

# COVINGTON

BEIJING BRUSSELS DUBAI JOHANNESBURG  
LONDON LOS ANGELES NEW YORK SAN FRANCISCO  
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
T +1 202 662 6000

## FOIA EXEMPT

### By Fedex Overnight Delivery

April 4, 2019

Attorney General  
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 8). 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 and address.

## COVINGTON

Such information is exempt from the public access provisions of the Freedom of Information Act, 5 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 and address, 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,



Matthew J. Schlesinger  
Jason A. Carey  
Swati R. Prakash  
Bethany Theriot  
Jessica R. Hanson  
Covington & Burling LLP  
One CityCenter  
850 10th Street NW  
Washington, DC 20001  
(202) 662-6000  
MSchlesinger@cov.com  
JCarey@cov.com

Michelle Lapointe  
Laura Rivera  
Southern Poverty Law Center  
P.O. Box 1287  
Decatur, GA 30031-1287  
(404) 521-6700  
Michelle.Lapointe@splcenter.org

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

**ATTACHMENT A**

**1. Submit to Appropriate Federal Agency**

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

Office of the General Counsel  
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Tucson Field Office  
4760 N. Oracle Road  
Suite 316  
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**

A.P.F. and his son, O.P.D., then seven years old, were forcibly separated by agents of the U.S. Department of Homeland Security ("DHS") sometime between May 15 and May 21, 2018. O.P.D. was put into the custody of the U.S. Department of Health and Human Services ("HHS"), Office for Refugee Resettlement ("ORR"), while A.P.F. remained in DHS custody. A.P.F. and O.P.D. were not reunited until Wednesday, July 25, 2018.

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

A.P.F. believes that he and his son were separated in the morning.

## **8. Basis of Claims**

### **A. The Government Forcibly Separated A.P.F. from O.P.D.**

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 were fleeing persecution in their home countries, only to encounter it in the very place they sought refuge. After being separated, children and their parents often could not communicate in any way for weeks or months. Parents did not know whether their children were safe—or even where their children were—and had no way to comfort or protect them. Children could not understand what had happened to them. Why had their mothers and fathers allowed them to be taken away? Why had their parents abandoned them to strangers? 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 inflicted on these families would deter other families from migrating to the United States.

A.P.F. and his then seven-year-old son, O.P.D., are among the families torn apart by the U.S. government. A.P.F. and O.P.D. suffered physical, mental, and emotional harm because of the unconstitutional, intentional, reckless, and negligent acts of U.S. government policymakers at the highest levels, whose goal was to cause harm and instill fear and terror. A.P.F. and O.P.D. suffered still greater harm because of the unconstitutional, intentional, reckless, and negligent acts and omissions of federal actors who used unnecessary and unreasonable force and cruelty to separate A.P.F. from his son, and failed to exercise the basic care and decency that are hallmarks of a civilized society.

A.P.F. and O.P.D. will carry the trauma of forcible separation with them for the rest of their lives. They seek redress from the government for the harm the government has caused them.

#### **1. A.P.F. and O.P.D. Seek Asylum in the U.S.**

A.P.F. and his son O.P.D., then seven years old, reached Arizona sometime around May 15, 2018. A.P.F. and O.P.D. came to the United States fleeing persecution in Guatemala and to seek medical care for O.P.D.'s heart and chest conditions. A.P.F. and O.P.D. are of the indigenous Q'anjob'al tribe. Their family had faced persecution, including having their house in the remote mountains of Guatemala burned down in an attempt to kill their family, because of their indigenous background and A.P.F.'s environmental advocacy efforts.

When O.P.D. was six years old, his family learned that he would only survive for one year unless he had a major heart surgery. The surgery, which would have to be performed in Guatemala City, was hundreds of miles and two days of bus rides away from where O.P.D.'s family lived, and would cost Q125,000 Guatemalan Quetzales. This was too much for O.P.D.'s family to afford; as the sole breadwinner A.P.F. only earned approximately Q8,400 per year,

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making the cost of the surgery nearly 15 times his annual income. A.P.F. tried for months to raise money by taking out loans from friends and a bank, but was still over Q70,000 short. To the family's relief, an organization called UNICAR raised and donated the remainder of the money, and O.P.D. and A.P.F. made the long journey to Guatemala City in February 2018 for O.P.D. to have surgery, two months after O.P.D.'s seventh birthday.

Surgeons cut through O.P.D.'s back to place a permanent metal clip in one of his heart valves. The surgery went as expected, but the surgeons told A.P.F. that he would need to ensure that O.P.D. had regular check-ups with a cardiologist to ensure his survival—something A.P.F. knew was nearly impossible given their income and the lack of access to cardiologists in Guatemala. A.P.F. knew that if there was an emergency, for example, O.P.D. could die. Given O.P.D.'s need for access to cardiologists and the persecution the family was facing, A.P.F. made the difficult decision to flee to the United States.

The two-week journey from Guatemala to northern Mexico taxed O.P.D.'s body. After the surgery, O.P.D. had developed a chest condition. His lungs and throat would sometimes become blocked by thick mucus. Coughing caused O.P.D. pain because of his wounds from the surgery, so when this happened he would choke, wheeze, and complain that he could not breathe. After the surgery, O.P.D.'s surgeon told A.P.F. that O.P.D. could choke on his mucus and instructed A.P.F. on the Heimlich maneuver should that happen. Sometimes, O.P.D. coughed in an effort to clear his congestion, but he was too weak to do so. At those times, A.P.F. felt afraid that O.P.D. could choke to death on the phlegm obstructing his airway. On the journey from Guatemala to Mexico, A.P.F. realized that O.P.D.'s condition became worse when he was cold, so A.P.F. tried to keep O.P.D. warm, covering him with his sweater and a small blanket, and holding him close.

