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FOIA EXEMPT

By FedEx Overnight Delivery

August 28, 2019

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U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, S.W.
Mail Stop 0485
Washington, DC 20528-0485

Office of the Principal Legal Advisor
Immigration and Customs Enforcement
500 12th Street, S.W.
Washington, DC 20536

U.S. Customs and Border Protection
Office of the Chief Counsel
1300 Pennsylvania Avenue, N.W.
Washington, DC 20229

U.S. Department of Health and Human
Services
Office of the General Counsel
200 Independence Avenue, S.W.
Washington, DC 20201

U.S. Customs and Border Protection
Tucson Field Office
4760 N. Oracle Road
Suite 316
Tucson, AZ 85705

**Re: Notice of Claims Under the Federal Tort Claims Act —
[REDACTED], on behalf of himself
and his minor son, [REDACTED]**

Counsel:

Enclosed please find administrative claims against the United States government filed pursuant to the Federal Tort Claims Act on behalf of [REDACTED] and his minor child, [REDACTED] (age 12). The enclosed claims consist of: (1) an executed claim authorization; (2) [REDACTED] birth certificate; and (3) SF-95 Forms completed on behalf of Mr. [REDACTED] and [REDACTED], including Attachment A thereto.

Covington & Burling LLP and the Southern Poverty Law Center represent Mr. [REDACTED] and his son in this matter. We are submitting these claims without the benefit of formal discovery. Claimants reserve the right to amend or supplement their claims.

Please be advised that this submission (including the attachments) contains information about the claimants that is private and confidential, including the claimants' names. Such information is exempt from the public access provisions of the Freedom of Information Act, 5

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U.S.C. § 552 (“FOIA”). Should any U.S. government agency receive a request for disclosure related to these claims, we ask that the government: (1) notify the undersigned before responding to the requestor; and (2) redact any information, including but not limited to the claimants’ names, that is exempt from disclosure under FOIA or any other applicable statute or regulation protecting the privacy of the claimants.

We look forward to discussing any proposals you may have for the prompt and fair resolution of these claims. Please feel free to contact us at any time.

Sincerely,



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Enclosures (Claim Authorization Form, Birth Certificate, SF-95 Forms, SF-95 Attachment)

ATTACHMENT A

1. Submit to Appropriate Federal Agency

Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

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U.S. Customs and Border Protection
Tucson Field Office
4760 N. Oracle Road
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Tucson, AZ 85705

2. Claimant's Personal Representative

Counsel: Matthew Schlesinger, Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956

Counsel: Michelle Lapointe, Southern Poverty Law Center, P.O. Box 1287, Decatur, GA 30031-1287

6. Date and Day of Accident

E.S.M. and his son H.S.S., then eleven years old, were forcibly separated by agents of the U.S. Department of Homeland Security ("DHS") on or about Sunday, May 20, 2018. H.S.S. was put into the custody of the U.S. Department of Health and Human Services ("HHS"), Office for Refugee Resettlement ("ORR"), while E.S.M. remained in DHS custody. E.S.M. and H.S.S. were not reunited until Friday, July 20, 2018.

7. Time (A.M. or P.M.)

E.S.M. believes that he and his son were separated in the afternoon.

8. Basis of Claims

A. The Government Forcibly Separated E.S.M. from H.S.S.

Between mid-2017 and late 2018, the United States government forcibly took thousands of children from their parents, sending them to facilities and foster homes hundreds of miles away. These families often had fled persecution in their home countries, only to encounter it in the very place they sought refuge. After being separated, children and their parents often were unable to communicate for weeks or months. Parents did not know whether their children were safe—or even where their children were. Children could not understand what had happened to them. The government tore apart families, subjecting children and parents to months of terror, anguish, and torment.

The government understood the harm that it was inflicting on these families. It took children from their parents not in spite of the harm, but because of it, intending that the terror visited upon these families would deter other families from migrating to the United States.

E.S.M. and his then-eleven-year-old son, H.S.S., are among the families who were torn apart by the U.S. government. E.S.M. and H.S.S. suffered mental, physical and emotional harm because of a multitude of unconstitutional, intentional, reckless, and negligent acts and omissions by a range of U.S. government actors, some of whom operate at the highest levels of the government, whose goal was to cause harm and instill fear and terror. Among other things, these federal actors unnecessarily and unreasonably separated E.S.M. from his son, employing cruelty when doing so, and failed to exercise the basic care and decency that are hallmarks of a civilized society.

E.S.M. and H.S.S. will carry the trauma of forcible separation with them for the rest of their lives. They seek redress from the government for the harm it has caused them.

1. E.S.M. and H.S.S. are Separated Without Any Information or Explanation.

In early May 2018, E.S.M. and H.S.S. fled their home in Guatemala, where E.S.M. had suffered an attempt on his life and his family had received threats, to seek refuge in the United States. They reached the U.S. border near Lukeville, Arizona on or about May 19, 2018.

