UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, *et al*.,	)	
Plaintiffs,	)	
v.	)	No. 17-cv-02122-TSC
ALEX M. AZAR II, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION AND A PRELIMINARY INJUNCTION BASED ON NEW FACTS DEMONSTRATING CONTINUED NEED FOR URGENT RELIEF

Plaintiffs submit this renewed motion for class certification (ECF No. 18), for provisional class certification and notice (ECF No. 90), and for preliminary injunctive relief (ECF No. 5). Since the filing of those motions, additional facts have come to light that reveal the extreme lengths to which Defendants will go in their attempts to obstruct access to abortion and coerce young girls into carrying their pregnancies to term. These additional facts confirm Plaintiffs' assertion that Defendants have violated, and will continue to violate, the putative class members' constitutional right to access abortion unless and until they are enjoined from doing so by an order of this Court. Indeed, new information shows that there have been multiple minors, not previously known to this Court, who have requested access to abortion while in Defendants' custody. In addition to demonstrating ongoing irreparable harm, these new facts also confirm that Plaintiffs easily satisfy the Rule 23(a) requirements for class certification. Accordingly, based on Plaintiffs' prior briefings and the additional information set forth below, Plaintiffs

respectfully urge this Court to rule quickly on their motions for class certification, or provisional class certification and notice, and for a preliminary injunction to prevent Defendants from inflicting irreparable harm on additional pregnant minors in their custody. *See* Mot. for Prelim. Inj. (ECF No. 5); Mot. for Class Cert. (ECF No. 18); Mot. for Prov. Class Cert. & Notice (ECF No. 90).

A. New Information Reveals That in the Span of Just a Few Months, Several Additional Minors Were Subjected to Defendants' Unconstitutional Policy, Further Demonstrating the Breadth of the Class and Ongoing Irreparable Harm.

Plaintiffs have obtained additional facts through discovery in *American Civil Liberties Union of Northern California v. Hargan*, No. 3:16-cv-03539-LB (N.D. Cal.) showing that minors, in addition to the named Plaintiffs, have suffered harm and that more are likely suffering harm on a continuing basis due to Defendants' policies of coercion and obstruction. These additional facts intensify the urgency for class certification and injunctive relief. In addition, they further support Plaintiffs' showing of numerosity/impracticability of joinder because the number of identifiable members in the putative class continues to grow and the fact that Plaintiffs' counsel are learning of these putative class members only through discovery in a separate action (discovery which has now closed) reflects the difficulty these young women have in obtaining counsel of their own to assert their rights in court. *See* Reply in Support of Class Cert. (ECF No. 56), at 18-21 (explaining the relevance of Defendants' obstruction of access of counsel and the unique vulnerability of putative class members). Absent action from this Court, there is no way for Plaintiffs, apart from relying on anonymous tips, to identify other members of the putative class who have been or are currently being harmed by Defendants' unconstitutional policy, or will be harmed in coming days, weeks, and months.

The evidence reveals that in the span of just five months August of 2017 to December of 2017 *at least* six pregnant minors were considering abortion while in Defendants' custody and were subjected to Defendants' coercion attempts, obstruction and outright prevention. *See* Decl. of B. Amiri in Supp. of Pls.' Renewed Mot. ("Decl. of B. Amiri") at Exs. A-M. This includes Jane Doe, Jane Poe and Jane Roe three of the named plaintiffs in this case and three additional minors whose cases Plaintiffs' counsel became aware of only after reviewing documents obtained in discovery.

- In August 2017, a minor who was pregnant and had requested an abortion while residing at a shelter in Arizona was taken to a crisis pregnancy center, given spiritual counseling and ended up participating in a "family session" in which her mother was informed of her pregnancy and desire for abortion, in spite of the minor's expressed desire that her family not be informed. *See id.*, Ex. A, PRICE PROD 00014828-29.
- Shortly thereafter, in September 2017, Jane Doe, the first named plaintiff in this case, was required to tell, or have ORR tell, her parents about her pregnancy and abortion decision, despite being "strongly opposed to parental notification," and was also required to attend "life-affirming" spiritual counseling at a crisis pregnancy center all prior to Defendant Lloyd's determination that it would not be in her best interests to obtain an abortion because "the fetus and pregnancy was also a minor in care." *See id.*, Ex. B, PRICE PROD 00014889-91; *id.*, Ex. C, PRICE PROD 00015152-53; *id.*, Ex. D, Dep. Tr. of J. White at 86:19-25; 89:23 90:20; 91:7 92:15.

- Also around September 2017, yet another minor who was pregnant and contemplating an abortion while residing at an ORR shelter in California was sent for counseling at a Christian crisis pregnancy center, despite having indicated that she did *not* want to receive Christian services, and Director Lloyd further instructed shelter staff to notify her parents of her pregnancy and abortion request, regardless of the fact that she had declined to talk to her family herself and had not consented to having shelter staff tell them. *See* Decl. of B. Amiri, Ex. E, PRICE PROD 00014814; *id.*, Ex. F, PRICE PROD 00014822-24.
- Less than a month later, in October 2017, yet another minor who was pregnant and requesting an abortion at a shelter in Texas was coerced into notifying her mother at Defendant Lloyd's direction, and Defendant Lloyd also instructed that she be taken for "options" counseling at a Catholic Charities counseling center. *See id.*, Ex. G, PRICE PROD 00014815-16; *id.*, Ex. H, PRICE PROD 00015133-34.
- And then, in December 2017, Defendants imposed their policy on two of the other named plaintiffs in this case. In Ms. Poe's case, Defendants employed a number of tactics aimed at coercing Ms. Poe into carrying her pregnancy to term, despite Defendants' knowledge that she had stated she would prefer to harm herself rather than continue with the pregnancy. *See id.*, Ex. I, PRICE PROD 00015506. For example, Defendant Lloyd required Ms. Poe to either notify her parents of her pregnancy and abortion decision herself or have them be notified. *See id.*, Ex. I, PRICE PROD 00015504-11. During the required notification session, Ms. Poe's family threatened to harm her if she had the abortion, causing her to temporarily

withdraw her request to obtain an abortion because as she later stated when reasserting her request she felt pressured by her mother and potential sponsor to continue with the pregnancy. *See id.*, Ex. J, PRICE PROD 00015514-16. After this attempt at coercion failed, Defendant Lloyd instructed staff to give Ms. Poe a pamphlet containing information about the risks of abortion and "the ability of unborn babies to feel pain," to read her a detailed description of the abortion procedure from a Supreme Court case, to offer her a graphic image of the procedure, and to make sure she has "a proper understanding of the development of her baby," all in further attempt to pressure her into carrying her pregnancy to term. *See id.*, Ex. K, PRICE PROD 00015450-53; *id.*, Ex. L, PRICE PROD 00015521-22.

- Defendants also required that Ms. Roe's family members be notified of her pregnancy and abortion decision, regardless of whether or not ORR had her consent to inform them. *See id.*, Ex. M, PRICE PROD 00015591-94.

Based on Defendants' policy and prior practices, it is virtually certain that there are other similarly situated pregnant minors who are in Defendants' custody *right now* and who have been or are currently being denied information about and/or access to abortion services pursuant to Defendants' unconstitutional policy. Without access to these putative class members, and absent class certification and a preliminary injunction as to the class, the constitutional rights of these minors will be violated, to the point where they may be forced to carry their pregnancies to term against their will.

B. New Facts Reinforce That Defendants Have a Uniform Policy of Coercion and Banning Abortion and Thus Plaintiffs Meet the Class Certification Commonality and Typicality Requirements.

The discovery materials also confirm Plaintiffs' assertion that Defendants have adopted and continue to enforce a *uniform* policy that is aimed at ensuring that *all* pregnant minors in their custody continue their pregnancies, regardless of the minors' wishes. The consistent manner in which Defendants have acted with respect to a rising number of individual minors' abortion requests confirms that there is "a uniform policy or practice that affects all class members" in this case. *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013); *DL v. District of Columbia*, 302 F.R.D. 1, 12 (D.D.C. 2013), *aff'd on other grounds*, 860 F.3d 713 (D.C. Cir. 2017) (finding commonality "where plaintiffs allege[d] widespread wrongdoing by a defendant because [of] a uniform policy or practice that affects all class members" (internal quotation marks omitted)); *see also* Reply in Support of Class Cert. (ECF No. 56) at 3-9. The continued application of the policy also demonstrates the dire need for class wide preliminary injunctive relief to prevent ongoing, irreparable harm. *See* Mem. in Supp. Mot. for TRO & Prelim. Inj. (ECF No. 5-1) at 14-16.

As the discovery materials further show, pursuant to Defendants' policy, once a minor requests information about and/or access to abortion, Defendants require that a number of coercive tactics be employed to break the minor's resolve in her abortion decision. These tactics include requiring that the minor's parents or family members be notified of her pregnancy and abortion decision, even over the objection of the minor and even in cases where concerns are raised about the danger to the minor's physical well-being of revealing her abortion decision. *See* Decl. of B. Amiri, Ex. B, PRICE PROD 00014889 (shelters are "not to take [a minor] to get a termination, or to any appointments to prepare her for a termination, without consent from the Director,

which cannot happen without written and notarized consent of her parents…"); *id.*, Ex. G, PRICE PROD 00014816 (when minors receive positive pregnancy tests "the parents must be notified"); *id.*, Ex. F, PRICE PROD 00014822 (shelters should "notify [parents] regardless of UAC's wishes"); *id.*, Ex. D, Dep. Tr. of J. White at 41:1 42:2 (explaining that "[i]n many cases" another step has been notification of the parents in the minors' home country of the minors' abortion decision, even "over the objection of the minor"); *id.* at 84:9-17 (confirming that one minor's parents were notified of the minor's abortion decision even where the Young Center an immigrants services organization that works one-on-one with unaccompanied immigrant children who come to the U.S. fleeing violence and abuse had raised concerns about the ramifications of revealing the minor's abortion decision); *see also id.*, Ex. N, Dep. Tr. of S. Lloyd at 133:3 134:1 (admitting that he directed parental notification about a minor's abortion decision). As Jonathan White, Deputy Director of ORR, explained, this policy of forced notification puts minors at risk of harm. *See id.*, Ex. D, Dep. Tr. of J. White at 42:3 43:1 (stating that, based on his social work background and training, he would "not recommend" notifying a minor's parents of her abortion decision over the minor's objection "[b]ecause of the potential of additional harm or risk").

Defendants' policy also requires that minors who request access to abortion receive "life-affirming" counseling from an anti-abortion crisis pregnancy center on the Defendants' list of "approved providers" a list that was commissioned by Director Lloyd and created with the assistance of two national Christian networks of anti-abortion crisis pregnancy centers. *See, e.g.*, *id.*, Ex. B, PRICE PROD 00014891 (when a young person wants to terminate a pregnancy "the child should seek spiritual counseling,

options counseling"); *id.*, Ex. O, PRICE PROD 00014997-98 (discussing creation and origin of approved provider list); *id.*, Ex. D, Dep. Tr. of J. White at 40:10-24 (noting that one of the steps that a minor must take after notifying ORR that she desires an abortion has been to visit a crisis pregnancy center). Indeed, Defendant Lloyd has admitted that he asked the Center for Faith-Based and Neighborhood Partnerships to create an "approved provider" list of "life-affirming" pregnancy centers and has required pregnant minors to visit crisis pregnancy centers from this list for counseling. *See id.*, Ex. N, Dep. Tr. of S. Lloyd at 161:6 162:10 (requesting that Shannon Royce the Director of the Center for Faith-Based and Neighborhood Partnerships identify "life-affirming" crisis pregnancy centers to which programs may refer minors if they are pregnant and seeking information about their options); *id.* at 133:3 134:1 (admitting that he required a minor who had requested an abortion to visit a crisis pregnancy center). Defendant Lloyd has also instructed that a minor be read and given a copy of a personalized letter from a family offering to adopt her baby if she continued her pregnancy.

The discovery materials further show that, even when a minor manages to withstand all of Defendants' coercion attempts, Defendants will *still* block the young woman from accessing abortion either by outright denying her abortion request or by withholding the now-requisite "consent from the Director" until it is too late. Indeed, Defendant Lloyd has clarified that, under ORR's policy, shelters "are not to take [minors] to get a termination, or to any appointments to prepare [them] for a termination, without consent from the Director, which cannot happen without written and notarized consent of her parents, *and will not necessarily follow*." Decl. of B. Amiri, Ex. B, PRICE PROD 00014889 (emphasis added); *see also id.*, Ex. P,

PRICE PROD 00014975 (where "pregnancy termination is being sought, [the parents] will need to provide written and notarized consent, although Scott [Lloyd] advises that this *does not constitute a commitment for the Director to approve the request*") (emphasis added); *id.*, Ex. D, Dep. Tr. of J. White at 16:15 18:7; 47:22 48:8; 56:11-15; 68:4-9 (discussing ORR's policy of requiring Director approval of all abortion requests and its application). In other words, pursuant to Defendants' policy, *even* where a minor's parents provide consent, Defendant Lloyd *still* retains for himself the power to veto both the minor's *and* her parents' decision and deny the minor's request. And Defendant Lloyd has admitted that he has not approved any abortion request in his time as ORR Director, even when the young woman was pregnant as a result of a rape, in part because of his belief that abortion is the "destruction of human life," and that it is his prerogative to apply his belief to override a minor's firm decision to have an abortion. *See id.*, Ex. N, Dep. Tr. of S. Lloyd at 64:19-21; 65:6-22; 114:11-13; 154:8-23. In other words, when viewed in the context of Defendant Lloyd's personal beliefs about abortion and his failure to approve *a single* abortion request even where the pregnancy is the result of rape and even where, as in the case of Ms. Poe, the minor has threatened self-harm if she is forced to carry to term Defendants' policy of conditioning minors' abortion access on Defendant Lloyd's approval is, in effect, an unconstitutional ban on abortion for minors in Defendants' care in all cases, the sole exception being where the pregnancy is an immediate threat to the young woman's life. Accordingly, the additional evidence regarding the existence and application of this uniform policy further rebuts Defendants' arguments that class treatment is inappropriate because of purported factual differences among the putative class members. *See* Reply in Support of Class Cert. (ECF No. 56), at

2-6 (explaining how common legal claims challenging a uniform policy applied to class member suffice to establish commonality).

C. The Course of This Litigation Shows How Inherently Transitory Plaintiffs' Claims Are.

Finally, although Defendants have argued at length that Jane Doe, Jane Roe and Jane Moe are not adequate class representatives because they have already received abortions and/or are no longer in the custody of ORR, *see* ECF No. 53 at 8-11; ECF No. 98 at 5-6; ECF No. 117 at 1-3, the proceedings to date in this case amply demonstrate that that Plaintiffs' claims are "inherently transitory" in nature, *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); ECF No. 56 at 11-18; ECF No. 103 at 1; ECF No. 107 at 1-2, and therefore fall within the well-established exception to the mootness doctrine. Defendants have no real response to this claim: They have conceded that there is no established length of time that renders a claim "transitory" and that a central consideration is whether a court has time to rule on class certification while the proposed representative retains a live individual claim. *See* ECF No. 53 at 9-10. So far in this litigation, four plaintiffs have sought relief: Jane Doe obtained an abortion with the aid of a court order within 12 days of filing for class certification. Jane Poe obtained an abortion with the aid of a court order within 5 days of joining the case. As for Jane Roe and Jane Moe, the government released each of them from its custody within days of filing their claims; Jane Roe was released within 4 days of filing her claim, Jane Moe within 3 days. Given the frenetic pace of the litigation over these women's motions for emergency relief, the Court has understandably been unable to rule on class certification prior to granting the TROs or the plaintiffs' release. These spans of 12, 5, 4, and 3 days fall comfortably within this Court's jurisprudence on the "inherently transitory"

exception. In fact, this Court has applied the "inherently transitory" rule to claims that would be live for a "length . . . impossible to predict," *Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013), to claims that would be live for "weeks or months," *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 183 (D.D.C. 2015), and even to claims that would be live for two years (while the children at issue were aged three to five), *DL*, 302 F.R.D. at 20. This case presents four examples of plaintiffs whose claims became moot far faster, and there is every reason to expect that future plaintiffs in the putative class will obtain relief with comparable dispatch once they are able to bring their claims before this Court.

Defendants only response is to cite *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013). But that case has no bearing here. First and "fundamentally," as stressed in *Symczyk* itself, 569 U.S. at 75, and as the D.C. Circuit has emphasized, *Symczyk* was about conditional certification of a "collective action" under the Fair Labor Standards Act, *not* about certification of a class under Rule 23. *Id.*; *DL*, 860 F.3d at 722. Thus, because it "hinged on the unique features of the FLSA cause of action" *Symczyk* is inapplicable in "Rule 23-land." *Id.* at 722; *accord Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014) ("[C]ourts have universally concluded that the *Genesis* discussion does not apply to class actions."), *aff'd on other grounds*, 136 S. Ct. 663 (2016). Second, the "inherently transitory" exception did not apply to the claim in *Symczyk* which was for unpaid wages because "a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations." 569 U.S. at 77. In this regard, the Court explicitly contrasted the damages claim in *Symczyk* with "claims for injunctive relief challenging ongoing conduct," *id.*

that is, the type of claim at issue here. Accordingly, *Symczyk* casts no doubt on Plaintiffs' case for class certification.

* * *

In sum, Defendants continue to interfere with and obstruct pregnant minors' access to abortion services. Indeed, even in the face of the temporary restraining orders issued by this Court thus far, Defendants have doubled down on applying their policy to minors in their care. Their persistence in this regard reaffirms the urgent need for class certification and preliminary injunctive relief in order to protect the constitutional rights and health of all putative class members who are currently or will be in Defendants' care. For these reasons, Plaintiffs respectfully urge this Court to grant their motion for class certification, or alternatively their motion for provisional class certification and notice, and to issue a preliminary injunction enjoining Defendants (along with their respective successors in office, officers, agents, servants, employees, attorneys and anyone acting in concert with them) from continuing to coerce and compel minors' in their care into carrying their pregnancies to term against their will.

Amended proposed orders on the motions are attached.

March 2, 2018

Respectfully submitted,

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Scott Michelman (D.C. Bar No. 1006945)
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**Admitted pro hac vice*

Attorneys for Plaintiffs

EXHIBIT I

From: White, Jonathan (ACF)
Sent: Thursday, December 07, 2017 10:28 PM
To: Lloyd, Scott (ACF)
Cc: [redacted] (ACF)
Subject: FW: ORR Director Request-TOP Request[redacted]

Importance: High

Scott,

To follow up on our conversation of this afternoon about the minor in [redacted] in [redacted] requesting termination of pregnancy:

As you instructed, I spoke with team members to prepare for staff to meet with the minor to seek answers to your questions about whether the minor is aware of all her options (termination, adoption, or parenthood) and is giving informed consent to the termination procedure:

(1) [redacted] indicated she is able to travel to [redacted] for a Saturday meeting with the minor. As I understand your request, [redacted] role is to assess whether the minor is aware of her options and whether the minor understands the procedure sufficiently to give informed consent to it.
(2) [redacted] has indicated that the DHUC staff are not able to participate, as the involvement of medical personnel would constitute options counseling and options counseling is outside the clinical training, expertise, and practice scope of DHUC staff member professionals. They would defer to the local treating physician to explain the surgical procedure. [redacted] followed up with an email to me, which I am forwarding below. After discussing the issue with him, I concur with him.
(3) Per your direction, the field staff will assist with setting up a meeting for [redacted] with the UAC's regular clinician and the UAC on Saturday.
(4) [redacted] will help with travel plan approval for [redacted] tomorrow, since I will be out of pocket much of the day [redacted]

So, to make sure we are on the same page:

- [redacted] can go to [redacted] (barring some end-of-CR travel issue) to meet with the minor and the program's clinician on Saturday. We are working to make that happen.
- The scope of [redacted] interactions with the minor will be to understand what the minor already knows and understands with regard to:
  - What the minor understands the termination procedure is and what it entails.
  - Whether the minor is aware that she has options for this pregnancy. The options are carrying the pregnancy to term and raising the child, carrying the pregnancy to term and placing the child for adoption, and termination. [redacted] will seek to confirm that the minor is clear that she has these options, including adoption, and that ORR would assist if she seeks to put the baby up for adoption.
  - That therefore if the minor seeks termination she is giving informed consent.
- However, [redacted] will ***not*** be providing options counseling herself, or providing information about the termination procedure, as that is outside her training and expertise. Her role is to assess what the minor knows, based on the options counseling the minor has already received, to see if the minor has informed consent.

Hope this is helpful. Let me know anything else you need.

Jonathan

From: [redacted] (ACF)
Sent: Thursday, December 07, 2017 9:38 PM
To: White, Jonathan (ACF)
Cc: [redacted] (ACF)
Subject: ORR Director Request-TOP Request [redacted]

Jonathan,

Thank you for reaching out to me to brief me of your discussions with Mr. Lloyd regarding the child at [redacted] shelter who is requesting an abortion to terminate a pregnancy caused by rape and the next steps in the child's care. My understanding is that Mr. Lloyd needs additional information so that he can make an informed decision. In particular, Mr. Lloyd would like confirmation that the child is giving informed consent and understands her options.

Regarding next steps, you mentioned that Mr. Lloyd would like 3 people ([redacted], a member of DHUC, and the clinician/social worker at [redacted]) to meet with the child to provide (from your description) options counseling including description of the abortive procedure and what it involves. Mr. Lloyd would like to have this done on Saturday, December 9, 2017.

[redacted]

[redacted]

[redacted] M.D., FAAP
[redacted]
[redacted] Division of Health for Unaccompanied Children (DHUC)
Unaccompanied Children Programs
Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services
Mary E. Switzer Building
330 C St SW [redacted]
Washington, DC 20201
[redacted]
www.acf.hhs.gov

From: White, Jonathan (ACF)
Sent: Friday, December 01, 2017 12:13 PM
To: Lloyd, Scott (ACF)
Subject: FW: UAC with TOP request: Instructions from leadership

Importance: High

Updated information just received:

Note: Minor disclosed to treating MD that **she believes pregnancy is a result of rape**. SIR on that disclosure expected shortly.
Minor also stated that she would prefer to harm herself than continue with pregnancy, which may constitute a medical risk of denying her the requested procedure.

Please advise next steps.

From: [redacted] (ACF)
Sent: Friday, December 01, 2017 12:07 PM
To: White, Jonathan (ACF)
Cc: De LA Cruz, James (ACF); Sualog, Jallyn (ACF); [redacted] (ACF); [redacted] (ACF)
Subject: Re: UAC with TOP request: Instructions from leadership

Good Morning,

There are a couple of updates on the case:

1 - As per the physician, any pregnancy at this age is risky; however, it is unknown how the pregnancy will affect the minor or if it's threatening her life or health.

2 - The minor disclosed to the MD that she believes that the pregnancy is a product of the rape. A SIR will be submitted within the next few minutes with the new information.

This is the response I received from the program:

"As part of the examination, the Child/Minor received an interview in the presence of an Interpreter, MD and Nursing Staff-([redacted]).

The Child/Minor claims that the pregnancy was a product of a rape by an unknown man. She was quite verbal during the interview session that she did not want to complete her pregnancy. She stated to the MD that she prefers to harm herself rather than continue with the pregnancy, with that in mind her mental health is at threat.

There are no contraindications for the termination. However, if the procedure is accepted/approved by ORR and the HQ, it should be perform soon."

Thank you,

[redacted]
Federal Field Specialist - [redacted]
U.S. Department of Health and Human Services
Administration of Children and Families
Office of Refugee Resettlement
Division of Unaccompanied Children's Operations

[redacted]
http://www.acf.hhs.gov/programs/orr/programs/ucs

From: White, Jonathan (ACF)
Sent: Friday, December 1, 2017 11:16:34 AM
To: [redacted] (ACF)
Cc: De LA Cruz, James (ACF); Sualog, Jallyn (ACF); [redacted] (ACF); [redacted] ACF)
Subject: RE: UAC with TOP request: Instructions from leadership

[redacted]

Thank you.

I will follow up with the ORR Director for next steps direction.

[redacted]

Hope this helps.

Jonathan

From: [redacted] (ACF)
Sent: Friday, December 01, 2017 9:55 AM
To: White, Jonathan (ACF)
Cc: De LA Cruz, James (ACF); Sualog, Jallyn (ACF); [redacted] (ACF); [redacted] (ACF)
Subject: RE: UAC with TOP request: Instructions from leadership

I just received information the OB/GYN examination revealed 20 weeks gestation (fetal size/weight etc), not 9 weeks as originally reported. A follow up examination is scheduled for [redacted]. The program still wants clarification about the question about the termination not medically indicated. Is it the pregnancy or the termination that does not pose a threat to her health, or both?

She does not have a sponsor at this time. The program is trying to obtain more information from her family in home country.

Please note that the minor's primary language is [redacted] and the program needs to use an interpreter, which has caused some delay in obtaining some information. At the examination with the OB/GYN the minor, with the assistance of a translator, requested a termination again.

Thank you,

[redacted]
Federal Field Specialist – [redacted]
U.S. Department of Health and Human Services
Administration of Children and Families
Office of Refugee Resettlement
Division of Unaccompanied Children's Operations

[redacted]
http://www.acf.hhs.gov/programs/orr/programs/ucs

From: White, Jonathan (ACF)
Sent: Thursday, November 30, 2017 5:02 PM
To: [redacted] (ACF)
Cc: De LA Cruz, James (ACF); Sualog, Jallyn (ACF); [redacted] (ACF); [redacted] (ACF)
Subject: Re: UAC with TOP request: Instructions from leadership

[redacted]

Jonathan White
Commander, US Public Health Service
Deputy Director for Children's Programs
Office of Refugee Resettlement
Administration for Children and Families
[redacted]

On: 30 November 2017 16:15, "[redacted] (ACF)" <[redacted]> wrote:

Thank you.

The pregnancy has been confirmed. She has nine weeks of gestation. [redacted] she has her first appointment with the OB/GYN a[redacted]

The minor decided to notify her mother in home country about the pregnancy. The mother discouraged the minor to have a termination, but the minor continues wanting to terminate.

Thank you,

[redacted]
Federal Field Specialist – [redacted]
U.S. Department of Health and Human Services
Administration of Children and Families
Office of Refugee Resettlement
Division of Unaccompanied Children's Operations

[redacted]
http://www.acf.hhs.gov/programs/orr/programs/ucs

From: White, Jonathan (ACF)
Sent: Thursday, November 30, 2017 2:47:40 PM
To: [redacted] (ACF)
Cc: De LA Cruz, James (ACF); Sualog, Jallyn (ACF); [redacted] (ACF); [redacted] (ACF)
Subject: UAC with TOP request: Instructions from leadership

[redacted]

Please see below the instructions from the ORR Director for the UAC at [redacted] who has made a request for TOP:

Please make sure the program proceeds with confirming the pregnancy with OB/GYN according to SOP. Also, the program should confirm that the termination is not medically indicated.

At the same time, the program should request permission of the UAC to contact parents and notify them of the pregnancy and the request for termination. The UAC can make the notification herself or have the program do it according to the UAC's wishes.

If you have any questions or need any clarification, don't hesitate to reach out to me.

Jonathan

Jonathan D. White
Commander, U.S. Public Health Service
Deputy Director for Children's Programs
Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services
330 C Street SW
[redacted]

From: White, Jonathan (ACF)
Sent: Wednesday, November 29, 2017 5:23 PM
To: Lloyd, Scott (ACF)
Cc: [redacted] (ACF)
Subject: Fwd: Pregnancy Termination Request

Importance: High

Please see below.

Jonathan White
Commander, US Public Health Service
Deputy Director for Children's Programs
Office of Refugee Resettlement
Administration for Children and Families
[redacted]

From: "White, Jonathan (ACF)" <[redacted]>
Subject: Re: Pregnancy Termination Request
Date: 29 November 2017 17:21
To: [redacted] (ACF)" <[redacted]>
Cc: "[redacted] (ACF)" <[redacted]>, [redacted](ACF)" <[redacted]>, "De LA Cruz, James (ACF)" <[redacted]>, "Sualog, Jallyn (ACF)" <[redacted]>

Stand by. I will obtain instructions. In the meantime, please reinforce to the program that per ORR heightened medical procedure guidance no steps can be taken toward TOP without approval from the ORR Director.

Jonathan White
Commander, US Public Health Service
Deputy Director for Children's Programs
Office of Refugee Resettlement
Administration for Children and Families
[redacted]

On: 29 November 2017 17:18, [redacted] (ACF)" <[redacted]> wrote:
Good Afternoon Mr. White,

This minor is requesting the termination of pregnancy.

[redacted]

She is approximately eight weeks pregnant. She first arrived at [redacted] on [redacted]/2017. [redacted] submitted a SIR on [redacted] for sexual abuse the minor suffered four months ago in home country. [redacted] found out that she was pregnant on [redacted] and requested an emergency transfer because they do not have the license to keep pregnant teens. The only program that had capacity at that time and was able to take her in such short notice was [redacted].

She was transferred to [redacted] on [redacted] [redacted] submitted two SIRs; one for the pregnancy with the minor's request to have the pregnancy terminated, and the other one for rape. The minor reported that the pregnancy is a product of consensual relations with her ex-boyfriend.

Should we refer her to one of the centers recommended by HQ?
What other steps the program and I need to take in regards to her request to terminate the pregnancy?

[redacted]

Thank you,

[redacted]
Federal Field Specialist - [redacted]
U.S. Department of Health and Human Services
Administration of Children and Families
Office of Refugee Resettlement
Division of Unaccompanied Children's Operations

[redacted]
http://www.acf.hhs.gov/programs/orr/programs/ucs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.D. and JANE ROE on behalf of themselves and others similarly situated; and JANE POE and JANE MOE, c/o ACLU 125 Broad Street, 18th Fl. New York, NY 10004, Plaintiffs, v. ALEX M. AZAR II, Secretary of Health and Human Services U.S. Department of Health & Human Services 200 Independence Avenue, S.W. Washington, D.C. 20201; STEVEN WAGNER, Acting Assistant Secretary for Administration for Children and Families, in his official capacity 330 C Street, S.W. Washington, D.C. 20201; and E. SCOTT LLOYD, Director of Office of Refugee Resettlement, in his official capacity 330 C Street, S.W. Washington, D.C. 20201, Defendants.	)	No. 17-cv-02122-TSC

THIRD AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
(Interference with minors' constitutional right to obtain an abortion)

Plaintiffs J.D. and Jane Roe, on behalf of themselves and a class of similarly situated pregnant unaccompanied immigrant minors in the legal custody of the federal government, and

Plaintiffs Jane Poe and Jane Moe, on behalf of themselves, for their complaint in the above-captioned matter, allege as follows:

PRELIMINARY STATEMENT

1. There are currently thousands of unaccompanied immigrant minors (also known as unaccompanied children, or "UCs") in the legal custody of the federal government. These young people are extremely vulnerable: Many have come to the United States fleeing abuse and torture in their home countries; many have been sexually abused or assaulted either in their home countries, during their long journey to the United States, or after their arrival; some have also been trafficked for labor or prostitution in the United States or some other country; and many have been separated from their families.

2. The federal government is legally required to provide these young people with basic necessities, such as housing, food, and access to emergency and routine medical care, including family planning services, post-sexual assault care, and abortion. And, as is true with everyone in the United States, the Constitution prohibits the government from imposing an "undue burden" on their right to obtain an abortion.

3. In 2017, Defendants revised nationwide policies to allow them to wield an unconstitutional veto power over unaccompanied immigrant minors' access to abortion in violation of their Fifth Amendment rights. Under these nationwide policies, Defendants also attempt to coerce minors to carry their pregnancies to term, including by forcing unaccompanied minors who request abortion to visit pre-approved anti-abortion crisis pregnancy centers, which require the minors to divulge the most intimate details of their lives to entities hostile to their abortion decisions, in violation of their First and Fifth Amendment rights. Defendants also force minors to notify parents or other family members of their pregnancies and/or their requests for abortions, or notify family members themselves, in violation of the First and Fifth Amendments. In some instances, the Director of the Office of Refugee Resettlement (ORR) has personally attempted to coerce minors to continue their pregnancies. When these efforts at coercion fail, Defendants bar minors from attending appointments necessary to secure an abortion.

4. In the last several months, at least four pregnant unaccompanied minors in the legal custody of the federal government who sought to access abortions "J.D." or "Jane Doe", "Jane Moe", "Jane Roe," and "Jane Poe"[1] were, pursuant to Defendants' policy, subjected to various coercion attempts, and ultimately blocked from accessing abortion. Plaintiffs were only able to access abortion after they sought emergency relief in this Court.

JURISDICTION AND VENUE

5. This action arises under the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act, and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331.

6. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Federal Rules of Civil Procedure 57 and 65, and by the inherent equitable powers of this Court.

7. The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412.

8. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

Plaintiff J.D.

9. Plaintiff J.D. came to the United States from her home country as a minor without her parents. J.D. was detained by the federal government and placed in a federally funded shelter in Texas. She was pregnant and in September 2017 told the staff at the shelter where she was housed that she wanted an abortion. J.D. faced extreme resistance from Defendants. With the assistance of court-appointed attorney and guardian ad litems, J.D. secured a court order permitting her to bypass state law requiring parental consent for abortion, and allowing her to

[1] The named Plaintiffs have all filed motions to proceed under pseudonyms, which are either pending or have been granted.

consent to the abortion on her own. Nevertheless, Defendants took the position that they would not allow J.D. to access abortion.

10. J.D. was forced to cancel multiple appointments for state-mandated counseling and the abortion due to Defendants' obstruction, which unnecessarily pushed J.D. later into pregnancy.