A.P.F. reached and crossed the U.S.-Mexico border. He saw a light in the distance and, thinking it was a Border Patrol station, walked toward it for hours along the U.S. side of the border fence. He was carrying his exhausted son, but it became too cold to continue. O.P.D. was wheezing and choking. Around 2 a.m., A.P.F. stopped and built a small camp fire, both to warm up O.P.D. but also in the hopes that Border Patrol would find him so he could ask for asylum.

## 2. A.P.F. and O.P.D. Are Taken Into Custody by CBP.

Not long after A.P.F. started the fire, a single Border Patrol agent found them. A.P.F. felt relieved at first, but was soon terrified. A.P.F. and O.P.D. were not used to being around tall people. Whereas A.P.F. is 5 feet 3 inches tall, the agent was much taller, had a gun in a holster on his hip, and appeared enraged. He appeared light-skinned, and he spoke some Spanish. He screamed obscenities at A.P.F. and O.P.D., calling them *pendejos*, *jodidos animales*, which translates to “stupid fucking animals.”<sup>1</sup>

The agent demanded over and over that A.P.F. explain “why you came to my country.” The agent kept his hand on his gun while screaming at them. A.P.F. kept his head down, held O.P.D. close, and did not speak because he was terrified of being shot. Eventually A.P.F. did try

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<sup>1</sup> This exchange, and any other exchange described herein unless otherwise noted, took place in Spanish.

Claimant: A.P.F., on behalf of himself and his minor son, O.P.D.

to tell the agent he was fleeing his home country and that his son had a severe medical condition. Though the agent spoke Spanish, the agent did not acknowledge anything that A.P.F. said.

The agent put A.P.F. and O.P.D. in the back of a covered pickup truck with the air conditioning on. They both felt chilled. A.P.F. held O.P.D. close to him to try to warm him, but they could not get warm. They were in the truck for about three hours before they arrived at a station.

At the station, several Border Patrol agents worked in a single office. After the agent that had transported A.P.F. and O.P.D. to the station left, the agents in the office made A.P.F. and O.P.D. sit on the floor. There were several other parents and children. With urgency in his voice, A.P.F. asked for help for O.P.D., but the agents told him he was not allowed to talk or ask questions. He tried to stand up but was ordered to sit back down and stay still. A.P.F. and O.P.D. waited like this for a long time. During this time, CBP agents took away A.P.F. and O.P.D.'s belongings, clothes, and shoes, and made them change into a thin inmate jersey and thin pants. A.P.F. kept O.P.D.'s sweater tucked under his arm because he knew O.P.D. would need it.

Afterward, a different officer sat A.P.F. and O.P.D. down at his desk to ask A.P.F. questions. This agent also spoke Spanish proficiently. A.P.F. gave the agent paperwork verifying his identity and relationship to his son, as well as evidence of O.P.D.'s medical condition, but the agent would not listen to his pleas for medical care for O.P.D. The agent aggressively asked A.P.F. "what you came to do in this country." A.P.F. told him they were seeking asylum. He also told the agent, "my son had a heart surgery a few months ago, is very sick, and can barely breathe."

The agent told A.P.F. that he "did not care," and that he and O.P.D. should not have come to "my country" because "you do not belong here." Desperate, A.P.F. tried to show the agent the scars on O.P.D.'s back and insisted that O.P.D. needed medical help, but the agent would not listen, or even look at him. A.P.F. began to cry. Seeing his father cry, O.P.D. started crying too. The agent continued to ignore both of them and would only stare at his computer.

About an hour later, the agent put A.P.F. and O.P.D. into a small cell with more than 20 other parents and children inside. A.P.F. again asked for medical attention for O.P.D., but the agent ignored him, put them in the cell, and left.

The cell had concrete floors and one bench along the wall that was also concrete. Cold air blasted from vents in the ceiling. It was so cold in the cell that A.P.F. and others called it the "*hielera*," meaning "icebox." There was no space to lay down, so A.P.F. sat with O.P.D. in his lap and put his sweater on. They were both freezing. After a few hours, O.P.D. complained of pain in his heart and chest. A.P.F. stood and went to the door of the cell to seek attention. When an agent walked by, A.P.F. knocked on the door and asked for help.

The agent opened the door and A.P.F. again explained that his son had a heart and chest condition and needed medical attention. But instead of acknowledging his plea, the agent made A.P.F. give him the sweater O.P.D. was wearing, because he was not allowed to have it.

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Over many hours, A.P.F. asked several more times for medical attention for O.P.D., to no avail. The agents ignored his pleas, and their only reaction was to point aggressively to tell him to go sit down away from the door. The agents even began threatening to not give A.P.F. his “next Maruchan” if A.P.F. kept trying to talk to them. The food that the agents gave the men and children in the cell, once every twelve hours, was a single Maruchan Ramen soup for adults, and one cookie and small juice box for each child. This was not enough food, and A.P.F. and O.P.D. remained hungry after eating it. Because he and O.P.D. were so hungry and the food they got was not enough as it was, A.P.F. stopped asking for medical help as frequently. He feared losing what little food they were given.

A.P.F. and O.P.D. spent more time in the cell, crammed in with many other people, freezing, hungry, and exhausted. There were several kids who appeared sick and were consistently coughing, and A.P.F. worried that the children were contagious and spreading germs in the small space. The parents struggled to find places to sit down with their kids because the *hielera* was so full. There was no space to sleep, and barely any to sit down. It was difficult to tell how many days passed, because there were no windows to the outdoors, and the lights were kept on day and night.