Immigration officers encountered E.S.M. and H.S.S. early in the morning and placed them, along with several other families, in a van. They were transported in the van for about two hours. When they disembarked from the van, they were placed in a CBP facility known as a *hielera* (“icebox”) for its frigid temperatures. They were crowded into a cinderblock cell approximately 15 feet by 20 feet, with multiple other families, approximately 30 adults and children in all. There were cement benches in the cell, but no beds. They were given aluminum

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Claimant: E.S.M., on behalf of himself and his minor son, H.S.S.

sheets, which were inadequate to shield them from the bitter cold. The bathrooms accessible to E.S.M., H.S.S., and the other detainees did not have doors, and the only source of drinking water was the sink used for washing hands. There was nowhere to bathe, and the people already detained there had gone days without bathing. The immigration officers gave them cold burritos to eat.

E.S.M. and H.S.S. had been in the cell for over 12 hours when officers called them out to answer questions. An officer asked E.S.M. where he was headed and who would receive him there. E.S.M. said they were headed to New York, where his brother lived. E.S.M. showed the officer H.S.S.'s birth certificate and his own identification. The officer sent E.S.M. and H.S.S. back to the cell. It was difficult for H.S.S. and E.S.M. to sleep on the floor of the cell, which was packed with other people.

The conditions inside the *hielera* were oppressive. But the news was about to get much worse for H.S.S. and E.S.M. In the afternoon of the next day, officers announced to the group—including H.S.S. and all the other children—that the children were going to be taken to a different location away from their parents, where they would be kept with other children only. One officer suggested that it was because the bathroom did not have proper doors and that the children needed to be in a place more adequate for them. This made E.S.M. think that the separation was temporary, even as rumors began sweeping through the room that the children were being taken away forever. E.S.M. felt very scared and stressed. Distressing thoughts began to enter his mind, including that he could be deported without H.S.S. Others in the cell began crying and panicking.

H.S.S. told his father that he did not want to be separated from him and that he didn't want to leave. As E.S.M. and H.S.S. began crying, E.S.M. tried to comfort his son by telling him that the separation would only be for a short time. The officers instructed E.S.M. and the other parents to pack up their children's belongings. In that moment, E.S.M. fully realized that the officers were going to separate him from his son, and he began panicking. E.S.M. felt his heart rate increase with fear, and H.S.S. began crying even harder. Officers momentarily returned to E.S.M. his backpack, which had been confiscated from him upon his arrival. He was instructed to put H.S.S.'s belongings in a separate plastic bag provided by the officers. E.S.M. began gathering H.S.S.'s belongings and putting them in the plastic bag he was provided. An officer made a list of everything that E.S.M. put in the bag—mainly clothes and some shoes. E.S.M. also gave his son the only cash he had. Other parents were also gathering their children's belongings and saying goodbye. It was a terrible scene, with both children and adults crying, and children begging their parents not to let the officials take them away. After E.S.M. packed H.S.S.'s things in the bag, the officers instructed him to walk H.S.S. towards a door of the *hielera*. The officers told E.S.M. and the other parents that the children needed to get on the bus

which was already parked in an interior area of the facility. There were bars on the windows of the bus, increasing E.S.M.'s despair at the thought of H.S.S. having to board it.

E.S.M. hugged his son tightly as they both cried. H.S.S. did not want to let his father go, and told him he feared that they would never be reunited. E.S.M. attempted to comfort H.S.S. by telling him that he would never leave him behind, and that their separation was likely just for a few days. Then E.S.M. had no choice but to let H.S.S. board the bus along with the other crying children. An officer grabbed H.S.S. by the hand and led him to the bus. E.S.M. watched in pain as his son boarded the bus with the other children, and worried about how H.S.S. and the other children would make it on their own. The treatment in the *hieleras* was so poor and he worried about the conditions his son would face wherever he was being taken. E.S.M. thought at least when they were together, he could comfort his son to get him to sleep. But alone—what would H.S.S. do?

On May 22, 2018, H.S.S. was admitted to the Southwest Key Las Palmas facility, a private contractor for ORR in Mesa, Arizona. ORR records indicate that during a counseling session on May 23, 2018, H.S.S. “displayed feelings of sadness regarding his separation from his father while in ICE custody.” At another session on July 4, records indicate that H.S.S. “expressed that he was feeling unmotivated throughout the week owing to the fact that he misses his father (who is currently in ICE custody).”

2. E.S.M. is Kept in Detention After Separation.

The parents were taken back to the cells, where no children remained. E.S.M., along with many of the other parents whose children had been taken away, continued to cry. E.S.M. and the other parents tried to ask the officers questions: Why did the children have to be taken away? Where were they going? But the officers would not answer. After a few hours, officers shackled the adults by their wrists and ankles and took them to a different *hielera*, about an hour or two away. When E.S.M. arrived at the second facility, he and others caught a glimpse of what they thought were the plastic bags with their children's belongings on metal racks on an adjoining wall. E.S.M. recalls seeing H.S.S.'s bag. He saw H.S.S.'s name on the bag's label and recognized the clothes inside the clear plastic bag. The adults thought that they had been taken to this second *hielera* to be closer to the children. But the parents were not taken to their children or given any other signs that they were there. The officers there also would not tell E.S.M. or the other parents anything about their children's whereabouts.

The second *hielera* had even worse conditions than the first. Every inch of the cell was packed with people, including the bathrooms, where some people were trying to lie down. E.S.M. remained standing for long stretches of time, for lack of space to sit down. He spent the night at this *hielera* but could not sleep.