11. Defendants also forced J.D. to visit an anti-abortion crisis pregnancy center.

12. Over J.D.'s objection, Defendants told J.D.'s mother about her pregnancy.

13. Defendants also subjected J.D. to medically unnecessary ultrasounds.

14. J.D. moved this Court to be referred to in this litigation by the initials "J.D." for "Jane Doe" to protect her privacy.

15. This Court granted a TRO preventing Defendants from continuing to block J.D. from obtaining abortion.

16. Defendants' obstruction delayed J.D.'s abortion by four weeks. If this Court had not granted a TRO, J.D. would have been forced to carry the pregnancy to term against her will.

17. J.D. has turned 18, and is no longer in Defendants' custody. She continues to fear retaliation because of her abortion decision, and she does not want her family or others to know she obtained an abortion.

18. J.D. sues on her own behalf and as the class representative of other similarly situated young women.

Plaintiff Jane Roe

19. Plaintiff Jane Roe came to the United States from her home country as a minor without her parents. She was detained by the federal government, and was residing in a private, federally funded shelter.

20. On November 21, 2017, she discovered she was pregnant during a medical examination after she was in federal custody. The physician discussed her pregnancy options, and she decided to have an abortion.

21. She asked her doctor and her shelter for an abortion, but Defendants did not allow her to have one. Ms. Roe requested to terminate her pregnancy by taking medications (known as a medication abortion) that end the pregnancy and essentially cause a miscarriage. However, because of Defendants' obstruction, Defendants pushed her further into her pregnancy, past the point in pregnancy in which medication abortion is available. Ms. Roe nonetheless still wanted an abortion, but Defendants refused to allow her to obtain one.

22. Defendants required Ms. Roe's sister and potential sponsor to be notified of her abortion request.

23. Ms. Roe was also subjected to a medically unnecessary ultrasound.

24. Ms. Roe filed suit seeking emergency relief preventing Defendants from continuing to obstruct her access to abortion. Ms. Roe was granted leave from this Court to proceed in this litigation as "Jane Roe" to protect her privacy.

25. This Court granted Ms. Roe the relief she requested and Defendants appealed. Before the appeal was briefed or the Circuit Court could rule, Defendants released Ms. Roe from custody.

26. Ms. Roe continues to fear retaliation because she requested and obtained an abortion.

27. She does not want her family or others to know she obtained an abortion.

28. Ms. Roe sues on her own behalf and as class representative of other similarly situated young women.

Plaintiff Jane Poe

29. Plaintiff Jane Poe came to the United States from her home country as a minor without her parents, was detained by the federal government, and is residing in a private, federally funded shelter.

30. Ms. Poe was raped in her home country. She discussed her pregnancy options with a physician, and in November 2017 requested an abortion.

31. Ms. Poe expressed thoughts of self-harm if she were unable to obtain an abortion.

32. Nonetheless, ORR subjected Ms. Poe to various coercion tactics, and unnecessarily pushed her further into her pregnancy.

33. For example, based on Defendants' policy, Defendants instructed the shelter that either Ms. Poe tell her mother and potential sponsor about her pregnancy, or the shelter must do so. As a result, Ms. Poe told her mother and potential sponsor about her pregnancy. They threatened to physically abuse her if she had an abortion.

34. Despite the circumstances surrounding Ms. Poe's pregnancy, her threats of self-harm, and the threats of abuse, Defendant Lloyd nevertheless determined that it was not in Ms. Poe's "best interest" to have an abortion, citing anti-abortion arguments and anti-abortion sources.

35. Defendant Lloyd's denial of Ms. Poe's abortion request was issued on December 17, more than two weeks after Ms. Poe's initial request.

36. Ms. Poe filed suit seeking emergency relief preventing Defendants from continuing to obstruct her access to abortion. This Court granted the requested relief. If this Court had not intervened, Ms. Poe would have been forced to carry her pregnancy to term.

37. Ms. Poe was granted leave by this Court to proceed in this litigation as "Jane Poe" to protect her privacy.

38. Ms. Poe fears retaliation because she obtained an abortion, and she does not want her family or others to know she obtained an abortion.

Plaintiff Jane Moe

39. Plaintiff Jane Moe came to the United States from her home country as a minor without her parents, was detained by the federal government, and resided in a private, federally funded shelter.

40. She decided to have an abortion. For two weeks, she asked the shelter for access to abortion but was not permitted to access abortion.

41. Pursuant to Defendants' policy, Jane Moe was required to visit an anti-abortion crisis pregnancy center to discuss her pregnancy where she was subjected to a medically unnecessary ultrasound.

42. Defendant Lloyd instructed that Ms. Moe be read and given a copy of a personalized letter from a family offering to adopt her baby if she continued the pregnancy.

43. Based on Defendants' policy, Defendants required Ms. Moe to disclose her pregnancy and request for an abortion to her sponsor.

44. Ms. Moe filed suit seeking emergency relief preventing Defendants from continuing to obstruct her access to abortion.

45. Three days later, before this Court could rule on that request, Defendants transferred her out of their custody.

46. Jane Moe also requested leave from this Court to proceed in this litigation as "Jane Moe" to protect her privacy. She fears retaliation because she has requested an abortion, and she does not want her family or others to know she requested an abortion.

47. Jane Moe sues on her own behalf.

Defendants

48. Defendant Alex M. Azar II is the Secretary of the United States Department of Health and Human Services ("HHS") and is responsible for the administration and oversight of the Department. Defendant Azar has authority over the Administration for Children and Families, a subdivision of HHS. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, Defendant Azar is violating the First and Fifth Amendment rights of those unaccompanied immigrant minors. Defendant Azar is sued in his official capacity.

49. Defendant Steven Wagner is the Acting Assistant Secretary for Administration for Children and Families. Defendant Wagner has authority over the Office of Refugee Resettlement ("ORR"), a subdivision of Administration for Children and Families. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, Defendant

Wagner is violating the First and Fifth Amendment rights of those unaccompanied immigrant minors. Defendant Wagner is sued in his official capacity.

50. Defendant E. Scott Lloyd is the Director of ORR. ORR oversees the unaccompanied children program. By interfering with, prohibiting and/or obstructing unaccompanied immigrant minors' access to abortion, and imposing his religious beliefs on these minors, Defendant Lloyd is violating the First and Fifth Amendment rights of those unaccompanied immigrant minors. Defendant Lloyd is sued in his official capacity.

FACTS GIVING RISE TO THIS ACTION

The Unaccompanied Children ("UC") Program

51. ORR has responsibility for the "care and custody of all unaccompanied [] children, including responsibility for their detention, where appropriate." 8 U.S.C. § 1232(b)(1). Unaccompanied immigrant minors are under 18 years old, have no legal immigration status, and either have no parent or legal guardian in the United States, or there is no parent or legal guardian in the United States able to provide care and physical custody. 6 U.S.C. § 279(g)(2). ORR determines whether a minor qualifies for this designation at the point the minor enters ORR custody.

52. By statute, any federal department or agency that determines that it has an unaccompanied immigrant minor in its custody must, absent "exceptional circumstances," transfer the minor to ORR within 72 hours of making that determination. *Id.* § 1232(b)(3). The federal government reports that in Fiscal Year 2017, 40,810 unaccompanied immigrant minors were referred to ORR.

53. The federal government and all of its programs are required to ensure that the best interests of the unaccompanied immigrant minor are protected. Section 462 of the Homeland Security Act requires ORR to "ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child." 6 U.S.C. § 279(b)(1)(B).

54. In addition, Section 235 of the Trafficking Victims Protection Reauthorization Act directs HHS to ensure that unaccompanied immigrant minors are "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

55. Most unaccompanied immigrant minors who are referred to ORR are eventually released from custody to parents or sponsors who live in the United States. Such minors are often held in short-term facilities or shelters while they await release to their parents or sponsors. A significant number of unaccompanied immigrant minors are not released to parents or sponsors, and spend longer periods of time in custody.

56. Although the majority of minors are eventually reunified with family members in the United States, some minors have no viable sponsor.

57. For those minors who do have a potential sponsor, the process for identifying, contacting, vetting and approving a qualified sponsor can take weeks or months. The process for sponsor vetting includes submission by a sponsor of the application for release and supporting documentation, the evaluation of the suitability of the sponsor, including verification of the sponsor's identity and relationship to the child, background checks, and in some cases home studies. This process is largely outside of the control of the individual minor.

58. Some minors may seek to return to their home country voluntarily, but that process also involves multiple steps, and can take at least several months. Unaccompanied minors in ORR custody must be placed in removal proceedings before an immigration judge, and only once in removal proceedings can a minor request voluntary departure. Once an immigration judge holds a hearing and determines that the minor is eligible for voluntary departure, he or she has discretion to grant it, but the government may oppose. Even if the judge grants voluntary departure, the process to repatriate the minor requires further steps, including involving the minor's home country's consulate. Overall, it can take months from the time the minor requests voluntary departure until she is returned to her home country, and the timing of many of the necessary steps is out of the minor's control. Moreover, asking for voluntary departure prior to the conclusion of the removal proceeding necessarily means that the minor gives up any defenses

to removal proceedings, including the opportunity to obtain Special Immigration Juvenile Status or asylum.

Unaccompanied Immigrant Minors Have an Acute Need for and Are Legally Entitled to Receive Access to Reproductive Health Care

59. Unaccompanied immigrant minors have an acute need for reproductive health care, which is both time-sensitive and is necessary over the course of their time in federal custody. For example, a high number of these young women are victims of sexual assault. Some of these women will need access to emergency contraception, and some will need access to abortion. Any female aged 10 or older must undergo a pregnancy test within 48 hours of admission to an ORR-funded facility. This is the point at which many young women first learn they are pregnant.

60. The federal government is legally obligated to ensure that all programs that provide care to these young people comply with the minimum requirements detailed in the *Flores v. Reno* Settlement Agreement, CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997) ("*Flores* agreement"). The *Flores* agreement is a nationwide consent decree that requires the government to provide or arrange for, among other things, "appropriate routine medical . . . care," including specifically "family planning services[] and emergency health care services."

61. Additionally, in response to its obligations under the Prison Rape Elimination Act and the Violence Against Women Reauthorization Act of 2013, ORR issued a regulation requiring all ORR-funded care provider facilities to, among other things, provide unaccompanied immigrant with access to reproductive healthcare if they are sexually assaulted in ORR custody. The regulation states, in relevant part, that grantees providing care to unaccompanied immigrant minors who have experienced sexual abuse while in federal custody must ensure "unimpeded access to emergency medical treatment, crisis intervention services, emergency contraception, and sexually transmitted infections prophylaxis." 45 C.F.R. § 411.92(a). The regulation further provides that grantees must ensure that a young person subject to sexual abuse in ORR custody is offered a pregnancy test, and "[i]f pregnancy results from an instance of sexual abuse, [the] care

provider facility must ensure that the victim receives timely and comprehensive information about all lawful pregnancy-related medical services." *Id.* § 411.93(d).

62. Adult women in Immigration and Customs Enforcement detention, and inmates in federal prison, are expressly granted the right to access abortion services. *See* ICE, *Detention Standard 4.4, Medical Care (Women)*, at 35 (revised Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/4-4.pdf; 28 C.F.R. § 551.23(c).

Defendants' Interference With, Obstruction, And Prohibition On Unaccompanied Immigrant Minors' Access to Abortion

63. Since March 2017, Defendants have had a policy, applicable to all pregnant UCs in their custody, of ensuring that young people continue their pregnancies while in ORR custody, unless doing so would pose a risk of death or serious injury. Defendants prohibit all federally funded shelters from taking "any action that facilitates" abortion access for unaccompanied minors in their care without "direction and approval from the Director of ORR." This includes scheduling appointments with medical providers, ensuring access to non-directive options counseling, ensuring access to court to seek a judicial bypass in lieu of parental consent, and providing access to the abortion itself. Defendant Lloyd has taken the position that "[g]rantees should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling."

64. In an email to all ORR staff, then-Acting Director of ORR Ken Tota summarized the policy: "Grantees are prohibited from taking any actions in [requests for abortion] without . . . signed authorization from the Director of ORR."

65. As part of the revised policy, pregnant minors seeking abortion are also subject to coercion tactics. For example, such minors are forced to tell their parents that they are pregnant

and seeking an abortion; if they refuse, ORR instructs the shelter to tell their parents against their wishes.

66. As described below, ORR also requires minors considering an abortion to visit a pre-approved anti-abortion crisis pregnancy center.

67. If these attempts to coerce the minor into carrying to term fail, ORR prevents the minor from obtaining an abortion while she is in its custody, unless the pregnancy would pose a risk of death or serious injury to the minor.

68. Defendants have exercised their unconstitutional veto power to deny minors access to abortion by prohibiting their shelters from transporting or allowing them to be transported to appointments related to abortion access.

69. Defendants' actions toward the named Plaintiffs are consistent with their policy, which has been enforced against other young women as well.

70. For example, in March 2017, another unaccompanied minor at a federally funded shelter in Texas decided to have an abortion. After obtaining a judicial bypass and receiving counseling, she started the medical abortion regimen for terminating a pregnancy. This regimen begins with a dose of mifepristone, followed by a dose of misoprostol within 48 hours later. After the minor took the mifepristone, ORR intervened, and forced her to go to an "emergency room of a local hospital in order to determine the health status of [her] and her unborn child." The Acting Director of ORR, Ken Tota, directed ORR as follows: "[i]f steps can be taken to preserve the life of . . . her unborn child, those steps should be taken." At the hospital, the minor was subjected to a medically unnecessary ultrasound. Defendants contemplated trying to "reverse" the minor's abortion against her will by forcing her to undergo an untested regimen of

progesterone. Eventually, after the intervention of other advocates, ORR allowed the minor to complete the medication abortion and take the second dose of pills.

71. Defendant Lloyd has personally contacted one or more unaccompanied immigrant minors who were pregnant and seeking abortion, and discussed with them their decision to have an abortion. Defendant Lloyd is trying to use his position of power to coerce minors to carry their pregnancies to term. Defendant Lloyd has a religious opposition to abortion and he is imposing his personal beliefs on unaccompanied minors.

72. ORR has also created a nationwide list of "Trusted Providers in HHS Cities," which comprises anti-abortion crisis pregnancy centers. The list was created by two anti-abortion, religiously affiliated organizations called CareNet and Heartbeat International. As part of ORR's policy, if a minor expresses that she is contemplating abortion, ORR requires her to visit one of these pre-approved centers.

73. Crisis pregnancy centers are categorically opposed to abortion, and generally do not provide information about pregnancy options in a neutral way. Many are also religiously affiliated, and proselytize to women.

74. Defendants forced J.D. to visit one of these centers for "counseling," forcing her to share her private personal and medical information, namely that she was pregnant and seeking an abortion, to an entity that is hostile to her decision to have an abortion. The center also prayed for J.D. in her presence during her mandatory visit.

75. Defendants have also required other minors to be counseled by crisis pregnancy centers, both before and after their abortions, including at the explicit direction of Defendant ORR Director Lloyd.

76. Defendants have also forced unaccompanied immigrant minors to tell their parents and/or immigration sponsors about their abortion decision, or Defendants themselves have told minors' family members or sponsors about the minors' pregnancy and/or abortion decision, against the express wishes of the minors, both before and after their abortions. Forcing parental notification over the minors' objection can cause the minor or other family members harm.

77. Defendants told J.D.'s mother about J.D.'s pregnancy over J.D.'s objections and tried to force J.D. to also tell her mother she was seeking an abortion, despite the fact that J.D had been abused by her parents.

78. Defendants also required Jane Poe to tell her mother in her home country and her potential sponsor that she was pregnant and seeking an abortion. They then threatened to beat her if she had an abortion.

79. In another minor's case, Defendant Lloyd explicitly required "the grantee or the federal field staff [to] notify her parents of the termination," even after she had obtained a judicial bypass to be allowed to access abortion without her parents' involvement or knowledge.

80. In another instance, ORR directed such parental notification despite being warned by the minors' advocate that the minor's father would retaliate against the mother because of the minor's abortion decision.

81. Defendant Lloyd has also obstructed minors' access to counsel and the courts for the purpose of impeding minors' access to abortion. In March 2017, Lloyd sent a directive saying that a minor seeking abortion "should not be meeting with an attorney regarding her termination or otherwise pursuing a judicial bypass at this point."

CLASS ALLEGATIONS

82. Pursuant to Federal Rule of Civil Procedure 23(b)(1) and (b)(2), Plaintiffs J.D. and Jane Roe bring this action as a class action on behalf of all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit.

83. The class is so numerous that joinder is impracticable. In any given year, there are hundreds of pregnant unaccompanied minors in Defendants' custody. Joinder is inherently impractical because the number of unnamed, future class members who will be pregnant while in ORR custody is unknown and unknowable, especially given the transient nature of the unaccompanied minors population and the temporal limitations of pregnancy. The young people affected by ORR's abortion restriction policy are geographically dispersed across the country. Many proposed class members are highly unlikely to file individual suits on their own behalf given the practical, legal, linguistic, monetary, and fear-based barriers that prevent their ability to access independent counsel to challenge ORR's abortion restrictions.

84. The claims of the Plaintiff Class members share common issues of law related to Defendants' coercion and obstruction, including but not limited to: (i) whether ORR's policy of coercing unaccompanied immigrant minors into carrying their pregnancies to term and, if they still seek an abortion, blocking their access to abortion procedures, violates class members' constitutional rights; (ii) whether ORR's policy of requiring a forced visit to an anti-abortion crisis pregnancy center violates class members' constitutional rights; (iii) whether disclosing or forcing the class members to disclose their pregnancies and abortion decisions to parents and/or immigration sponsors violates class members' constitutional rights; and (iv) whether Defendant Lloyd's imposition of his religious faith on the minors violates the Establishment Clause.

85. The claims of the Plaintiff Class members share common issues of fact, including but not limited to the implementation of Defendants' policy and practice of obstructing or preventing of access to abortion and of coercing minors into carrying their pregnancies to term in the various ways detailed above.

86. The claims of J.D. and Jane Roe are typical of the claims of members of the Plaintiff Class.

87. The named class representatives will fairly and adequately protect the interests of the Plaintiff Class. The named class representatives have no interest that is now or may potentially be antagonistic to the interests of the Plaintiff Class. The attorneys representing the named class representatives are experienced civil rights attorneys and are considered able practitioners in federal constitutional litigation. These attorneys should be appointed as class counsel.

88. Defendants have acted, have threatened to act, and will continue to act on grounds generally applicable to the Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The Plaintiff Class may therefore be properly certified under Fed. R. Civ. P. 23(b)(2).

89. Prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for individual members of the Plaintiff Class. The Plaintiff Class may therefore be properly certified under Fed. R. Civ. P. 23(b)(1).

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
FIFTH AMENDMENT RIGHT TO PRIVACY AND LIBERTY
(INDIVIDUAL PLAINTIFFS AND CLASS AGAINST DEFENDANTS)

90. Defendants violate unaccompanied immigrant minors' right to privacy guaranteed by the Fifth Amendment by wielding a veto power over their abortion decisions, and by obstructing, interfering with, or blocking access to abortion, including by trying to coerce minors to carry to term by such tactics as forcing minors to visit crisis pregnancy centers, and when those tactics fail, preventing them from accessing the courts for the purpose of obtaining judicial bypasses, and from going to medical facilities where they can obtain legal abortions.

91. Defendants violate the Fifth Amendment rights of unaccompanied minors by revealing, or forcing the minors to reveal, information about their pregnancy and abortions to their parents or other family members, including immigration sponsors, both before and after the abortion.

92. Defendants violate unaccompanied minors' Fifth Amendment right to bodily integrity by subjecting them to medically unnecessary ultrasounds.

SECOND CLAIM FOR RELIEF
FIRST AMENDMENT - COMPELLED SPEECH
(INDIVIDUAL PLAINTIFFS AND CLASS AGAINST DEFENDANTS)

93. By compelling unaccompanied immigrant minors to disclose their pregnancy and decision to have an abortion to crisis pregnancy centers, and to their parents, family members and/or immigration sponsors, Defendants violate the unaccompanied immigrant minors' rights against compelled speech guaranteed by the First Amendment. The compelled disclosure reveals private, intimate information to others, including to entities hostile to the minors' abortion decision.

THIRD CLAIM FOR RELIEF
INFORMATIONAL PRIVACY
(INDIVIDUAL PLAINTIFFS AND CLASS AGAINST DEFENDANTS)

94. By requiring unaccompanied immigrant minors to disclose their identities, their pregnancies, and their decisions to seek or have an abortion, to a crisis pregnancy center, parents, family members, and/or immigration sponsors, or doing so themselves, Defendants violate the minors' rights to informational privacy guaranteed by the Fifth Amendment.

FOURTH CLAIM FOR RELIEF
FIRST AMENDMENT ESTABLISHMENT CLAUSE
(INDIVIDUAL PLAINTIFFS AND CLASS AGAINST DEFENDANTS)

95. Defendants violate the Establishment Clause by requiring unaccompanied immigrant minors to obtain counseling at crisis pregnancy centers that are often religiously affiliated, and that proselytize to the unaccompanied immigrant minors who are forced to go there.

96. Defendant Lloyd's actions violate the Establishment Clause by imposing his religious beliefs on unaccompanied minors, and directing that they hear unwanted religious messages about their pregnancies and pregnancy outcomes.

97. Defendants' actions alleged herein endorse and impose upon the class members a particular set of religious beliefs.

98. Defendants' actions alleged herein have the predominant purpose of advancing a particular set of religious beliefs.

99. Defendants' actions alleged herein have the predominant effect of advancing a particular set of religious beliefs.

100. Defendants' actions alleged herein are religiously coercive.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and:

1. Certify this action as a class action under Federal Rule of Civil Procedure 23;

2. Declare, pursuant to 28 U.S.C. § 2201, that Defendants' actions, as set forth above, violate the Establishment and Free Speech Clauses of the First Amendment to the United States Constitution, and the Fifth Amendment right to privacy, liberty, informational privacy, and bodily integrity;

3. Enter a preliminary and permanent injunction as to the Class to prevent Defendants from wielding a veto power over an unaccompanied minors' abortion decision, including interfering, obstructing, or blocking their access to abortion;

4. Enter a preliminary and permanent injunction as to the Class to prevent Defendants from pressuring or coercing pregnant minors to carry their pregnancies to term, including by forcing unaccompanied immigrant minors to visit crisis pregnancy centers as a condition of having an abortion or after an abortion;

5. Enter a preliminary and permanent injunction as to the Class preventing Defendants from imposing religious beliefs on unaccompanied minors;

6. Enter a preliminary and permanent injunction as to the Class preventing Defendants from revealing, or forcing unaccompanied immigrant minors to reveal, to the minors' parents, family members or immigration sponsors information about the minors' pregnancies and/or abortion decisions, either prior to or after an abortion against the minors' will;

7. Enter a preliminary and permanent injunction to prevent Defendants from retaliating against unaccompanied immigrant minors for seeking or obtaining abortions, and from retaliating against shelters, shelter staff, or immigration attorneys for assisting minors in accessing abortion;

8. Award costs and fees for this action, including attorneys' fees;

9. Award such further relief as this Court deems appropriate.

February 15, 2017

Respectfully Submitted,

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*Motion for admission *pro hac vice granted*

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[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 18-5093, 18-8003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, *et al.*,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, Secretary of Health and Human Services, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia
No. 17-cv-02122-TSC

PLAINTIFFS–APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Defendants have inflicted enough harm on the young women in their custody, and should not be permitted to enforce their unlawful policy while they appeal the District Court's properly-entered preliminary injunction and class certification. For the past year, Defendants have developed and implemented a policy that denies pregnant unaccompanied minors access to unbiased information about their pregnancy options; coerces them to carry their pregnancies to term; and blocks them from going to any abortion-related appointments. The named Plaintiffs, and numerous unidentified members of the class, were subjected to Defendants' policy.

The minors in Defendants' care are isolated, and often unaware of their right to obtain an abortion. Plaintiffs' counsel only learned of some of the named Plaintiffs from anonymous tips, and only learned about other minors whose abortion requests were denied by ORR months later through discovery in another case against ORR. When the named Plaintiffs found their way to Plaintiffs' counsel after being significantly delayed by Defendants' obstruction tactics, Plaintiffs' counsel sought immediate injunctive relief on their behalf, which the Court granted as to three named Plaintiffs within a matter of days (Defendants released the fourth named Plaintiff before the District Court could rule on the TRO).

Because Defendants are unlikely to succeed on the merits of their appeal and will experience no harm from the preliminary injunction, this Court should deny the stay. Moreover, granting a stay will cause minors irreparable harm: they will be subjected to Defendants' coercion, and Defendants will prevent them from obtaining abortion care. Denying the stay will serve the public interest by protecting the constitutional rights and health of pregnant unaccompanied minors. Defendants' motion for a stay should therefore be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Unaccompanied immigrant minors (or "unaccompanied children" or "UCs") come to the United States without their parents, often fleeing violence or abuse. After their initial apprehension, Defendant Office of Refugee Resettlement ("ORR") bears responsibility for their "care and custody." 8 U.S.C. § 1232(b)(1). The federal government and all of its programs are required to ensure that the best interests of UCs are protected. *See* 6 U.S.C. § 279(b)(1)(B); 8 U.S.C. § 1232(c)(2)(A).

Protecting UCs' best interests includes ensuring access to health care, including reproductive health care. Indeed, under a nationwide consent decree, the federal government is obligated to provide or arrange for, among other things, "appropriate routine medical . . . care," including specifically

"family planning services[] and emergency health care services."[1] Additionally, an ORR regulation requires all ORR-funded shelters to, among other things, provide UCs who are victims of sexual assault while in federal custody with access to reproductive healthcare. *See* 45 C.F.R. § 411.93(d). UCs have an acute need for such care, in part because many are victims of sexual assault, immediately before, during, or after their journeys to the United States. Third Amended Complaint (ECF No. 118-1) ¶ 59; Amnesty International, *Invisible Victims*, at 15 (April 2010).[2]

Nevertheless, pursuant to Defendants' policy, when a minor requests information about and/or access to abortion, Defendants employ coercive tactics, including forcing the minor to tell her parents of her pregnancy and abortion decision, even in cases where it would endanger the minor or others. *See*, *e.g.*, ECF No. 121-3; ECF No. 92-1; ECF No. 56-10. As Jonathan White, former Deputy Director of ORR, testified, this policy of forced notification puts minors at risk of harm. ECF No. 121-5 at 42:3-43:1.

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[1] *See Flores v. Reno Settlement Agreement*, CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997), Exhibit 1, "Minimum Standards for Licensed Programs", at 15, *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf.

[2] Available at https://fusiondotnet.files.wordpress.com/2014/09/amr410142010eng.pdf.

Defendants also require minors who indicate that they are considering abortion to receive "life-affirming" counseling from religiously affiliated anti-abortion crisis pregnancy centers on Defendants' list of "approved providers" a list that was commissioned by Director Lloyd and created with the assistance of two national networks of anti-abortion crisis pregnancy centers. *See, e.g.*, ECF No. 121-3; ECF No. 121-16; ECF No. 121-15 at 161:6-162:10.

When a minor manages to withstand Defendants' coercion, Defendants block her from accessing abortion. Defendant Lloyd has made clear that, under ORR's policy, shelters "are not to take [minors] to get a termination, or to any appointments to prepare [them] for a termination, without consent from the Director, which cannot happen without written and notarized consent of her parents, and will not necessarily follow." ECF No. 121-3. Defendant Lloyd has admitted he has not approved any abortion, even when the young woman was pregnant as a result of a rape and was suicidal. *See id.*, ECF No. 121-15 at 64:19-21; 65:6-22.

After four young women who were subjected to Defendants' policy of coercion and obstruction sought TROs three were granted, and Defendants released the other before the lower court could rule the District Court

certified a class of all pregnant minors in Defendants' legal custody and preliminarily enjoined Defendants' policy.

ARGUMENT

Defendants cannot carry their "heavy burden" of justifying a stay of the District Court's Order. *Williams v. Zbaraz*, 442 U.S. 1309, 1311-12 (1979). "A stay is not a matter of right" but rather is an "exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations and citations omitted). Courts assess four factors: (1) whether the moving party "has made a strong showing that [it] is likely to succeed on the merits"; (2) whether it "will be irreparably injured absent a stay"; (3) whether a stay "will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Id*. at 425-26, 434. The first two factors are the most critical. *Id.* at 434. Here, *all* factors militate *against* granting a stay.

I. The Government Has Not Made a Strong Showing of Success on the Merits.

A. Defendants Are Unlikely to Succeed on Their Appeal of the Court's Class Certification Order.[3]

[3] Plaintiffs agree that class certification is "bound up" with the preliminary injunction, although they disagree that certification under Rule 23(f) is appropriate given that the District Court's decision is not "manifestly erroneous." *In re Brewer*, 863 F.3d 861, 875 (D.C. Cir. 2017).

1. Defendants Have Not Shown that Their Mootness Arguments Will Prevail on Appeal.

Defendants argue that class certification was improper because Plaintiffs' class representatives' claims are moot. As a threshold matter, that argument ignores all but *one* of Plaintiffs' claims: the right to access abortion while in ORR custody. Gov't Mot. at 6. Defendants cannot dispute that at the time the class was certified representatives Ms. Doe and Ms. Roe had live claims, such as their informational privacy claim.[4]

In any event, the District Court properly found that the class claim for abortion access falls under the "inherently transitory" exception to mootness. The Supreme Court has repeatedly recognized that there are "cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *accord U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975). "In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (quotation marks omitted).

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[4] The District Court's amended order (ECF No. 136) recognizes that Ms. Moe and Ms. Poe are not class representatives.

The District Court properly focused on two features of Plaintiffs' claims. First, the claims are from "unaccompanied minors in ORR custody, a transitory population" whose members remain in custody for a period that is "uncertain and unpredictable." Mem. Opinion at 18 ("Opinion"), ECF No. 126. Second, the claims seeking access to abortion are "necessarily time limited" such that "there may be circumstances in which a court is required to rule on emergency requests for injunctive relief in a shorter timeframe than it could feasibly rule on a class certification motion." *Id.* at 19.

Defendants' authorities do not demonstrate otherwise. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013), concerned conditional certification of a "collective action" under the Fair Labor Standards Act and therefore is inapplicable in "Rule 23-land," *DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017). Further, Defendants mischaracterize *Genesis Healthcare* as stating that a class action can proceed after the plaintiffs' claims become moot "only when" mootness occurs "'after the class has been duly certified.'" Gov't Mot. at 6-7. The quoted statement merely describes the facts of *Sosna*, but the Court did not limit the universe of mootness exceptions to the situation presented in *Sosna*; the word "only" is Defendants' addition. Indeed, the "inherently transitory" exception to mootness that the District Court applied is a separate doctrine from *Sosna*

that operates independently and does not apply "only when" mootness postdates certification. *See, e.g.*, *Cty. of Riverside,* 500 U.S. at 52 ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction."). Defendants' reliance on *Kremens v. Bartley*, 431 U.S. 119 (1977), is likewise misplaced: *Kremens* did not even mention the "inherently transitory" rule.

Defendants also argue that the "inherently transitory" doctrine cannot apply because class certification was "pending for months." Gov't Mot. at 7. But "transitoriness" is measured by how long the *merits* are pending, not the motion for class certification. *See, e.g.*, *Cty. of Riverside*, 500 U.S. at 52. Here, the District Court was unable to certify a class in the short time period in which the individual Plaintiffs sought access abortion. *See* ECF Nos. 5, 20; ECF Nos. 63, 73; ECF Nos. 105, 114 (Plaintiffs' TROs were pending for 7 days or less). These short time periods fall comfortably within the range of cases applying the "inherently transitory" exception. *See Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013) (claims that would be live for a "length . . . impossible to predict"); *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 183 (D.D.C. 2015) (claims that would be live for "weeks or months"); *DL v. District of Columbia*, 302 F.R.D. 1, 20 (D.D.C.

2013) (claims live for up to two years), *aff'd on other grounds*, 860 F.3d 713 (D.C. Cir. 2017).

Defendants also argue that the "inherently transitory" exception cannot apply where claims become moot by court-ordered relief rather than "statutory deadlines or time limits that passed of their own accord." Gov't Mot. at 7. However, neither this Court nor the Supreme Court has ever imposed such a limitation. Defendants point to *Genesis Healthcare*, 596 U.S. at 77, but that case speaks in terms of litigation having "run its course" without the slightest hint that the reason for that condition matters. Were Defendants' novel distinction valid, it would "punish Plaintiffs for seeking relief in response to urgent needs." Opinion at 19. Defendants' argument finds support in neither precedent nor logic.

2. The District Court Properly Held That Plaintiffs Satisfy the Commonality and Typicality Requirements of Rule 23(a).

The District Court, following well-settled law, correctly held that Plaintiffs meet the commonality and typicality requirements.[5] ECF No. 126 at 11-15. Indeed, those factors are easily met where, as here, there is a uniform policy or practice that affects all class members. *DL*, 713 F.3d at

[5] Defendants do not dispute that Plaintiffs meet the numerosity requirement of Rule 23(a), given that "ORR has approximately 30 pregnant UACs enter its care and custody on a monthly basis." Gov't Mot., Ex. A, ¶ 12.

(D.C. Cir. 2013); *see also Wal-Mart Stores v. Dukes*, 564 U.S. 338, 353 (2011).