At all hours of the day and night, A.P.F. and O.P.D. were freezing. They had no blankets. Some of the other families had thin sheets of foil to use as blankets, but A.P.F. and O.P.D. were not provided one. After over a day in the cell, A.P.F. found a small piece of a foil sheet that another family had left, and he tried to cover O.P.D. with it. But pieces of the sheet disintegrated and fell off when O.P.D. shifted his body, and the pieces of foil got into O.P.D.’s mouth and eyes, exacerbating his condition.

O.P.D.’s health got progressively worse. O.P.D. cried consistently because he was cold, because he was hungry, because he was in pain, and because he was afraid. A.P.F. told O.P.D. stories about dragons to try and distract him. If A.P.F. expressed any fear or discomfort, O.P.D. became inconsolable. And so A.P.F., despite his own feelings of fear, hunger, cold, and exhaustion, tried to appear calm to keep his son calm.

After at least two days in the freezing cell, O.P.D. started having a greenish hue to his skin. Despite the agents’ threats to withhold food, A.P.F. again asked for medical attention, and was ignored. It was not until O.P.D. began severely choking, and A.P.F. gave him the Heimlich maneuver, dislodging a mass of mucus that had been blocking his airway, that agents took them out of the cell and brought them to a hospital. The doctor who saw O.P.D. did not speak Spanish, so A.P.F. did not understand much of what happened. He later learned that O.P.D. was diagnosed with an acute respiratory infection.

After the hospital, A.P.F. and O.P.D. were placed back in the same freezing cell, despite A.P.F.’s attempts to explain that the cold made O.P.D. worse.

3. The U.S. Government Takes O.P.D. from A.P.F.

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On what A.P.F. thinks was their third day in the cell, A.P.F. and O.P.D. witnessed a horrifying scene. An agent much taller and larger than anyone in the cell, with a gun in his holster, called a father and son to the door of the cell and told the father to give up his son. When the father refused, the agent grabbed the man by his neck and shoved him back into the cell, forcibly grabbing and taking his son, who was even younger than O.P.D. The child was led away desperately crying and screaming, "Daddy, I do not want him to take me!"

Seeing this, O.P.D. started screaming and crying. Other children in the cell also began to scream and cry in fear. Panicked, O.P.D. asked A.P.F., "Are they going to do that to us?" A.P.F. tried to calm his son and said no, but O.P.D. wailed louder, "Do not lie to me, they are going to take me!" He clung to A.P.F.'s neck, crying uncontrollably.

A.P.F. and O.P.D. then witnessed other children being taken by force from their parents, and A.P.F. became terrified that if O.P.D. was taken by force, he could be hurt because of his heart surgery wounds. A.P.F. decided to explain this to O.P.D. and coached him not to struggle and to go willingly so that he would not be hurt by the agents. O.P.D. did not understand, did not accept what was happening, and refused to agree to be taken willingly. Despite feeling a sense of dread and horror he had never before experienced, A.P.F. tried to be calm and told O.P.D. that everything was going to be okay.

When the moment came, A.P.F. had O.P.D. in his arms. Three tall agents armed with guns came into the cell and told A.P.F. to come to the door and put his son down. A.P.F. first asked to speak with an officer about O.P.D.'s medical condition. The agent said no. A.P.F. then asked for 30 extra seconds to hug his son, but the officer demanded that A.P.F. put O.P.D. down. O.P.D. did not want to be put down and he clutched his father tightly, and A.P.F. did not want to put him down either. They both trembled with fear and clutched each other. The agents yelled threateningly that A.P.F. needed to obey and put O.P.D. down. More agents approached, and they forcibly wrenched O.P.D. out of A.P.F.'s arms. A.P.F. and O.P.D. kept holding hands. The agents ripped their hands apart and took O.P.D. away. O.P.D. looked back at A.P.F., screaming, almost fainting, as he was being taken away. A.P.F. saw an incredible fear on his son's face that he will never forget, and he knows that his son saw that same fear on A.P.F.'s face. His son screamed and cried, "Daddy, why are you letting them take me?"

A.P.F. tried to follow the agents out of the cell to comfort O.P.D., but the agents forced him to stay in the cell and closed the door after they left. A.P.F. yelled and cried for his son but the agents ignored him. A.P.F. felt "totally destroyed" in that moment.

4. A.P.F. and O.P.D. Are Lost to Each Other for More than 50 Days.

After taking away his child, agents took A.P.F. out of the cell he was in and led him to a different room. This room had approximately 70 adults in it. It was so crowded that A.P.F. felt he could not breathe. There was no place to use the bathroom and the room stunk of urine and bodies. The smell was nauseating. There was no fresh air. There was no space to lie down or even to sit and rest. People fainted every so often and an agent would come and take them away.

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A.P.F. was kept in this room for approximately 10 days. He stood in a corner for most of this time. He continued to receive just one Maruchan Ramen every twelve hours, and he felt constant hunger. But A.P.F.'s extreme physical discomfort paled next to the terror of losing his young son, who had been frail and sick when he was taken away. A.P.F. could not calm down. He thought his son had been taken away from him permanently, and he was terrified that the officers who took him did not know of or did not care about O.P.D.'s medical conditions and needs. If his son started choking, who would help him? Would he be able to see a cardiologist? He felt as if his son had been killed and he would never see him again. A.P.F. had suicidal thoughts during this time.