Claimant: E.S.M., on behalf of himself and his minor son, H.S.S.

On or about May 21, 2018, E.S.M. was taken with a group of other separated parents to a court. He understood that he was being charged with misdemeanor improper entry to the United States. E.S.M.'s appointed lawyer explained that if he pleaded guilty, he would be sentenced to time served. So E.S.M. pleaded guilty and received a sentence of time served. Through his appointed lawyer, E.S.M. begged the judge to be reunited with his son. The federal magistrate judge's Minutes for E.S.M.'s case state "Court recommends upon release the defendant be reunited with his child: H.S.-S., YOB 2006, who entered the United States with the defendant." From the court, E.S.M. was taken to yet another *hielera* several hours away. The *hielera* was very dark. There were no windows to the outside, so E.S.M. and the other people held there had no idea if it was day or night. Just as they had done at the first two *hieleras*, E.S.M. and other parents who had been separated asked about their children, but the officers insisted that they knew nothing. E.S.M. was distraught. He could barely eat and hardly slept. After a few days at this facility, E.S.M. was shackled at his wrists and ankles, and had a six-inch chain connecting his wrists to another chain around his waist. He was then sent to what he believes was an ICE detention center in Florence, Arizona for a couple of days. At Florence, a fellow detainee gave him \$10 to deposit into his commissary account, which he used to call his wife in Guatemala. E.S.M.'s wife had spoken earlier with H.S.S. on the phone and told E.S.M. that their son was in a "shelter." This call was the first time E.S.M. received news of his son since their separation. The mere fact that he now knew where H.S.S. was located brought E.S.M. some relief, but E.S.M. felt inescapably distressed; he had no idea if H.S.S. was eating well or sleeping, and whether he was being cared for or mistreated.

After Florence, E.S.M. was shackled and put on a bus and then on a plane to Georgia. He was chained the entire time. E.S.M. was sent to the Stewart Detention Center in Lumpkin, Georgia. At Stewart, after about two weeks of separation, E.S.M. was finally able to talk with H.S.S. for the first time. Using money that his brother had deposited in his account to make a call from ICE detention, he called the shelter where H.S.S. was staying in Mesa, Arizona. The government never provided any contact information or information related to H.S.S.'s whereabouts to E.S.M. Instead, E.S.M.'s brother was able to discover the telephone number for H.S.S.'s social worker at the Southwest Key Las Palmas facility, and provided it to E.S.M. During their first call, H.S.S. was crying, and they were only able to speak for a few minutes. With tears in his eyes, E.S.M. did his best to remain strong for his son. Thereafter, E.S.M. was able to talk to H.S.S. about once a week for about ten minutes each call. Each time they spoke, E.S.M. would ask his son how he was doing. H.S.S. would always say he was doing fine, but did not say much else. E.S.M. sensed that H.S.S. was not in fact doing well, but did not want to worry his father. Because E.S.M. could not see H.S.S. over video, he could not get a good sense of how his son was actually doing.

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While at Stewart, E.S.M. had an interview with an asylum officer who found E.S.M. had a credible fear of returning to Guatemala. After a few weeks at Stewart, E.S.M. was moved yet again, this time to an ICE detention center in Folkston, Georgia. He recalls that he had to undergo a DNA test and was interviewed by government officials while at Folkston, but still had no idea when, or even if, he would be reunified with H.S.S. E.S.M. felt disturbed by the DNA test. He was perplexed at the suggestion that he would lie about being H.S.S.'s father. He felt that the U.S. government had no basis to doubt that he was H.S.S.'s father, especially since he had given them his government identification and H.S.S.'s birth certificate.

E.S.M. and the other detained men began to see stories on the news about family separation and a judge's order that the government had to reunify families separated at the border, but no one from the government gave E.S.M. or the other separated fathers any information about the judge's orders or the whereabouts or welfare of their children. After a couple of weeks at the Folkston detention center, E.S.M. was once again placed in full shackles and then transferred to Texas.

3. E.S.M. and H.S.S. are Reunited and Face the Effects of Separation.

When E.S.M. arrived in Texas, he was taken to the ICE detention center in Port Isabel. He still did not know what was going to happen—if he was going to be deported back to Guatemala or reunited with his son. After his arrival at Port Isabel, E.S.M. was told that he would be reunited with H.S.S., and that it would happen on a Thursday. But Thursday came and went, and still E.S.M. had not seen his son. The following day, on or around July 20, 2018, E.S.M. waited for H.S.S. as the other separated parents were called out one by one to be reunified with their children. E.S.M. started to feel desperate. Of the forty or so parents in his group, he was the last to be taken to his child. The waiting was agony for E.S.M. Finally, an officer walked him from his cell to a waiting area at the detention center. H.S.S. was standing there with a social worker. There were no other children around because H.S.S. was the last in his group to be taken to his parent. E.S.M. and H.S.S. saw each other at the same moment. They ran to each other, embraced, and then both started crying. It had been two months since they had seen each other. E.S.M. felt tremendous relief, but also extreme sadness about what the separation had done to his son. H.S.S. told his father that he thought he was never to come for him, tinging their reunion with sorrow as E.S.M. came face to face with the anguish his son had gone through.