Defendants have a uniform policy of ensuring that UCs continue their pregnancies while in government custody. *See supra* at 5-6. As part of this policy, Defendants employ a common set of coercive tactics including forced visits to crisis pregnancy centers and mandatory parental notification to steer pregnant UCs away from abortion, and, if those tactics fail, they block access to any abortion-related care. *Id*. All pregnant minors in ORR custody are subject to this policy, regardless of what pregnancy outcome they may ultimately choose. Class members also suffer "common harms, susceptible to common proof, and curable by a single injunction." *DL*, 860 F.3d at 724 (internal citations omitted). Moreover, the class representatives' and other class members' claims "are based on the same legal theory." *Nat'l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32, 40 (D.D.C. 2017).

Defendants do not seriously dispute that Plaintiffs challenge a uniform policy. Instead, they point to irrelevant potential factual differences between class members (such as their age, length of pregnancy, state of residence, and whether ORR can release them from custody). Gov't Mot. at 13-14. None of those facts has any bearing on the central common question in this

case: whether Defendant's uniform anti-abortion policy is constitutional. Even if factual distinctions had some bearing on this case which they do not commonality and typicality are not destroyed merely by factual variations. *See Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987); *see also DL*, 860 F.3d at 725-26; *R.I.L-R.*, 80 F. Supp. 3d at 181-82.

Defendants also incorrectly claim that *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), announced a general rule disfavoring class actions in due process cases. Gov't Mot. at 14. In fact, the Court merely remanded the case for further consideration of class status given the specific facts and claims in that case, noting that what process is due is often flexible and fact-based. *Jennings*, 138 S. Ct. at 852. Additionally, that case involved procedural due process, rather than (as here) substantive due process.

That many pregnant UCs decide to carry to term, Gov't Mot. at 15, is irrelevant and does not make Doe or Roe's claims atypical. Defendants' policy affects all pregnant UCs by steering their pregnancy decisions in coercive ways, denying them unbiased information, disclosing their decisions to third parties, and ultimately taking the power to determine the

outcomes of their pregnancies out of their hands and placing it, unconstitutionally, into the hands of Defendant Lloyd.[6]

3. The District Court Properly Found the Class Representatives Are Adequate.

The District Court likewise properly exercised its discretion in finding the class representatives adequate, as they "have no conflicts of interest with the class and are capable of vigorously prosecuting class interests." Opinion at 19-20 (citing *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575-76 (D.C. Cir. 1997)). The government contests this finding by raising speculative and unsupported concerns about the "vigorousness" with which Ms. Doe and Ms. Roe will represent the class, and by positing that "changed minds" and/or divergent "positions on abortion" between the representatives and some class members will somehow create conflicts of interest. Gov't Mot. at 8-12. Neither contention is valid.

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[6] The government outrageously suggests that the minor's factual circumstances are important given the so-called "agenda" of the class representatives, implying that they and their lawyers seek to push UCs to terminate their pregnancies. Gov't Mot. at 14. In fact, the class representatives and counsel seek to ensure that every pregnant minor in ORR custody can exercise her constitutional right to decide for herself, free from coercion, whether to become a parent. Similarly, the government's inappropriate and offensive personal attack on Ms. Garza is irrelevant for many reasons. As the government was forced to acknowledge, the Texas Attorney General's baseless inquiry into Ms. Garza's conduct has been closed with no finding of wrongdoing.

As this Court has recognized, "plaintiffs with moot claims may adequately represent a class." *DL*, 860 F.3d at 726 (citing *Geraghty*, 445 U.S. at 407). Defendants' authorities, *Hall v. Beals*, 396 U.S. 45 (1969), *Long v. Dist. of Columbia*, 469 F.2d 927 (D.C. Cir. 1972), and *Spriggs v. Wilson*, 467 F.2d 382 (D.C. Cir. 1972), are distinguishable and long out of date. None discussed whether the claims were "inherently transitory"; in fact, they all predate the Supreme Court's articulation in *Sosna* of the "inherently transitory" rule. Two of the cases involved claims in which the challenged government policy or practice no longer existed, *Hall*, 396 U.S. at 48-50, or never applied to the named plaintiff to begin with, *Long*, 469 F.2d at 929-30.

Defendants also complain that the class representatives were only "briefly involved with this case," and that their declarations lack explicit statements that they will vigorously pursue class claims. Gov't Mot. at 9. But the length of involvement cannot be the measure of class representatives' commitment; if it were, no representatives would *ever* be appropriate in cases involving "inherently transitory" claims. And neither this Court nor the Supreme Court has ever required a specific length of involvement or a particular set of magic words to establish that a proposed class representative will vigorously pursue the class's interests. Rather, both

this Court in *DL* and the Supreme Court in *Sosna* focused on the demonstrated commitment of the named plaintiffs through the course of litigation, and the lack of apparent conflicting interests. *See Sosna*, 419 U.S. at 403; *DL*, 860 F.3d at 726. Moreover, contrary to the government's assertion that Ms. Doe and Ms. Roe "spoke only of their own immediate interests in obtaining abortions," each declared their desire to be a class representative for similarly situated individuals. *See* ECF Nos. 5-2, 63-2, 105-2.

Furthermore, the government's factually disputed claim about Ms. Roe's age is irrelevant. She was harmed by the government's abortion-ban, just like the class members she represents.

Nor do the class representatives have conflicts of interest with class members who "do not want an abortion, may strongly oppose abortions, and [] support ORR's challenged conduct here." Gov't Mot. at 11. UCs who choose not to exercise their right to an abortion are not harmed in any way by being class members; thus, there is no conflict between their decisions and the class members. To the contrary, the government is enjoined from "interfering with or obstructing any class member's access to" all "pregnancy-related care," not merely abortion. Dist. Ct. Order, ECF No. 127 ("Order"), at 1.

B. Defendants Have Not Made a Strong Showing That They Will Succeed on Their Appeal of the Preliminary Injunction.

1. Defendants Are Unlikely to Succeed on Appeal of the Order Blocking Them From Obstructing or Interfering With Abortion Access.

Defendants' argument that they are entitled to ban abortion for UCs is, as the District Court recognized, flatly wrong under well-established and recent Supreme Court precedent. *See* Opinion at 23 (citing, e.g., *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). If the government were allowed to block UCs' access to abortion it could do the same for others in government custody a position that has already been rejected. *See, e.g.*, *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). Indeed, Defendants cannot square their extreme policy for UCs with other governmental policies for adult women in ICE detention and the Bureau of Prisons. *See* ICE Guidelines, Detention Standard 4.4, Medical Care, *available at* https://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf.; 28 C.F.R. § 551.23(c).

Defendants make three arguments against the injunction. First, Defendants argue, without citation, that "to sustain the injunction, this Court must agree that the ORR policies and procedures constitute an undue burden

in every possible circumstance." Gov't Mot. at 18. That is incorrect: abortion restrictions must be invalidated if they impose an undue burden for a *large fraction* of the women for whom the provision at issue is "'an actual rather than an irrelevant restriction.'" *Whole Woman's Health v*, 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). Plaintiffs easily meet that standard here given that Defendants impose a ban on abortion for all unaccompanied minors.

Second, they claim that they are not imposing an undue burden on a UC's right to abortion because she could obtain an abortion after she is united with a sponsor. Gov't Mot. at 18-21. But the District Court found, based on undisputed evidence, that the minor controls neither the approval of a sponsor nor the timing of the sponsorship process, which, assuming she has a viable sponsor at all, can take weeks or months. Opinion at 27; *see also* Decl. of Robert Carey, ECF No. 23-1, ¶ 6. Simply because Plaintiff Moe was quickly reunified with her family, Gov't Mot. at 19-20, does not mean that Defendants' policy didn't impose an undue burden on her access to abortion. To the contrary, her abortion request languished at ORR for two weeks while she was pushed further into her pregnancy until she found counsel and sought a TRO. Ms. Moe's TRO filing prompted Defendants to speed up the reunification with her family member. If she had not found

counsel, her abortion request would have languished longer, and she would have been unnecessarily pushed further into her pregnancy.

Third, Defendants argue that a minor could voluntarily depart. But as the District Court held, Opinion at 26, the Constitution does not permit the government to penalize a minor for seeking to exercise her right to an abortion by forcing her to return to her home country or to sacrifice her opportunity to be reunited with family here or seek asylum. Moreover, these minors are often fleeing horrific circumstances in their home countries, as the named Plaintiffs' stories demonstrate. *See* Opinion at 26. And voluntary departure can take months and requires the discretionary decision of an immigration judge. *See* Proposed Third Amended Complaint ¶ 58 (ECF No. 118-1).

To justify the time it takes for reunifications, Defendants rely on *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). But the fact that a state's judicial bypass process may take a certain number of days does not give Defendants carte blanche to independently obstruct a minor's access to abortion for the same number of days with the intent to deny her abortion access entirely. In any event, the Supreme Court has more recently made clear that a government-imposed delay of a length similar to the examples Defendants cite is unconstitutional. *See Whole Woman's Health*,

136 S. Ct. at 2318 (2016) (striking down abortion restriction that resulted in three-week wait time for appointments).

Defendants' final point that the District Court did not consider other miscellaneous "highly relevant" factors, Gov't Mot. at 21, is merely a rehash of their attack on class certification by pointing out irrelevant factual variations that could exist among class members. Defendants never explain why these factors are relevant to the merits nor explain how the injunction requires a minor to be allowed to access an "abortion [that] would violate state law."

2. Defendants Are Not Likely to Succeed on Appeal of the Prohibition On Revealing a Minor's Abortion Decision.

Defendants are unlikely to succeed in reversing the District Court's order preliminarily enjoining them "from forcing any class member[s] to reveal the fact of their pregnancies and/or their abortion decisions to anyone, and from revealing that fact or those decisions to anyone themselves."[7] ECF No. 136. Contrary to Defendants' assertion, Gov't Mot. at 16, Plaintiffs do not claim that Defendants violate the First Amendment prohibition on

[7] The District Court's amended order makes clear Defendants may communicate to third parties with the minor's non-coerced permission and in the event of a medical emergency in which the minor is unable to communicate this information to a medical provider herself. ECF No. 136.

compelled speech by forcing minors to tell their parents of their abortion decision. Rather, Plaintiffs made the following claims:

First, that Defendants' policy violates minors' Fifth Amendment right to keep their abortion decisions confidential from their parents. ECF No. 104 at ¶ 71 (First Claim for Relief). The Supreme Court has held that, although a state can require parental involvement for minors seeking abortions, such a requirement must also have an avenue for minors to "bypass" parental involvement. *Bellotti v. Baird*, 443 U.S 622, 647 (1979). As one court put it, if *Bellotti* means anything, "it surely means that States seeking to regulate minors' access to abortion must offer a credible bypass procedure, *independent of parents or legal guardians*." *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1112 (5th Cir. 1997), *overruled on other grounds by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

Second, that Defendants violate Plaintiffs' right to informational privacy by telling parents, sponsors, crisis pregnancy centers, and others, about minors' pregnancy and/or abortion decisions. ECF No. 104 at ¶ 73 (Third Claim For Relief). People have a right to privacy "in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). This privacy interest is heightened here, where the "personal matter" at issue the decision to have an abortion is highly sensitive, intimate and

emotionally charged. *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986), *overruled on other grounds by Casey*, 505 U.S. at 882.

Third, that Defendants violate minors' right to compelled speech by forcing them to discuss their pregnancies anti-abortion crisis pregnancy centers. ECF No. 104 at ¶ 72 (Second Claim For Relief). The First Amendment protects "the right to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The only other court that has considered a similar issue has held the government violates the First Amendment by forcing people seeking abortion to visit an anti-abortion pregnancy center to discuss their abortion. *See Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Daugaard*, 799 F. Supp. 2d 1048, 1054-58 (D.S.D. 2011).

The facts here confirm the harms inherent when the government forcibly reveals a person's abortion decision to others. Defendants required Plaintiff Poe to disclose her abortion decision to her parents, who threatened to beat her if she had an abortion. ECF No. 96 at 4. They then sought to tell Ms. Poe's sponsor knowing that it would cause Ms. Poe harm. *Id.* If Defendants want to ensure that a sponsor will not retaliate against a minor

because she has had an abortion, Gov't Mot. at 17-18, the solution is simple: Defendants should not tell the sponsor that the minor has had an abortion.[8]

Defendants' argument that they must be able to tell a minor's medical provider, Gov't Mot. at 17, is equally unavailing. If a minor's abortion is relevant to her health history, she can convey that information to her health care providers, just as any other teenager could do in the confines of a confidential patient-provider relationship.

II. The Balance of Harms Favors the Plaintiffs and the Injunction Serves the Public Interest.

The District Court correctly held that Plaintiffs will suffer irreparable harm absent an injunction. Class members seeking abortions will be prevented from obtaining them, class members seeking unbiased information about abortion and about their legal options will be prevented from obtaining that, class members seeking to keep their abortion decisions confidential from parents or sponsors will be prevented from doing so. The undisputed facts irrefutably support these conclusions.

[8] Ms. Poe resided in a state where minors can consent to abortion without parental involvement. Accordingly, Defendants' alleged position articulated for the first time in their motion for a stay in the District Court that they do not tell a minor's parents or sponsor of her abortion decision if it is contrary to law or would cause harm to the minor, Gov't Mot. at 16-17, flies in the face of the evidence.

On the other hand, "Defendants have not shown any legitimate interest that will be harmed by the issuance of a preliminary injunction." Opinion at 27. This is true because Defendants' interest in preventing UCs from effectuating their constitutional rights is simply not legitimate. Defendants' mischaracterization of their interest as not "facilitating" abortion is wordplay, belied by the facts.

A stay would not serve the public interest. Allowing the government to violate basic, well-established constitutional rights *harms* the public interest. *See, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Defendants' claim that permitting young women to exercise their right to have an abortion will harm the public interest by "incentivizing" others to leave their home countries and come to the United States to seek an abortion is preposterous. There is no evidence that minors make the perilous trek to the United States for the purpose of having abortions. As Defendants themselves have explained, UCs "leave their home countries to join family already in the United States, escape abuse, persecution or exploitation in the home country, or to seek employment or educational opportunities in the United States."[9]

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[9] Administration for Children and Families Factsheet, *available at* https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay should be denied.

April 19, 2018

Respectfully submitted,

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CERTIFICATE AS TO THE PARTIES AND AMICI

Pursuant to this Court's Circuit Rule 28(a)(1)(A), counsel for Plaintiffs-Appellees hereby adopts Appellants' Certificate of Parties and Amici Curiae.

The ruling under review in this case is the March 30, 2018 Order entered by Judge Tanya S. Chutkan, reported at ECF No. 127, which certified a class and granted Plaintiffs' motion for a class-wide injunctive relief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Circuit Rule 32, this brief includes 4, 759 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count of this word processing system in preparing this certificate.

April 19, 2018

/s Brigitte Amiri

Brigitte Amiri

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2018, the foregoing Opposition to Appellants' Motion for a Stay was electronically filed with the Clerk of the Court by using the appellate CM/ECF system. Service will be made on opposing counsel who are CM/ECF users automatically through the CM/ECF system.

/s Brigitte Amiri

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his official capacity; and XAVIER BECERRA, Attorney General of California, in his official capacity,

Defendants.

Case No. 2:18-cv-00490-JAM-KJN

DECLARATION OF HOLLY S. COOPER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Judge: Honorable John A. Mendez
Action Filed: March 6, 2018

I, Holly S. Cooper, declare as follows:

1. I am a resident of the State of California. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below.

2. I have knowledge of the conditions in many immigration detention centers within the State of California. I have been a lawyer for almost 20 years and for the majority of my career, I have provided free legal representation and consultations to individuals in immigration detention centers. Over the course of my career, I have interviewed thousands of men and women in the custody of Immigration and Customs Enforcement (ICE) and unaccompanied children in the custody of the Office of Refugee Resettlement. I have also been permitted special access to certain detention centers to inspect detention centers in my capacity as the Co-director of the University of California, Davis School of Law's Immigration Law Clinic, counsel for the *Flores v. Reno* Settlement Agreement (Case No. CV85 4544 (C.D.Cal. 1996), and in my capacity as a former member and advisor of the American Bar Association's Immigration Commission.

3. I regularly visit with clients in the Yuba County Jail, the Rio Cosumnes Correctional Center ("RCCC") in Elk Grove, and the Contra Costa County Jail—sometimes as frequently as twice a week. For the 12 years that I have been visiting immigration detainees in Yuba County Jail and the Sacramento County Jail (both formerly at the downtown jail and currently at the RCCC jail), immigration detainees' information has been publicly available. Yuba County has maintained a webpage that makes available personal information of detainees such as names, booking date, ages, weight, gender, height, and whether the person is in county custody or immigration custody (or as Yuba County refers to it as "INS" custody). See Exhibit A, a true and correct redacted copy of a screenshot of the Yuba County website where detainee information is made available.

4. Sacramento County also lists whether the person is in county or immigration custody on its roster that is kept at the jail. The roster is publicly available on a desk in front of the jail's reception area. Anyone from the public can access this roster. I frequently use the publicly available lists to get an accounting of how many persons are in immigration custody at

each facility, to help families find loved ones, and to determine lengths of detention for my clients.

5. Department of Homeland Security ("DHS") also runs a program called Victims of Immigrant Crime Engagement ("VOICE"). VOICE releases detainees' information to: (1) a victim of crime(s); (2) a witness of crime(s); (3) an individual with a legal responsibility to act on behalf of a victim or witness (e.g., attorneys, parents, legal guardians, etc.); or (4) individuals acting at the request of a victim or witness.

6. DHS also maintains a publicly available online locator for every ICE detainee. One needs the "A" number (located in many public records like Ninth Circuit orders), and the person's country of birth; or one can search with the individual's name and country of birth.

7. For almost 18 years, I have documented, witnessed, and listened to detainees recount their experiences enduring systemic, sub-human conditions in immigration custody in public and private California immigration detention centers. I visit immigration detention centers in California almost every week and interview at least 30 individuals in immigration custody every month. The following are my observations and experiences from my visits and investigations of detention centers throughout my career:

- Spoken to detainees on the telephone who are contemplating suicide while they are describing feces smeared on their segregated cell;
- Inspected rape phone hotlines only to realize the phone was not even connected to a phone line;
- Witnessed almost universally inadequate law libraries;
- Witnessed retaliation against clients for demanding humane medical treatment;
- Witnessed many detention centers with attorney-client visit rooms that are not sound proof, where clients are afraid to speak for fear of being overheard;
- Heard detainees recount life threatening medical issues that are not being treated;
- Some detainees have told me they have been raped while in detention (one even as recent as last month);
- Some detainees have witnessed guards performing oral sex on other guards;

- Witnessed clients (both adults and children) suffer from inadequate food sources in detention centers;
- Clients and detainees have complained about being transported in shackles—which can be extraordinarily painful for elderly detainees and detainees with disabilities;
- Children have also been shackled during asylum interviews and suffered injuries from shackles being too tight around the wrists; and
- Women detainees had inferior recreational facilities at Mesa Verde Detention Center.

The issues are systemic, pervasive, and have not abated throughout the 18 years I have been working with adults and children in immigration detention centers.

8. Unsanitary and unsafe conditions continue to exist in detention facilities in California. For instance, during a visit to RCCC in January 2014, I observed that the facility was old, loud, and dirty. As we walked down the halls, the concrete was wet and dirty—like a thin sludge on the ground. Men were detained with other county inmates who were in criminal custody. Some pods were open with bunks out in the open, and other pods were double-tiered with locked down cells. Last year around March 2017, detainees at RCCC were evacuated due to high levels of lead and copper in the drinking water was discovered by local government inspection officials.

Inadequate Mental Health Care

9. Suicidal ideation is a major issue for persons and children in prolonged detention. Children have called me from detention during the Christmas holidays crying in total despair that they just want to be with their mothers. Most detained children are hundreds of miles from family and often are only able to speak with parents less than an hour per week. Mothers and fathers who are detained have particularly profound trauma at being separated from their children. Detainees are not permitted to touch their children throughout their detention, and walking through the family visitation rooms I often see children and parents crying, placing their hands over the plexiglass dividers trying to touch. One very unique aspect of immigration detention is that many individuals are applying for immigration defenses that require them to provide detailed narratives about their past traumas. Many asylum seekers, abused children, and crime victims must provide

sworn testimony regarding their past rapes, past torture, past child abuse, and past traumas. Detailing past traumatic experiences in a public court takes a tremendous psychological toll on immigration detainees. This trauma is compounded by the fact that most do not have their traditional support networks to sustain them because they are detained. For example, a woman may be required to provide specific, graphic detail of all past rapes for her asylum hearing, and then must return alone to her cell at the detention center. Detainees have shown me where they self-mutilate due to the despair of prolonged detention and tell me of their suicidal thoughts. It is not uncommon to have to counsel individuals who are having suicidal ideations. One detainee told me how he witnessed one detainee cut his wrists and watched the blood spill out from the bathroom stall. He cried to me as he recounted how people were in complete despair and not getting adequate psychological care.

10. I have also represented clients with severe psychological issues who face extreme medical neglect. In one case, we obtained the client's prior psychiatric history evincing severe psychiatric history that was being treated with psychotropic medications. After receiving notice of the client's prior medical treatment, the advice nurse at the detention center prescribed Tylenol and more outdoor time, and ignored the client's prior treatment plan. When he was released from detention months later, neither his family nor I was notified. He was released in downtown San Francisco in a patient gown made from paper. It took hours for me and his family to find him. After he was found, he told us he had to beg for money so he could take the Bay Area Rapid Transit system home to Oakland.

Inadequate Medical Care

11. *Medical indifference to immigration detainees is pervasive and unabated.* Detainees with medical or psychological issues rarely receive adequate medical care. Throughout my 18 years visiting immigration detention centers I have observed that detention centers: (1) fail to meet health care needs of individuals in a timely manner; (2) often fail to refer individuals to higher-level medical care providers when necessary (and in some cases this failure has resulted in death); (3) fail to provide adequate staff and medical personnel; (4) fail to communicate critically

important information about individuals' medical conditions between staff and especially during transfers; and (5) fail to adequately screen individuals for illnesses.

12. Almost every time I visit an immigration detention center, detainees complain of medical neglect. On a recent visit a man told me that he had severe pain in his mouth and believed his tooth was infected. He told me was going to pull out the tooth himself because he was not receiving medical attention and feared the infection would spread.

13. On or around May 11, 2015, I inspected the Mesa Verde Detention Facility in Bakersfield, California, because it had recently opened and a delegation of civil rights lawyers wanted to inspect the facility. I inspected the facility in my capacity as Co-director of the UC Davis Immigration Law Clinic. A prison official and ICE officers lead the "tour" of the facility and answered questions. I was concerned to learn that medical staffing included only 20 hours a week of a contract physician rather than having a doctor at the facility at all times. The planned 20 hours per week of psychiatric care on-site was also a concern given that approximately 400 detainees were in custody there. After our tour, we learned that there was a waiting list for appointments with the psychiatrist.

14. On or around May 22, 2015, I inspected the Otay Mesa Detention Facility near San Diego, California with a delegation from the American Bar Association. On this inspection, we were not permitted to speak with the ICE detainees, but we were permitted to ask questions to the detention center spokesperson and medical staff. Therefore, we had no access to the detainees' perspective on this visit. One issue of concern was the lack of confidentiality of medical records. We were told by the detention center spokesperson that ICE officers as well as the Office of Chief Counsel could access and inspect a detainee's medical file. This raised concerns that information that was given to medical staff for treatment purposes could be used to a person's detriment in deportation proceedings.

Language Barriers

15. The overwhelming majority of immigration detainees do not speak, write, or read English. Spanish is the predominant language of most detainees. Other languages spoken by detainees are Tagalog, Vietnamese, Mandarin, Punjabi, French, Wolof, Somali, Haitian Creole,

Hindi, Urdu, Farsi, and indigenous languages from Guatemala and Mexico. Language barriers create enormous obstacles for non-English speakers. Although detainees have simultaneous translations during their removal hearings, they are not afforded a translator to prepare the legal forms required by the court. Immigration detainees also do not have the right to appointed counsel unless they have a serious mental disorder pursuant to *Franco-Gonzalez v. Holder*, No. CV 10-102211 DG (C.D. Cal). The vast majority of immigration detainees (most of whom do not speak, read, or write English) represent themselves without the assistance of a lawyer. In some California detention centers, only around 15% of the detainees have the assistance of a lawyer.

16. Most defenses in immigration court are enormously complicated and require submitting lengthy legal forms to the court. The immigration legal forms are akin to Internal Revenue Service tax forms—they are lengthy and incomprehensible to most persons. For example, if an immigration detainee asked an immigration judge for the opportunity to apply for political asylum, she would be given the Form I-589, a 10-page form in English that asks complex questions regarding persecution in her home country. The Form I-589 is required of anyone wishing to seek political asylum. If, for example, the detainee was a monolingual Mandarin speaker from China, she would need to complete the Form I-589 in English. If the person cannot read or write in English, they cannot complete the form. Most detainees who cannot afford a lawyer have no choice but to ask other detainees to assist them with the forms. This forces immigration detainees to disclose very personal details about their persecution, sexual orientation, or rape histories to other detainees. Detainees helping non-English speakers usually have no legal training—and even though well-intended—often miss critical details or facts that can have a serious prejudicial effect on the person's asylum application. Even as a trained lawyer, I can spend a minimum of 15 hours completing a Form I-589 with my clients—if I need to use a translator that timeframe can easily be doubled. Moreover, if a pro se detainee who cannot read or write in English must author a legal brief to the court of appeals, the legal process becomes a farce. To properly write a legal appellate brief, the detainee must be able to read lengthy transcripts in English, research case law in English, read relevant court cases in English, and write legal briefs in English analyzing the transcripts and case law applicable to their case.

Immigration detainees often stare at me in confusion, as I describe the appellate process in the Board of Immigration Appeals and Ninth Circuit and what will be required in their legal briefs. I can confidently say that a person who does not read or write English cannot represent themselves in a court of appeals without assistance. Many immigration detainees give up valid claims for relief because the language barriers make it extremely difficult to represent themselves in pro se.

17. Language barriers also stymie access to medical treatment, as most detainees must fill out "kites" or medical request forms in English to receive medical treatment. If an immigration detainee cannot speak English, again they must rely on the benevolence of immigration detainees who can write the medical requests in English for them. They must disclose very personal information to complete strangers to request medical treatment.

Lack of Access to Telephones

18. Telephone access has historically been an enormous issue for detainees and lawyers who are trying to reach their clients. One near-common characteristic of immigration detention is its remoteness from California's urban centers or distance from free legal service providers. Over the years, ICE has contracted with detention centers located in El Centro, Marysville, Elk Grove, California City, Bakersfield, and Adelanto, among other cities. Most of these are distant from free legal services and major cities. Thus, phone access is critical to an individual's legal case as many lawyers and nonprofit lawyers cannot afford the time and expense to travel to remote detention centers. A part of this issue has been remediated through a class action settlement called *Lyon, et al. v. United States Immigration Customs Enforcement*, No. 13-cv-5878, that covers Northern California detention centers; however, many detention centers in Southern California are not covered by the settlement. Persistent issues for Southern California facilities are: (1) inability to call numbers with automated attendants; (2) inability to call legal counsel on a confidential phone line; (3) inability of lawyers to reach clients on confidential phone lines; (4) inability to leave messages (most detention center phones disconnect the detainee call if no "live" person is there to receive the call); and (5) the high cost of phone calls. The lack of inadequate phone access impedes a person's ability to gather evidence in support of their claim, impacts a lawyer's ability to effectively represent their client, and impacts California

residents who must pay the high costs of the collect telephone calls from their family in friends in detention.

Inadequate Access to Legal Resources and Counsel

19. Immigration law is extraordinarily complex yet law libraries in immigration detention centers are universally inadequate. Rarely are relevant forms available in immigration detention centers' law libraries. Immigrants in removal proceedings often apply for relief from removal. Typical forms used to apply for relief are: (1) applications for political asylum; (2) applications for U visas; (3) applications for cancellation of removal; (4) fee waivers; and (5) applications for adjustment of status. It is common for law libraries not to have any of these forms.

20. Immigrants also bear the burden of proof in applications for relief. For example, for political asylum, an applicant must show an objectively reasonable fear of persecution in her home country. This is typically demonstrated through human rights reports, newspaper articles, and State Department reports submitted by the applicant. However, law libraries in detention centers rarely contain relevant human rights materials and applicants cannot meet their burden without assistance outside of the detention center.

21. Legal materials are generally out-of-date and inadequate. Typically, the situation is so dire, that I donate my old legal treatises and compilations of current human rights reports to detention centers. I have even asked publishers to send me defective books (i.e. books with torn pages or spines) so that I can donate them to the detainees.

22. During my visit to Mesa Verde Detention Center in 2015, I noted that the law library was inadequate. During the inspection, I had the opportunity to log in and run a search on the legal database available to detainees, and had three concerns about the system. First, given that I – a trained attorney with considerable experience using different legal search engines – could not figure out how to conduct a search without significant guidance from the librarian, I doubted that most detainees could do the same. I queried the system on a basic deportation question and the system told me it could not find any cases that met a basic criteria. Detainees often do not have access to recent, critical information pertaining to their cases. Immigration law

can change from week-to-week and having up-to-date legal information is critical. Moreover, there were no immigration forms or relevant human rights reports available in the law library. A large number of immigration detainees apply for asylum, withholding of removal, and relief under the Convention Against Torture, all of which usually require immigrants to bear the burden of proof and present evidence about conditions in their home countries. Without access to current human rights reports, immigrants cannot present such evidence and meet their burdens. Further, we were told if a detainee wanted to print any documents, they had to be mailed to the law librarian and she would print them. This raised concerns about the privacy of the data as many detainees are recounting private information about torture and persecution that would have to be emailed to a third party for printing.

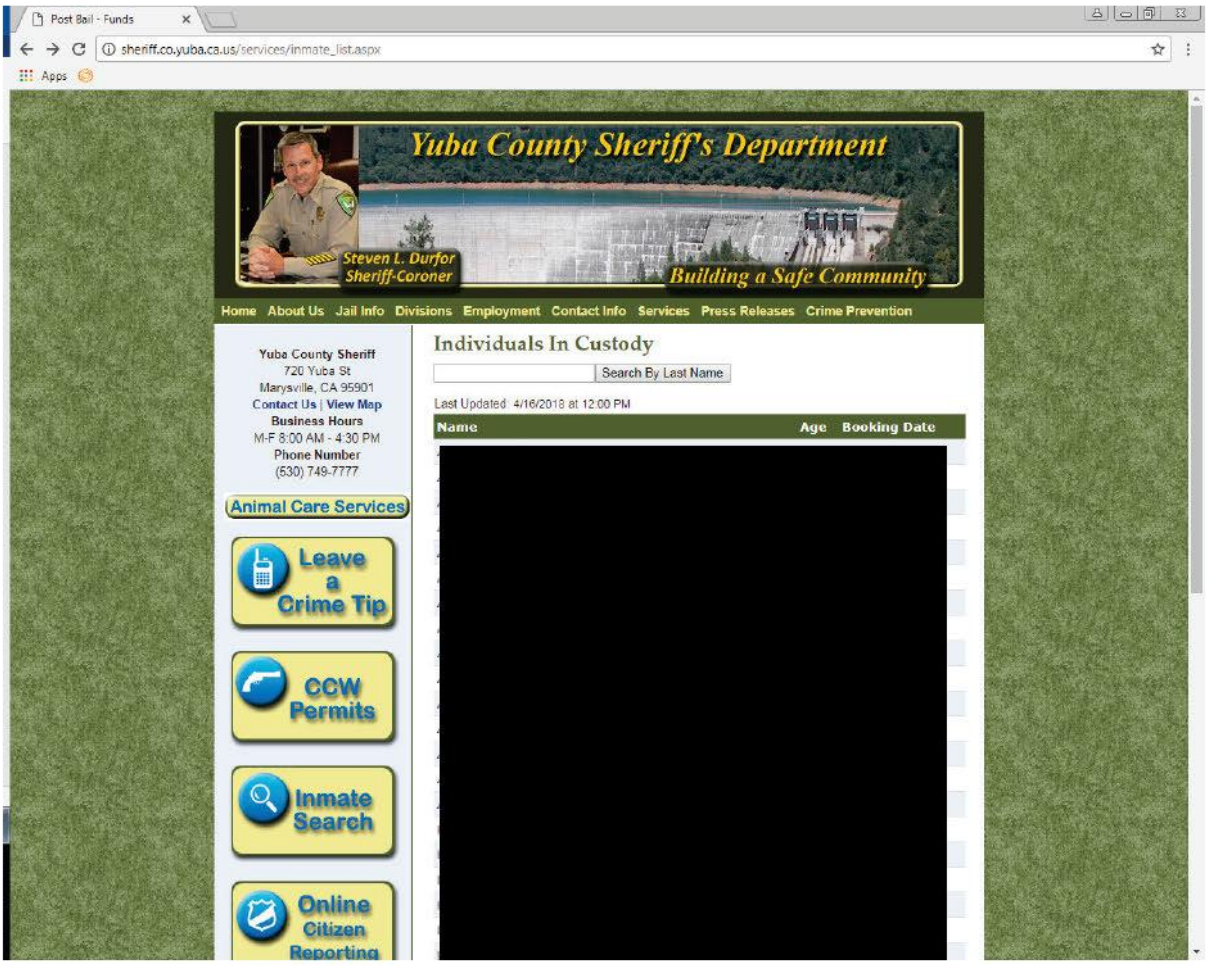
23. Around January 2014, I was given a "tour" of RCCC in Elk Grove. The law library was in a large cage in the middle of a larger room. The library had no relevant information for ICE detainees. The library appeared catered to persons in criminal custody.