The agents provided no explanation for why they had taken O.P.D. away or what would happen to O.P.D. Not knowing where his son was and how his son was doing—not knowing whether he was safe, or even alive—tortured A.P.F. Over the next nearly three months, A.P.F. would never get any explanation at any point from any government agent.

About ten days after taking O.P.D. away, agents put chains on A.P.F.'s wrists, waist, and ankles, and boarded him on a bus, and then a plane, relocating him to a different detention center. A.P.F. would be transferred like this multiple times over the next months, with no explanation or notice as to where he was going or why. At each new detention facility, A.P.F. was held in a *hielera* for many hours before being transferred to a different cell. At each new detention center, A.P.F. tried to ask about O.P.D., but was either ignored or told he did not have the right to speak to the agents.

From other parents who had their kids taken, A.P.F. found out about a phone number to call to try and speak with O.P.D., and he tried calling it collect almost daily. But the calls did not go through. During all of this time, A.P.F.'s pain, hunger, and discomfort remained in the background. His fear for O.P.D.'s safety and well-being dominated his mind.

A.P.F. asked whenever he could for information about his son, but the ICE agents in the detention facilities just ignored him. For example, about one month after O.P.D. was taken, A.P.F. begged one officer to be put in touch with his son, and told the officer that his son was very sick. The officer responded, "We know nothing about your case, much less your family." Later, other officers told A.P.F. and other fathers that the government had taken away their kids for good, and that they would be deported without their children. Being told that he had lost his son forever caused A.P.F. terror and anguish that cannot be put into words. A.P.F. again had suicidal thoughts.

All around A.P.F., other parents suffered as A.P.F. did, and many eventually "drove themselves mad with sadness, regret, and fear." There was a desperation that permeated the detainees, and A.P.F. succumbed to constant agony and "feeling dead." He lost hope of ever being with his son again.

Approximately a month and a half after O.P.D. was taken, A.P.F. and several other detainees were brought to a large room to "sign some papers." The ICE agents in the room gave the detainees papers in English and refused to explain what they meant. A.P.F. walked up to an ICE officer to ask what happened to his son and what the paper was. The ICE officer yelled at

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A.P.F. for asking questions, refused to answer, and told him to go sit down in a way that made A.P.F. feel demoralized. A.P.F. did not say another word. ICE told the detainees that if they did not sign these forms, there would be “problems with ICE,” so A.P.F. felt obligated to sign and did so. Approximately two weeks later, ICE agents brought A.P.F. another paper, this time with a Spanish translation, that included the option of being deported with O.P.D. or relinquishing his son and being deported alone. A.P.F. recalls signing “that he wanted to be with his son.”

5. After About 50 Days Apart, A.P.F. and O.P.D. Are Finally Allowed to Speak — Once.

About fifty days after the government took O.P.D., some advocates visited the detention center where A.P.F. was held. He was able to meet with them and explain that his son had been taken away, that his son was sick, and that he desperately wanted to find out about his son and talk with him. The advocates talked to ICE, and later ICE let A.P.F. call O.P.D. On July 7, 2018, A.P.F. and several other detainees were put in a line and given approximately 10 minutes each to use a cell phone to talk to their children, in front of everyone else in the room. While they were waiting in line, one of the fathers did not stand in line correctly and an ICE officer yelled at him menacingly and threatened to hurt him. A.P.F. felt threatened and afraid.

Eventually it was A.P.F.’s turn to use the cell phone. When O.P.D. answered the phone, all A.P.F. could do was cry. He had no words. He says of that moment, “My life returned to me when I heard his voice.”

A.P.F. and O.P.D. cried together on the phone, neither able to speak at first. But then, knowing their time was limited, they tried to quickly catch up. O.P.D. told A.P.F. that he had been able to talk on the phone with his mother in Guatemala. He told A.P.F. that he went on a train and had gotten lost on the train, and that he went on a plane. A.P.F. asked him how his health was. He told his father he wasn’t feeling well and that his heart hurt, and that he felt pain at night. But then their time was up. A.P.F. had to say goodbye. He told O.P.D. to be strong, to take care of himself, and that they would see each other soon. After speaking with his son, A.P.F. became even more worried about O.P.D.’s health.

This was the only time, in approximately 70 days of detention, that the government allowed father and son to talk with each other.

6. A.P.F. Learns that O.P.D. was Sexually Abused While in the Custody of the U.S. Government.

Advocates who visited the Folkston, Georgia ICE detention center helped A.P.F. get in touch with his wife in Guatemala and his brother in California. A.P.F. had no money to be able to place calls, but his wife and brother set up accounts so that they could receive collect calls from A.P.F. Although A.P.F. asked, he was unable to place any calls to his son because he could not pay for them. For the same reason, A.P.F. was unable to make calls to his attorneys.

Thereafter, A.P.F. spoke with his wife, who had been able to speak with O.P.D. on the phone and told A.P.F. that O.P.D. was in a foster home in New York. A.P.F. learned something

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from her that broke him all over again: after O.P.D. had been taken away from A.P.F., O.P.D. had been sexually abused in the foster home.

When A.P.F. learned this from his wife in Guatemala, he felt hysterical and powerless. His mind raced with questions: “Why couldn’t the government protect my son? Why couldn’t the government tell me what was going on and help? The laws of the United States were supposed to protect us, but why did everything turn out the reverse?” A.P.F. went into a spiral of negative thinking. He had self-destructive thoughts. He felt terrorized by the guilt and pain of knowing that his son had been victimized in this way without his father to protect or comfort him. He felt like a bad father for not having the strength to protect O.P.D. in the moment they were separated or the foresight to know something terrible like this would happen.

