiffs trusted and relied on Defendant to

provide for their safety and well-being while they were in custody, giving rise to a fiduciary relationship between Plaintiffs and Defendant.

269. Further, Defendant, having separated Orlan from his father, assumed legal custody of and stood *in loco parentis* to him. As Orlan's legal custodian, Defendant created a fiduciary relationship with him and assumed an obligation to act in his best interests.

270. By engaging in the various acts and omissions described in this complaint—including but not limited to forcibly separating Rafael and Orlan and needlessly keeping them apart for thirty-seven days rather than reuniting father and son while they were in proximate CBP facilities following Rafael's brief criminal proceeding; intimidating, screaming at, and threatening Rafael and Orlan at the time of apprehension and while they were in CBP custody; failing to provide Rafael and Orlan with adequate food, shelter, and care while they were detained together; withholding information from Rafael and Orlan about each other's whereabouts, well-being, or whether they would ever be reunited; failing to facilitate adequate communication between Rafael and Orlan while they were separated; and failing to implement sufficient mechanisms to track separated families, which caused officials to transport Orlan to the wrong facility for reunification, Defendant breached its fiduciary duties to Plaintiffs.

271. As a direct and proximate result of those breaches, Plaintiffs suffered and continue to suffer mental anguish, emotional and psychological trauma, physical manifestations of anxiety and stress, and impairment of their parent-child relationship.

272. Under the FTCA, the United States is liable to Plaintiffs for breach of fiduciary duty.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Award compensatory damages in the amount of \$2,500,000 for harm to Rafael, resulting from Defendant's conduct;
- B. Award compensatory damages in the amount of \$2,500,000 for harm to Orlan, resulting from Defendant's conduct;
- C. Award attorneys' fees and costs pursuant to, among other provisions, the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- D. Grant other such other and further relief as the Court may deem just and appropriate, including all equitable relief to which Plaintiffs are entitled.

November 14, 2022

s/ Jennifer Fiorica Delgado

Jennifer Fiorica Delgado

Markiana J. Julceus

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*Pro Bono Counsel for Plaintiffs*

**CERTIFICATION UNDER L. Civ. R. 11.2**

I certify that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

s/ Jennifer Fiorica Delgado  
Jennifer Fiorica Delgado  
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