24. The ability to confer with counsel in immigration detention centers is also limited. For instance, Mesa Verde Detention Facility did not have sound-proof rooms for attorneys. The attorney-client visitation rooms at RCCC were of varying sizes and were "first-come-first-serve." The smaller visitation rooms could not reasonably accommodate more than one person, thus, if the lawyer needed a translator, he or she would have to wait for the larger room. At the Otay Mesa Detention Facility, I also had concerns of the adequacy of the law library due to lack of relevant forms and legal resources, and concerns over phone access.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on April 30, 2018 in Woodland, California.

HOLLY S. COOPER

EXHIBIT A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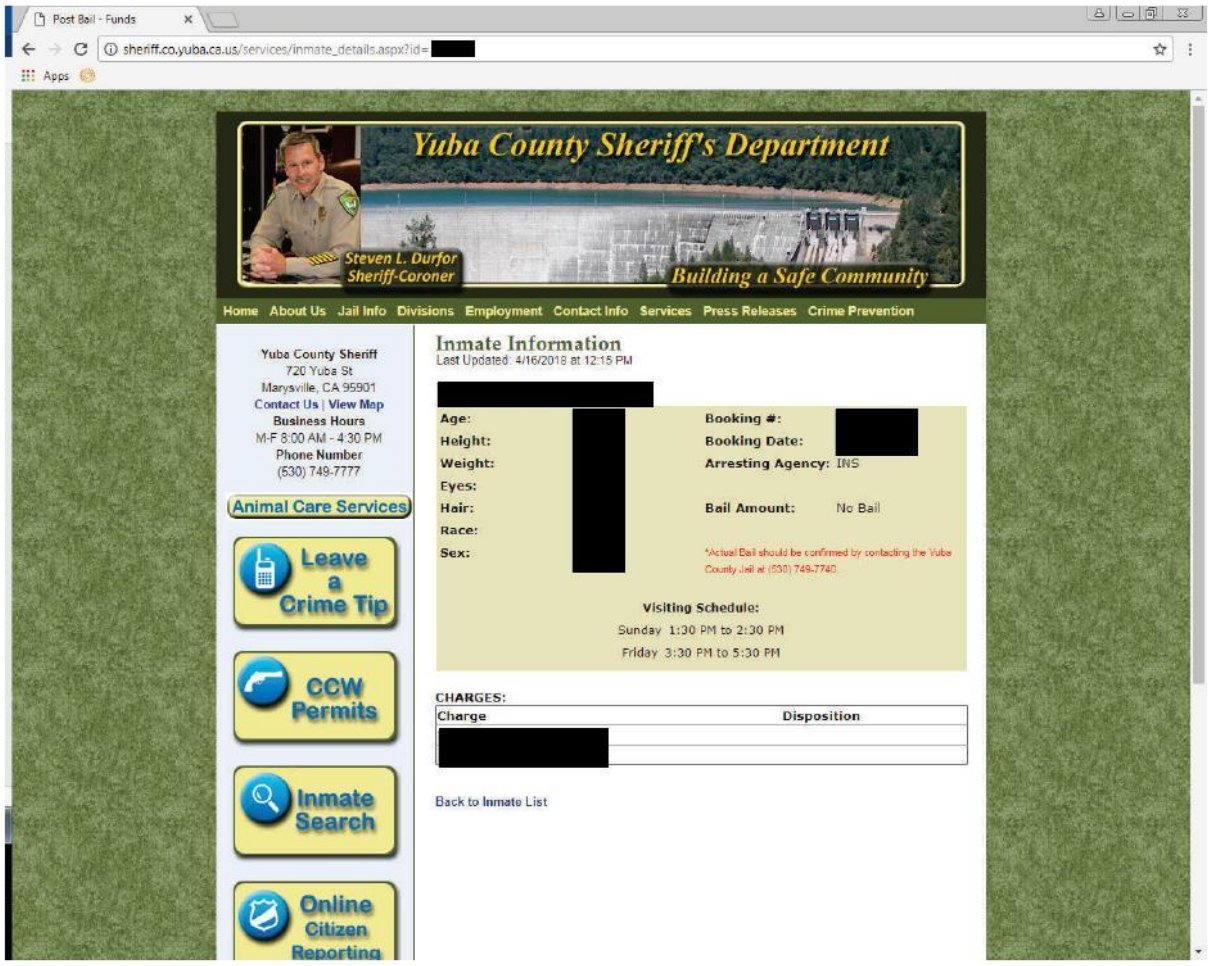
Apps
Yuba County Sheriff's Department
Steven L. Durfor
Sheriff-Coroner
Building a Safe Community
Home About Us Jail Info Divisions Employment Contact Info Services Press Releases Crime Prevention
Yuba County Sheriff
720 Yuba St
Marysville, CA 95901
Contact Us | View Map
Business Hours
M-F 8:00 AM - 4:30 PM
Phone Number
(530) 749-7777
Animal Care Services
Leave a Crime Tip
CCW Permits
Inmate Search
Online Citizen Reporting
Individuals In Custody
Search By Last Name
Last Updated: 4/16/2018 at 12:00 PM
Name
Age
Booking Date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sheriff.co.yuba.ca.us/services/inmate_details.aspx?id=[redacted]
Apps
Yuba County Sheriff's Department
Steven L. Durfor
Sheriff-Coroner
Building a Safe Community
Home About Us Jail Info Divisions Employment Contact Info Services Press Releases Crime Prevention
Yuba County Sheriff
720 Yuba St
Marysville, CA 95901
Contact Us | View Map
Business Hours
M-F 8:00 AM - 4:30 PM
Phone Number
(530) 749-7777
Animal Care Services
Leave a Crime Tip
CCW Permits
Inmate Search
Online Citizen Reporting
Inmate Information
Last Updated: 4/16/2018 at 12:15 PM
[redacted]
Age:
Height:
Weight:
Eyes:
Hair:
Race:
Sex:
[redacted]
Booking #:
Booking Date:
[redacted]
Arresting Agency: INS
Bail Amount: No Bail
*Actual Bail should be confirmed by contacting the Yuba County Jail at (530) 749-7740.
Visiting Schedule:
Sunday 1:30 PM to 2:30 PM
Friday 3:30 PM to 5:30 PM
CHARGES:
Charge
Disposition
[redacted]
Back to Inmate List

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**Admitted Pro Hac Vice*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Ms. L. et al.,

Petitioners-Plaintiffs,

v.

U.S. Immigration and Customs Enforcement ("ICE"); et al.,

Respondents-Defendants.

Case No. 18-cv-00428-DMS-MDD

Date Filed: June 25, 2018

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF CLASSWIDE PRELIMINARY INJUNCTION

NO HEARING DATE

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INTRODUCTION

On March 9, when Plaintiffs first sought classwide relief, the government had already taken hundreds of children from their parents. When this case was argued before the Court on May 4, the number of separated children had grown to more than 700. The government has since confirmed that between May 5 and June 9 alone, over 2,300 children were separated from their parents. More than 2,000 of those children remain separated. This follows the government's "zero tolerance" policy announced on May 7, three days after this Court held arguments.

On June 20, President Trump signed an Executive Order that purports to end further separations. It does not. The Order contains explicit loopholes, including an exception for separations that the government deems in the "interests" of the child. Because the government interprets that best-interest standard in a way that would allow separations that are inconsistent with this Court's prior due process opinion and with universally accepted child welfare norms a preliminary injunction remains critical to prevent future unlawful separations.

Even more pressing, the Order does not address the reunification of already-separated families at all, and the government has no meaningful plan for swiftly ensuring that such reunifications occur. Thus, thousands of families remain separated, and many parents have no idea where their children are or how to find them. With each added day of separation, the terrible trauma inflicted by the government on both parents and children continues to mount. Many of the children are babies and toddlers who every night are crying themselves to sleep wondering if they will ever see their parents again. Indeed, one separated child was only 4 months old and another was still breastfeeding. *See, e.g.*, Declaration of Laura Tuell ("Tuell Decl."), Ex. 32, ¶ 17b (noting child who was taken from her mother while breastfeeding); *id.*, ¶ 17a (mother told that daughter would be waiting for her after court appearance; daughter was gone when mother came back); Declaration of

Manoj Govindaiah ("Govindaiah Decl."), Ex. 36, ¶ 6(b) (father separated from *four-month-old baby*, then deported without baby).

Without immediate action from this Court, these families will remain separated. The Office of Refugee Resettlement's ("ORR") normal release process for children in its care will not swiftly reunify most separated families, because that process is not designed to reunify children with detained parents. Having spent months cruelly separating families and defending its right to do so including for weeks after this Court declared that practice "brutal, offensive" and contrary to "traditional notions of fair play and decency" the government cannot be left on its own to end the suffering it has intentionally caused. This Court's intervention is necessary to ensure that these due process violations are swiftly corrected.

As set forth more fully in the proposed Order submitted with this brief, Plaintiffs respectfully request that the Court require Defendants to:

1) reunify all children with their parents within 30 days, and within 10 days for children under 5 years old, except where the government has clear evidence that the parent is unfit or a danger to the child, or the parent is in a criminal facility that does not house minors;
2) provide parents, within 7 days, telephonic contact with their children;
3) stop separating children from their parents except where there is clear evidence that the parent is unfit or a danger to the child, or the parent is in a criminal facility that does not house minors;
4) not remove separated parents from the United States without their children, unless the parent affirmatively, knowingly, and voluntarily waives the right to reunification before removal.

I. Recent Events: The Government Has Now Separated More Than Two Thousand Children from Their Parents.

Defendants have been separating thousands of families throughout the last year. Even before the government formally announced its zero tolerance policy, it

had separated hundreds of children from their family members. *See* Decl. of Stephen B. Kang ("Kang Decl."), Ex. 38, ¶ 3.

On May 7, 2018, Attorney General Sessions announced an initiative to refer "100 percent" of immigrants who cross the Southwest border for criminal immigration prosecutions, also known as the "zero-tolerance policy." Kang Decl., Ex. 38, ¶ 4. Attorney General Sessions stated that as part of that prosecution, the parent's child "will be separated from you as required by law." *Id.*

In early May, the pace of family separations increased. At a Senate Judiciary Committee hearing in May, a deputy chief of U.S. Customs and Border Protection ("CBP") testified that between May 6 and May 19 alone, a total of 658 children were separated from their family members. Kang Decl., Ex. 38, ¶ 5. In June 2018, the Department of Homeland Security ("DHS") reported that in the six weeks between April 19 and May 31, the administration took around 2,000 children away from their parents. *Id.*, ¶ 6. And on June 19, CBP officials confirmed that "[o]ver 2,300 children were separated from their parents at the U.S.-Mexico border between May 5 and June 9." *Id.*, ¶ 8; *see also id.*, ¶ 7 (documenting cases of separated children living in cages and being cared for by other children).

On June 20, President Trump issued an Executive Order ("EO"), Section 3 of which provides that DHS "shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." Kang Decl., Ex. 38, ¶ 9, Sec. 3(a).

The EO contains exceptions that will allow the continued unlawful family separation of families. Kang Decl., Ex. 38, ¶ 9, Sec. 3(b). And significantly, the EO makes *no* mention of how the government intends to reunify already-separated children with their parents, even though thousands of parents and children remain apart. The government has since claimed in a public statement that it has begun to

put in place efforts to reunite. As set forth below, however, those measures are wholly inadequate. Kang Decl., Ex. 38, ¶ 10.[1]

II. There is No System To Reunify Separated Families Expeditiously, and the Government's Existing "Reunification" Process Is Not Designed to Address the Current Crisis.

At the June 22 telephonic hearing, the government's counsel could not clarify whether Defendants intend to quickly reunify already-separated parents. As to parents who had been separated from their children as a result of the government's decision to prosecute them for illegal entry, government counsel admitted that she "can't speak to the . . . further effect of the executive order on that detention":

> [The Court asked before:] when a parent is released from criminal custody and taken into ICE custody, is the practice to reunite them in family detention? And at that time I said no, that was not the practice. I think my answer on that narrow question would be the same.

Kang Decl., Ex. 38, ¶ 22 ("June 22 Hearing Transcript"), at 29:25-30:12.

In response to the Court's questions about whether any system exists that would allow separated parents to reunite with their children, government counsel relied entirely on ORR's *preexisting* processes for releasing immigrant children from its custody, which do not address parents who remain in DHS custody:

> MS. FABIAN: There are procedures by which O.R.R. then releases minors to the custody of a parent *who has been released from custody*, and those are the procedures . . . . Whether there is . . . additional procedures that can be put in place to improve those procedures or expedite [them], I think that is something that is the subject of ongoing discussion. But at the moment the process is the same . . . .

June 22 Hearing Transcript at 30:18-31:1 (emphasis added).

The core problem is that ORR's preexisting process for releasing children from custody is not adequate to meet the current need for swift reunification. For starters, as the government's counsel explained at the June 22 hearing, ORR's process only addresses release to *non*-detained parents. June 22 Hearing Transcript at 33:2-22. But DHS continues to detain hundreds, if not thousands, of the parents

[1] The Order could of course be rescinded at any time.

whose children have been taken away. ORR's existing process will not facilitate their reunification at all. Declaration of Robert Carey (former head of ORR) ("Carey Decl."), Ex. 33, ¶¶ 7-9.

More broadly, ORR's sponsorship and reunification processes were designed for the entirely different situation of a child who comes to the border *alone*, where ORR must look for a sponsor (family member or otherwise), and investigate that sponsor. *See* Carey Decl., Ex. 33, ¶¶ 2-7 (describing purpose and function of preexisting reunification processes). Here, in contrast, the child was forcibly taken from his or her own parent. In this situation, ORR must simply give the child back (absent clear evidence the parent is unfit or a danger). But that is not happening. ORR's preexisting process is simply not set up to quickly reunite an unlawfully separated child. *See* Kang Decl., Ex. 38, ¶ 23 (describing a separated parent's attempt to reunite with her child using ORR's existing process).

For example, ORR has no systems designed to flag a child as having been separated from a parent at or near the time of the family's arrest; track the identity and detention location of the separated child's parent after the separation; ensure regular contact between a separated detained child and her detained parent; or reunify the child and parent in an ICE family detention facility. *See* Carey Decl., Ex. 33 ¶¶ 8-9; Supplemental Declaration of Michelle Brané ("Supp. Brané Decl."), Ex. 31, ¶¶ 4-5, 8-11; Supplemental Declaration of Jennifer Podkul ("Supp. Podkul Decl."), Ex. 30, ¶¶ 3-5, 12; Tuell Decl., Ex. 32, ¶¶ 7-17 (numerous parents separated from kids and given no information about their kids' locations).

Now that the government is aware that its actions are under scrutiny, it is likely to point to hastily-created and ad hoc procedures to show that it is addressing the current crisis. But its June 23 DHS Fact Sheet only describes a process by which "adults who are subject to removal are reunited with their children for the purposes of removal." Kang Decl., Ex. 38, ¶ 10 ("DHS Fact Sheet"); *see id.* (describing "removal coordination"). It does not show the existence of any process

to swiftly reunify all detained parents with their children. *See also* Supp. Brané Decl., Ex. 31, ¶ 12 (explaining why the processes described in the Fact Sheet will not reunify detained parents); Supp. Podkul Decl., Ex. 30, ¶ 14 (same).

Moreover, the evidence demonstrates that these recent steps are woefully inadequate even to allow *communication* between parents and children, much less to reunite them. For instance, ORR has created a 1-800 hotline number that supposedly allows parents to find the children that have been taken from them. But ORR's hotline regularly puts people on hold for 30 minute periods, and it is infeasible for detained parents to stay on the line that long. *See* Supp. Brané Decl., Ex. 31, ¶¶ 5-6; Supp. Podkul Decl., Ex. 30, ¶¶ 6-8. Moreover, ORR's hotline is now generating a constant busy signal. *Id.* Similarly, DHS has created a hotline for ORR caseworkers or attorneys trying to find parents. But that hotline merely permits a caller to request contact with a detained parent, and field offices can decline to respond to such requests. Supp. Podkul Decl., Ex. 30, ¶¶ 10-11; *see also* Govindaiah Decl., Ex. 36, ¶ 6(c) (describing detained separated parents who could not access ORR/DHS communications systems to contact children).

Thus, if the government is left to follow its existing practices which put the onus on parents to request reunification with their children, and without any reliable system in place for them to do so -- the overwhelming majority of children will not be reunited any time in the near future. That will mean that more and more children will suffer irreparable harm. As Plaintiffs' preliminary injunction briefs explained, the forcible separation of children can permanently traumatize children, and the effects can last through the child's lifetime. Over the past month, the scientific and professional condemnation of the administration's practice has only grown, with *thousands* of experts joining to describe the lasting harm that every day of separation inflicts on children. Major medical associations including the American Medical Association, the American College of Physicians, the American Academy of Pediatrics, the American Psychological Association, the American

Psychiatric Association, and a group of over 5,000 medical professionals and experts have voiced their vehement and unified opposition to this brutal practice. Kang Decl., Ex. 38, ¶¶ 11-19.

Nor is there any question that the assessment of the medical community is correct. One of the parents who submitted a declaration in this case, J.I.L., was finally reunited with her 4 and 10 year-old boys after months of separation, but both boys constantly ask whether someone will come to take them from their mother again. Declaration of Lisette Diaz, Ex. 35, ¶¶ 2-3. The 4 year-old is having nightmares, and often wakes in the night to search for his mother. *Id.*, ¶ 3. That deep-seated, potentially permanent trauma and sense of vulnerability is precisely what the medical community predicted would occur. This little boy, and thousands of other small children, will be forever scarred. And this is to say nothing of the harm that parents are suffering. *See* Kang Decl., Ex. 38, ¶ 20 (reporting on father who committed suicide after being separated from his family).

Immediate injunctive relief is necessary to ensure that the daily irreparable harm of separation ends promptly.

III. The Flores Settlement Agreement Does Not Prohibit the Reunification of Separated Children with Their Detained Parents.

At the June 22 hearing, this Court inquired whether any injunctive relief would "be good for only a 20-day period in light of the *Flores* Settlement . . . ." June 22 Hearing Transcript at 13:5-10. As Plaintiffs explained, even if the *Flores* settlement rigidly required release of children on the 20th day, which it does not, it would still mean the government should be reuniting children with their detained parents for that 20-day period, which the government is not doing. *Id.* at 13:20-14:1. Moreover, many families are released by or before the 20-day mark, because they are able to show they have bona fide asylum claims and are not a flight risk or danger. *Id.* at 14:2-5; Declaration of Carlos Holguin ("Holguin Decl."), Ex. 37, ¶ 9. Most fundamentally, the *Flores* Settlement does not remotely abrogate or remove a

parent's existing right to make decisions concerning the care and custody of their own children. *See* June 22 Hearing Transcript at 14:6-16:10. The Settlement is for the benefit of the children and in no way would require the forcible release of a child where the parent believes it is not in the child's best interests. Thus, where a parent and child are detained together in a family detention center, a parent may choose to keep the child with her, especially where the child is of a tender age. *See* Holguin Decl., Ex. 37, ¶¶ 5-8, 10 (*Flores* Class Counsel explaining that the settlement does not require release over the parent's objection). In short, the *Flores* Settlement poses no bar to ordering reunification of children with detained parents.[2]

IV. Any Injunction Should Ensure That Parents in DHS Custody Can Remain Detained with Their Children, Even if the Parents Are Facing Criminal Prosecution.

Plaintiffs wish to clarify a point of confusion that may have arisen as a consequence of the government's shifting practice regarding the detention of parents facing criminal prosecution. Plaintiffs continue not to challenge the separation of a parent from a child for the period that the parent is in a criminal facility that does not permit children. However, the mere fact that the parent is being prosecuted for illegal entry does not mean that separation is required. If the parent is being prosecuted but is nonetheless being held in a DHS facility, then there is no need to separate the family, because DHS can house families. And indeed, the June 20 Executive Order directs DHS to detain parents with their children "during the pendency of any criminal improper entry or immigration

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[2] Plaintiffs' claim in this case, and this discussion of *Flores*, pertain only to those parents who came to the United States with their minor children, and were separated from their children by DHS. This case does not address the rights of children who come to the United States alone. In addition, any knowing and voluntary waiver by the parent of their child's release rights under *Flores* would apply narrowly to the child's right to be released or held in a licensed facility after 20 days. The parent would not, of course, waive any other rights that *Flores* provides.

proceedings . . . ." EO Sec. 3(a). Accordingly, a plaintiff parent and child should have the ability to remain together, even if the parent is currently undergoing criminal prosecution, as long as the parent is detained in a DHS facility, rather than a criminal facility that does not permit children.

V. An Injunction to Prevent Future Separations Remains Necessary, and the Court Should Order the Government to Follow Well-Established Child Welfare Standards.

Plaintiffs also request that this Court preliminarily enjoin future separations. Although the June 20 Executive Order purports to end future separations, it contains a significant carve-out that authorizes family separation "when there is a *concern* that detention of an alien child with the child's alien parent would pose a risk to the child's welfare." Kang Decl., Ex. 38, ¶ 9, EO Sec. 3(b) (emphasis added). Those vague terms are not defined, and allow DHS officers enormous leeway to effect separations for unconstitutional reasons.[3]

The example of S.S., who was taken from Ms. L. based on a mere allegation that they were not related, is illustrative. As the Court is aware, Defendants have claimed that it was in the 6 year-old's own interests to be separated from her mother, because Ms. L did not have her documents with her by the time she reached the United States after a 10-country journey from the Congo (a common occurrence for asylum seekers, *see* Anker and Gilman Declarations, Dkt. 48-1, Exs. 19-20). Yet rather than verify parentage through a DNA test or other means, the government separated the child for close to 5 months. This ran contrary to well-settled child welfare practices. As explained by one the country's leading child welfare experts, it would never be in a child's interests to separate the child *before* taking basic steps to verify parentage, even where the government genuinely had

[3] Lawyers representing separated parents testify that separations are continuing to occur in cases, like Ms. L.'s, where the parent has not been prosecuted. *See* Tuell Decl., Ex. 32, ¶¶ 7-12, 13a, 13c, 14-15, 16d, 16f, 16h, 16i, 16l-16p, 16r-16s.

doubts about parentage (something that would have seemed unlikely in Ms. L.'s case given that the child was frantically pleading with officers not to take her away from her mother). *See* Guggenheim Decl., Ex. 17, Dkt. 48-1, ¶¶ 14-20.

Critically, Defendants have continued to defend the legality of Ms. L.'s separation from her daughter. Thus, because the EO allows the government to separate when it deems it in the interests of the child, the EO does not eliminate the need for an injunction to prevent future separations. To the contrary, the EO is an explicit grant of authority for the government to continue separations like Ms. L.'s.

At the June 22 hearing, the Court also asked if it would be appropriate to separate children on the basis of criminal history. It is not, unless the criminal history is indicative of a parent's danger to his or her child. Professor Guggenheim's supplemental declaration explains that "the only basis for separating children from parents in American law is when it is done to protect them from imminent danger that could result from being allowed to continue to reside with the parent." Supp. Guggenheim Decl., Ex. 34, ¶ 6. Therefore, "[c]riminal convictions are relevant only insofar as they bear on the fitness of the parent, and even then must be considered in combination with a totality of the factors that go to the best interests of the child." *Id.*; *see id.*, ¶¶ 8-9 (citing state case law explaining that under a proper application of the best-interest standard, mere fact of criminal record does not make a parent unfit). Otherwise, a parent could lose her child merely because she made a mistake in the past.[4]

[4] Indeed, the June 23 DHS Fact Sheet underscores the need for an injunction, because it explains that even its limited reunification procedures may not apply whenever "the adult is a criminal alien." Kang Decl., Ex. 38, ¶ 10. This broad, undefined term is deeply at odds with the best-interest standard, as it does not provide any individual assessment of the severity of the criminal record, let alone whether that record bears on the fitness of the parent.

Applying this universally-accepted understanding, Plaintiffs' proposed order would still permit the government to separate children when there is a genuine reason for believing that the parent is a danger to the child, but would not permit the government to separate a family whenever it simply declared it in the child's interests."

VI. Parents Facing Imminent Deportation Require Safeguards to Ensure that They Are Not Removed Without Their Children.

Parents who are facing imminent deportation without their separated children are in particularly grave need of immediate relief. As the Court observed, parents facing deportation without their accompanying children are "part and parcel" of this case. June 22 Hearing Transcript at 41:16-22; Am. Compl., Dkt. 32, at 12.

There is evidence that parents have been deported without their children. *See* Govindaiah Decl., Ex. 36, ¶ 6(b) (father separated from four-month-old baby, both deported separately); Kang Decl., Ex. 38, ¶ 21 (father separated from six-year-old daughter, then deported without her); Tuell Decl., Ex. 32, ¶ 16k (parent who was deported without her child). There is a real risk of this continuing to occur given the lack of tracking, and parents are terrified that this will happen to them. *See* Declaration of Kristin Greer Love, Ex. 29, ¶¶ 4-18 (describing cases of fathers at risk of imminent deportation who remain separated from young children). This Court should therefore prohibit the government from removing any parent without their minor child where the parent requests to be deported with the child.

VII. Plaintiffs' Order Provides the Appropriate Framework for Expeditious Reunification.

Plaintiffs have attached a Proposed Order that sets forth their requested relief in greater detail. The Proposed Order includes three key components.

First, it sets clear deadlines for reunifying already-separated children with their parents. Without timetables, it is impossible to ensure compliance with the injunction. For example, in this case, Ms. L. was separated from her daughter on

November 5 and was not reunited until March 16 — five months of separation resulting from the government's failure to take simple steps to confirm her relationship with her daughter. Ms. C. was reunited in June, more than *eight months* after her release from criminal custody. Mr. U., another parent declarant in this case, has still not been reunited after eight months. The length of these separations is typical of the class.

Thirty days is an appropriate general deadline for the government to mobilize its substantial resources to fix a problem that it deliberately created, and reunify all parents — whether detained or not — with their children (absent clear evidence of neglect, abuse or unfitness or a detained parent's stated desire that the child not be reunified with them). A shorter deadline — 10 days — is appropriate for children under age five, since they are particularly vulnerable. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (affirming injunction requiring DHS to provide class members bond hearings within 45 days); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205-06 (N.D. Cal. 2017) (ordering agency to grant hearings for detained youth within 7 days of rearrest); *Armstrong v. Schwarzenegger*, 2007 WL 2694243, at *6 (N.D. Cal. Sept. 11, 2007) (ordering agency to implement new tracking system for parole proceedings within 14 days).

Second, the Court should order the government to provide Class Members with a way to contact their children telephonically within one week of the order. Many of the parents do not even know where their children are, and have not had any chance to reassure their children that reunification will happen. *See, e.g.*, Tuell Decl., Ex. 32, ¶¶ 7-17 (describing dozens of cases at one detention center alone in which parents were not told where their separated children were taken).

Third, the Court should ensure that any future separations comply with well-settled constitutional due process standards. Importantly, the mere presence of criminal history cannot be a categorical bar to reunification, nor can the government

fail to take basic steps to verify parentage prior to separation (as it did in Ms. L.'s case). *See* Supp. Guggenheim Decl., Ex. 34, ¶¶ 5-6.[5]

* * *

Defendants may claim in their upcoming filings that they intend to create a plan for reunification and to stop future separations. The time for vague promises has passed, especially given that this Court put the government on notice three weeks ago that the practice of separating fit parents from their children was "brutal [and] offensive," in violation of due process.

Despite the Court's warning, the government continued to separate hundreds of additional children each week, and, as importantly, has failed to reunify those it has separated. Indeed, for those separations that occurred due to a prosecution (such as Ms. C.'s), the government does not even offer a justification for continuing the separation once the parent is released from jail. It simply argues that the initial separation was justified while the parent was in criminal custody.. But that is wholly unresponsive to Plaintiffs' claim that the *continued* separation is unconstitutional without a clear demonstration of unfitness or danger to the child.

Only this Court can immediately remedy the severe harm that the government's unconstitutional policies have wreaked on these vulnerable children and their parents. No more parents and children should have to go sleep wondering if and when they will ever see each other again.

[5] The Court asked if Plaintiffs currently sought to enjoin separations occurring in the interior of the United States. June 22 Hearing Transcript at 19:17-22. Plaintiffs maintain that all unlawful separations should be enjoined. But if the Court determines that further record development would be necessary regarding the interior, the Court can reserve that issue and order relief for all class members who were apprehended at or within 100 miles of the U.S.-Mexico border.

CONCLUSION

For these reasons, this Court should grant Plaintiffs' request for a preliminary injunction.

Dated: June 25, 2018

Respectfully Submitted,

/s/ Lee Gelernt

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I electronically filed the foregoing with the Clerk for the United States District Court for the Southern District of California by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Lee Gelernt
Lee Gelernt, Esq.

Ms. L. et al., v. U.S. Immigration and Customs Enforcement, et al.

EXHIBITS TO PLAINTIFFS' SUPPLMENTAL MEMORANDUM IN SUPPORT OF CLASS-WIDE PRELIMINARY INJUNCTION

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Exhibit 38

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Ms. L., et al.,

Petitioners-Plaintiffs,

v.

U.S. Immigration and Customs Enforcement ("ICE"), et al.,

Respondents-Defendants.

Case No. 18-cv-00428-DMS-MDD

DECLARATION OF STEPHEN B. KANG

CLASS ACTION

1. I, Stephen B. Kang, make the following declaration based on my personal knowledge and declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

2. I am a Detention Attorney for the ACLU Immigrants' Rights Project, and a member of the State Bar of California. I am counsel for Plaintiffs in this case.

3. Attached as Exhibit A is an April 20, 2018 article from the *New York Times* titled "Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border," available at https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html. This article reported that government data showed that "more than 700 children have been taken from adults claiming to be their parents since October, including more than 100 children under the age of 4."

4. Attached as Exhibit B is a May 7, 2018 announcement from Attorney General Jefferson B. Sessions III, titled "U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks to the Association of State Criminal Investigative Agencies 2018 Spring Conference," available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-association-state-criminal-investigative.

5. Attached as Exhibit C is a May 30, 2018, Los Angeles Times article titled "Trump's zero tolerance at U.S.-Mexico border is filling child shelters," available at http://www.latimes.com/nation/la-na-trump-zero-tolerance-migrant-children-20180530-story.html?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily. This article quotes a Customs and Border Protection official's testimony to the Senate Judiciary Committee, which confirmed that between May 6 and May 19 alone, a total of 658 children were separated from their family members.[1]

[1] The video of the relevant Senate Judiciary Committee hearing testimony is available at https://www.judiciary.senate.gov/meetings/tvpra-and-exploited-loopholes-affecting-unaccompanied-alien-children.

6. Attached as Exhibit D is a June 16, 2018, CNN article titled "2,000 children separated from parents at border," available at https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.htm. This article states that "[t]he US government has separated at least 2,000 children from parents at the border since implementing a policy that results in such family separations, the Department of Homeland Security confirmed Friday."

7. Attached as Exhibit E is a June 18, 2018, Associated Press article titled "Hundreds of Children Wait in Border Patrol Facility in Texas," available at https://www.apnews.com/9794de32d39d4c6f89fbefaea3780769.

8. Attached as Exhibit F is a June 19, 2018, Reuters article titled "Hurdles facing parents and children separated at U.S. border," available at https://www.reuters.com/article/us-usa-immigration-reunification-explain/hurdles-facing-parents-and-children-separated-at-us-border-idUSKBN1JF39I. This article reports that "[o]ver 2,300 children were separated from their parents at the U.S.-Mexico border between May 5 and June 9 under the Trump administration's 'zero tolerance' policy, U.S. Customs and Border Protection said . . . ."

9. Attached as Exhibit G is an Executive Order dated June 20, 2018, titled "Affording Congress an Opportunity to Address Family Separation."

10. Attached as Exhibit H is a DHS-HHS Fact Sheet titled "Zero-Tolerance Prosecution and Family Reunification," available at https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

11. Attached as Exhibit I is a June 14, 2018 Letter from Physicians for Human Rights to Secretary Nielsen and Attorney General Sessions, available at https://s3.amazonaws.com/PHR_other/Separation_Letter_FINAL.pdf. Over 5000 medical professionals and experts signed this letter, which urges the administration to "immediately end the practice of family separation and take all measures to ensure

that currently separated families are reunited without delay" on the basis of evidence that the "practice is profoundly harmful to children and to families."

12. Attached as Exhibit J is a June 14, 2018 Letter from the American Psychological Association to President Trump, available at http://www.apa.org/advocacy/immigration/separating-families-letter.pdf?utm_content=1529093770&utm_medium=social&utm_source=multiple. The Letter urges an end to family separation and cites "empirical evidence of the psychological harm that children and parents experience when separated."

13. Attached as Exhibit K is a June 19, 2018, Letter from the American Medical Association, June 19 Letter to Secretary Nielsen, Secretary Azar, and Attorney General Sessions, available at https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2018-6-19-Final-Letter-to-The-Administrations-zero-tolerance-prosecution-policy.pdf. The Letter explains that "childhood trauma and adverse childhood experiences created by inhumane treatment often create negative health impacts that can last an individual's entire lifespan."

14. Attached as Exhibit L is a May 31, 2018 Statement by the American College of Physicians, titled ACP Objects to Separation of Children from their Parents at Border, available at https://www.acponline.org/acp-newsroom/acp-objects-to-separation-of-children-from-their-parents-at-border. The Statement urges an end to the separation practice because inflicting separation on children will "create negative health impacts that will last an individual's entire lifespan."