From Port Isabel, E.S.M. and H.S.S. traveled together to New York City to attempt to rebuild their lives together. As they traveled to New York, H.S.S. asked his dad many questions about his father's time in detention: if he had been able to sleep well, if the food they gave him was good, and how he would spend his time at the detention center. H.S.S. told his dad that he suffered most during the time right after the separation, but would not elaborate. H.S.S. recalls

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Claimant: E.S.M., on behalf of himself and his minor son, H.S.S.

being very cold while in the *hielera*; he had arrived with a jacket but officers took it away from him. He remembers the *hielera* filled with adults and children. He remembers having to eat the cold burritos because he was so hungry. Even now, over a year later, H.S.S. cannot speak about his time separated from his father without being overcome with tears.

During their first few months together after the separation, E.S.M. noticed that H.S.S. had changed. He was afraid to be alone and worried every time E.S.M. left the house. H.S.S. is also more distant. Whereas before he was a talkative kid, he is now notably quiet. He used to enjoy talking about soccer and school but is now more withdrawn.

ORR records indicate that H.S.S. was admitted to the shelter on May 22, 2018. This fact is particularly concerning for E.S.M. because the government took his son from him on May 20, 2018. To this day he does not know where his child was from May 20, 2018 through his admission to Southwest Key on May 22, 2018. The thought that H.S.S. may have spent an additional two days in a *hielera*—or some other unknown location—on his own torments E.S.M. When asked about the separation, H.S.S. becomes painfully overwhelmed; he sobs and is unable to continue speaking.

E.S.M. feels that he has been psychologically damaged by his forced separation from H.S.S. and that it has left him traumatized. During the time he was apart from H.S.S., he constantly worried about what was happening to his son. Not being with H.S.S.—and not knowing what he was going through—was incredibly difficult for E.S.M., and his head was constantly filled with anxiety about what could possibly be happening to his son. E.S.M. struggles with the fear that his son will be taken from him again. The separation planted a fear that remains in his mind and soul. E.S.M.'s faith in God keeps him hopeful that one day his and H.S.S.'s wounds will heal.

B. The Government Illegally Separated Families for the Purpose of Deterring Future Migrants.

Since 2017, the Administration has taken thousands of children from their parents, intending to cause terror, anguish and harm, and to use that cruelty to deter future migrants from seeking to enter the United States. Both the practice of separating families itself, and its implementation, violate the Constitution, the law, and basic human decency.

The many harms that the Administration inflicted on E.S.M. and H.S.S., as described in Section A, were not only foreseeable, but intentional. Forcible parent-child separations have long been known to cause significant short- and long-term damage to mental, physical, and emotional health. Knowing this, and indeed because of this, the government cruelly separated E.S.M. and H.S.S. and others like them for the purpose of deterring future migrants from entering the United States. It made the harm far worse by implementing a policy with carelessness and callous

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Claimant: E.S.M., on behalf of himself and his minor son, H.S.S.

disregard for the physical safety and emotional well-being of E.S.M. and H.S.S. Administration officials have yet to acknowledge or accept any responsibility for the harms they caused. For all of these reasons, E.S.M. and H.S.S. seek relief through these claims.

1. The Government's Forcible Separation of Families Violated the Constitution, the Law, and Norms of Basic Human Decency.

The government's policy of separating families who, like E.S.M. and H.S.S., sought to enter the United States through the U.S. southern border in 2017 and 2018 deliberately violated the constitutional rights of those separated, including the right to family integrity. For decades, this nation's highest court has recognized the fundamental right to family integrity protected by the Constitution: "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."¹ These constitutional protections extend to citizens and non-citizens alike, even when confined by the government.²

In the name of deterrence, the government indiscriminately tore immigrant children from their parents, sent the children thousands of miles away, refused to inform parents and children of each other's whereabouts or well-being, refused to provide adequate means for parents and children to talk with each other, and failed to have any system for tracking the children or ensuring that families could ever be reunited.

As Judge Sabraw concluded in *Ms. L. v. U.S. Immigration and Customs Enforcement*, the government's actions "shock[] the conscience."³ The *Jacinto-Castanon de Nolasco* court further stated that "nothing in federal law suggests that deterring immigration by indefinitely separating families once the parents have been transferred to immigration custody is a compelling or legitimate government objective."⁴ Both the policy itself and its callous implementation violate the Constitution, the law, and norms of human decency.

¹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

² *Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't*, 319 F. Supp. 3d 491, 500 (D.D.C. 2018) ("The fact that [families are] lawfully detained in immigration custody does not eliminate [their] due process right to family integrity.").

³ 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018).

⁴ *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 502.

2. Forcibly Separating Families Causes Irreparable Harm to Children and Parents.

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.*”⁵ Children attach to their caregiver from the time they are born, and the children’s sense of safety “depends on that relationship.”⁶ Disrupting that relationship causes “the parts of the brain that deal with attachment and fear” to “develop differently.”⁷

It is not surprising, then, that “[s]eparation irreparably harms [families] every minute it persists.”⁸ This finding of the *Jacinto-Castanon de Nolasco* court is firmly anchored in scientific studies and literature. As an expert physician testified to Congress, “[a] *century of countless studies* across the behavioral and social sciences provide *extensive evidence* of the consequences of separating children from their parents, especially if that separation is unexpected, abrupt, or in a frightening context.”⁹ For example, research into World War II separations shows “documented far reaching effects of these separations into adulthood, including increased risk for mental health problems, poor social functioning, insecure attachment, disrupted stress reactivity, and mortality.”¹⁰

The American Academy of Pediatrics (“AAP”) explained the effects of separation on children: “[H]ighly stressful experiences, like family separation, can . . . disrupt[] a child’s brain architecture and 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.”¹¹

⁵ *Id.* (emphasis added).