After learning from his wife in Guatemala about his son’s sexual abuse, A.P.F. increased his efforts to ask ICE for information about his son, but to no avail. No officers paid attention to A.P.F.’s requests for information or to call his son. A.P.F. felt utterly helpless and distraught.

Sometime in early July, A.P.F. and other detainees were in a room with a television on, and the news channel Univision reported on a policy called “Zero Tolerance.” The news anchor reported that a court had ordered the government to reunite children and parents whom it had separated. A.P.F. and other detainees crowded around the television when they heard this. As soon as the ICE officer who was supervising the room noticed what they were watching, he changed the channel. This was the first time A.P.F. learned about the policy and understood why his son had been taken from him — that it was a policy of the U.S. government to separate children from their parents.

On June 26, 2018, Judge Sabraw in the U.S. District Court for the Southern District of California issued a class-wide preliminary injunction prohibiting the government from deporting any parent who had been separated from his child at the U.S. border and detained by the Department of Homeland Security before he was reunified with his child. *Ms. L. v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133, 1146 (S.D. Cal. 2018). Judge Sabraw, finding that the government’s policy of separating families at the border likely violated the substantive due process right to family integrity, ordered the government to reunite the families like A.P.F. and O.P.D., within 30 days, or by July 26, 2018. *Id.* at 1149.

7. After Approximately 70 Days, Father and Son Are Reunited.

Several days later, in July 2018, A.P.F. and several other fathers were put in chains and transferred to a new detention center, again with no explanation. When A.P.F. arrived at Port Isabel, Texas, he did not know what would happen. Within the grounds, though, A.P.F. noticed a mother walking with a child. He felt a glimmer of hope — maybe he would be reunited with O.P.D. He tried not to feel too much hope because the agents had not told them what was going to happen, and he was scared even to hope to see his son again. As time passed, he watched as other fathers were reunited with their children and released, but he was passed over, and was given no explanation why.

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A few days later, officers returned A.P.F.'s clothes to him, brought him and about thirty other fathers to a room, and took off their chains. The fathers waited in the room. Sometime later, the door opened, and thirty children walked in one by one, disoriented, crying, and looking around frantically. It was not until this moment that A.P.F. let himself have hope that he would get his son back, and he was suddenly overcome with emotion. A.P.F. then spotted O.P.D., who was looking around the room fearfully and crying.

O.P.D. looked at A.P.F. but did not recognize him.

Crying, A.P.F. called his son's name. O.P.D. looked at him again, still unrecognizing, but walked slowly toward him. O.P.D. then jumped into his father's embrace. They both sobbed, hugging each other close, for several minutes. They were at first unable to speak because they were overcome with grief for everything that happened. A.P.F. felt a deep sorrow that his son had endured terrible suffering.

After several minutes, O.P.D. began to say over and over, "Daddy, don't let them take me away again. Daddy, we have to leave right now so they don't take us again." Clutching his son close, A.P.F. told O.P.D. that everything had only been a bad dream, and that they would not be separated again.

A.P.F. and O.P.D. were detained for two more days together before being released. During those days, O.P.D. clung to A.P.F. and reacted in panic whenever an ICE agent came near them. O.P.D. asked repeatedly when they could leave and whether the agents were going to take him away again, and A.P.F. reassured O.P.D. each time that they were not going to be separated again.

Around July 27, 2018, approximately 70 days after A.P.F. and O.P.D. were forcibly separated from each other, they were released together. The release occurred with no notice to A.P.F., A.P.F.'s and O.P.D.'s counsel, or A.P.F.'s brother in California, who was A.P.F. and O.P.D.'s sponsor. As a result, father and son had no money and nowhere to go when they were released. They had to seek refuge in a Catholic Charities shelter in Texas until A.P.F.'s brother could arrange for their travel to California.

After being reunited, A.P.F. learned bits and pieces of what his son had gone through, but he laments that he will "never know everything that happened," both because his son is too young to explain every aspect of what happened to him, and because it upsets O.P.D. to talk about the subject, so A.P.F. tries to avoid it. A.P.F. learned most of what happened to O.P.D. through paperwork from ORR, but that paperwork was often inaccurate and incomplete.

8. O.P.D. Suffered Clinical Trauma from the Separation from His Father and Sexual Abuse in Government Custody.

After he was taken from his father, O.P.D. was sent to New York and placed in an institution operated by a government contractor, Cayuga Centers. O.P.D. spent the days at the Center and spent nights at a foster home with several other children. On various occasions, at night, other children climbed into O.P.D.'s bed and touched O.P.D.'s penis, butt, and chest. This

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made O.P.D. feel extremely uncomfortable. O.P.D. told the foster adult what happened each time, and the adult told the kids to go back to their beds each time. But the sexual abuse persisted. When O.P.D. later reported the sexual abuse to a counselor, who then reported it to the foster adults and the New York Police Department (“NYPD”), the foster parent claimed to not have known.

O.P.D.’s mental health deteriorated in the face of the emotional harm the government inflicted upon him by forcibly separating him from his father and allowing him to be exposed to sexual abuse. His suffering was registered in several assessments of his mental health, even if the individuals evaluating him all but ignored the government-inflicted sources of trauma.

On June 13, 2018, ORR evaluated O.P.D. for trauma using an analytical form for children and adolescents. Fifteen points or higher on the evaluation is defined as “clinical” trauma. O.P.D. registered thirty-six points. O.P.D. indicated on the form that someone close to him had suddenly or violently passed away. The evaluation stated that O.P.D. “almost always” had nightmares and disturbing thoughts or images in his mind about “what happened.” It also stated that O.P.D. had negative thoughts about himself or others, thoughts like “I will not have a good life,” “I can’t trust anyone,” and “the world is unsafe.”