15. Attached as Exhibit M is a June 19, 2018 Statement by the American College of Emergency Physicians, "ACEP Opposes Current DHS 'Zero Tolerance' Immigration Policy," available at https://www.acep.org/federal-advocacy/federal-advocacy-overview/children-immigration-statement/#sm.0000xos7uy5dpe7x112vqpxa33tqr. It

states that "separations will significantly escalate mental and physical health risks for both children and their parents."

16. Attached as Exhibit N is a May 30, 2018 Statement by the American Psychiatric Association Opposing Separation of Children from Parents at the Border, available at https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border. The statement urges an end to separations because the "evidence is clear that this level of trauma also results in serious medical and health consequences for these children and their caregivers."

17. Attached as Exhibit O is a May 8, 2018 Statement by the American Academy of Pediatrics Opposing Separation of Children and Parents at the Border, available at https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx. The statement urges an end to separations, and explains that the practice "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health."

18. Attached as Exhibit P is a American Public Health Association, Separating parents and children at US border is inhumane and sets the stage for a public health crisis, available at https://www.apha.org/news-and-media/news-releases/apha-news-releases/2018/parent-child-separation. The statement urges an end to separations and explains that the practice places children at heightened risk of experiencing adverse childhood events and trauma, which research has definitively linked to poorer long-term health."

19. Attached as Exhibit Q is a Statement by the National Academy of Science, Engineering, and Medicine on the Harmful Consequences of Separating Families at the U.S. Border, available at http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=06202018&_ga=2.158375806.559449867.1529328563-861433489.1524492203. The statement

urges an immediate end to separations based on "an extensive body of evidence" that "points to the danger of current immigration enforcement actions that separate children from their parents."

20. Attached as Exhibit R is a June 9, 2018 Washington Post article titled "A family was separated at the border, and this distraught father took his own life," available at https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html?utm_term=.38a3e92283df. It tells the story of a 39-year old Honduran father who, after separation from his family, committed suicide while detained.

21. Attached as Exhibit S is a June 23, 2018 Washington Post article titled "U.S. officials separated him from his child. Then he was deported to El Salvador," available at https://www.washingtonpost.com/world/the_americas/u-s-officials-separated-him-from-his-child-then-he-was-deported-to-el-salvador/2018/06/23/37b6940a-7663-11e8-bda1-18e53a448a14_story.html?noredirect=on&utm_term=.801ab72b4426. The article tells the story of a father separated from his six-year old daughter after entering the United States who was deported without her, and without knowing where she had been placed. The first time he spoke to her was after his deportation.

22. Attached as Exhibit T are excerpts from the transcript of the status conference the Court held in this case on Friday, June 22, 2018.

23. Attached as Exhibit U is a June 24, 2018, New York Times article titled "Torn Apart by Zero Tolerance, Kept Apart by Red tape, available at https://www.nytimes.com/2018/06/24/us/family-separation-brazil.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news. The

article describes the case of a separated parent who is attempting to reunite with her son through the ORR reunification process.

24. I declare under penalty of perjury under the laws of the United States of America and California that the foregoing is true and correct, based on my personal knowledge. Executed in San Francisco, California on June 25, 2018.

/s/Stephen B. Kang_____
STEPHEN B. KANG

Exhibit J

June 14, 2018

President Donald Trump
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Trump:

On behalf of the American Psychological Association (APA), we are writing to express our deep concern and strong opposition to the Administration's new policy of separating immigrant parents and children who are detained while crossing the border. We previously wrote to then Secretary of Homeland Security John Kelly on April 5, 2017, about this matter. Based on empirical evidence of the psychological harm that children and parents experience when separated, we implore you to reconsider this policy and commit to the more humane practice of housing families together pending immigration proceedings to protect them from further trauma.

APA is the leading scientific and professional organization representing psychology in the United States. Our membership includes researchers, educators, clinicians, consultants, and students. APA works to advance the creation, communication, and application of psychological knowledge to benefit society and improve people's lives. We have 115,700 members and affiliates across the United States and in many other countries, many of whom serve immigrant youth and adults in a wide range of settings, including schools, community centers, hospitals and refugee resettlement centers.

The current policy calls for children to be removed from their parents and placed for an often indeterminate period of time in the custody of the Office of Refugee Resettlement. Decades of psychological research have determined that it is in the best interest of the child and the family to keep families together. Families fleeing their homes to seek sanctuary in the United States are already under a tremendous amount of stress.[1] Sudden and unexpected family separation, such as separating families at the border, can add to that stress, leading to emotional trauma in children.[2] Research also suggests that the longer that parents and children are separated, the greater the reported symptoms of anxiety and depression are for children.[3] Adverse childhood experiences, such as parent-

[1] Chaudry, A. (2011). Children in the aftermath of immigration enforcement. *The Journal of the History of Childhood and Youth,* 4 (1), 137-154.
[2] Dreby, J. (2012). The burden of deportation on children in Mexican immigrant families. *Journal of Marriage and Family,*74, 829-845. Doi:10.1111/j.1741-3737.2012.00989x
[3] Suárez-Orozco, C., Bang, H.J. & Kim, H.Y (2010). I felt like my heart was staying behind: Psychological implications of family separations and reunifications for immigrant youth. *Journal of Adolescent Research 26(2),* 222-257.

child separation, are important social determinants of mental disorders. For children, traumatic events can lead to the development of post-traumatic stress disorder and other mental health disorders that can cause long lasting effects.[4] Furthermore, immigration policies, such as separating families at the border, can also adversely impact those immigrants who are already in the United States. They can suffer from feelings of stigmatization, social exclusion, anger, and hopelessness, as well as fear for the future.[5]

As a tragic example of the current policy's serious potential for harm, a Honduran man who was separated from his wife and 3-year-old son after he crossed the border into Texas recently took his own life while detained in a holding cell, according to the Customs and Border Protection officials, public records, and media reports.[6] There are also reports of detained immigrants foregoing legitimate claims for asylum by pleading guilty to expedite the return of their separated children and reports of parents being deported while their children, including infants, remain in custody. These incidents serve to highlight the mental health crisis for many families caused by the Administration's policy.

Given these considerations, a change in immigration policy regarding the detention of immigrant families at the border is desperately needed from separating parents and children to housing them together and providing needed physical and mental health services. As psychologists, we have documented multiple harmful effects of parent-child separation on children's emotional and psychological development and well-being and urge that the current policy of family separation be reversed. Should you have any questions regarding these comments, please contact Serena Dávila, J.D., with our Public Interest Directorate at sdavila@apa.org or 202-336-6061.

Sincerely,

Jessica Henderson Daniel, Ph.D., ABPP
President

Arthur C. Evans, Jr., Ph. D.
Chief Executive Officer

cc: U.S. Attorney General Jeff Sessions
U.S. Secretary of Homeland Security Kirstjen Nielsen

[4] Rojas-Flores, L., Clements, M., Koo, J. London, J. (2017). Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation. *Psychological Trauma: Theory, Research, Practice, and Policy,* Vol 9, No. 3, 352.
[5] Suárez-Orozco, C., (2017). Conferring Disadvantage: Behavioral and Developmental Implications for Children Growing up in the Shadow of Undocumented Immigration Status. *Wolters Kluwer Health, Inc., 426.*
[6] Mays J. & Stevens M. (2018, June 10). Honduran Man Kills Himself After Being Separated From Family at U.S. Border, Reports Say. *The New York Times.* Retrieved from https://www.nytimes.com/2018/06/10/us/border-patrol-texas-family-separated-suicide.html.

Exhibit R

The Washington Post

National Security

A family was separated at the border, and this distraught father took his own life

by Nick Miroff June 9 ✉Email the author

A Honduran father separated from his wife and child suffered a breakdown at a Texas jail and killed himself in a padded cell last month, according to Border Patrol agents and an incident report filed by sheriff's deputies.

The death of Marco Antonio Muñoz, 39, has not been publicly disclosed by the Department of Homeland Security, and it did not appear in any local news accounts. But according to a copy of a sheriff's department report obtained by The Washington Post, Muñoz was found on the floor of his cell May 13 in a pool of blood with an item of clothing twisted around his neck.

Starr County sheriff's deputies recorded the incident as a "suicide in custody."

Muñoz's death occurred not long after the Trump administration began implementing its "zero-tolerance" crackdown on illegal migration, measures that include separating parents from their children and the threat of criminal prosecution for anyone who enters the United States unlawfully.

[Trump's 'zero tolerance' at the border is causing child shelters to fill up fast]

Much of the controversy generated by the approach has centered on its potentially traumatic impact for migrant children, but the government has said little about how it handles parents who become mentally unstable or violent after authorities split up their families.

Officials at U.S. Customs and Border Protection in Washington, which oversees border enforcement, had no immediate comment on Muñoz's death nor the whereabouts of his wife and child. Starr County authorities refused to provide a copy of Muñoz's autopsy report and did not respond to several phone messages requesting more information about the cause of death.

An official at the Embassy of Honduras in Washington, Assunta Garcia, said the nation's ambassador was the only person authorized to comment on Muñoz's death. But Garcia said he was too busy attending to a visit from President Juan Orlando Hernández.

According to Border Patrol agents with detailed knowledge of what occurred, Muñoz crossed the Rio Grande with his wife and 3-year-old son on May 12 near the tiny town of Granjeno, Tex. The area is a popular crossing point for Central American families and teenagers who turn themselves in to apply for asylum in the United States.

Soon after Muñoz and his family were taken into custody, they arrived at a processing station in nearby McAllen and said they wanted to apply for asylum. Border Patrol agents told the family they would be separated. That's when Muñoz "lost it," according to one agent, speaking on the condition of anonymity to discuss the incident.

"The guy lost his s—," the agent said. "They had to use physical force to take the child out of his hands."

Muñoz was placed in a chain-link detention cell, but he began punching the metal and shaking it violently, agents said.

[Illegal border crossings remained high in May despite Trump's crackdown]

Though Muñoz did not attempt to assault Border Patrol staff, he was at that point considered to be "pre-assault" because he was so agitated. As one agent described it, Muñoz "had the look of a guy at a bar who wanted to fight someone."

"We had to get him out," the agent said. "Those cells are about as secure as a dog kennel. He could have hurt someone."

Unruly detainees typically are taken to local jails, where they can be placed in more secure settings or isolation cells, known as administrative segregation. Border Patrol agents found a vacant cell for Muñoz 40 miles away at

the Starr County Jail in Rio Grande City. When they attempted to place Muñoz in the van, he tried to run away and had to be captured and restrained.

"He yelled and kicked at the windows on the ride to the jail," an agent said. Shackled and handcuffed, Muñoz attempted to escape again upon arrival and once more had to be restrained.

According to the sheriff's department report, Muñoz was booked into the jail at 9:40 p.m. He remained combative and was placed in a padded isolation cell, it says.

Guards said they checked on Muñoz every 30 minutes and observed him praying in a corner of his cell the following morning.

A guard who walked by the cell at 9:50 a.m. said he noticed Muñoz lying in the center of the floor, unresponsive and without a pulse. The guard "noticed a small pool of blood by his nose" and "a piece of clothing twisted around his neck which was tied to the drainage location in the center of the cell," according to the incident report filed by the sheriff's department that morning.

Paramedics found Muñoz dead, his electrocardiogram showing a "flat line," according to the report. The sheriff's department said it attempted to contact Honduran authorities who could reclaim Muñoz's body, but they received no answer at a consulate. Muñoz's wife and son were later released from Border Patrol custody, according to one agent.

Another agent familiar with what happened said he couldn't understand why Muñoz "would choose to separate himself from his family forever" by taking his own life. Homeland Security officials say they are doing more to explain the separation process to parents and have set up a special hotline to help them locate their children after several reports of migrants being sent back to Central America while their children remain in U.S. foster care thousands of miles away.

2274 Comments

Nick Miroff covers immigration enforcement, drug trafficking and the Department of Homeland Security on The Washington Post's National Security desk. He was a Post foreign correspondent in Latin America from 2010 to 2017, and has been a staff writer since 2006. Follow @NickMiroff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Ms. L.; et al.,

Petitioners-Plaintiffs,

v.

U.S Immigration and Customs Enforcement ("ICE"); et al.,

Respondents-Defendants.

Case No.: 18cv0428 DMS (MDD)

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASSWIDE PRELIMINARY INJUNCTION

Eleven weeks ago, Plaintiffs leveled the serious accusation that our Government was engaged in a widespread practice of separating migrant families, and placing minor children who were separated from their parents in government facilities for "unaccompanied minors." According to Plaintiffs, the practice was applied indiscriminately, and separated even those families with small children and infants many of whom were seeking asylum. Plaintiffs noted reports that the practice would become national policy. Recent events confirm these allegations. Extraordinary relief is requested, and is warranted under the circumstances.

On May 7, 2018, the Attorney General of the United States announced a "zero tolerance policy," under which all adults entering the United States illegally would be subject to criminal prosecution, and if accompanied by a minor child, the child would be

separated from the parent.[1] Over the ensuing weeks, hundreds of migrant children were separated from their parents, sparking international condemnation of the practice. Six days ago on June 20, 2018, the President of the United States signed an Executive Order ("EO") to address the situation and to require preservation of the "family unit" by keeping migrant families together during criminal and immigration proceedings to the extent permitted by law, while also maintaining "rigorous[]" enforcement of immigration laws. *See* Executive Order, Affording Congress an Opportunity to Address Family Separation § 1, 2018 WL 3046068 (June 20, 2018). The EO did not address reunification of the burgeoning population of over 2,000 children separated from their parents. Public outrage remained at a fever pitch. Three days ago on Saturday, June 23, 2018, the Department of Homeland Security ("DHS") issued a "Fact Sheet" outlining the government's efforts to "ensure that those adults who are subject to removal are reunited with their children for the purposes of removal."[2]

Plaintiffs assert the EO does not eliminate the need for the requested injunction, and the Fact Sheet does not address the circumstances of this case. Defendants disagree with those assertions, but there is no genuine dispute that the Government was not prepared to accommodate the mass influx of separated children. Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place, and families have been separated for months. Some parents were deported at separate times and from

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[1] *See* U.S. Att'y. Gen., *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

[2] *See* U.S. Dep't of Homeland Sec., *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

different locations than their children. Migrant families that lawfully entered the United States at a port of entry seeking asylum were separated. And families that were separated due to entering the United States illegally between ports of entry have not been reunited following the parent's completion of criminal proceedings and return to immigration detention.

This Court previously entered an order finding Plaintiffs had stated a legally cognizable claim for violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution based on their allegations the Government had separated Plaintiffs from their minor children while Plaintiffs were held in immigration detention and without a showing that they were unfit parents or otherwise presented a danger to their children. *See Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 2018 WL 2725736, at *7-12 (S.D. Cal. June 6, 2018). A class action has been certified to include similarly situated migrant parents. Plaintiffs now request classwide injunctive relief to prohibit separation of class members from their children in the future absent a finding the parent is unfit or presents a danger to the child, and to require reunification of these families once the parent is returned to immigration custody unless the parent is determined to be unfit or presents a danger to the child.

Plaintiffs have demonstrated a likelihood of success on the merits, irreparable harm, and that the balance of equities and the public interest weigh in their favor, thus warranting issuance of a preliminary injunction. This Order does not implicate the Government's discretionary authority to enforce immigration or other criminal laws, including its decisions to release or detain class members. Rather, the Order addresses only the circumstances under which the Government may separate class members from their children, as well as the reunification of class members who are returned to immigration custody upon completion of any criminal proceedings.

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I.

BACKGROUND

This case started with the filing of a Complaint by Ms. L., a Catholic citizen of the Democratic Republic of the Congo fleeing persecution from her home country because of her religious beliefs. The specific facts of Ms. L.'s case are set out in the Complaint and this Court's June 6, 2018 Order on Defendants' motion to dismiss. *See Ms. L.*, 2018 WL 2725736, at *1-3. In brief, Ms. L. and her then-six-year-old daughter S.S., lawfully presented themselves at the San Ysidro Port of Entry seeking asylum based on religious persecution. They were initially detained together, but after a few days S.S. was "forcibly separated" from her mother. When S.S. was taken away from her mother, "she was screaming and crying, pleading with guards not to take her away from her mother." (Am. Compl. ¶ 43.) Immigration officials claimed they had concerns whether Ms. L. was S.S.'s mother, despite Ms. L.'s protestations to the contrary and S.S.'s behavior. So Ms. L. was placed in immigration custody and scheduled for expedited removal, thus rendering S.S. an "unaccompanied minor" under the Trafficking Victims Protection and Reauthorization Act ("TVPRA"), Pub. L. No. 110-457 (Dec. 23, 2008), and subjecting her to the "care and custody" of the Office of Refugee Resettlement ("ORR").[3] S.S. was placed in a facility in

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[3] The TVPRA provides that "the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of" HHS and its sub-agency, ORR. 8 U.S.C. § 1232(b)(1). An "unaccompanied alien child" ("UAC") is a child under 18 years of age with no lawful immigration status in the United States who has neither a parent nor legal guardian in the United States nor a parent nor legal guardian in the United States "available" to care for them. 6 U.S.C § 279(g)(2). According to the TVPRA, a UAC "may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. § 1232(c)(3)(A).

Chicago over a thousand miles away from her mother. Immigration officials later determined Ms. L. had a credible fear of persecution and placed her in removal proceedings, where she could pursue her asylum claim. During this period, Ms. L. was able to speak with her daughter only "approximately 6 times by phone, never by video." (Am. Compl. ¶ 45.) Each time they spoke, S.S. "was crying and scared." (*Id.* ¶ 43.) Ms. L. was "terrified that she would never see her daughter again." (*Id.* ¶ 45.) After the present lawsuit was filed, Ms. L. was released from ICE detention into the community. The Court ordered the Government to take a DNA saliva sample (or swab), which confirmed that Ms. L. was the mother of S.S. Four days later, Ms. L. and S.S. were reunited after being separated for nearly five months.

In an Amended Complaint filed on March 9, 2018, this case was expanded to include another Plaintiff, Ms. C. She is a citizen of Brazil, and unlike Ms. L., she did not present at a port of entry. Instead, she and her 14-year-old son J. crossed into the United States "between ports of entry," after which they were apprehended by U.S. Border Patrol. Ms. C. explained to the agent that she and her son were seeking asylum, but the Government, as was its right under federal law, charged Ms. C. with entering the country illegally and placed her in criminal custody. This rendered J. an "unaccompanied minor" and he, like S.S., was transferred to the custody of ORR, where he, too, was housed in a facility in Chicago several hundred miles away from his mother. Ms. C. was thereafter convicted of misdemeanor illegal entry and served 25 days in criminal custody. After completing that sentence, Ms. C. was transferred to immigration detention for removal proceedings and consideration of her asylum claim, as she too had passed a credible fear screening. Despite being returned to immigration custody, Ms. C. was not reunited with J. During the five months she was detained, Ms. C. did not see her son, and they spoke on the phone only "a handful of times[.]" (*Id.* ¶ 58.) Ms. C. was "desperate" to be reunited with her son, worried about him constantly and did not know when she would be able to see him. (*Id.*) J. had a difficult time emotionally during the period of separation from his mother. (*Id.* ¶ 59.) Ms. C. was eventually released from immigration detention on bond, and only recently reunited

with J. Their separation lasted more than eight months despite the lack of any allegations or evidence that Ms. C. was unfit or otherwise presented a danger to her son.[4]

Ms. L. and Ms. C. are not the only migrant parents who have been separated from their children at the border. Hundreds of others, who have both lawfully presented at ports of entry (like Ms. L.) and unlawfully crossed into the country (like Ms. C.), have also been separated. Because this practice is affecting large numbers of people, Plaintiffs sought certification of a class consisting of similarly situated individuals. The Court certified that class with minor modifications,[5] and now turns to the important question of whether Plaintiffs are entitled to a classwide preliminary injunction that (1) halts the separation of class members from their children absent a determination that the parent is unfit or presents a danger to the child, and (2) reunites class members who are returned to immigration custody upon completion of any criminal proceedings absent a determination that the parent is unfit or presents a danger to the child.

Since the present motion was filed, several important developments occurred, as previously noted. First, on May 7, 2018, the Government announced its zero tolerance policy for all adult persons crossing the border illegally, which resulted in the separation of hundreds of children who had crossed with their parents. This is what happened with Ms. C., though she crossed prior to the public announcement of the zero tolerance policy.

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[4] As stated in the Court's Order on Defendants' motion to dismiss, Plaintiffs do not challenge Ms. C.'s initial separation from J. as a result of the criminal charge filed against her. Plaintiffs' only complaint with regard to Ms. C. concerns the Government's failure to reunite her with J. after she was returned to immigration custody.

[5] The class is defined to include: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child." (*See* Order Granting in Part Mot. for Class Cert. at 17.) The class does not include parents with criminal history or communicable disease, or those apprehended in the interior of the country or subject to the EO. (*See id.* at 4 n.5.)

She is not alone. There are hundreds of similarly situated parents, and there are more than 2,000 children that have now been separated from their parents.

When a parent is charged with a criminal offense, the law ordinarily requires separation of the family. This separation generally occurs regardless of whether the parent is charged with a state or federal offense. The repercussions on the children, however, can vary greatly depending on status. For citizens, there is an established system of social service agencies ready to provide for the care and well-being of the children, if necessary, including child protective services and the foster care system. This is in addition to any family members that may be available to provide shelter for these minor children. Grandparents and siblings are frequently called upon. Non-citizens may not have this kind of support system, such as other family members who can provide shelter for their children in the event the parent is detained at the border. This results in immigrant children going into the custody of the federal government, which is presently not well equipped to handle that important task.

For children placed in federal custody, there are two options. One of those options is ORR, but it was established to address a different problem, namely minor children who were apprehended at the border without their parents, *i.e.*, true "unaccompanied alien children." It was not initially designed to address the problem of migrant children detained with their parents at the border and who were thereafter separated from their parents. The second option is family detention facilities, but the options there are limited. Indeed, at the time of oral argument on this motion, Government counsel represented to the Court that the "total capacity in [family] residential centers" was "less than 2,700." (Rep. Tr. at 9, May 9, 2018, ECF No. 70.) For male heads of households, *i.e.*, fathers traveling with their children, there was only one facility with "86 beds." (*Id.* at 43.)

The recently issued EO confirms the government is inundated by the influx of children essentially orphaned as a result of family separation. The EO now directs "[h]eads of executive departments and agencies" to make available "any facilities … appropriate" for the housing and care of alien families. EO § 3(d). The EO also calls upon the *military*

by directing the Secretary of Defense to make available "any existing" facility and to "construct such facilities[,]" if necessary, *id.* § 3(c), which is an extraordinary measure. Meanwhile, "tent cities" and other make-shift facilities are springing up. That was the situation into which Plaintiffs, and hundreds of other families that were separated at the border in the past several months, were placed.

This situation has reached a crisis level. The news media is saturated with stories of immigrant families being separated at the border. People are protesting. Elected officials are weighing in. Congress is threatening action. Seventeen states have now filed a complaint against the Federal Government challenging the family separation practice. *See State of Washington v. United States*, Case No. 18cv0939, United States District Court for the Western District of Washington. And the President has taken action.

Specifically, on June 20, 2018, the President signed the EO referenced above. The EO states it is the Administration's policy "to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources." *Id.* § 1.[6] In furtherance of that policy, the EO indicates that parents and children who are apprehended together at the border will be detained together "during the pendency of any criminal improper entry or immigration proceedings" to the extent permitted by law. *Id.* § 3. The language of the EO is not absolute, however, as it states that family unity shall be maintained "where appropriate and consistent with law and available resources[,]" *id.* § 1, and "to the extent permitted by law and subject to the availability of appropriations[.]" *Id.* § 3. The EO also indicates rigorous enforcement of illegal border crossers will continue. *Id.* § 1 ("It is the policy of this Administration to rigorously enforce our immigration laws."). And finally, although the Order speaks to a policy of "maintain[ing] family unity,"

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[6] The Order defines "alien family" as "any person not a citizen or national of the United States who has not been admitted into, or is not authorized to enter or remain in, the United States, who entered this country with an alien child or alien children at or between designated ports of entry and who was detained[.]" *Id.* § 2(a)(i).

it is silent on the issue of reuniting families that have already been separated or will be separated in the future." *Id.*

In light of these recent developments, and in particular the EO, the Court held a telephonic status conference with counsel on June 22, 2018. During that conference, the Court inquired about communication between ORR and DHS, and ORR and the Department of Justice ("DOJ"), including the Bureau of Prisons ("BOP"), as it relates to these separated families. Reunification procedures were also discussed, specifically whether there was any affirmative reunification procedure for parents and children after parents were returned to immigration detention following completion of criminal proceedings. Government counsel explained the communication procedures that were in place, and represented, consistent with her earlier representation to the Court, that there was no procedure in place for the reunification of these families.[7]

The day after the status conference, Saturday, June 23, DHS issued the Fact Sheet referenced above. This document focuses on several issues addressed during the status conference, *e.g.*, processes for enhanced communication between separated parents and children, but only "for the purposes of removal." It also addresses coordination between and among three agencies, CBP, ICE, and HHS agency ORR, but again for the purpose of removal. The Fact Sheet does not address reunification for other purposes, such as immigration or asylum proceedings, which can take months. It also does not mention other vital agencies frequently involved during criminal proceedings: DOJ and BOP.

At the conclusion of the recent status conference, the Court requested supplemental briefing from the parties. Those briefs have now been submitted. After thoroughly

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[7] The Court: "Is there currently any affirmative reunification process that the government has in place once parent and child are separated? Government counsel: I would say … when a parent is released from criminal custody and taken into ICE custody is the practice to reunite them in family detention[?] And at that [previous hearing] I said no, that that was not the practice. I think my answer on that narrow question would be the same." (Rep. Tr. at 29-30, June 22, 2018, ECF No. 77.)

considering all of the parties' briefs and the record in this case, and after hearing argument from counsel on these important issues, the Court grants Plaintiffs' motion for a classwide preliminary injunction.

II.

DISCUSSION

Plaintiffs seek classwide preliminary relief that (1) enjoins Defendants' practice of separating class members from their children absent a determination that the parent is unfit or presents a danger to their child, and (2) orders the government to reunite class members with their children when the parent is returned to immigration custody after their criminal proceedings conclude, absent a determination that the parent is unfit or presents a danger to the child. Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To meet that showing, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20).[8]

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[8] The Ninth Circuit applies separate standards for injunctions depending on whether they are prohibitory, *i.e.*, whether they prevent future conduct, or mandatory, *i.e.*, "they go beyond 'maintaining the status quo[.]'" *Hernandez v. Sessions*, 872 F.3d 976, 997 (9th Cir. 2017). The standard set out above applies to prohibitory injunctions, which is what Plaintiffs seek here. To the extent Plaintiffs are also requesting mandatory relief, that request is "subject to a higher standard than prohibitory injunctions," namely that relief will issue only "when 'extreme or very serious damage will result' that is not capable of compensation in damages,' and the merits of the case are not 'doubtful.'" *Id.* at 999 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). The Ninth Circuit recognizes that application of these different standards "is controversial[,]" and that other Circuits have questioned this approach. *Id.* at 997-98. This Court need not, and does not, address that discrepancy here. Suffice it to say that to the extent some portion of Plaintiffs' requested relief is subject to a standard higher than

Before turning to these factors, the Court addresses directly Defendants' argument that an injunction is not necessary here in light of the EO and the recently released Fact Sheet. Although these documents reflect some attempts by the Government to address some of the issues in this case, neither obviates the need for injunctive relief here. As indicated throughout this Order, the EO is subject to various qualifications. For instance, Plaintiffs correctly assert the EO allows the government to separate a migrant parent from his or her child "where there is a *concern* that detention of an alien child with the child's alien parent would pose a risk to the child's welfare." EO § 3(b) (emphasis added). Objective standards are necessary, not subjective ones, particularly in light of the history of this case. Furthermore, the Fact Sheet focuses on reunification "at time of removal[,]" U.S. Dep't of Homeland Sec., *supra*, note 2, stating that the parent slated for removal will be matched up with their child at a location in Texas and then removed. It says nothing about reunification during the intervening time between return from criminal proceedings to ICE detention or the time in ICE detention prior to actual removal, which can take months. Indeed, it is undisputed "ICE has no plans or procedures in place to reunify the parent with the child other than arranging for them to be deported together after the parent's immigration case is concluded." (Pls.' Supp. Mem. in Supp. of Classwide Prelim. Inj., Ex. 31 ¶ 11.) Thus, neither of these directives eliminates the need for an injunction in this case. With this finding, the Court now turns to the *Winter* factors.

A. Likelihood of Success

"The first factor under *Winter* is the most important likely success on the merits." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). While Plaintiffs carry the burden of demonstrating likelihood of success, they are not required to prove their case in full at the preliminary injunction stage but only such portions that enable them to obtain the injunctive relief they seek. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

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the traditional standard for injunctive relief, Plaintiffs have met their burden for the reasons set out below.

Here, the only claim currently at issue is Plaintiffs' due process claim.[9] Specifically, Plaintiffs contend the Government's practice of separating class members from their children, and failing to reunite those parents who have been separated, without a determination that the parent is unfit or presents a danger to the child violates the parents' substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution. To prevail on this claim, Plaintiffs must show that the Government practice "shocks the conscience." In the Order on Defendants' motion to dismiss, the Court found Plaintiffs had set forth sufficient facts to support that claim. *Ms. L.*, 2018 WL 2725736, at *7-12. The evidence submitted since that time supports that finding, and demonstrates Plaintiffs are likely to succeed on this claim.

As explained in the Court's Order on Defendants' motion to dismiss, the "shocks the conscience" standard is not subject to a rigid list of established elements. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (stating "[r]ules of due process are not … subject to mechanical application in unfamiliar territory.") On the contrary, "an investigation into substantive due process involves an appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements[.]" *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998).

Here, each Plaintiff presents different circumstances, but both were subjected to the same government practice of family separation without a determination that the parent was unfit or presented a danger to the child. Ms. L. was separated from her child without a determination she was unfit or presented a danger to her child, and Ms. C. was not reunited with her child despite the absence of any finding that she was unfit or presented a danger

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[9] In their supplemental brief, Defendants assert Plaintiffs are raising new claims based on events that transpired after the Complaints were filed, *e.g.*, the announcement of the zero tolerance policy and the EO. The Court disagrees. Plaintiffs' claims are not based on these events, but are based on the practice of separating class members from their children. The subsequent events are relevant to Plaintiffs' claim, but they have not changed the claim itself, which remains focused on the practice of separation.

to her child. Outside of the context of this case, namely an international border, Plaintiffs would have a high likelihood of success on a claim premised on such a practice. *See D.B. v. Cardall*, 826 F.3d 721, 741 (4th Cir. 2016) (citing cases finding due process violation where state action interfered with rights of fit parents); *Heartland Academy Community Church v. Waddle*, 595 F.3d 798, 808-811 (8th Cir. 2010) (finding removal of children from religious school absent evidence the students were "at immediate risk of child abuse or neglect" was violation of clearly established constitutional right); *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000) (citing *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1126 (3d Cir. 1997) ("courts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.")

The context of this case is different. The Executive Branch, which is tasked with enforcement of the country's criminal and immigration laws, is acting within its powers to detain individuals lawfully entering the United States and to apprehend individuals illegally entering the country. However, as the Court explained in its Order on Defendants' motion to dismiss, the right to family integrity still applies here. The context of the family separation practice at issue here, namely an international border, does not render the practice constitutional, nor does it shield the practice from judicial review.

On the contrary, the context and circumstances in which this practice of family separation were being implemented support a finding that Plaintiffs have a likelihood of success on their due process claim. First, although parents and children may lawfully be separated when the parent is placed in criminal custody, the same general rule does not apply when a parent and child present together lawfully at a port of entry seeking asylum. In that situation, the parent has committed no crime, and absent a finding the parent is unfit or presents a danger to the child, it is unclear why separation of Ms. L. or similarly situated class members would be necessary. Here, many of the family separations have been the result of the Executive Branch's zero tolerance policy, but the record also reflects that the

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. Ms. L. is an example of this family separation practice expanding beyond its lawful reach, and she is not alone. (*See, e.g.*, Pls.' Reply Br. in Supp. of Mot. for Class Cert., Exs. 22-23, 25-26) (declarations from parents attesting to separation at border after lawfully presenting at port of entry and requesting asylum); Pls.' Supp. Mem. in Supp. of Classwide Prelim. Inj., Ex. 32 ¶¶ 9, 10b, 11a (listing parents who were separated from children after presenting at ports of entry)).

As set out in the Court's prior Order, asylum seekers like Ms. L. and many other class members may be fleeing persecution and are entitled to careful consideration by government officials. Particularly so if they have a credible fear of persecution. We are a country of laws, and of compassion. We have plainly stated our intent to treat refugees with an ordered process, and benevolence, by codifying principles of asylum. *See, e.g.,* The Refugee Act, PL 96-212, 94 Stat. 102 (1980). The Government's treatment of Ms. L. and other similarly situated class members does not meet this standard, and it is unlikely to pass constitutional muster.

Second, the practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality. The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees' release, at all levels state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not

accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process. *See Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassiter v. Dept. of Soc. Services of Durham County, N.C.*, 452 U.S. 18, (1981)) (stating it is "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right.") (internal quotation marks omitted).