⁶ William Wan, *What Separation from Parents Does to Children: ‘The Effect is Catastrophic’*, WASH. POST (June 18, 2018), <http://tinyurl.com/yxf6en34>.

⁷ *Id.*

⁸ *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 503.

⁹ *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 116th Cong. 1 (2019) [hereinafter *Oversight & Investigations Hearing*] (testimony of Jack P. Shonkoff, M.D., Director, Center on the Developing Child at Harvard University) (emphasis added).

¹⁰ Johayra Bouza et. al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, Soc’y for Res. in Child Dev. Statement of the Evid., June 20, 2018, <https://tinyurl.com/y4oc2uk9>; see also, e.g., Wan, *supra* note 6 (describing the psychological and physiological responses that “wreak[] dramatic and long-term damage” on children who are forcibly separated from their parents).

¹¹ *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 503 (quoting Colleen Kraft, Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://tinyurl.com/ycr3rjqh>); see also Brittny Mejia, *A 3-Year-Old was Separated from his Father at the Border. Now His Parents are Dealing with His Trauma*, L.A. TIMES (July 3, 2018), <https://tinyurl.com/y79ra9un> (“A child taken from a parent is flooded with anxiety, which quickly turns into panic. . . . Children’s bodies and brains, ‘are absolutely not built to withstand

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Claimant: E.S.M., on behalf of himself and his minor son, H.S.S.

Children who experience trauma like forced separation from a parent “are at a much greater risk of developing mental health disorders such as depression, anxiety, addiction, ADHD and PTSD. Their physical health is also negatively affected.”¹² The materials cited here barely scratch the surface of the wealth of expert material describing the harms caused by family separation. Given the “extensive evidence,” the irreparable harm caused by forcibly separating parents and children is indisputable.¹³

3. The Government Knew of the Harm It Would Cause by Tearing Children from Their Parents at the Border.

Moreover, the federal government knew of the harm caused by separating children from their parents long before it began separating families like E.S.M. and H.S.S. Evidence of that is plentiful, both in internal agency comments and in the government’s reaction to the public outcry against the policy when it was initially proposed in 2017. For example:

- In 2016, the U.S. Department of Homeland Security’s (“DHS”) Advisory Committee on Family Residential Centers concluded that “the separation of families for purposes of immigration enforcement or management, or detention is *never* in the best interest of children.”¹⁴

that level of stress.” (quoting child psychiatrist Dr. Amy Cohen)); Allison Abrams, LCSW-R, *Damage of Separating Families: The Psychological Effects on Children*, PSYCHOL. TODAY (June 22, 2018), <http://tinyurl.com/y844pqsk> (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.”); *id.* (Children who are separated from a parent “develop insecure/disorganized attachment and persisting high levels of stress.”) (quotations omitted).

¹² Abrams, *supra* note 11; *see also* Sarah Reinstein, *Family Separations and the Intergenerational Transmission of Trauma*, CLINICAL PSYCHIATRY NEWS (July 9, 2018), <https://tinyurl.com/y3h7asck> (“[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.”); *Oversight & Investigations Hearing, supra* note 9 (testimony of Cristina Muñiz de la Peña, Ph.D, Terra Firma Mental Health Director, Center for Child Health and Resiliency, on behalf of the American Psychological Association, at 4) (“Sudden and unexpected family separation is also associated with stress and emotional trauma for children, housing instability, food insecurity, interrupted schooling, and behavioral/emotional responses such as fear, anxiety, aggression and changes to sleep and appetite. Parental separation can have a long-term negative impact on children into adulthood.”).

¹³ Moreover, here, the harm caused by the forced separation of the children from their parents was compounded by the harm caused by the resultant detention of the children. *See, e.g.,* Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS e20170483 (2017), <https://tinyurl.com/yc3sco99> (AAP Policy Statement noting that studies of detained unaccompanied minors in the United States found “high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems” and that the AAP has found “no evidence indicating that *any* time in detention is safe for children” (emphasis added)).

¹⁴ U.S. IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (2016) (emphasis added), <https://tinyurl.com/y5o9d2wc>.

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- In February 2017, having noticed a marked uptick in young children separated from parents at the border, a high-ranking HHS official expressed his concerns about the harms of family separation directly to then-ORR director Scott Lloyd and other top officials.¹⁵ This same official has testified before Congress that because “[s]eparating children poses significant risk of traumatic psychological injury to the child,’ . . . neither he nor anyone he worked with ‘would ever have supported such a policy.’”¹⁶
- In March 2017, when senior officials at DHS told the press that the agency was considering a deterrence policy of separating migrant parents and children at the border,¹⁷ the announcement was met with an immediate wave of warnings from the medical community. The AAP, among others, warned that such a policy would affect “vulnerable, scared children” and urged policymakers to “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.”¹⁸

When confronted by public backlash to the then-proposed family separation policy, DHS Secretary John Kelly, who had initially confirmed DHS’s plans to pursue family separation, changed course, assuring the Senate Committee on Homeland Security and Governmental Affairs in April 2017 that children would be separated from their mothers only “if the child’s life is in danger” or if the mother was addicted to drugs,¹⁹ rather than as a matter of due course for families arriving at or crossing the border.