A counselor in New York also found O.P.D. was exhibiting symptoms of post-traumatic stress disorder (“PTSD”). O.P.D. told the counselor that he prayed for his father, whom he missed very much. O.P.D. described almost always feeling hyper-vigilant and nervous, and suffering from flashbacks and nightmares. He reported feelings of guilt, isolation, and disinterest. The therapist attributed the signs of PTSD to O.P.D.’s surgery. But on June 28, 2018, O.P.D. disclosed that he was being sexually abused in his foster home.

The ORR significant incident report about this stated: “[Unaccompanied children] will benefit from individual therapy as needed following reunification to address any emotional distress resulting from traumatic experiences.” Yet a PTSD questionnaire bearing the same date as O.P.D.’s report of sexual abuse ignored the forcible separation from his father, and the sexual abuse he was suffering in foster care, as potential causes of his trauma.

Instead, issue areas like negligence, sexual abuse, and family separation are marked “N/A,” with a line drawn through them. A comment by the evaluator states, “None of the above - trauma regards to operation.” Next to the question, “Has someone touched your private parts when you did not want them to?” the box that is checked is “NO.” Based on the incomplete PTSD evaluation, an ORR case manager concluded that O.P.D. did not have PTSD.

The same day O.P.D. reported the sexual abuse to the counselor, O.P.D. was placed in a new foster home, and the next day, on June 29, 2018, NYPD officers visited the new home to interview him. However, O.P.D. was asleep. The officers told the foster parent they would return at a later date to conduct the interview, and that O.P.D. was not to leave the state before then.

O.P.D. was unable to talk to his mother about his sexual abuse in U.S. custody for over two weeks, and was never able to tell his father until they were reunited. O.P.D. cried as he told

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his mother in Guatemala on a July 11, 2018 call about being touched by other children. Shortly after, O.P.D.'s mother told A.P.F.

The NYPD scheduled a date for the interview with O.P.D., July 26, 2018, and instructed that O.P.D. was not to leave the state before then. But the day before the scheduled interview, on July 25, 2018, the government transported O.P.D. to Port Isabel Detention Facility. The transfer occurred without notifying NYPD or allowing them to conduct the interview with O.P.D.

One week later, the NYPD Special Victims Unit recommended closing the investigation into the sexual abuse of O.P.D. A police report indicates "all leads [were] exhausted" because O.P.D. had left New York before the scheduled interview, and Cayuga Centers "does not have any forwarding information to contact the child or his father."

9. A.P.F. and O.P.D. Continue to Suffer After Being Reunited.

In the weeks after O.P.D. and A.P.F. were reunited, O.P.D. blamed A.P.F. for their separation, demanding to know why A.P.F. had let the officers take O.P.D. away. He asked A.P.F., "If you are my Daddy, why didn't you do anything? Why didn't you defend me?"

A.P.F. explained that it was the U.S. law to separate them, that the officers had guns, and there was nothing he could do. Eventually O.P.D. stopped asking. It caused A.P.F. deep pain that his son felt this way.

A.P.F. could not leave O.P.D.'s side without O.P.D. becoming terrified, crying, and begging his father not to leave him. O.P.D. told his father that every night he had been alone, he thought about A.P.F. and asked God to let him have his father back. O.P.D. told A.P.F. that he asked every day "where his Daddy is," and "when is he coming," but the adults just told O.P.D. he had to wait. A.P.F. asked about O.P.D.'s health while they were separated, and O.P.D. said that he felt sick all the time, and went to a doctor once.

In the months since O.P.D. and A.P.F. were reunited, A.P.F. has noticed that O.P.D. is still traumatized in many ways, and his behavior has changed. Whereas before he was a happy and adjusted child, outgoing, friendly, and trusting of adults, he is now hyper-vigilant, withdrawn, and often sad. O.P.D. has tantrums for no apparent reason and one time became aggressive with A.P.F. and tried to hit him. O.P.D. often expresses fear that A.P.F. will be taken and deported without O.P.D. O.P.D.'s emotions sometimes change quickly and without warning; he can go from being happy to deeply sad, or from being sad to angry. O.P.D. sometimes says that he feels that he has no family in the world. A.P.F. tries to explain that he has his father and mother, but O.P.D. seems to be stuck on the thought that he has no one.

O.P.D. is terrified of any adult that appears to be a law enforcement officer, including security guards, and grabs onto his father's hand in fear if he sees someone in uniform. For fear of triggering O.P.D. if they see someone in uniform, A.P.F. rarely takes him out in public except when they go to and from O.P.D.'s cardiologist appointments and O.P.D.'s elementary school, where he is in the second grade.

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O.P.D. avoids discussing what occurred during his separation from his father, including his time at Cayuga and the abuse incidents in foster care, and A.P.F. tries to only talk about happy subjects with O.P.D. to avoid upsetting him. O.P.D. still has nightmares and often wakes up crying, calling and reaching for his father. O.P.D. repeatedly tells a story of when he got lost on a train and another child found him and taught him “how to take deep breaths if you are scared.”

A.P.F. continues to suffer physical and emotional harm from the separation. He tries to forget everything that happened but he cannot. He often feels sadness and fear at random times. Sometimes A.P.F. does not want to get out of bed in the morning when he thinks of everything that happened. Since being reunified with his son, A.P.F. has experienced unrelenting, acute headaches behind his eyes and along his temples when he becomes stressed, especially when he thinks about his ever-present fear that immigration will separate him from his son again and deport him without his son. Before the separation from his son, he never had headaches as a response to stressful thoughts.