The lack of effective methods for communication between parents and children who have been separated has also had a profoundly negative effect on the parents' criminal and immigration proceedings, as well as the childrens' immigration proceedings. *See United States v. Dominguez-Portillo*, No:EP-17-MJ-4409-MAT, 2018 WL 315759, at *1-2 (W.D. Tex. Jan. 5, 2018) (explaining that criminally charged defendants "had not received any paperwork or information concerning the whereabouts or well-being of" their children). In effect, these parents have been left "in a vacuum, without knowledge of the well-being and location of their children, to say nothing of the immigration proceedings in which those minor children find themselves." *Id.* at *14. This situation may result in a number of different scenarios, all of which are negative some profoundly so. For example, "[i]f parent and child are asserting or intending to assert an asylum claim, that child may be navigating those legal waters without the benefit of communication with and assistance from her parent; that defendant, too, must make a decision on his criminal case with total uncertainty about this issue." *Id.* Furthermore, " a defendant facing certain deportation would be unlikely to know whether he might be deported before, simultaneous to, or after their child, or whether they would have the opportunity to even discuss their deportations[.]" *Id.* Indeed, some parents have already been deported without their children, who remain in government facilities in the United States.[10]

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[10] *See*, *e.g.*, Pls.' Supp. Mem. in Supp. of Classwide Prelim. Inj., Ex. 32 ¶ 16k, Ex. 36 ¶ 7a; Nelson Renteria, *El Salvador demands U.S. return child taken from deported father*,

The absence of established procedures for dealing with families that have been separated at the border, and the effects of that void on the families involved, is borne out in the cases of Plaintiffs here. Ms. L. was separated from her child when immigration officials claimed they could not verify she was S.S.'s mother, and detained her for expedited removal proceedings. That rendered S.S. "unaccompanied" under the TVPRA and subject to immediate transfer to ORR, which accepted responsibility for S.S. There was no further communication between the agencies, ICE and ORR. The filing of the present lawsuit prompted release and reunification of Ms. L. and her daughter, a process that took close to five months and court involvement. Ms. C. completed her criminal sentence in 25 days, but it took nearly eight months to be reunited with her son. She, too, had to file suit to regain custody of her son from ORR.

These situations confirm what the Government has already stated: it is not affirmatively reuniting parents like Plaintiffs and their fellow class members for purposes other than removal. Outside of deportation, the onus is on the parents, who, for the most part, are themselves in either criminal or immigration proceedings, to contact ORR or otherwise search for their children and make application for reunification under the TVPRA. However, this reunification procedure was not designed to deal with the present circumstances. (*See* Pls.' Supp. Mem. in Supp. of Classwide Prelim. Inj., Ex. 33 ¶¶ 6-9.) Rather, "ORR's reunification process was designed to address the situation of children who come to the border or are apprehended outside the company of a parent or legal guardian." (*Id.* ¶ 6.) Placing the burden on the parents to find and request reunification with their children under the circumstances presented here is backwards. When children are

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REUTERS (June 21, 2018, 4:03 PM), https://www.reuters.com/article/us-usa-immigration-el-salvador/el-salvador-demands-us-return-child-taken-from-deported-father-idUSKBN1JH3ER; Miriam Jordan, *'I Can't Go Without My Son': A Deported Mother's Plea*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html.

separated from their parents under these circumstances, the Government has an affirmative obligation to track and promptly reunify these family members.

This practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim. When combined with the manner in which that practice is being implemented, *e.g.*, the lack of any effective procedures or protocols for notifying the parents about their childrens' whereabouts or ensuring communication between the parents and children, and the use of the children as tools in the parents' criminal and immigration proceedings, (*see* Pls.' Supp. Mem. in Supp. of Classwide Prelim. Inj., Ex. 29 ¶¶ 8, 14), a finding of likelihood of success is assured. A practice of this sort implemented in this way is likely to be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," *Lewis*, 523 U.S. at 847 n.8, interferes with rights "'implicit in the concept of ordered liberty[,]'" *Rochin v. Cal.*, 342 U.S. 165, 169 (1952) (quoting *Palko v. State of Conn.*, 302 U.S. 319, 325 (1937)), and is so "'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

For all of these reasons, the Court finds there is a likelihood of success on Plaintiffs' due process claim.

B. Irreparable Injury

Turning to the next factor, Plaintiffs must show they are "'likely to suffer irreparable harm in the absence of preliminary relief.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Winter*, 555 U.S. at 20). "'It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.'" *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). As explained, Plaintiffs have demonstrated the likelihood of a deprivation of their constitutional rights, and thus they have satisfied this factor.

The injury in this case, however, deserves special mention. That injury is the separation of a parent from his or her child, which the Ninth Circuit has repeatedly found constitutes irreparable harm. *See Leiva Perez v. Holder*, 640 F.3d 962, 969 70 (9th Cir. 2011); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (identifying "separated families" as an irreparable harm).

Furthermore, the record in this case reflects that the separations at issue have been agonizing for the parents who have endured them. One of those parents, Mr. U., an asylum seeker from Kyrgyzstan, submitted a declaration in this case in which he stated that after he was told he was going to be separated from his son he "felt as though [he] was having a heart attack." (Reply in Supp. of Mot. for Class Cert., Ex. 21 ¶ 4.) Another asylum-seeking parent from El Salvador who was separated from her two sons writes,

> The separation from my sons has been incredibly hard, because I have never been away from them before. I do not want my children to think that I abandoned them. [My children] are so attached to me. [One of my children] used to sleep in bed with me every night while [my other child] slept in his own bed in the same room.… It hurts me to think how anxious and distressed they must be without me.

(Reply in Supp. of Mot. for Class Cert., Ex. 24 ¶ 9.) And another asylum-seeking parent from Honduras described having to place her crying 18-month old son in a car seat in a government vehicle, not being able to comfort him, and her crying as the officers "took [her] son away." (Reply in Supp. of Mot. for Class Cert., Ex. 25 ¶ 7.) There has even been a report that one father committed suicide in custody after being separated from his wife and three-year-old child. *See* Molly Hennessy-Fiske, *Honduran Migrant Who Was Separated From Family is Found Dead in Texas Jail in an Apparent Suicide*, L.A. TIMES (June 9, 2018, 5:35 PM), http://www.latimes.com/nation/la-na-border-patrol-suicide-20180609-story.html.

The parents, however, are not the only ones suffering from the separations. One of the *amici* in this case, Children's Defense Fund, states,

> there is ample evidence that separating children from their mothers or fathers leads to serious, negative consequences to children's health and development. Forced separation disrupts the parent-child relationship and puts children at increased risk for both physical and mental illness.... And the psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation even after eventual reunification with a parent or other family.

(ECF No. 17-11 at 3.) Other evidence before the Court reflects that "separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development." (ECF No. 17-13 at 2.) That evidence reflects:

> Separation from family leaves children more vulnerable to exploitation and abuse, no matter what the care setting. In addition, traumatic separation from parents creates toxic stress in children and adolescents that can profoundly impact their development. Strong scientific evidence shows that toxic stress disrupts the development of brain architecture and other organ systems, and increases the risk for stress-related disease and cognitive impairment well into adult years. Studies have shown that children who experience such traumatic events can suffer from symptoms of anxiety and post-traumatic stress disorder, have poorer behavioral and educational outcomes, and experience higher rates of poverty and food insecurity.

(ECF No. 17-13 at 2.) And Martin Guggenheim, the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law and Founding Member of the Center for Family Representation, states:

> Children are at risk of suffering great emotional harm when they are removed from their loved ones. And children who have traveled from afar and made their way to this country to seek asylum are especially at risk of suffering irreversible psychological harm when wrested from the custody of the parent or caregiver with whom they traveled to the United States.

(Mem. in Supp. of Classwide Prelim. Inj., Ex. 17 ¶ 16.) All of this evidence, combined with the constitutional violation alleged here, conclusively shows that Plaintiffs and the

class members are likely to suffer irreparable injury if a preliminary injunction does not issue.

C. Balance of Equities

Turning to the next factor, "[t]o obtain a preliminary injunction, a plaintiff must also demonstrate that 'the balance of equities tips in his favor.'" *Hernandez*, 872 F.3d at 995 (quoting *Winter*, 555 U.S. at 20). As with irreparable injury, when a plaintiff establishes "a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

Plaintiffs here assert the balance of equities weighs in favor of an injunction in this case. Specifically, Plaintiffs argue Defendants would not suffer any hardship if the preliminary injunction is issued because the Government "cannot suffer harm from an injunction that merely ends an unlawful practice[.]" *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see also Arizona Dream Act Coalition*, 757 F.3d at 1069 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)) (stating balance of equities favors "'prevent[ing] the violation of a party's constitutional rights.'"). When the absence of harm to the Government is weighed against the harms to Plaintiffs set out above, Plaintiffs argue this factor weighs in their favor. The Court agrees.

The primary harm Defendants assert here is the possibility that an injunction would have a negative impact on their ability to enforce the criminal and immigration laws. However, the injunction here preventing the separation of parents from their children and ordering the reunification of parents and children that have been separated would do nothing of the sort. The Government would remain free to enforce its criminal and immigration laws, and to exercise its discretion in matters of release and detention consistent with law. *See* EO §§ 1, 3(a) & (e) (discussing *Flores v. Sessions*, CV 85-4544); *see also Comm. of Cent. Am. Refugees v. I.N.S.,* 795 F.2d 1434, 1439-40 (9th Cir. 1986) (stating "prudential considerations preclude[] interference with the Attorney General's [exercise of] discretion" in selecting the detention facilities where aliens are to be

detained). It would just have to do so in a way that preserves the class members' constitutional rights to family association and integrity. *See Rodriguez*, 715 F.3d at 1146 ("While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values.") Thus, this factor also weighs in favor of issuing the injunction.

D. Public Interest

The final factor for consideration is the public interest. *See Hernandez*, 872 F.3d at 996 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)) ("When, as here, 'the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction.'") To obtain the requested relief, "Plaintiffs must demonstrate that the public interest favors granting the injunction 'in light of [its] *likely* consequences,' i.e., 'consequences [that are not] too remote, insubstantial, or speculative and [are] supported by evidence.'" *Id.* (quoting *Stormans*, 586 F.3d at 1139). "'Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.'" *Id.* (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)).

This case involves two important public interests: the interest in enforcing the country's criminal and immigration laws and the constitutional liberty interest "of parents in the care, custody, and control of their children[,]" which "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Both of these interests are valid and important, and both can be served by the issuance of an injunction in this case.

As stated, the public's interest in enforcing the criminal and immigration laws of this country would be unaffected by issuance of the requested injunction. The Executive Branch is free to prosecute illegal border crossers and institute immigration proceedings against aliens, and would remain free to do so if an injunction were issued. Plaintiffs do not seek to enjoin the Executive Branch from carrying out its duties in that regard.

What Plaintiffs do seek by way of the requested injunction is to uphold their rights to family integrity and association while their immigration proceedings are underway. This right, specifically, the relationship between parent and child, is "constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), and "well established." *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011). The public interest in upholding and protecting that right in the circumstances presented here would be served by issuance of the requested injunction. *See Arizona Dream Act Coalition*, 757 F.3d at 1069 (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("'[I]t is clear that it would not be equitable or in the public's interest to allow the state … to violate the requirements of federal law, especially when there are no adequate remedies available.'") Accordingly, this factor, too, weighs in favor of issuing the injunction.

III.
CONCLUSION

The unfolding events the zero tolerance policy, EO and DHS Fact Sheet serve to corroborate Plaintiffs' allegations. The facts set forth before the Court portray reactive governance responses to address a chaotic circumstance of the Government's own making. They belie measured and ordered governance, which is central to the concept of due process enshrined in our Constitution. This is particularly so in the treatment of migrants, many of whom are asylum seekers and small children. The extraordinary remedy of classwide preliminary injunction is warranted based on the evidence before the Court. For the reasons set out above, the Court hereby GRANTS Plaintiffs' motion for classwide preliminary injunction, and finds and orders as follows:

(1) Defendants, and their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them, are preliminarily enjoined from detaining Class Members in DHS custody without and apart from their minor children, absent a determination that the parent is unfit or presents a danger to the

child, unless the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child in DHS custody.[11]

(2) If Defendants choose to release Class Members from DHS custody, Defendants, and their officers, agents, servants, employees and attorneys, and all those who are in active concert or participation with them, are preliminary enjoined from continuing to detain the minor children of the Class Members and must release the minor child to the custody of the Class Member, unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child.

(3) Unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child:

(a) Defendants must reunify all Class Members with their minor children who are under the age of five (5) within fourteen (14) days of the entry of this Order; and

(b) Defendants must reunify all Class Members with their minor children age five (5) and over within thirty (30) days of the entry of this Order.

(4) Defendants must immediately take all steps necessary to facilitate regular communication between Class Members and their children who remain in ORR custody, ORR foster care, or DHS custody. Within ten (10) days, Defendants must provide parents telephonic contact with their children if the parent is not already in contact with his or her child.

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[11] "Fitness" is an important factor in determining whether to separate parent from child. In the context of this case, and enforcement of criminal and immigration laws at the border, "fitness" could include a class member's mental health, or potential criminal involvement in matters other than "improper entry" under 8 U.S.C. § 1325(a), (*see* EO § 1), among other matters. Fitness factors ordinarily would be objective and clinical, and would allow for the proper exercise of discretion by government officials.

(5) Defendants must immediately take all steps necessary to facilitate regular communication between and among all executive agencies responsible for the custody, detention or shelter of Class Members and the custody and care of their children, including at least ICE, CBP, BOP, and ORR, regarding the location and well-being of the Class Members' children.

(6) Defendants, and their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them, are preliminarily enjoined from removing any Class Members without their child, unless the Class Member affirmatively, knowingly, and voluntarily declines to be reunited with the child prior to the Class Member's deportation, or there is a determination that the parent is unfit or presents a danger to the child.

(7) This Court retains jurisdiction to entertain such further proceedings and to enter such further orders as may be necessary or appropriate to implement and enforce the provisions of this Order and Preliminary Injunction.

A status conference will be held on **July 6, 2018**, at **12:00 noon**, to discuss all necessary matters. A notice of teleconference information sheet will be provided in a separate order.

IT IS SO ORDERED.

Dated: June 26, 2018

Hon. Dana M. Sabraw
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON; COMMONWEALTH OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF MARYLAND; STATE OF OREGON; STATE OF NEW MEXICO; COMMONWEALTH OF PENNSYLVANIA; STATE OF NEW JERSEY; STATE OF IOWA; STATE OF ILLINOIS; STATE OF MINNESOTA; STATE OF RHODE ISLAND; COMMONWEALTH OF VIRGINIA; STATE OF NEW YORK; STATE OF VERMONT; STATE OF NORTH CAROLINA; STATE OF DELAWARE; and THE DISTRICT OF COLUMBIA,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; DONALD TRUMP, in his official capacity as President of the United States of America; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. DEPARTMENT OF HEALTH AND

NO.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

HUMAN SERVICES; OFFICE OF REFUGEE RESETTLEMENT; KIRSTJEN NIELSEN, in her official capacity as Secretary of the U.S. Department of Homeland Security; THOMAS HOMAN, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; KEVIN K. MCALEENAN, in his official capacity as Commissioner of U.S. Customs and Border Protection; ALEX AZAR, in his official capacity as Secretary of U.S. Department of Health and Human Services; SCOTT LLOYD, in his official capacity as Director of Office of Refugee Resettlement; and JEFFERSON BEAUREGARD SESSIONS III, in his official capacity as the Attorney General of the United States,

Defendants.

I. INTRODUCTION

1. The States of Washington, California, Maryland, Oregon, New Mexico, New Jersey, Iowa, Illinois, Minnesota, Rhode Island, New York, Vermont, North Carolina, and Delaware; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; and the District of Columbia (collectively, the States) bring this action to protect the States and their residents against the Trump Administration's practice of refusing entry to asylum applicants who present at Southwestern border ports of entry and its cruel and unlawful policy of forcibly separating families who enter the country along our Southwestern border.

2. Widespread news reports, as well as interviews of detainees in Seattle and elsewhere, confirm that families fleeing violence and persecution in their home countries who try to present themselves at Southwestern ports of entry to seek asylum are being refused entry into the United States. Border officials are unlawfully turning away these families on the pretext that the United States is "full" or no longer accepting asylum seekers. This unlawful practice

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exacerbates the trauma already suffered by refugee families while simultaneously artificially increasing illegal entry violations.

3. For those families that do enter the United States along the Southwestern border, immigration officials have implemented the Trump Administration's policy of forcibly separating parents from their children regardless of the family's circumstances or the needs of the children. As of June 20, 2018, the new policy had already resulted in the separation of over two thousand children from their parents at the Southwestern border, most recently at a rate of 50-70 families separated *every day*. Defendants have taken children as young as infants from their parents, often with no warning or opportunity to say goodbye, and providing no information about where the children are being taken or when they will next see each other. The States' interviews of detainees in their respective jurisdictions confirm the gratuitous harm that this policy inflicts on parents and children and the immediate and deleterious impact it has on families and communities.

4. As of June 25, 2018, emerging reports suggest that immigration officials are now using the children taken from their parents as leverage to coerce parents to withdraw their asylum claims.

5. Defendants have repeatedly and publicly admitted that a policy of intentionally separating immigrant children from their parents would be "cruel, "horrible," and "antithetical to child welfare." But they have alternately claimed that they have no such policy, or that it is somehow mandated by federal law or prior court decisions.

6. In truth, however, Defendants have embraced a policy of separating parents from their children for the express purpose of deterring immigration along the Southwestern border

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(the "Policy"). No law or court decision requires such separation. Rather, Defendants have chosen to adopt the Policy as part of their "zero tolerance" or "100 percent prosecution" approach to individuals who enter the country unlawfully, irrespective of circumstances, and to then use such misdemeanor criminal charges to detain parents indefinitely in federal facilities that cannot accommodate families.

7. Hundreds of children are left to languish in makeshift detention facilities where staff are sometimes told not to comfort them until a placement is found for the child. Defendants have moved the children and parents to different locations all over the country. While the parents are held in federal facilities to await further immigration proceedings, their children are sent elsewhere to group shelters or family placements.

8. Defendants have made clear that the purpose of separating families is not to protect children, but rather to create a public spectacle designed to deter potential immigrants from coming to the United States. As Counselor to the President Kellyanne Conway said recently: "Nobody likes seeing babies ripped from their mothers' arms . . . but we have to make sure that DHS' laws are understood through the soundbite culture that we live in." *KellyAnne Conway: 'Nobody likes' Policy Separating Migrant Kids at the Border* (June 17, 2018) *available at* https://www.nbcnews.com/politics/first-read/conway-nobody-likes-policy-separating-migrant-kids-border-n884016, attached hereto as Ex. 1. Defendants' Policy is causing severe, intentional, and permanent trauma to the children and parents who are separated in furtherance of an illegitimate deterrence objective.

9. On June 20, 2018, President Trump signed an Executive Order purporting to suspend the Policy, but any relief offered by the Order is illusory. The Order says nothing about

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reuniting the families already ripped apart by the federal government, and Trump Administration officials have made clear the Order will have no impact on the thousands of families who have already been traumatized.

10. Moreover, based on its text and contemporaneous statements by Administration officials, it is clear the Order does not require the end of family separation. In fact, the Administration currently lacks both the capacity and the legal authority to detain families together for indefinite periods of time, which is what the Order contemplates as the alternative to separating families.

11. On June 21, 2018, as required by the Order, Attorney General Sessions filed an *Ex Parte* Application for relief from the *Flores* Settlement (a 1997 agreement which sets national standards regarding the detention, release, and treatment of all children in DHS custody). That request seeks rescission of *Flores'* protections so that families may be detained indefinitely during the pendency of any immigration proceedings involving their members, a plan that raises the specter of internment camps.

12. Moreover, the *Flores* application seeks a "determin[ation] that the Agreement's state licensure requirement does not apply to ICE family residential facilities." The government's attempt to modify the *Flores* settlement terms by removing States' licensing authority and jurisdiction over such facilities is a direct attack on the States' sovereign powers.

13. Neither the Order nor the Administration's *Flores* application offer any assurance that the Administration will not return to a family separation policy when its efforts to intern families together fail. In response to the public outcry against family separation, in recent days President Trump has proposed that Homeland Security simply deport immigrants without

hearing or legal process instead of, or perhaps in addition to, interning thousands of families in military facilities.

14. The Policy, and the Trump Administration's subsequent attempt to shield their facilities from state licensing standards, is an affront to States' sovereign interests in enforcing their laws governing minimum standards of care for children, declaring the family unit to be a fundamental resource of American life that should be nurtured, and requiring the preservation of the parent-child relationship unless the child's right to basic nurture, health, or safety is jeopardized. The Policy also adversely affects the States' proprietary interests, forcing States to expend resources to remediate the harms inflicted by the Policy, some of which are likely to be permanent. State programs, including child welfare services, social and health services, courts, and public schools are all experiencing fiscal impacts due to family separation that will only increase. The Policy, and the Administration's related conduct, has caused severe and immediate harm to the States and their residents, including parents who are detained, released, or otherwise reside in the States after being forcibly separated from their children; children who are placed in facilities, shelters, sponsor homes, foster care, or who otherwise reside in the States after being separated from their parents; extended families and sponsors in the States; and the States' immigrant communities.

15. The Court should declare the practice of refusing to accept asylum seekers who present at Southwestern points of entry and the related Policy of family separation illegal and order Defendants to stop implementing them immediately. The Court should order Defendants to reunite every family separated by these unlawful acts immediately, and to take such other actions as are warranted by the time of hearing. Defendants' conduct has caused real harms to

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the States and our residents, harms that will only increase unless Defendants are enjoined from continuing.

II. JURISDICTION AND VENUE

16. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). The United States' sovereign immunity is waived by 5 U.S.C. § 702.

17. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e)(1). Defendants are the United States of America and United States agencies or officers sued in their official capacities. The State of Washington is a resident of this judicial district, and a substantial part of the events or omissions giving rise to this Complaint occurred within the Western District of Washington. For example, as of June 18, 2018, parents who were recently refused entry and then victimized by the Policy were being detained at the Federal Detention Center SeaTac, which is located in King County. At that time, a number of children who were separated from their parents pursuant to the Policy also were being detained in Seattle and other nearby locations.

18. The States bring this action to redress harms to their sovereign, proprietary, and *parens patriae* interests.

III. PARTIES

A. Plaintiffs

19. The Plaintiff States of Washington, California, Maryland, Oregon, New Mexico, New Jersey, Iowa, Illinois, Minnesota, Rhode Island, New York, Vermont, North Carolina, Delaware, and the Commonwealths of Massachusetts, Pennsylvania, and Virginia, represented by and through their Attorneys General, are sovereign states of the United States of America.

The District of Columbia, represented by and through its Attorney General, is a municipal corporation organized under the Constitution of the United States and the local government for the territory constituting the permanent seat of the federal government.

20. The States are aggrieved and have standing to bring this action because of the injuries to the States caused by the Policy, including immediate and irreparable injuries to their sovereign, proprietary, and quasi-sovereign interests.

21. Nothing in the June 20 Executive Order remedies these harms, and the June 21 application to modify *Flores* is a direct attack on the sovereign powers of the States.

B. Defendant Federal Agencies and Officers

22. Defendant the United States of America includes government agencies and departments responsible for the implementation of the Immigration and Nationality Act (INA) and the admission, detention, and removal of non-citizens who are traveling or returning to the United States via air, land, and sea ports across the United States.

23. Defendant Donald Trump is the President of the United States, and he is sued in his official capacity.

24. Defendant Department of Homeland Security (DHS) is a federal cabinet agency responsible for implementing and enforcing the INA. DHS is a Department of the Executive Branch of the U.S. Government, and is an agency within the meaning of 5 U.S.C. § 552(f).

25. Defendant Immigration and Customs Enforcement (ICE) is the component agency of DHS that is responsible for carrying out removal orders; operating adult immigration detention facilities; and contracting for the detention of immigrants in removal proceedings, including with public and private operators of detention centers, jails, and prisons.

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26. The U.S. Customs and Border Protection (CBP) is an Operational and Support Component agency within DHS. CBP is responsible for detaining and/or removing non-citizens arriving at air, land, and sea ports across the United States.

27. Defendant U.S. Citizenship and Immigration Services (USCIS) is a component agency of DHS that, through its Asylum Officers, conducts interviews of certain individuals apprehended at the border to determine whether they have a credible fear of persecution and should be permitted to apply for asylum.

28. Defendant U.S. Department of Health and Human Services (HHS) is a department of the executive branch of the U.S. government.

29. Defendant Office of Refugee Resettlement (ORR) is a component of HHS which provides care for and placement for unaccompanied noncitizen children.

30. Defendant Kirstjen Nielsen is the Secretary of DHS. She is sued in her official capacity.

31. Defendant Thomas Homan is the acting Director of ICE and is sued in his official capacity.

32. Defendant Kevin K. McAleenan is the Commissioner of CBP and is sued in his official capacity.

33. Defendant Alex Azar is the Secretary of HHS and is sued in his official capacity.

34. Defendant Scott Lloyd is Director of ORR and is sued in his official capacity.

35. Defendant Jefferson Beauregard Sessions III is sued in his official capacity as the Attorney General of the United States. In this capacity, he has responsibility for the

administration of the immigration laws pursuant to 8 U.S.C. § 1103 and oversees the Executive Office of Immigration Review.

IV. ALLEGATIONS

A. Federal Immigration Policy Has Traditionally Emphasized Family Reunification, Recognizing that Children Belong with their Families

36. When DHS, typically through ICE or CBP, detains an undocumented child who is traveling alone, *i.e.*, unaccompanied by a parent, the relevant federal agencies follow an established process. Specifically, ICE or CBP may detain an unaccompanied alien child (UAC) for up to 72 hours, as other federal agencies locate an appropriate shelter facility for that child. 8 U.S.C. § 1232(b)(3). ICE or CBP then must turn the child over to the ORR for shelter placement. *Id.*

37. Once in ORR custody, children are placed in ORR-funded and supervised shelters, where staff must attempt to locate a parent and determine if family reunification is possible. If ORR is unable to find a parent, ORR staff will try to locate another family member, relative, family friend, or caretaker in the United States to serve as a sponsor who can care for the child during the pendency of any subsequent immigration proceeding.

38. Unaccompanied children in ORR custody for whom no sponsor placement can be made are moved to secondary ORR-contracted and state-licensed group care facilities, which can be anywhere in the country. In such cases, if ORR assesses that the child has a pathway to legal immigration status, ORR will place the child in an ORR-contracted and state-licensed long term foster care program while the immigration process continues. If ORR determines that a pathway does not exist, the child may remain in a shelter or ORR-contracted and state-licensed group care during removal proceedings.

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39. Thus, unaccompanied children typically arrive in the individual states in three ways: they may be placed initially in a state-licensed shelter located in the state while ORR determines if a family member can be found in the country; they may arrive when ORR releases them to the care of an in-state sponsor while their immigration proceeding goes forward; or they can be moved into a placement in an ORR-contracted and state-licensed long term foster care program as they await their immigration proceeding.

40. While ORR's initial shelter care placement and long term foster care programs are largely federally funded, an unaccompanied child's in-state placements impose burdens on the receiving state, discussed below.

B. After Almost a Year of Threats, Defendants Adopted an Official Policy of Separating Families Who Cross the Southwestern Border, Creating a New Class of "Unaccompanied" Children

41. For over a year, the Trump Administration has made clear in numerous public statements that it was considering an official Policy to separate families at the Southwestern border in an effort to deter immigrants from Latin America from coming to the United States.

42. As early as March 2017, a senior DHS official stated that Defendants were considering a proposal to separate children from their parents at the Southwestern border. *See* Mary Kay Mallonee, *DHS Considering Proposal to Separate Children From Adults at Border* (March 4, 2017) *available at* https://www.cnn.com/2017/03/03/politics/dhs-children-adults-border/, attached hereto as Ex. 2.

43. On March 7, 2017, John Kelly, the then-Secretary of DHS, confirmed that DHS was considering a policy of separating children from their parents: "I am considering that. They will be well cared for as we deal with their parents." *See* Daniella Diaz, *Kelly: DHS Considering*

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Separating Undocumented Children From Their Parents at the Border (March 7, 2017) *available at* https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html, attached hereto as Ex. 3.

44. Then-Secretary Kelly publicly backed away from those statements after harsh criticism from the press, human-rights advocates, and members of Congress. *See* Tal Kopan, *Kelly Says DHS Won't Separate Families at the Border* (March 29, 2017) *available at* https://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html and attached hereto as Ex. 4. An inside source, however, reported that the family separation proposal was still on the table for discussion at DHS as of August 2017. *See* Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids From Their Parents*, The New Yorker (May 30, 2018) *available at* https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents, attached hereto as Ex. 5.

45. In fact, DHS secretly piloted the Policy in the El Paso sector of the border in western Texas from July to November 2017. *See* Dara Lind, *Trump's DHS is Using an Extremely Dubious Statistic to Justify Splitting up Families at the Border*, Vox (May 8, 2018) *available at* https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families, attached hereto as Ex. 6.

46. It was later reported that between October 2017 and April 2018, 700 families were separated at the Southwestern border, including at least 100 children under the age of four. *See* Ex. 3.

47. On February 12, 2018, 33 U.S. Senators also a letter to DHS Secretary Nielsen, concerned that DHS was carrying out "a systematic and blanket policy to separate a child from a parent" upon arrival to the United States a policy the Senators condemned as "cruel" and "grotesquely inhumane." The letter is attached hereto as Ex. 7. The letter notes that Secretary Nielsen "failed to repudiate" such a policy during a recent Senate Judiciary Committee hearing, and points to "numerous [documented] cases in which parents have been separated from their children." *Id.*

48. In the spring of 2018, an influx of families seeking to enter the United States may have catalyzed the Administration to finally embrace the Policy. In March and April of 2018, the number of families from Latin America apprehended at the Southwestern border increased dramatically, going from 5,475 in February to 8,873 in March (a 62% increase) and 9,653 in April (a 76% increase from February). *See* Southwest Border Migration FY2018, U.S. Dept. of Homeland Security *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration, attached hereto as Ex. 8 *and* Southwest Border Migration FY2017, U.S. Dept. of Homeland Security *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017#, attached hereto as Ex. 9[1].

[1] CBP tracks "apprehensions" and "inadmissibles" separately and adds these together to count "total enforcement actions." *See* CBP Enforcement Statistics FY2018, U.S. Customs and Border Protection *available at https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics*, attached hereto as Ex. 10. "Inadmissibles refers to individuals encountered at ports of entry who are seeking lawful admission into the United States but are determined to be inadmissible, individuals presenting themselves to seek humanitarian protection under our laws, and individuals who withdraw an application for admission and return to their countries of origin within a short timeframe." *Id.* "Apprehensions refers to the physical control or temporary detainment of a person who is not lawfully in the U.S. which may or may not result in an arrest." *Id.*

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49. The number of family units deemed to be inadmissible went from 3,941 in February to 5,162 in March (a 31% increase) and 5,445 in April (a 38% increase from February). *See* Ex. 8. These numbers include all persons who enter at ports of entry but are deemed to be inadmissible; asylum seekers; and individuals who apply for admission but subsequently return to their countries of origin within a short time frame. *See* Ex. 9. The numbers reflected an increase of 672% in March 2018 in comparison to March 2017, and 697% in April 2018 in comparison to April 2017. *Compare* Exs. 8 and 9.

50. According to at least one source, the President's frustration with the rising numbers of Latino immigrants at the Southwestern border in March and April of 2018 was the impetus for publicly adopting the Policy. *See* Ex. 5. When asked what had changed since the prior year when the Administration backed away from adopting such a policy the person pointed to the President: "What you're seeing now is a President's frustration with the fact that the numbers are back up." *Id.*

51. In early April 2018, President Trump reportedly expressed frustration with DHS Secretary Nielsen for failing to stop or decrease immigration at the Southwestern border. Several officials stated that one persistent issue was President Trump's belief that Secretary Nielsen and DHS were resisting his direction that parents be separated from their children when crossing unlawfully at the US-Mexico border. *See* Shear and Pearlroth, *Kirstjen Nielsen, Chief of Homeland Security, Almost Resigned After Trump Tirade* (May 10, 2018) *available at* https://www.nytimes.com/2018/05/10/us/politics/trump-homeland-security-secretary-resign.html, attached hereto as Ex. 11. The President and his aides had been pushing a family

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separation policy for weeks as a way to deter families from crossing the Southwestern border illegally. *Id.*

52. On April 6, 2018, President Trump issued a memorandum directing Attorney General Sessions and DHS Secretary Nielsen to detail all measures and identify any resources or steps "needed to expeditiously end 'catch and release' practices" that allow undocumented immigrants to be released into the community pending resolution of their immigration cases.

53. That same day, Attorney General Sessions formally announced a "zero-tolerance" policy "for offenses under 8 U.S.C. § 1325(a), which prohibits both attempted illegal entry and illegal entry into the United States by an alien." *See* Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, U.S. Department of Justice (April 6, 2018) *available at* https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry, attached hereto as Ex. 12.

54. In a memorandum also issued April 6, Attorney General Sessions "direct[ed] each United States Attorney's Office along the Southwest Border . . . to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a)" and made clear that this directive "superseded any existing policy." *See* Memorandum for Federal Prosecutors Along the Southwest Border (April 6, 2018), attached hereto as Ex. 13.

55. On May 7, 2018, DHS adopted an official Policy of "referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution," and Attorney General Sessions publicized that children would be automatically separated from parents or other adults with whom they were traveling. *See Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, Justice News

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(May 7, 2018) available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions, attached hereto as Ex. 14.

56. With that, Attorney General Sessions and Secretary Nielsen carried out President Trump's directive: Under the new federal law enforcement priority, all undocumented adults crossing the U.S.-Mexico border at unauthorized locations would be referred by DHS to the Department of Justice. DOJ would then charge each adult with misdemeanor illegal entry or reentry. Everyone so referred would be prosecuted and detained regardless of familial circumstances or asylum claims, and children would be automatically separated from their parents and transferred to the custody of ORR for placement elsewhere.