Given the Administration’s own internal comments and the government’s response to the many public warnings opposing a family separation policy, there is no question that the

¹⁵ *Oversight & Investigations Hearing, supra* note 9 (testimony of Commander Jonathan White, U.S. Public Health Service Commissioned Corps, U.S. Department of Health and Human Services) *see Migrant Family Separation Policy: Hearing Before the H. Judiciary Comm.*, 116th Cong. 1:11 (2019), <https://www.c-span.org/video/?458199-1/allegations-sexual-abuse-unaccompanied-minors-raised-house-hearing>.

¹⁶ Colleen Long, *Official Who Oversaw Migrant Kids: Separation Causes Trauma*, AP NEWS (Feb. 7, 2019), <https://tinyurl.com/y59zw9xo> (quoting testimony of Commander Jonathan White, U.S. Public Health Service Commissioned Corps).

¹⁷ Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, REUTERS (Mar. 3, 2017), <http://tinyurl.com/y6qpmrpu>.

¹⁸ Fernando Stein & Karen Remley, *Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Mothers and Children at the Border* (Mar. 4, 2017), <http://tinyurl.com/jzeburx>.

¹⁹ Brooke Singman, *Kelly Says Full-scale Border Wall ‘Unlikely,’ Clarifies Position on Family Detentions*, FOX NEWS (Apr. 5, 2017), <https://tinyurl.com/y425hlq6>.

Administration was well aware of the harms family separation would cause — before it began separating families in mid-2017.

4. Knowing the Harm, the Government Forcibly Separated Families for the Purpose of Deterring Future Migrants.

Despite Secretary Kelly’s public assurance that families crossing the border would be separated only in specific circumstances for the welfare of the child, in 2017 the Administration began indiscriminately separating families who crossed the southern U.S. border. It did so knowing the separations would cause harm, and intending to leverage that harm to deter future immigrants from seeking to enter the United States.

The roots of the federal government’s practice of separating families include a family separation pilot program instituted in the U.S. Border Patrol’s El Paso sector between July and October 2017.²⁰ Under the program, the government purportedly targeted for criminal prosecution parents who unlawfully crossed the border into the United States with young children. It detained parents as criminals, and forcibly took their children away from them. Customs and Border Protection (“CBP”) placed the children in the custody of the Office of Refugee Resettlement (“ORR”) (a division of HHS), which dispersed the children into institutionalized settings and foster homes throughout the country.

The federal government’s policy and practice of separating families at the border culminated in the U.S. Attorney General’s announcement, on April 6, 2018, of a “Zero Tolerance Policy.” The Zero Tolerance Policy “fundamentally changed DHS’ approach to immigration enforcement,” which, until 2017, did not separate a child from an accompanying adult except in very limited circumstances, such as where CBP determined that the adult was not the child’s parent or guardian or the adult posed a danger to the child.²¹ Several aspects of the U.S. Government’s policy and practice of separating families in 2017 and 2018 reveal that its goal was to deter future immigrants from seeking entry to the United States by harming families through forcible separation.

²⁰ OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 3 (2019), available at <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [hereinafter HHS OIG REPORT] (“From July through November 2017, the El Paso sector of Customs and Border Protection (CBP), an agency within DHS, implemented new policies that resulted in 281 individuals in families being separated.”); see also Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran ‘Pilot Program’ for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018), <https://tinyurl.com/y7sk25mv>; Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem*, JUST SECURITY (June 22, 2018), <https://tinyurl.com/y3zpdkdl>.

²¹ See, e.g., OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 3 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [hereinafter DHS OIG REPORT].

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For example, a December 2017 internal DHS memo confirms that “prosecution of family units” and “separat[ion] [of] family units” (as well as the publicity that would accompany such actions) were viewed as differing pathways to deterring future migration.²² Despite the “official” federal government policy of “not referring for prosecutions families or individuals arriving at ports of entry or attempting to enter the country through legal means,”²³ many families lawfully crossed the border and yet were separated anyway.²⁴

Moreover, while the Zero Tolerance Policy was in effect, CBP limited the number of asylum seekers permitted to lawfully cross the border at ports of entry each day.²⁵ This drove many families who had fled their home countries in fear “to take other routes into the country, at which point they were prosecuted and had their children taken from them.”²⁶

A DHS directive, issued on June 23, 2018, suggested that once families were separated, only parents who were subject to removal would be reunited with their children, and only “for the purposes of removal.”²⁷ This directive imposed a “Hobson’s choice” on parents who had to choose between the hope of seeing their children again or continuing to seek asylum in the United States. The Administration would not allow them to do both.

²² Policy Options to Respond to Border Surge of Illegal Immigration, <https://assets.documentcloud.org/documents/5688664/Merkleydocs2.pdf>; see 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://tinyurl.com/y48npsbe>.