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

The Administration took 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 policy itself, and its implementation, violated the Constitution, the law, and basic human decency.

The many harms that the Administration inflicted on A.P.F. and O.P.D., 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 A.P.F. and O.P.D. and others like them for the purpose of deterring future migrants from entering the United States. The government made the harm far worse by implementing its policy with carelessness and callous disregard for the physical safety and emotional well-being of A.P.F. and O.P.D. Administration officials have yet to acknowledge or accept any responsibility for the harms they caused. For all of these reasons, A.P.F. and O.P.D. 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 A.P.F. and O.P.D., 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.”<sup>2</sup> These constitutional protections extend to citizens and non-citizens alike, even when confined by the government.<sup>3</sup>

Through its family separation policy, 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.”<sup>4</sup> “[N]othing 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.”<sup>5</sup> Both the policy itself and its callous implementation violate the Constitution, the law, and norms of human decency.

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 wellbeing, *plainly causes irreparable harm.*”<sup>6</sup> Children attach to their caregiver from the time they are born, and the children’s sense of safety “depends on that relationship.”<sup>7</sup> Disrupting that relationship causes “the parts of the brain that deal with attachment and fear” to “develop differently.”<sup>8</sup> It is not surprising, then, that “[s]eparation irreparably harms [families] every minute it persists.”<sup>9</sup>

The findings of the *Jacinto-Castanon de Nolasco* court are 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.”<sup>10</sup> For example, research into World War II separations shows

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<sup>2</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>3</sup> *Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enft*, 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.”).

<sup>4</sup> 310 F. Supp. 3d 1133, 1142.

<sup>5</sup> *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 502.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> William Wan, *What Separation from Parents Does to Children: ‘The Effect is Catastrophic’*, WASH. POST (June 18, 2018), <http://tinyurl.com/yxf6en34>.

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

<sup>9</sup> *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 503.

<sup>10</sup> *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. (2019) [hereinafter

“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.”<sup>11</sup>

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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

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

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*Oversight & Investigations Hearing*] (testimony of Jack P. Shonkoff, MD, Director, Center on the Developing Child at Harvard University) (emphasis added).

<sup>11</sup> 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/y3fkofpb>; see also, e.g., Wan, *supra* note 7 (describing the psychological and physiological responses that “wreak[] dramatic and long-term damage” on children who are forcibly separated from their parents).

<sup>12</sup> *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 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).

<sup>13</sup> Abrams, *supra* note 12; 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.”).

<sup>14</sup> 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, Marsha Griffin, Alan J. Shapiro & Council on Community Pediatrics, *Detention of Immigrant Children*, 139 PEDIATRICS 6 (Mar. 13, 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)).

Moreover, the federal government *knew* of the harm caused by separating children from their parents long before it instituted the family separation policy to which A.P.F. and O.P.D. were subjected. 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."<sup>15</sup>
- 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.<sup>16</sup> 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.'"<sup>17</sup>
- 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,<sup>18</sup> 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."<sup>19</sup>

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 parents only "if the child's life

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<sup>15</sup> U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., REP. OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (2016) (emphasis added), *available at* <https://tinyurl.com/y5o9d2wc>.

<sup>16</sup> *Oversight & Investigations Hearing*, *supra* note 10 (testimony of Commander Jonathan White, U.S. Public Health Service Commissioned Corps, U.S. Department of Health and Human Services).

<sup>17</sup> 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).

<sup>18</sup> Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, REUTERS (Mar. 3, 2017), <http://tinyurl.com/y6qpmrpu>.

<sup>19</sup> 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>.

is in danger” or if the parent was “an addict,”<sup>20</sup> 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 Administration was well aware of the harms family separation would cause — before it implemented its family separation policy.

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, the Administration instituted a general policy of separating all 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 family separation policy began as a pilot program of family separation in the U.S. Border Patrol’s El Paso sector between July and October 2017.<sup>21</sup> Under the program, the government targeted parents who unlawfully crossed the border into the United States with young children for criminal prosecution. It detained parents as criminals, and forcibly took their children away from them. 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.

About six months later, on April 6, 2018, the U.S. Attorney General announced a “Zero Tolerance Policy,” extending the practices of criminal prosecution and family separation tested in the El Paso pilot program to the entirety of the southern border. 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.<sup>22</sup>

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<sup>20</sup> Brooke Singman, *Kelly Says Full-scale Border Wall ‘Unlikely,’ Clarifies Position on Family Detentions*, FOX NEWS (Apr. 5, 2017), <https://tinyurl.com/y425hlq6>.

<sup>21</sup> 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 Rapple, *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>.

<sup>22</sup> 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 at 2 (2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [hereinafter DHS OIG REPORT].

Several aspects of the Zero Tolerance Policy reveal that its goal was to harm families through forcible separation in an effort to deter future immigrants from seeking entry to the United States.

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.<sup>23</sup> 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,”<sup>24</sup> many families lawfully crossed the border and yet were separated anyway.<sup>25</sup>

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.<sup>26</sup> 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.”<sup>27</sup>

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.”<sup>28</sup> This directive imposed a “Hobson’s choice” on parents: They had to choose between seeing their children again or continuing to seek asylum in the United States. The Administration would not allow them to do both.

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<sup>23</sup> 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>.

<sup>24</sup> *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.”).

<sup>25</sup> 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.”).

<sup>26</sup> See DHS OIG REPORT, *supra* note 22, at 5-7.

<sup>27</sup> 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 22, at 5-7.