57. Accordingly, Defendants have thus created a new category of "unaccompanied" children those who came into the country with a parent but were, pursuant to the Policy, forcibly separated by ICE or CBP immediately thereafter.

58. Perhaps emboldened by the directive, DHS officers at ports of entry along the Southwestern border have been refusing to let immigrants present themselves and request asylum, turning people away because the United States is "full." *See* Alfredo Corchado, *Asylum Seekers Reportedly Denied Entry at Border as Trump Tightens 'Zero Tolerance' Immigration Policies* (June 6, 2018) *available at* https://www.dallasnews.com/news/immigration/2018/06/06/reports-turning-back-asylum-seekers-border-crossings-trump-tightens-grip-zero-tolerance-immigration-policies, attached hereto as Ex. 15.

59. One report describes immigrants who were turned away on the bridge in El Paso by CBP officers before they reached the border checkpoint, so they were unable to make their

asylum request at the port of entry. *Id.* Ruben Garcia, founder of a nonprofit that assists immigrants in El Paso explains: "If you look indigenous and you look Central American, they will stop you . . . They never ask why they are coming. They just say we can't receive you." *Id.* When asked why they are refusing to allow immigrants to reach checkpoints to request asylum, CBP officials state that centers are "full." *Id.*

60. Recent interviews with detained parents held in federal facilities in Seattle confirm these reports. For example, one mother presented herself and her 15-year old son at the Laredo, Texas port of entry and requested asylum for herself and safe passage for her American-citizen son. Officials at the port of entry detained her, separated her from her son, and told her that the United Sates "will not give [her] asylum" and that she "w[ould] not see [her] son again until he turns 18" because he would be taken to a shelter or given to an American family for adoption. Another mother claiming asylum was told, in front of her 14-year-old daughter, that she would be "punished with jail time" for having come to the United States.

61. The effect of this conduct is an increasing influx of entrants at locations other than ports of entry, which Defendants construe as violations of 8 U.S.C. § 1325 and its implementing regulations. The adults are then routed into the criminal system while the children are turned over to ORR for placement thereby separating the family and implementing the Policy.

62. Since announcing the Policy, Defendants have repeatedly acknowledged its existence and cruelty. For example, President Trump, tweeting on May 26, 2018, referred to the Policy as a "horrible law." The May 26, 2018 tweet is attached hereto as Ex. 16.

63. On May 29, 2018, Devin O'Malley, a Justice Department spokesman, recapped the Policy, telling reporters that suspected crossers "will not be given a free pass," and will face criminal prosecution and federal detention "irrespective of whether or not they have brought a child with them." *See* Ted Hesson, *White House's Miller blames Democrats for border crisis*, Politico (May 29, 2018) *available at* https://www.politico.com/story/2018/05/29/stephen-miller-democrats-border-574537, attached hereto as Ex. 17.

64. On June 16, 2018, it was reported that Senior Advisor to the President Stephen Miller was a driving force in adoption and implementation of the Policy. *See* Chas Danner, *Separating Families at the Border Was Always Part of the Plan* (June 17, 2018) *available at* http://nymag.com/daily/intelligencer/2018/06/separating-families-at-border-was-always-part-of-the-plan.html, attached hereto as Ex. 18. While others acknowledge the controversial nature of the Policy, Mr. Miller unapologetically embraced it, calling it "a simple decision by the administration . . . . The message is that no one is exempt from immigration law." *Id.*

65. On June 17, 2018, Counselor to the President Kellyanne Conway acknowledged the existence of the Policy in an interview with NBC's "Meet the Press," stating, "As a mother, as a Catholic, as somebody who has a conscience . . . I will tell you that nobody likes this policy." *See* Ex. 1. She continued, "Nobody likes seeing babies ripped from their mothers' arms, from their mothers' wombs, frankly, but we have to make sure that DHS' laws are understood through the soundbite culture that we live in." *Id.*

66. On June 18, 2018, President Trump characterized the Policy as one of the United States' "horrible and tough" immigration laws. *See* Hains, Tim, *President Trump: "The United States Will Not be a Migrant Camp", "Not On My Watch"* (June 18, 2018) *available at*

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https://www.realclearpolitics.com/video/2018/06/18/president_trump_the_united_states_will_not_be_a_migrant_camp.html, attached hereto as Ex. 19.

67. Also on June 18, 2018, in remarks before the National Sheriffs' Association (NSA), Attorney General Sessions promoted the deterrent effect of family separation: "We cannot and will not encourage people to bring their children or other children to the country unlawfully by giving them immunity in the process." *See* Luis Sanchez, *Sessions on separating families: If we build a wall and pass legislation, we won't have these 'terrible choices'*, The Hill (June 18, 2018) *available at* http://thehill.com/homenews/administration/392785-sessions-on-separating-families-if-we-build-a-wall-and-pass, attached hereto as Ex. 20.

68. And in her remarks to the NSA, DHS Secretary Nielsen also confirmed the existence of the Policy, stating: "Illegal actions have and must have consequences. No more free passes, no more get out of jail free cards." *See* Tal Kopan, *'We will not apologize': Trump DHS chief defends immigration policy* (June 18, 2018) *available at* https://www.cnn.com/2018/06/18/politics/kirstjen-nielsen-immigration-policy/index.html, attached hereto as Ex. 21.

69. The Policy has resulted in thousands of brutal familial separations.

70. For example, during a briefing call on June 15, 2018, DHS officials admitted that 1,995 children were separated from 1,940 adults at the U.S.-Mexico border from April 19 through May 31, 2018. The adults were all referred for prosecution. *See How Trump Family Separation Policy Became What it is Today* (June 14, 2018) *available at* https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today, attached hereto as Ex. 22.

71. According to DHS data released on June 18, 2018 by Senator Dianne Feinstein, federal immigration officials separated 2,342 children from adults at the border between May 5 and June 9, 2018. *See* Louis Nelson, *Defiant Trump refuses to back off migrant family separations*, Politico (June 18, 2018) *available at* https://www.politico.com/story/2018/06/18/trump-immigration-child-separations-650875, attached hereto as Ex. 23.

C. The President's Executive Order Does Not End Family Separation

72. On June 20, 2018, President Trump issued an Executive Order entitled, "Affording Congress an Opportunity to Address Family Separation" (the Order). The Order is attached hereto as Ex. 24. While purporting to suspend the practice of separating families, the Order offers illusory relief. Indeed, the language of the Order itself does not actually require an end to family separation, and in fact, it implicitly recognizes that the Policy will continue.

73. By its own terms, the Order states that it does not confer any enforceable right or benefit on any person.

74. The Order appears to direct the Secretary of Homeland Security to detain families together "during the pendency of any criminal proceedings for improper entry or immigration proceedings involving their members," while continuing the practice of prosecuting and detaining all unauthorized border crossers.

75. At the same time, the Order acknowledges that Defendants do not have the resources or facilities necessary to effectuate its terms. Indeed, every provision of the Order is to be carried out only "where appropriate and consistent with law and available resources." These terms are undefined, leaving familial detention largely discretionary. Likewise, the Order

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repeatedly affirms that family unity is "subject to the availability of appropriations," but provides no parameters on when appropriations will be sought or even how much funding is needed.

76. Similarly, the Order directs the Secretary of Defense to provide existing available facilities to house immigrant families, or to construct them, but again there is no indication that appropriate federal facilities exist and are available, or that construction of new family internment facilities is feasible.

77. The Order also acknowledges that Defendants cannot lawfully carry out its terms until they receive a court order "that would permit" the family detention scheme contemplated. Because almost every provision in the Order is subject to the availability of non-existent resources and legal authority for indefinite detention that is contrary to settled law, it fails to provide any actual relief.

78. The Order also is silent as to the thousands of families already separated by the Policy. It does nothing to require their reunification or redress the harms inflicted on those families. As a spokesperson for HHS' Administration for Children and Families explained, "There will not be a grandfathering of existing cases … I can tell you definitively that is going to be policy." *See* Michael D. Shear, Abby Goodnough and Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart,* (June 20, 2018) *available at* https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news, attached as Ex. 25.

79. Defendants have confirmed that the Order will not end family separation, ostensibly because only Congress can reverse the Policy. Notably, the Order poses a striking

contrast with the Administration's previous statements that Congressional legislation is the sole means of ending family separation, including President Trump's explicit statement that "You can't do it through executive order." *See* "*Trump said only legislation could stop family separation. He just issued an executive order,*" the Washington Post (June 20, 2018) *clip available at* https://www.washingtonpost.com/video/politics/trump-said-only-legislation-could-stop-family-separation-hes-about-to-issue-an-executive-order/2018/06/20/c4f93aea-74a9-11e8-bda1-18e53a448a14_video.html?utm_term=.d6843e5acc54, and Adam Edelman, *Trump signs order stopping his policy of separating families at border* (June 20, 2018) *available at* https://www.nbcnews.com/politics/immigration/trump-says-he-ll-sign-order-stopping-separation-families-border-n885061, attached hereto as Ex. 26.

80. Likewise, just days prior to issuance of the Order, Defendants stated numerous times their position that only Congress could end a policy of separating families. For example, on June 18, 2018, Secretary Nielsen announced: "Until these loopholes are closed by Congress, it is not possible, as a matter of law, to detain and remove whole family units who arrive illegally in the United States. Congress and the courts created this problem, and Congress alone can fix it. Until then, we will enforce every law we have on the books to defend the sovereignty and security of the United States." *See* Matthew Nussbaum, *Trump falsely claimed for days that he couldn't end family separations* (June 20, 2018) *available at* https://www.politico.com/story/2018/06/20/trump-false-claims-family-separations-656011, attached hereto as Ex. 27.

81. Also on June 18, 2018, White House Press Secretary Sarah Huckabee Sanders stated: "There's only one body here that gets to create legislation and it's Congress. Our job is

to enforce it, and we would like to see Congress fix it. That's why the President has repeatedly called on them to work with him to do just that." *Id.*

82. And on June 20, 2018, contemporaneous with announcing the Order, Vice President Pence claimed that changing the law was the only way to end family separation: "I think the American people want the Democrats to stop the obstruction, to stop standing in the way of the kind of reforms at our border that will end the crisis of illegal immigration. We can solve this issue of separation." *See* V*ice President Mike Pence: Democrats Can Fix Family Separation at Border* (June 20, 2018) available at https://kdkaradio.radio.com/articles/vice-president-mike-pence-democrats-can-fix-family-separation-border, attached hereto as Ex. 28.

83. When President Trump signed the Order, Vice President Pence and Secretary Nielsen again called on Congress to end separating families at the border; Vice President Pence suggested that the Order is only applicable "in the immediate days forward" and "call[ed] on Congress to change the laws" for a more permanent fix. *See* clip at https://www.c-span.org/video/?447373-1/president-trump-signs-executive-order-halting-family-separation-policy.

84. Later that day, at a briefing organized by the White House, Gene Hamilton, a counselor to Attorney General Sessions, sidestepped a question about whether a family that crosses the border now would be separated, stating that an "implementation phase" would occur, but that he was not sure precisely what DHS or HHS would do in the immediate future. Mr. Hamilton echoed President Trump's, Nielsen's, and Sessions' statements that "Congress needs to provide a permanent fix for this situation." Mr. Hamilton stated that if Congress does not act, it would be up to the *Flores* judge to decide whether the Administration could keep families

together. *See* Charlie Savage, *Explaining Trump's Executive Order on Family Separation*, (June 20, 2018) available at https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html, attached hereto as Ex. 29.

D. Pursuant to the Order, the Attorney General Has Launched an Attack on State Sovereignty

85. The Order directs the Attorney General to "promptly file a request with the U.S. District Court for the Central District of California to modify the Settlement Agreement in *Flores v. Sessions*," making rescission of *Flores'* protections a predicate to the maintenance of family unity.

86. The *Flores* Agreement, which has been in place since 1997, "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS," including both accompanied and unaccompanied minors. Stipulated Settlement Agreement, ¶ 9, attached hereto as Ex. 30. Among other things, *Flores* prevents the DHS from detaining children in restricted facilities for long periods and it requires federal detention centers to meet state licensing requirements for childcare facilities.

87. As Vice President Pence previously conceded, the *Flores* agreement provides only two options for the long term placement of families (1) parental detention and family separation, or (2) keeping families together, by releasing them into the community. *See* clip available at https://www.c-span.org/video/?c4736625/pence-options-law).

88. On June 21, 2018, Attorney General Sessions filed an *ex parte* application seeking relief from the *Flores* Settlement Agreement to allow the federal government to detain families indefinitely at non-licensed facilities. *Flores, et al. v. Sessions, et al.*, Case No. CV 85-4544-DMG (C.D. Cal.), Dkt. 435-1 at 1, 13, attached hereto as Ex. 31.

89. In his application, Attorney General Sessions admits that mass internment of families by the federal government is currently illegal: "this Court's construction of the Flores Settlement Agreement eliminates the practical availability of family detention across the nation . ." Ex. 31 at 2. "Under current law and legal rulings, including this Court's, it is not possible for the U.S. government to detain families together during the pendency of their immigration proceedings. It cannot be done." *Id*. at 3.

90. Nevertheless, Attorney General Sessions argues that indefinitely detaining families is necessary for deterrence. Specifically, he asserts that, without family detention, there is "a powerful incentive for aliens to enter this country with children." *Id*. at 1. Attorney General Session claims that, "[u]ndeniably the limitation on the option of detaining families together and marked increase of families illegally crossing the border are linked." *Id*. at 2. "'[D]etaining these individuals dispels such expectations, and deters others from unlawfully coming to the United States.'" *Id*. at 13 (internal citations omitted).

91. Attorney General Sessions also requests an exemption from state licensing requirements, "because of ongoing and unresolved disputes over the ability of States to license these types of facilities." Ex. 31 at 17-18.

92. The district court and the Ninth Circuit in *Flores* rejected almost identical arguments advanced by the federal government in 2015. *See Flores v. Lynch*, 212 F. Supp. 3d 907, 913 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded,* 828 F.3d 898 (9th Cir. 2016); *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016). At that time, the government requested that the trial court modify the *Flores* agreement to allow DHS to hold female-headed families with their children indefinitely in family detention centers in Texas and New Mexico.

Rather than grant that request, the district court confirmed that *Flores* requires that "Defendants must house children who are not released in a non-secure facility that is licensed by an appropriate state agency to care for dependent children." Case No. CV 85-4544-DMG (C.D. Cal.), Dkt. 177 at 12. The court stated: "The fact that the [Texas and New Mexico] family residential centers cannot be licensed by an appropriate state agency simply means that, under the Agreement, [children] … cannot be housed in these facilities except as permitted by the Agreement." *Id.* at 12-13.

93. The district court also found that the alleged "influx" of immigrants crossing the U.S.-Mexico border did not constitute changed circumstances warranting the requested modification and rejected the government's stated rationale that the "family detention policy [would] deter[] others who would have come." Case No. CV 85-4544-DMG (C.D. Cal.), Dkt. 177 at 23. The Ninth Circuit affirmed, stating: "The Settlement expressly anticipated an influx . . . and, even if the parties did not anticipate an influx of this size, we cannot fathom how a 'suitably tailored' response to the change in circumstances would be to exempt an entire category of migrants from the Settlement, as opposed to, say, relaxing certain requirements applicable to all migrants." *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016).

E. Defendants' Recent Statements Call Into Question the Administration's Commitment to the Rule of Law

94. Neither the Order nor the *Flores* application offer any assurance that the Administration will not once again return to a family separation policy when its efforts to inter families together fail.

95. To the contrary, on June 25, 2018, Attorney General Sessions told an audience in Reno, NV that DOJ would continue carrying out President Trump's "zero-tolerance" directive

because to do otherwise "would encourage more adults to bring more children illegally on a dangerous journey." The same day, CBP Commissioner Kevin McAleenan stated that his agency would stop referring parents with children for prosecution but that this is a "temporary" halt. *See* Shannon Pettypiece and Toluse Olorunnipa, *Border Patrol Halts Prosecution of Families Crossing Illegally* (June 25, 2018) *available at* https://www.bloomberg.com/news/articles/2018-06-25/border-patrol-halts-prosecution-of-families-crossing-illegally.

96. Further, the Trump Administration's statements from June 20, 2018-June 26, 2018 raise the specter of further unconstitutional and unlawful acts.

97. For example, in response to the public outcry against family separation, the Administration appears to be preparing to intern thousands of families in military facilities. As Commissioner McAleenan explained, he is unable to refer parents for prosecution without separating them from their children due to lack of resources, but that he and his agency are working on a plan to resume criminal referrals. *See* Shannon Pettypiece and Toluse Olorunnipa, *Border Patrol Halts Prosecution of Families Crossing Illegally* (June 25, 2018) *available at* https://www.bloomberg.com/news/articles/2018-06-25/border-patrol-halts-prosecution-of-families-crossing-illegally.

98. On June 21, 2018, at DHS's request, the Pentagon agreed to host up to 20,000 unaccompanied migrant children on military bases. *See* Dan Lamothe, Seung Min Kim and Nick Miroff, *Pentagon will make room for up to 20,000 migrant children on military bases,* the Washington Post (June 21, 2018) *available at* https://www.washingtonpost.com/news/checkpoint/wp/2018/06/21/pentagon-asked-to-make-

room-for-20000-migrant-children-on-military-bases/?utm_term=.decab089f684, attached hereto as Ex. 32.

99. Defense Secretary Jim Mattis confirmed on June 24, 2018, that the military is preparing to construct camps for migrants on at least two military bases. *See* Phil Stewart, *Pentagon eyes temporary camps for immigrants at two bases*, Reuters (June 24, 2018) available at https://www.reuters.com/article/us-usa-immigration-military/pentagon-eyes-temporary-camps-for-immigrants-at-two-bases-idUSKBN1JL015, attached hereto as Ex. 33. Moreover, a planning document from the United States Navy details "temporary and austere" tent cities that would be able to house 25,000 migrants on abandoned airfields. *See* Philip Elliott, *Exclusive: Navy Document Shows Plan to Erect 'Austere" Detention Camps, Time* (June 22, 2018) http://time.com/5319334/navy-detainment-centers-zerol-tolerance-immigration-family-separation-policy/, attached hereto as Ex. 34.

100. Emerging reports as of June 25, 2018, suggest that immigration officials are using the children taken from their parents as leverage to coerce parents to withdraw their asylum claims. The family reunification Fact Sheet released by the Department of Homeland Security on June 23, 2018, provides for family reunification only for adults "who are subject to removal" so that they may be "reunited with their children for the purposes of removal." *See* Fact Sheet: Zero Tolerance Prosecution and Family Reunification (June 23, 2018) *available at* https://content.govdelivery.com/accounts/USDHS/bulletins/1f98ad8, attached hereto as Ex. 35. In other words, parents who hope to be quickly reunited with their children must abandon their own asylum claims and agree to withdraw their children's claims to remain in the United States. *See* Dara Lind, *Trump will reunite separated families but only if they agree to deportation*,

Vox (June 25, 2018) *available at* https://www.vox.com/2018/6/25/17484042/children-parents-separate-reunite-plan-trump, attached hereto as Ex. 36.

101. Parents have felt compelled to act accordingly. On June 24, 2018, a DHS official stated that parents separated from their children "were quickly given the option to sign paperwork leading to their deportation. Many chose to do so." The June 24, 2018 tweet is *available at* https://twitter.com/jacobsoboroff/status/1010862394103328771, and attached hereto as Ex. 37. This is consistent with other accounts of parents signing voluntary deportation paperwork out of "desperation" because officials had suggested that it would lead to faster reunification with their children. *See, e.g.*, Jay Root and Shannon Najmabadi, *Kids in exchange for deportation: Detained migrants say they were told they could get kids back on way out of U.S.*, Texas Tribune (June 24, 2018) *available at* https://www.texastribune.org/2018/06/24/kids-exchange-deportation-migrants-claim-they-were-promised-they-could/?utm_campaign=trib-social-buttons&utm_source=twitter&utm_medium=social, attached hereto as Ex. 38.

102. Likewise, on June 24, 2018, a senior administrative official speaking on the condition of anonymity confirmed that defendants do not plan to reunite families until after a parent has lost his or her deportation case, effectively punishing parents who may otherwise pursue an asylum claim or other relief request and creating tremendous pressure to abandon such claims so that parents may be reunited with kids. *See* Maria Sacchetti, Michael Miller and Robert Moore, *Sen. Warren visits detention center, says no children being returned to parents there*, The Washington Post (June 24, 2018) *available at* https://www.washingtonpost.com/local/immigration/desperate-to-get-children-back-migrants-

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are-willing-to-give-up-asylum-claims-lawyers-say/2018/06/24/c7fab87c-77e2-11e8-80be-6d32e182a3bc_story.html, attached hereto as Ex. 39.

103. In recent days, President Trump has proposed deporting immigrants without hearing or legal process as his favored alternative. On June 21, 2018 President Trump stated: "We shouldn't be hiring judges by the thousands, as our ridiculous immigration laws demand, we should be changing our laws, building the Wall, hire Border Agents and Ice and not let people come into our country based on the legal phrase they are told to say as their password." *See* https://mobile.twitter.com/realDonaldTrump/status/1009770941604298753.

104. On June 24, 2018, President Trump again proposed that immigrants who cross into the United States should be sent back immediately without due process or an appearance before a judge: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents..." *See* Katie Rogers and Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, The New York Times (June 24, 2018) *available at* https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html, attached hereto as Ex. 40.

105. On June 25, 2018, President Trump continued: "Hiring manythousands [sic] of judges, and going through a long and complicated legal process, is not the way to go will always be disfunctional [sic]. People must simply be stopped at the Border and told they cannot come into the U.S. illegally. Children brought back to their country….." The June 25, 2018

tweet is available at https://twitter.com/realDonaldTrump/status/1011228265003077632, and attached hereto as Ex. 41.

106. On June 25, 2018, White House press secretary Sarah Huckabee Sanders confirmed that CPB's halt of prosecution referrals "is a temporary solution. This isn't going to last. . . This will only last a short amount of time, because we're going to run out of space, we're going to run out of resources to keep people together." Secretary Sanders reiterated: "We're not changing the policy . . . We're simply out of resources. And at some point, Congress has to do what they were elected to do, and that is secure our border, that is stop the crime coming into our country." Secretary Sanders dodged questions regarding President Trump's recent suggestion that immigrants be afforded no due hearing or due process prior to deportation. *See* Press Briefing by Press Secretary Sarah Sanders (June 25, 2018), *available at* https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-062518/.

F. Defendants' Policy Causes Devastating Harm To Children and Parents

107. Separating families when a child's safety is not at risk causes immediate, acute trauma as well as foreseeable long term damage and harm to both the parents and the children. The negative effects and consequences of the Policy are likely to be long-lasting and in some cases debilitating.

108. Unless required to protect a child's safety, forced separation from their parents is likely to cause immediate and extreme psychological harm to young children, and the resulting cognitive and emotional damage can be permanent. Parental separation is a traumatic loss for the child; as a result they are likely to experience post-traumatic symptoms such as nightmares,

and other manifestations of anxiety and depression, all of which are likely to increase in severity the longer the separation lasts and lead to the potential development of problematic coping strategies in both the near and long term. This trauma may be exacerbated for children who are fleeing persecution or violence in their home countries.

109. Observations by those who have seen children recently separated pursuant to Defendants' Policy suggest that conditions created by Defendants will further exacerbate the separation trauma. By way of example, after touring a shelter along the Texas border to Mexico, Dr. Colleen Kraft, President of the American Academy of Pediatrics, described a "screaming" girl, "no older than 2" who could not be comforted because shelter workers had been told they are not allowed to touch the children, not even to hold a crying child and convey some semblance of compassion. *See Immigrant children: What a doctor saw in a Texas shelter*, The Washington Post (June 17, 2018) *available at* https://www.washingtonpost.com/news/post-nation/wp/2018/06/16/america-is-better-than-this-what-a-doctor-saw-in-a-texas-shelter-for-migrant-children/?utm_term=.e1e5566675e9, attached hereto as Ex. 42.

110. These reports are also consistent with the observations of State employees who recently interviewed separated children living in Seattle. Every child displayed significant distress when relaying their experience and broke down when describing their separation. Some reported ongoing nightmares, others were so traumatized they could not continue the brief interviews.

111. Similarly, parents who arrive together with their children at the U.S. border and then are separated from their children by the U.S. government are likely to experience immediate and acute psychological injury as a result. Under the Policy, many parents are being separated

from their children suddenly without the chance to prepare the child or even say goodbye, without knowing where they or their children will be taken, without any guarantee of reunification, and often without contact with their children or with long gaps in that contact. When parents and children are allowed to speak, it is only briefly ten minutes or so by telephone.

112. These otherwise fit parents are likely to experience deterioration of their mental and physical health in the aftermath of the forcible separation from their children with symptoms including anxiety, depression, PTSD, and other trauma-related disorders. In some cases, parental trauma from separation from their children will become unbearable because their available coping mechanisms may be overwhelmed by the sudden loss of the important role of parent and protector of the child. Indeed, at least one parent, distraught after officials pried his 3-year-old son from his arms, is reported to have committed suicide following the separation. *See* Nick Miroff*, A family separated at the border, and this distraught father took his own life*, (June 9, 2018) *available at* https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html?utm_term=.96a4606e47c7, attached hereto as Ex. 43.

113. These general observations were confirmed by interviewers who recently spoke with mothers detained in a federal facility in King County, Washington. The mothers were visibly upset, with some expressing panic and desperation, because they lacked information about their children's safety and did not know whether or when they would see their children again.

G. The Policy Is Expressly Intended to Use Traumatized Children and Families to Deter Migration of Latina/o Immigrants and for Political Leverage

114. Defendants have changed public positions on the Policy numerous times over the last few weeks, but what has remained consistent throughout is Defendants' unambiguous adoption of a policy at the Southwestern border that uses trauma as deterrence, and their insistence that Congress overhaul immigration laws to codify President Trump's immigration agenda, including building a wall at the U.S.-Mexico border. *See* JM Rieger, *The Trump Administration Changed its Story on Family Separation no Fewer than 14 Times Before Ending the Policy* (June 20, 2018) *available at* https://www.washingtonpost.com/news/the-fix/wp/2018/06/20/the-trump-administration-changed-its-story-on-family-separation-no-fewer-than-14-times-before-ending-the-policy/?utm_term=.6719a188344f, Ex. 44 (collecting contradictory statements). Confirmation of these two goals is reflected in statements from a year ago and continued even after issuance of the Executive Order.

115. As early as March 7, 2017, then-Secretary of DHS John Kelly confirmed that the Policy was intended to "to deter movement" along the Southwestern border. *See* Ex. 3. Later that year, a source who attended a DHS meeting to discuss ways to "deter immigrants from coming to the U.S. illegally" reported that the Policy was still being considered, but kept getting "bogged down" because of how "difficult and controversial it was." *See* Ex. 4.

116. On December 5, 2017, Kirstjen Nielsen replaced John Kelly as DHS Secretary.

117. On February 8, 2018, 75 members of Congress wrote a letter to DHS Secretary Nielsen expressing "deep[] concern that the Department of Homeland Security (DHS) is separating families, including parents and their minor children . . . along the U.S.-Mexico border." DHS' "reported justification of this practice as a deterrent to family migration suggests

a lack of understanding about the violence many families are fleeing in their home countries" and "[m]ore pointedly, the pretext of deterrence is not a legally sufficient basis for separating families." The letter is attached hereto as Ex. 45.

118. The letter details two complaints filed in December 2017 that confirmed DHS was "intentionally separating families for purposes of deterrence and punishment." In particular, the second complaint documented "instances of infants and toddlers as young as one and two years old separated from their parents and rendered 'unaccompanied'" among these was "a father separated from his one-year-old son, Mateo, despite presenting appropriate documents to establish their relationship." *Id.*

119. Attorney General Sessions has confirmed that the Policy is intended to deter other families from entering the United States. For example, on April 6, 2018, he issued a warning to immigrants crossing the Southwestern border that "illegally entering this country will not be rewarded, but instead will be met with the full prosecutorial powers of the Department of Justice" and children "will be separated from [their parents]." *See* Ex. 12.

120. In May 2018, DHS announced the results of its pilot at the El Paso border sector from July to November 2017. Its report later found to be inaccurate further confirms that deterrence is the primary purpose of the Policy. When asked about the Policy, DHS reported that "[t]he number of illegal crossings between ports of entry of family units dropped by 64 percent. This decrease was attributed to the prosecution of adults amenable to prosecution for illegal entry while risking the lives of their children. Of note, the numbers began rising again after the initiative was paused." *See* Ex. 6. Notably, public reporting suggests that, based on DHS' own statistics, these numbers are wrong and that there was, in fact, a 64% *increase* in apprehensions.

Id.; *see also* US Border Patrol Southwest Border Apprehensions by Section FY2017, U.S. Customs and Border Protection *available at* https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017#field-content-tab-group-tab-9, attached hereto as Ex. 46 and US Border Patrol Southwest Border Apprehensions by Section FY2018, U.S. Customs and Border Protection *available at* https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions#field-content-tab-group-tab-1, attached hereto as Ex. 47.

121. On May 11, 2018, White House Chief of Staff John Kelly was interviewed by National Public Radio. When asked whether he was in favor of the Policy, he acknowledged that "the vast majority of the people that move illegally into United States are not bad people. They're not criminals. They're not MS-13. . . . They're not bad people. They're coming here for a reason. And I sympathize with the reason. . . . But a big name of the game is deterrence." *See* White House Chief of Staff John Kelly's Interview with NPR (May 11, 2018) *available at* https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr, transcript attached hereto as Ex. 48. He noted that the Policy "would be a tough deterrent" but that "this is a technique that no one hopes will be used extensively or for very long." *Id.*

122. On June 5, 2018, Attorney General Sessions was asked whether it was "absolutely necessary" to "separate parents from children when they are detained or apprehended at the border." He responded, "yes" and "[i]f people don't want to be separated from their children, they should not bring them with them. We've got to get this message out." *See* Hugh Hewitt, US Attorney General Jeff Sessions on Children Separated From Parents at Border, F-1 Visas For PRC Students, and Masterpiece Cakeshop Decision (June 5, 2018) *available at*

http://www.hughhewitt.com/attorney-general-jeff-sessions-on-the-immigration-policies-concerning-children-apprehended-at-he-border-and-f-1-visas/, transcript attached hereto as Ex. 49.

123. On June 14, 2018, Attorney General Sessions quoted a Bible verse ostensibly to justify the Policy to leaders of the faith community and added: "Having children does not give you immunity from arrest and prosecution." *See* Adam Edelman, *Sessions Cites Bible in Defense of Breaking up Families, Blames Migrant Parents* (June 14, 2018) *available at* https://www.nbcnews.com/politics/immigration/sessions-cites-bible-defense-breaking-families-blames-migrant-parents-n883296, attached hereto as Ex. 50.

124. Public statements suggest that the Trump Administration intends to use the Policy as a negotiating tool to force congressional acquiescence to its proposed immigration legislation. For example, President Trump tweeted on May 26, 2018 that Democrats should "end the horrible law that separates children from there [sic] parents once they cross the Border." The May 26, 2018 tweet is available at https://twitter.com/realDonaldTrump/status/1000375761604370434, and attached hereto as Ex. 51.

125. On May 29, 2018 Senior Advisor to the President Stephen Miller confirmed that families are intentionally being traumatized for political gain: "If we were to have those [Republican sponsored] fixes in federal law, the migrant crisis emanating from Central America would largely be solved in a very short period of time," and "[f]amilies would then therefore be able to be kept together and could be sent home expeditiously and safely." *See* Ted Hesson, *White House's Miller Blames Democrats for border crisis,* Politico (May 29, 2018) *available* at

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https://www.politico.com/story/2018/05/29/stephen-miller-democrats-border-574537, attached hereto as Ex. 52.

126. On June 16, 2018, President Trump confirmed that he is using the Policy to push lawmakers to enact immigration legislation more in line with his own agenda: "Democrats can fix their forced family breakup at the Border by working with Republicans on new legislation." *See* Kate Sullivan, *Trump suggests separation of families at border is a negotiating tool* (June 16, 2018) *available at https://www.cnn.com/2018/06/16/politics/trump-separation-families-negotiating-tool/index.html*, attached hereto as Ex. 53.

127. On June 18, 2018, President Trump complained that "[w]e have the worst immigration laws in the entire world. Nobody has such sad, such bad and actually, in many cases, such horrible and tough you see about child separation, you see what's going on there." *See* Ex. 19. He suggested, "[i]f the Democrats would sit down, instead of obstructing, we could have something done very quickly, good for the children, good for the country, good for the world. It could take place quickly." *Id.* But in the meantime, he stated, "The United States will not be a migrant camp and it will not be a refugee holding facility, it won't be." *Id.*

128. On June 18, 2018, in remarks before the National Sheriffs' Association, Attorney General Sessions also suggested that if lawmakers would simply acquiesce to President Trump's demands to fund a wall on the Southwestern border, Defendants would stop separating families: "We do not want to separate parents from their children," "[i]f we build the wall, if we pass legislation to end the lawlessness, we won't face these terrible choices." *See* Ex. 20.

129. DHS Secretary Nielsen also linked the Policy with demands the Administration has made on Congress: "We are enforcing the laws passed by Congress, and we are doing all

that we can in the executive branch to protect our communities. It is now time that Congress act to fix our broken immigration system." *See* Ex. 21.