²³ *Myth vs. Fact: DHS Zero-Tolerance Policy*, U.S. DEP’T OF HOMELAND SEC. (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>; see also Jeff Sessions, Attorney General, U.S. Dep’t of Justice, Attorney General Sessions Addresses Recent Criticisms of Zero Tolerance By Church Leaders (June 14, 2018) (prepared remarks available at <https://www.justice.gov/opa/speech/attorney-general-sessions-addresses-recent-criticisms-zero-tolerance-church-leaders>) (“[I]f the adults go to one of our many ports of entry to claim asylum, they are not prosecuted and the family stays intact pending the legal process.”).

²⁴ See *Ms. L.*, 310 F. Supp. 3d at 1143 (“[T]he practice of family separation was occurring before the zero tolerance policy was announced, and that practice has resulted in the casual, if not deliberate, separation of families that lawfully present at the port of entry, not just those who cross into the country illegally.”).

²⁵ See DHS OIG REPORT, *supra* note 21, at 5-7.

²⁶ Evan Halper, *Federal Investigators Find Many Failures in Trump’s Family Separation Policy*, L.A. TIMES (Oct. 2, 2018), <https://tinyurl.com/y2srdo9q>; see also DHS OIG REPORT, *supra* note 21, at 5-7.

²⁷ *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification*, U.S. DEP’T OF HOMELAND SEC. (June 23, 2018), <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>.

All of this evidence shows that the government intentionally inflicted the severe harm caused by forcible separation on families, like E.S.M. and H.S.S., who crossed the U.S. border. The government did so to deter future immigrants from coming to the United States.²⁸

5. The Government's Deliberate Lack of Planning Intensified the Harms, Prolonging Separation and Delaying Reunification

The Administration then multiplied the harm it intended to cause by the shocking carelessness with which it implemented its policy and practice of separating families. Among other things, a deliberate lack of planning resulted in the Administration failing to adequately track separated families, failing to communicate with parents about their children's welfare, and failing to take care to comply with child welfare standards, all of which compounded the harms already inflicted on families who had been forcibly separated.

Failure to adequately track separations. Despite the fact that tracking whether a child had been separated from his or her parent merely required adding a checkbox to an ORR / DHS referral page,²⁹ these two agencies primarily responsible for implementing the policy instituted no "consistent way to indicate in their data systems children and parents separated at the border" until at least the summer of 2018.³⁰ The most staggering result of this failure was that the Administration had no ready records of where thousands of parents' children were located, and could not promptly reunite parents and children,³¹ even when ordered to do so by a U.S. District Court.³² The Administration's failure to track separated children meant that, immediately after being separated from their parents, many children were held in CBP short-term detention

²⁸ Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://tinyurl.com/y5kcxv18>; Rafael Bernal, *HHS Official Says Family Separation Policy Will Have 'Deterrence Effect'*, THE HILL (June 19, 2018), <https://tinyurl.com/y69w9b3r>.

²⁹ *Oversight of the Trump Administration's Family Separation Policy: Hearing Before the H. Comm. on the Judiciary* (Feb. 26, 2019) (statement of Scott Lloyd, Senior Advisor, Center for Faith and Opportunity Initiatives, U.S. Department of Health and Human Services, at 4), <https://docs.house.gov/meetings/JU/JU00/20190226/108872/HHRG-116-JU00-Wstate-LloydS-20190226.pdf>.

³⁰ GOV'T ACCOUNTABILITY OFFICE, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO IDENTIFY AND REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER, *Highlights*; see also *id.* at 16-18.

³¹ DHS OIG REPORT, *supra* note 21, at 9-11; see Kevin Sieff, *The Chaotic Effort to Reunite Immigrant Parents with their Separated Kids*, WASH. POST (June 21, 2018), <https://tinyurl.com/y4wpora7>; Miriam Jordan, *Torn Apart by Zero Tolerance, Kept Apart by Red Tape*, N.Y. TIMES (June 24, 2018), <https://tinyurl.com/y9t2mnyt>.

³² See Halper, *supra* note 26. These circumstances led the court to conclude that the "unfortunate reality" of the family separation policy was that "migrant children [were] not accounted for with the same efficiency and accuracy as property." *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original).

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facilities for longer than the 72-hour period permissible under federal law,³³ in some cases for as long as 25 days,³⁴ before being transferred to ORR custody.

Failure to communicate with parents about children's whereabouts and safety. After separation, parents and children often did not know each other's whereabouts for weeks or months. When the children were taken, "officers often failed to fully explain to parents what was happening and how the adults could get in touch with their kids."³⁵ The government failed to provide parents with any "paperwork" documenting the location or well-being of their children, or to enable communication between parents and their separated children.³⁶ One Texas federal district court observed that "[t]he practical effect" of these failures was "to create a 'blackout' period where parent and child are wholly incommunicado from each other."³⁷ And even if parents found out where their children were and a correct phone number for that location, phone calls were logistically difficult and expensive to make, severely limiting the few precious minutes that parents and children could hear each other's voices.³⁸ The anguish of not knowing for an extended period of time where their family members were or how they were doing, and then not being able to spend meaningful time talking once they made contact, further exacerbated the anguish and harm parents and children suffered from being torn apart.