<sup>28</sup> *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 these circumstances show that the government intentionally inflicted the severe harm caused by forcible separation on families, like A.P.F. and O.P.D., who crossed the U.S. border. The government did so to deter future immigrants from coming to the United States.<sup>29</sup>

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. The Attorney General announced the Zero Tolerance Policy without any prior notice to DHS and HHS (including ORR) officials,<sup>30</sup> purposely giving those agencies no time to plan for or coordinate implementation.<sup>31</sup> Among other things, this 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 basic 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,<sup>32</sup> 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.<sup>33</sup> 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,<sup>34</sup> even when ordered to do so by a U.S. District

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<sup>29</sup> 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/y5kcxvl8>; Rafael Bernal, *HHS Official Says Family Separation Policy Will Have 'Deterrence Effect'*, THE HILL (June 19, 2018), <https://tinyurl.com/y69w9b3r>.

<sup>30</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 12 (2018), available at <https://www.gao.gov/products/GAO-19-163> [hereinafter GAO REPORT] ("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."). Indeed, at least one high-ranking HHS official learned of the policy over television. *Oversight & Investigations Hearing, supra* note 10 (testimony of Commander Jonathan White, U.S. Public Health Service Commissioned Corps, U.S. Department of Health and Human Services).

<sup>31</sup> A high-ranking HHS official testified before Congress that ORR considered planning for the increase but was specifically told not to. *Id.*; see also GAO REPORT, *supra* note 30, at 14 ("DHS officials told [HHS leadership] that DHS did not have an official policy of separating parents and children.").

<sup>32</sup> *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), available at <https://docs.house.gov/meetings/JU/JU00/20190226/108872/HHRG-116-JU00-Wstate-LloydS-20190226.pdf>.

<sup>33</sup> GAO REPORT, *supra* note 30, *Highlights*; see also *id.* at 16-19.

<sup>34</sup> DHS OIG REPORT, *supra* note 22, 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>.

Court.<sup>35</sup> 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 facilities for longer than the permissible 72-hour period, in some cases for as long as 25 days,<sup>36</sup> 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, as was the case with A.P.F. and O.P.D. 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."<sup>37</sup> 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.<sup>38</sup> 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."<sup>39</sup> 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.<sup>40</sup> The anguish of not knowing for months 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 a thousand staff members without conducting FBI background fingerprint checks and having a "dangerously low number of clinicians serving children" at that facility.<sup>41</sup> A spokeswoman for the HHS's Inspector General's Office stated that these deficiencies posed "serious safety and health vulnerabilities."<sup>42</sup> At some detention centers, staff

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<sup>35</sup> See Halper, *supra* note 27. 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).

<sup>36</sup> DHS OIG REPORT, *supra* note 22, at 8.

<sup>37</sup> Halper, *supra* note 27.

<sup>38</sup> See *United States v. uez-Portillo*, No. EP-17-MJ-4409-MAT, 2018 WL 315759, at \*1-\*2, \*9 (W.D. Tex. Jan. 5, 2018).

<sup>39</sup> *Id.* at \*9.

<sup>40</sup> See Halper, *supra* note 27; Jordan, *supra* note 34; 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>.

<sup>41</sup> Daniella Silva, *Trump Administration Waived Strict Background Checks for Staff at Migrant Child Detention Camp*, NBC NEWS (Nov. 27, 2018), <http://tinyurl.com/y4asqmw7>.

<sup>42</sup> *Id.*

members were drunk while they were supposed to be caring for separated children.<sup>43</sup> 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.<sup>44</sup> In addition to the pervasive sexual abuse of detained children, there are reports of widespread denial of medical care, including for burn injuries, broken bones, and sexually transmitted diseases.<sup>45</sup> In other reported cases, staff gave children medicine to which they were allergic despite warnings on the children's medical bracelets.<sup>46</sup>

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 A.P.F.'s and O.P.D.'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 A.P.F. and O.P.D. severe trauma and emotional distress.<sup>47</sup>

The government knew that forcibly taking O.P.D. from A.P.F. would fill them with terror, desperation, and anguish. It purposefully inflicted that trauma on A.P.F. and O.P.D. to instill fear in others. It then compounded that trauma by keeping A.P.F. and O.P.D. apart for approximately 70 days, without telling them anything about the other's whereabouts or well-being, without allowing them even to speak to one another for 50 days, and without any plan for reuniting them. And, as a result of the government's actions and failures, O.P.D. was exposed to sexual abuse in a foster system overburdened with unaccompanied children.

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<sup>43</sup> Bogado, Michels & Swales, *Separated Migrant Children Are Headed Toward Shelters that Have a History of Abuse and Neglect*, TEX. TRIB. (June 20, 2018), <https://tinyurl.com/ydyl6wvb>.

<sup>44</sup> *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>.

<sup>45</sup> Bogado, Michels & Swales, *supra* note 43; 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>; HUMAN RIGHTS WATCH ET AL., *CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 45-54* (June 2018), <http://tinyurl.com/yyzafjq8> (outlining “unreasonable delays in providing care,” “poor practitioner and nursing care,” and “botched emergency responses” as repeated defects in DHS facilities that have consistently led to “deadly failures”).

<sup>46</sup> Bogado, Michels & Swales, *supra* note 43.

<sup>47</sup> 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, negligence, battery and/or assault, false imprisonment, and violations of the Fourth and Fifth Amendments to the United States Constitution.

Attachment A to Standard Form 95

Claimant: A.P.F., on behalf of himself and his minor son, O.P.D.

A.P.F. and O.P.D. 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.