Child welfare standards ignored in the rush to expand detention capacity. ORR was completely unprepared and unable to properly care for the thousands of vulnerable children referred to its custody by DHS. The shortcuts approved by high-level government officials and implemented by rank-and-file agents and contractors to try to deal with the influx of children led to a shocking series of abuses of children. For example, the rush to set up make-shift facilities resulted in one facility hiring over one thousand staff members without conducting FBI background fingerprint checks and having a "dangerously low number of clinicians serving children" at that facility.³⁹ A spokeswoman for the HHS's Inspector General's Office stated that

³³ Trafficking Victims Protection Reauthorization Act, 8 U.S.C.A. § 1232(b)(3); see SARAH HERMAN PECK & BEN HARRINGTON, CONGRESSIONAL RESEARCH SERVICE, THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS, at 5 (Sep. 17, 2018), <https://fas.org/sgp/crs/homsec/R45297.pdf>.

³⁴ DHS OIG REPORT, *supra* note 21, at 8.

³⁵ Halper, *supra* note 26.

³⁶ See *United States v. Dominguez-Portillo*, No. EP-17-MJ-4409-MAT, 2018 WL 315759, at *1-*2, *9 (W.D. Tex. Jan. 5, 2018).

³⁷ *Id.* at *9.

³⁸ See Halper, *supra* note 26; Jordan, *supra* note 32; Jack Herrera, *A New Report Reveals How Family Separation Led Border Officials to Break the Law*, PACIFIC STANDARD (Oct. 4, 2018), <https://tinyurl.com/y7x44kz6>.

³⁹ Daniella Silva, *Trump Administration Waived Strict Background Checks for Staff at Migrant Child Detention Camp*, NBC NEWS (Nov. 27, 2018), <http://tinyurl.com/y4asqmw7>.

these deficiencies posed “serious safety and health vulnerabilities.”⁴⁰ At one detention center, a staff member was drunk while he was involved with care for separated children.⁴¹ The Justice Department has received reports of unwanted sexual touching, staff members having sexual relationships with children detainees, and staff members showing children pornographic videos.⁴² In addition to the pervasive sexual abuse of detained children, there are reports of widespread denial of medical care, including for a burn injury, a broken wrist, and a sexually transmitted disease.⁴³ In another reported case, staff gave a child medicine to which she was allergic despite warnings on the child’s medical bracelet.⁴⁴

The Administration’s express intent to inflict the trauma of family separation as a deterrent — followed by its failures to track children, tell their parents anything about their whereabouts and well-being, and provide them with safe and appropriate care — evidence at best a callous disregard for the anguish of separated parents and children, and at worst an intent to increase their suffering to maximize the deterrent effect of the family separation policy.

10. State the Nature and Extent of Each Injury or Cause of Death, Which Forms the Basis of the Claim. If Other Than Claimant, State the Name of the Injured Person or Decedent.

The federal government deliberately violated E.S.M.’s and H.S.S.’s constitutional rights, including their right to family integrity, and failed in its basic duties not to harm those in its custody. The government’s actions and failures were designed to and did cause E.S.M. and H.S.S. severe trauma and emotional distress.⁴⁵

The government knew that forcibly taking H.S.S. from E.S.M. would fill them with terror, desperation, and anguish. It purposefully inflicted that trauma on E.S.M. and H.S.S. to instill fear in others. It then compounded that trauma by, among other things, keeping E.S.M. and H.S.S. apart for a total of approximately 60 days, without telling them anything about the other’s

⁴⁰ *Id.*

⁴¹ Aura Bogado et al., *Separated Migrant Children Are Headed Toward Shelters that Have a History of Abuse and Neglect*, TEX. TRIB. (June 20, 2018), <https://tinyurl.com/ydyl6wvb>.

⁴² *Id.* From 2014 to 2018, HHS received more than 4,500 complaints of sexual abuse against unaccompanied minors, often involving staff. Sophie Tatum, *HHS Docs Show Thousands of Alleged Incidents of Sexual Abuse Against Unaccompanied Minors in Custody*, CNN (Feb. 26, 2019), <https://tinyurl.com/y65zrqql>.

⁴³ Bogado et al., *supra* note 42; *see also* Shefali Luthra & Marisa Taylor, *Immigrant Families Placed in Detention Centers Face Health Care Challenges*, WASH. POST (July 2, 2018), <http://tinyurl.com/y5ezbqk3>.

⁴⁴ Bogado et al., *supra* note 42.

⁴⁵ Among other causes of action, the facts related herein support claims for infliction of emotional distress (whether intentional or negligent), interference with the parent-child relationship, fraud, negligence, battery and/or assault, false imprisonment, and violations of the Fourth and Fifth Amendments to the United States Constitution.

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whereabouts or well-being, without allowing them even to speak to one another for approximately 14 days, and without any plan for reuniting them. As a result of the government's actions and failures, both E.S.M. and H.S.S. continue to suffer from the effects of the separation.

E.S.M. and H.S.S. will carry the harm done to them for the rest of their lives. The government's conduct here is unconscionable, and it cannot be excused in a civilized society.

11. Witnesses

[REDACTED]

13b. Phone Number of Person Signing the Form

Matthew Schlesinger, Covington & Burling LLP, (202) 662-5581.

Michelle Lapointe, Southern Poverty Law Center, (404) 521-6700.