H. Defendants' Family Separation Policy Targets Immigrant Families Based on Their National Origin

130. Defendants' Policy is directed only at "Southwest Border crossings" (*see* Ex. 13), the majority of which consist of immigrants from Latin America. Indeed, in its reports on recent "Southwest Border Apprehensions," CBP only tracks family unit apprehensions for immigrants from El Salvador, Guatemala, Honduras, and Mexico. *See* U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018, *available at* https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions, attached hereto as Ex. 54. Defendants do not track whether the Policy is impacting family unit migration from any other countries.

131. Defendants' stated rationale for adopting the Policy *i.e.*, to deter migration is ineffective and not a legitimate law enforcement tactic. Rather than deter migration, the number of families and unaccompanied children apprehended has steadily increased since Defendants have implemented the Policy. According to Defendants' own statistics, in March 2018, the number of families apprehended at the Southwestern border was 37,385; in April 2018, 38,278; and in May 2018, 40,344. *See* Ex. 8. The number of family units arriving at ports of entry determined to be inadmissible also stayed relatively stable; in March 2018, the number was 5,162, in April, 5,445, and in May 4,718. *Id.*

132. Defendants also report that U.S. border agents made more than 50,000 arrests in each of the months of March, April and May 2018 "an indication that escalating enforcement tactics by the Trump Administration including separating immigrant parents from their children has not had an immediate deterrent effect." *See* Nick Miroff, *Border arrests exceed*

50,000 for third month in a row (June 6, 2018), *available at* https://www.washingtonpost.com/world/national-security/border-arrests-exceed-50000-for-third-month-in-a-row/2018/06/06/db6f15a6-680b-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.72b8f43a7470, attached hereto as Ex. 55.

133. On May 23, 2018, Steven Wagner, Acting Secretary of the Administration for Children and Families testified before a Senate committee, stating: "In FY 2017, 84 percent of [unaccompanied alien minors] referred to ORR came from Honduras, Guatemala, and El Salvador. To date in FY 2018, 93 percent of referred children come from those countries." A copy of the Wagner Statement is attached as Ex. 56.

134. On April 6, 2018, President Trump signed a memorandum ordering agencies to "expeditiously end" the practice of "catch and release," a pejorative phrase that refers to the practice of allowing immigrants to be released into the community pending resolution of their immigration cases. *See* Jesse Byrnes, *Trump signs memo ordering end to 'catch and release" practices*, The Hill, *available at* *http://thehill.com/homenews/administration/382054-trump-signs-memo-ordering-end-to-catch-and-release-practices*, attached hereto as Ex. 57. For example, the memo orders DHS to submit a report within 45 days "detailing all measures that their respective departments have pursued or are pursuing to expeditiously end 'catch and release' practices." *Id.* It also requests "a detailed list of all existing facilities, including military facilities, that could be used, modified, or repurposed to detain aliens for violations of immigration law" and specifically directs Attorney General Sessions and DHS Secretary Nielsen to identify any resources "that may be needed to expeditiously end 'catch and release' practices." *Id.*

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135. The Policy announced shortly thereafter targets only the immigrants at the Southwestern border, the vast majority of whom are from Latin American countries. *See* Ex. 12.

136. In stark contrast to Defendants' Southwestern border actions, DHS' updated Northern Border Strategy, announced on June 12, 2018, aims "to facilitate the flow of lawful cross-border trade and travel, and strengthen cross-border community resilience." Although the Northern Border Strategy is intended, in part, to "safeguard our northern border against terrorist and criminal threats," the strategy does not demand prosecution and family separation for all unauthorized entrants at the northern border of the United States. *See* Department of Homeland Security Northern Border Strategy *available at* https://www.dhs.gov/sites/default/files/publications/18_0612_PLCY_DHS-Northern-Border-Strategy.pdf, attached hereto as Ex. 58.

137. The Policy is intended to target immigrants by their country of origin and is consistent with the demonstrated anti-Latina/o bias repeatedly shown by President Trump.

138. Members of the Trump Administration repeatedly disparaged Latin American countries during the presidential campaign and during the Trump presidency. When Mr. Trump announced his campaign at Trump Tower in June 2015, he announced: "When Mexico sends its people, they're not sending their best. . . . They're bringing drugs. They're bringing crime. They're rapists." *See* Z. Byron Wolf, *Trump basically called Mexicans rapists again*, *available at https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html*, attached hereto as Ex. 59. In that same speech, he first proposed the idea of building a wall along the Southwestern border and "mak[ing] Mexico pay for that wall."

139. During the first Republican presidential debate, then-candidate Trump again stated his distaste for immigrants from Mexico: "The Mexican government is much smarter, much sharper, much more cunning. And they send the bad ones over because they don't want to pay for them. They don't want to take care of them." *See* Andrew O'Reilly, *At GOP debate, Trump says 'stupid' U.S. leaders are being duped by Mexico*, Fox News (Aug. 6, 2015) *available at* http://www.foxnews.com/politics/2015/08/06/at-republican-debate-trump-says-mexico-is-sending-criminals-because-us.html, attached hereto as Ex. 60.

140. Soon after, on August 25, 2015, then-candidate Trump refused to answer questions about immigration posed by Jorge Ramos, a Mexican-American and the top news anchor at Univision, a Spanish-language news network. After sending his bodyguard to physically remove Mr. Ramos, then-candidate Trump derisively told Mr. Ramos to "Go back to Univision." *See* Phillip Rucker, *First, Trump booted Univision anchor Jorge Ramos out of his news conference. Then things got interesting*, The Washington Post, (Aug. 25, 2015) *available at* https://www.washingtonpost.com/news/post-politics/wp/2015/08/25/first-trump-booted-univision-anchor-jorge-ramos-out-of-his-news-conference-then-things-got-interesting/?utm_term=.33965c195aca, attached hereto as Ex. 61.

141. In May 2016, then-candidate Trump referred to anti-Trump protestors who carried the Mexican flag as "criminals" and "thugs." Donald Trump, "The protestors in New Mexico were thugs who were flying the Mexican Flag." The May 25, 2016 tweet is attached hereto as Ex. 62. Donald Trump, "Many of the thugs that attacked peaceful Trump supporters in San Jose were illegals." The June 4, 2016 tweet is attached hereto as Ex. 63.

142. In June 2016, then-candidate Trump impugned the integrity of a federal judge presiding over a lawsuit against one of his businesses. Trump commented that Judge Gonzalo Curiel's rulings against him "[H]as to do with perhaps that I'm very, very strong on the border. . . . Now, he is Hispanic, I believe. He is a very hostile judge to me." *See* Jose A. DelReal and Katie Zezima, *Trump's personal, racially tinged attacks on federal judge alarm legal experts*, The Washington Post (June 1, 2016) *available at* https://www.washingtonpost.com/politics/2016/06/01/437ccae6-280b-11e6-a3c4-0724e8e24f3f_story.html?utm_term=.c82ec7177a13, attached hereto as Ex. 64.

143. U.S. House Speaker Paul Ryan publicly rebuked his own party's presumptive presidential nominee, stating: "Claiming a person can't do the job because of their race is sort of like the textbook definition of a racist comment. I think that should be absolutely disavowed. It's absolutely unacceptable." *See* Tom Kertscher, *Donald Trump's racial comments about Hispanic judge in Trump University case*, Politifact (June 8, 2016) available at http://www.politifact.com/wisconsin/article/2016/jun/08/donald-trumps-racial-comments-about-judge-trump-un/, attached hereto as Ex. 65.

144. In an interview with CBS News on June 5, 2016, then-candidate Trump reiterated his views, noting that "[Judge Curiel]'s a member of a club or society very strongly, pro-Mexican, which is all fine. But I say he's got bias." *See* CBS News, Transcript of Face the Nation (June 5, 2016) *available at* https://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/, attached hereto as Ex. 66. Judge Curiel is a member of the San Diego Chapter of the La Raza Lawyers Association. *See* Michelle Ye Hee Lee, *Trump Supporters' False Claim That Trump U Judge Is a Member of a Pro-immigrant Group*, The Washington Post (June 7, 2016)

available at https://www.washingtonpost.com/news/fact-checker/wp/2016/06/07/trump-supporters-false-claim-that-trump-u-judge-is-a-member-of-a-pro-immigrant-group/?utm_term=.07b5b0148791, attached hereto as Ex. 67.

145. On August 21, 2015, two men urinated on a sleeping Latino man and then beat him with a metal pole. They later told police that "Donald Trump was right; all these illegals need to be deported." When asked about the incident, then-candidate Trump failed to condemn the men, instead describing them as "passionate." *See* Adrian Walker, *'Passionate' Trump fans behind homeless man's beating?* (Aug. 21, 2015) *available at* https://www.bostonglobe.com/metro/2015/08/20/after-two-brothers-allegedly-beat-homeless-man-one-them-admiringly-quote-donald-trump-deporting-illegals/I4NXR3Dr7litLi2NB4f9TN/story.html, attached hereto as Ex. 68. Specifically, Trump stated, "[i]t would be a shame . . . I will say that people who are following me are very passionate. They love this country and they want this country to be great again. They are passionate." *Id.*

146. In October 2016, during a presidential debate, then-candidate Trump responded to a question about immigration by stating: "We have some bad hombres here and we're going to get them out." *See* Katie Zezima, *Trump on immigration: There are 'bad hombres' in the United States*, The Washington Post (Aug. 30, 2017) *available at* https://www.washingtonpost.com/news/post-politics/wp/2016/10/19/trump-on-immigration-there-are-bad-hombres-in-the-united-states/?utm_term=.e24f12fed08a, attached hereto as Ex. 69.

147. On January 27, 2017, newly-inaugurated President Trump and Mexico's President Peña Nieto discussed President Trump's proposal for a border wall over the phone.

During that transcribed conversation, President Trump again referred to "hombres" stating: "You have some pretty tough hombres in Mexico that you may need help with, and we are willing to help you with that big-league. But they have to be knocked out and you have not done a good job of knocking them out." *See* Greg Miller *et. al.*, *Full Transcripts of Trump's Calls with Mexico and Australia*, The Washington Post (Aug. 3, 2017) *available at* https://www.washingtonpost.com/world/national-security/you-cannot-say-that-to-the-press-trump-urged-mexican-president-to-end-his-public-defiance-on-border-wall-transcript-reveals/2017/08/03/0c2c0a4e-7610-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.85f36aa7a876, attached hereto as Ex. 70.

148. In August 2017, President Trump pardoned Joe Arpaio, the former Arizona sheriff who oversaw operations that consistently targeted and harassed Latino residents in Maricopa County. After a thorough investigation, the U.S. Department of Justice issued a report in 2011 finding that Mr. Arpaio's office had committed numerous civil rights violations by, *inter alia*, conducting immigration sweeps that routinely violated the Fourth Amendment; detaining Latino residents based on fabricated charges; placing Spanish-speaking inmates in solitary confinement as punishment for not speaking English; refusing to accept requests for basic services written in Spanish; pressuring Latino inmates to sign deportation forms; and referring to Latino inmates as "wetback," "Mexican bitches," and "stupid Mexicans." *See* Letter/Report, attached hereto as Ex. 71. The report found that Mr. Arpaio's own actions "promoted a culture of bias in his organization and clearly communicated to his officers that biased policing would not only be tolerated, but encouraged." *Id.*

149. A federal judge ruled twice that Mr. Arpaio's deputies unlawfully deprived detainees of food and medical care, and tortured inmates by locking them in unbearably hot solitary confinement cells in violation of the Eighth Amendment. *See* Mark Joseph Stern, *White Nationalist Rule is Already Here* (Aug. 15, 2017), *available at* http://www.slate.com/news-and-politics/2018/06/district-court-judge-rules-that-trump-administration-child-separations-would-be-unconstitutional.html, attached hereto as Ex. 72. The vast majority of individuals jailed by Mr. Arpaio's office were Latinos detained on suspicion of being undocumented. *Id.* In issuing the pardon, President Trump stated that Mr. Arpaio "has done a lot in the fight against illegal immigration. He's a great American patriot and I hate to see what has happened to him." *Id.*

150. In February 2018, President Trump referred to nations such as El Salvador as "shithole countries" in a meeting with lawmakers, and suggested that the U.S. preferred to receive immigrants from countries like Norway. *See* David Boddiger, *Trump falsely links Central American Immigrants to Drug Trafficking, Again* (Feb. 3, 2018) *available at* https://splinternews.com/trump-falsely-links-central-american-immigrants-to-drug-1822692216, attached hereto as Ex. 73.

151. That same month, President Trump said of undocumented immigrants from Mexico and Central America, "You know they're bad. They're pouring in from El Salvador, Honduras, Mexico, all over." *See* Ex. 73. He added, "These countries are not our friends." *Id.*

152. In April 2018, President Trump expressed repeated frustration with immigration numbers at the Southwestern border, and made a number of racially charged comments around the time he issued the memorandum directing DHS Secretary Nielsen and Attorney General

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Sessions to end catch-and-release practices. For example, President Trump again insinuated that Mexican immigrants are rapists. *See* Ex. 59.

153. President Trump also commented multiple times about a "caravan" of Central American immigrants aiming to reach the Southwestern border, many of whom planned on seeking asylum. He stated that "Mexico has the absolute power to not let these large 'Caravans' of people enter our country." *See* Edgard Garrido, *Migrant 'caravan' that angers Trump nears U.S.-Mexico border*, Reuters (April 23, 2018), *available at* https://www.reuters.com/article/us-usa-immigration-caravan/migrant-caravan-that-angers-trump-nears-u-s-mexico-border-idUSKBN1HU2ZB, attached hereto as Ex. 74. The "caravans" are an apparent reference to a contingent of Latin American immigrants traveling through Mexico. *Id.* President Trump stated: "If it reaches our border, our laws are so weak and so pathetic . . . it's like we have no border." *See* Klein, Starr, Shoichet, *Trump: 'We're going to be guarding our border with the military' until wall complete* (April 3, 2018) *available at* https://www.cnn.com/2018/04/03/politics/trump-border-wall-military/index.html, attached hereto as Ex. 75. He added, "[t]he caravan makes me very sad that this could happen to the United States." *Id.*

154. After expressing frustration regarding the "caravan," President Trump announced that he planned to dispatch U.S. troops to guard the U.S.-Mexico border because "we have very bad laws for our border" so "we're going to do some things militarily, until we can have a wall and proper security we're going to be guarding our border with the military." *See* Ex. 75.

155. On June 19, 2018, President Trump tweeted that without strong border policies "illegal immigrants" would "pour into and infest our Country." *See* https://twitter.com/realDonaldTrump/status/1009071403918864385.

156. On June 20, 2018, shortly after signing the Executive Order, at a rally in Duluth, Minnesota amid chants of "Build the Wall," President Trump repeated: "They're not sending their finest. We're sending them the hell back. That's what we're doing." *See* Katie Rogers and Jonathan Martin, *'We're Sending them the Hell Back,' Trump Says of Securing the County's Borders,* The New York Times (June 20, 2018) *available at* https://www.nytimes.com/2018/06/20/us/politics/trump-minnesota-rally.html, attached hereto as Ex. 76.

I. The Policy Has Been Widely Denounced by the United Nations, Professional Organizations, Public Figures, and Religious Leaders

157. The United Nations High Commissioner for Human Rights has called for an end to the Policy, saying, "The thought that any state would seek to deter parents by inflicting such abuse on children is unconscionable. I call on the United States to immediately end the practice of forcible separation of these children." *See* Stephanie Nebehay, *U.N. rights boss calls for an end to Trump's policy of family separation,* (June 18, 2018) *available at* https://www.reuters.com/article/us-un-rights/un-rights-boss-calls-for-end-to-trumps-policy-of-family-separation-idUSKBN1JE0NA, attached hereto as Ex. 77. A spokesperson for the U.N. also said that the Policy "amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child." *See* Nick Cumming-Bruce, *Taking Migrant Children From Parents Is Illegal, U.N. Tells U.S.*, available at

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https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html, attached hereto as Ex. 78.

158. Numerous professional and religious organizations have also denounced the Policy. On June 12, 2018, the American Bar Association (ABA) expressed "strong opposition" to Defendants' "separation of children from their parents when arriving at the southern border," calling the practice "unfair, inhumane, and, in the end, ineffective." *See* ABA letter attached hereto as Ex. 79 (noting "that the primary purpose of the 'zero tolerance' Policy is to serve as a deterrent for migrant parents" at the Southwestern border, and "that family separation is not a collateral consequence of regular law enforcement" but "an explicitly intentional goal.").

159. The Policy has also been widely condemned by the medical community. For example, the American Association of Pediatrics (AAP) recently denounced Defendants' Policy, writing: "Separating children from their parents contradicts everything we stand for as pediatricians protecting and promoting children's health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her health. This type of prolonged exposure to serious stress - known as toxic stress - can carry lifelong consequences for children." *See* AAP Statement Opposing Separation of Mothers and Children at the Border (March 4, 2017), *available at* https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/immigrantmotherschildrenseparation.aspx, attached hereto as Ex. 80; *See also* AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), *available at* https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx, attached hereto as Ex. 81; The American Academy of Family Physicians also released a statement in opposition, urging

the federal government to "withdraw its policy" and "instead, give priority to supporting families and protecting the health and well-being of the children within those families." *See* American Academy of Family Physicians Statement Regarding the United States Department of Homeland Security's Policy to Separate Children from Adult Caregivers available at https://www.aafp.org/dam/AAFP/documents/advocacy/prevention/equality/ST-DHSPolicyChild-AdultSeparation-061618.pdf, attached hereto as Ex. 82. Further, the American Medical Association "strongly urge[d]" the Defendants to withdraw the Policy, writing, "It is well known that childhood trauma and adverse childhood experiences created by inhumane treatment often create negative health impacts that can last an individual's entire lifespan." See AMA Urges Administration to Withdraw "Zero Tolerance" Policy (June 20, 2018) *available at* https://www.ama-assn.org/ama-urges-administration-withdraw-zero-tolerance-policy, attached hereto as Ex. 83.

160. On June 13, 2018, Daniel Cardinal DiNardo of the United States Conference of Catholic Bishops (USCCB) "join[ed] Bishop Joe Vásquez, Chairman of USCCB's Committee on Migration, in condemning the continued use of family separation at the U.S./Mexico border: "Families are the foundational element of our society" and separating parent from child "is not the answer" to "protecting our borders." *See* A Statement from Daniel Cardinal DiNardo, United States Conference of Catholic Bishops, (June 13, 2018) *available at* http://www.usccb.org/news/2018/18-098.cfm, attached hereto as Ex. 84.

161. Likewise, the Southern Baptist Convention recently passed a resolution affirming that immigrants be treated "with the same respect and dignity as those native born," and emphasizing "maintaining the priority of family unity." *See* Sasha Ingber, *Faith Leaders Oppose*

Trump's Immigration Policy of Separating Children From Parents, *available at* https://www.npr.org/2018/06/16/620651574/faith-leaders-oppose-trumps-immigration-policy-of-separating-children-from-paren, attached hereto as Ex. 85.

162. Prominent figures from both political parties have denounced the Policy. For example, on June 17, 2018, former First Lady Laura Bush wrote: "Our government should not be in the business of warehousing children in converted box stores or making plans to place them in tent cities in the desert outside of El Paso. These images are eerily reminiscent of the Japanese American internment camps of World War II, now considered to have been one of the most shameful episodes in U.S. history." *See* Laura Bush: *Separating Children from Their Parents at the Border Breaks my Heart*, The Washington Post, *available at* https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html?utm_term=.84b533c697a8, attached hereto as Ex. 86. Likewise, Jeb Bush, former Florida Governor, recently stated: "Children shouldn't be used as a negotiating tool." The June 18, 2018 tweet is attached hereto as Ex. 87.

163. At least one federal court has found that Defendants' practice of separating immigrant families "arbitrarily tears at the sacred bond between parent and child" and "is brutal, offensive, and fails to comport with traditional notions of fair play and decency." *Ms. L. v. U.S Immigration & Customs Enf't*, No. 18-cv-0428 DMS, 2018 WL 2725736, at *12 (S.D. Cal. June 6, 2018).

J. Defendants' Policy Harms the States' Sovereign Interests

164. Defendants' Policy and subsequent actions harm the States' sovereign interests by interfering with their licensing authority and rendering the States unable to honor their own policies favoring family unity.

165. Even for residential facilities that are federally funded, States have sovereign responsibility for the licensing, inspection, and monitoring of out-of-home care providers (i.e., providers who care for children away from their parents). The States conduct periodic licensing monitoring visits to these facilities, meeting with the staff and children in their care, to ensure that these facilities meet minimum safety standards, including background check approvals, facility safety standards, and ensuring the facilities provide necessary and appropriate care to the children.

166. For example, in Washington State, any agency that cares for children on a 24-hour basis away from their parents must be licensed. *See, e.g.* RCW 74.15.020, 74.15.090. Under RCW 74.15.030(7) and .080, the state's department of social and health services has the authority and duty to access and inspect the facility's records for the purpose of determining whether or not there is compliance with state licensing requirements. *See also* ch. 388-145 WAC (the licensing requirements for group homes and youth shelters). These licensing requirements apply to all private facilities, even those operated by a private agency contracting with the federal government.

167. In the Commonwealth of Massachusetts, no "agency or institution of the federal government" may operate a "[foster care] placement agency, group care facility, or temporary shelter facility" for children unless licensed by the Department of Early Education and Care

(EEC). Mass. Gen. Laws Ch. 15D, § 1A, 6. EEC "may, at any reasonable time, visit and inspect any facility" subject to such licensure. *Id,* § 9.

168. Likewise, New York State has licensing and oversight responsibilities over the facilities where immigrant children who are separated from their parents are placed. Specifically, the Bureau of Child Welfare and Community Services ("CWCS") of the New York State Office of Children and Family Services ("OCFS") has regulatory, licensing, inspection and supervisory authority over residential programs that care for foster children. N.Y. Soc. Serv. Law §§ 460-b, 460-c, 462-a. OCFS issues operating certificates to non-profit agencies in New York State that provide residential care in a congregate setting to UACs, including the children who have been separated from their parents at the border. OCFS, as the licensing state agency of child residential programs in New York, retains the authority to conduct building, equipment, fire and safety inspections of these facilities. Also, OCFS has the statutory authority to establish regulatory standards for the certification or approval of foster homes, and the authority of an agency to certify or approve foster homes. N.Y. Soc. Serv. Law §§ 378, 460-a, N.Y. Not-for-Profit Corp. Law § 404(b). Provider agencies in New York that contract with ORR place UACs in foster homes that the agency has approved or certified pursuant to this authority from the state.

169. In the State of North Carolina, "[n]oTo s person shall operate, establish or provide foster care for children or receive and place children in residential care facilities, family foster homes, or adoptive homes without first applying for a licensure to the Department" of Health and Human Services]. N.C. Gen. Stat. § 131D-10.3. In addition to other powers and duties, the North Carolina Department of Health and Human Services also has the authority to "[i]nspect

facilities and obtain records, documents, and other information necessary to determine compliance with" North Carolina law and regulations. *Id.* § 131D-10.6(6).

170. Likewise, Delaware licenses, registers, and monitors all residential and nonresidential childcare facilities including . . . child placement and adoption agencies . . ." 29 *Del. C.* § 9003 (7). Delaware's monitoring scheme includes the right of entrance, inspection, and access to the papers of childcare facilities operating within Delaware and entities that operate within Delaware and place children in other states. 31 *Del. C.* §§ 343, 344. In certain circumstances, a violation of Delaware's childcare licensing requirements may constitute a criminal act. 31 *Del. C.* § 345.

171. Other States have similar licensing authority and statutory regimes. These provisions are intended to protect children from substandard housing and care, and are essential to the wellbeing of minors placed in facilities located in the States.

172. The United States' *Ex Parte* Application for relief from the *Flores* Settlement is a frontal attack on that sovereign interest. That request seeks rescission of *Flores's* protections and a "determin[ation] that the Agreement's state licensure requirement does not apply to ICE family residential facilities." The United States has thus sought to extinguish state licensing powers over federally contracted out-of-home care providers, leaving those facilities wholly unregulated at the local level. The government's attempt to modify the *Flores* settlement terms by removing States' licensing authority and jurisdiction interferes with the States' sovereign powers.

173. Moreover, each of the States is required to respect family integrity absent a finding that a parent is unfit or unavailable to care for a child. Here, the federal government has

intentionally separated parents from children and is leaving it to the States' court systems to establish alternative guardianships for them, or relying on state-licensed foster care facilities to care for the children, rendering the States unable to enforce the legal mandates and public policies that require keeping families together unless the best interests of the child dictate otherwise.

174. For example, the **State of Washington** has a longstanding public policy affirming the importance of family integrity and the primacy of the parent-child relationship. Wash. Rev. Code § 13.34.020 "declares that the family unit is a fundamental resource of American life which should be nurtured" and mandates "that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized." Wash. Rev. Code § 26.09.002 likewise "recognizes the fundamental importance of the parent-child relationship to the welfare of the child" and requires "that the relationship between the child and each parent [] be fostered unless inconsistent with the child's best interests." Similarly, Washington's child abuse and neglect law, contained in chapter 26.44 RCW, enshrines the state's policy that "[t]he bond between a child and his or her parent . . . is of paramount importance[.]" RCW 26.44.010. Under Washington law, the state is justified to intervene in that relationship only when a child is deprived of the right to conditions of minimal nurture, health, and safety.

175. Washington also has recognized that children in government custody have substantive due process rights under the U.S. Constitution. *See Braam v State of Washington*, 150 Wn.2d 689, 81 P.3d 851 (2003) (foster children possess substantive due process rights). While these rights are not coextensive with parental rights in every context, Washington recognizes a child's constitutional rights "to be free from unreasonable risk of harm, including a

risk flowing from the lack of basic services, and a right to reasonable safety." *Id.* The intentional exposure of a child to an unreasonable risk of harm, including physical or mental injury, violates these rights.

176. Washington has also declared that practices that discriminate against any of its inhabitants because of race, creed, color, or national origin are matters of public concern that threaten the rights and proper privileges of the State and harm the public welfare, health, and peace of the people. *See* Wash. Rev. Code § 49.60.010.

177. **The Commonwealth of Massachusetts** has long committed itself to the promotion and safeguarding of the family unit. Massachusetts law, for example, notes that "the family is the best source of child rearing," 110 C.M.R. 1.02, and holds that "the policy of this commonwealth [is] to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children." Mass. Gen. Laws c. 119, § 1. Normally, therefore, "the interest of the child is best served by a stable, continuous environment with his or her own family." *Adoption of Frederick*, 405 Mass. 1, 4 (1989). As a result, the Commonwealth allows "state intervention into a family unit [to] be used only when it is clearly needed to protect a child." 110 C.M.R. 1.02.

178. The Commonwealth of Massachusetts has also long protected the civil rights and liberties of its residents, outlawing practices that harm or discriminate individuals based on race, color, religious creed, or national origin. *See, e.g.,* Mass. Gen. Laws c. 151B, § 4; c. 151C, § 2; c. 76, § 5; and c. 272, § 98.

179. **The State of Oregon** has statutorily codified a number of deeply-rooted public concerns that are grossly undermined by defendants' unlawful actions, thus harming Oregon's

sovereign interests. Oregon recognizes the intrinsic value of family relationships and prioritizes protecting them. For example, Or. Rev. Stat. § 419B.007 states the policy of Oregon is to "preserve family life" by "stabilizing the family." In addition, Oregon has declared there is a "strong preference" that children live "with their own families." Or. Rev. Stat. § 419B.090(5). Similarly, custody determinations are based on the best interest of the child, including "[t]he emotional ties between the child and other family members" as well as "[t]he desirability of continuing an existing relationship." *Id.* Oregon thus places great value on the parent-child relationship, on "interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent" in addition to a child's physical needs. Or. Rev. Stat. § 109.119 (10)(a).

180. Oregon further recognizes that children are individuals who have legal rights. Among those rights are "freedom from…emotional abuse or exploitation." Or. Rev. Stat. § 419B.090(1). To that end, Oregon has enacted laws and policies to protect children's rights. For example, "[i]t is the policy of the State of Oregon to safeguard and promote each child's right to safety, stability and well-being and to safeguard and promote each child's relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments." Or. Rev. Stat. § 419B.090(3).

181. Moreover, Oregon acknowledges the importance of due process rights afforded to parents facing "interference" with their right to "direct the upbringing of their children" because the policy of Oregon is to "guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution and to protect the rights and interests of children." Or. Rev. Stat. § 419B.090(4). Oregon requires appointment of legal counsel for

parents whenever due process so requires, and courts must consider "[t]he duration of and degree of invasiveness of the interference with the parent-child relationship" that could result from legal proceedings as well as the "effects" the proceedings may have on later proceedings or events that may interfere with the parent-child relationship. Or. Rev. Stat. § 419B.205(1). Pursuant to Or. Rev. Stat. § 419B.165, a child taken into custody must be released to a parent unless a court order prevents it or there is probable cause to believe the child may be endangered by immediate release.

182. When parents and children are separated, Oregon prioritizes a child's existing relationships in considering placement alternatives. For example, "there shall be a preference given to placement of the child or ward with relatives and persons who have a caregiver relationship with the child." Or. Rev. Stat. § 419B.192(1). Oregon law also recognizes the value of sibling relationships and requires state social agencies to make "diligent efforts" to keep siblings together when they have been separated from their parents. Or. Rev. Stat. § 419B.192(2).

183. Children separated from families in Oregon are entitled to participate in age and developmentally appropriate activities. Specifically, this includes activities that are reflective of and promote "development of cognitive, emotional, physical and behavioral capacities that are typical for an age or age group." Or. Rev. Stat. § 419B.194(a)(A). Moreover, Oregon requires appropriate activities for a specific child separated from family "based on the developmental stages attained by the child." Or. Rev. Stat. § 419B.194(a)(B). In making these determinations, the "reasonable and prudent parent standard" applies. Or. Rev. Stat. § 419B.194(b). The standard is characterized by "careful and sensible parental decisions that

maintain the health, safety and best interests of a child or ward while encouraging the emotional and developmental growth of the child or ward…" *Id.*

184. Oregon has also codified anti-discrimination policies that protect all Oregon residents from disparate treatment based on race, color, religion, sex, sexual orientation, national origin, marital status or age. Or. Rev. Stat. § 659A.403(1). Further, it is unlawful for any person to deny another full and equal accommodations, advantages, facilities, and privileges of any place of public accommodation. Or. Rev. Stat. § 659A.403(3).

185. The **State of California** similarly has a long history of preserving the integrity of the family unit and the parent-child relationship. For example, California Welfare and Institutions Code section 11205 declares "the family unit is of fundamental importance to society in nurturing its members," and states "[e]ach family has the right and responsibility to provide sufficient support and protection of its children." California's policy to "preserve and strengthen a child's family ties whenever possible" and to remove a child from the custody of his or her parents "only when necessary for his or her welfare or for the safety and protection of the public" is delineated in California Welfare and Institution Code section 201, subdivision (a), and section 16000, subdivision (a).

186. California's interests in protecting the physical, emotional and psychological health of minors and in preserving and fostering the parent-child relationship "are extremely important interests that rise to the level of 'compelling interests' for purposes of constitutional analysis." *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 348 (1997).

187. It is California policy that social services programs must prevent or reduce inappropriate institutional care by providing community-based care, home-based care, or other forms of less intensive care. Cal. Welf. & Inst. Code § 13003(4).

188. In California, per statute, any out-of-home placement of children must be in the "least restrictive family setting," and should promote "normal childhood experiences that [are] suited to meet the child's or youth's individual needs." Cal. Welf. & Inst. Code § 16000(a).

189. California also has robust constitutional and statutory protections against discrimination. For example, the California Constitution protects against discrimination on the basis of race, creed, color or national or ethnic origin. Cal. Const. art. I, § 8. California law also protects against discrimination on the basis of ancestry, citizenship, primary language, and immigration status. Cal. Civ. Code § 51. California is also committed to developing strategic polices and plans regarding health issues affecting immigrants and refugees. Cal. Health & Saf. Code § 131019.5.

190. **The State of New Mexico**'s laws embody a public policy dedicated to the preservation of the family unit. NMSA 1978, Sec. 32A-1-3 (2009). To "the maximum extent possible, children in New Mexico shall be reared as members of a family unit." *Id.* *See also* NMSA 1978, Section 40-15-3 (2005) ("It is the policy of the state that its laws and programs shall: support intact, functional families and promote each family's ability and responsibility to raise its children; strengthen families in crisis and at risk of losing their children, so that children can remain safely in their own homes when their homes are safe environments and in their communities…help halt the breakup of the nuclear family[.]"). Further, New Mexico's Family Preservation Act clearly indicates the purpose of the Act is to "confirm the state's policy of

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support for the family" as a "institution" and that the Act is "intended to serve as a benchmark against which other legislation may be measured to assess whether it furthers the goals of preserving and enhancing families in New Mexico." NMSA 1978, Section 40-15-2 (2005). New Mexico case law affirms there is a clearly established right to familial integrity embodied in the Fourteenth Amendment. *Oldfield v. Benavidez,* 1994-NMSC-006, ¶ 14, 116 N.M. 785.

191. The New Mexico Children's Code also ensures that New Mexican parents have substantial due process protections prior to losing the right to care of and custody of their own children. *See* NMSA 1978, Section 32A-4-28. The sole fact that a parent is incarcerated is not a basis for terminating parental rights. *Id.* A parent's fundamental liberty interest in the care, custody, and management of their children is well established. *See State ex rel. Children, Youth & Families Dep't v. Mafin M.*, 2003 NMSC 015, ¶ 18, 133 N.M. 827, 70 P.3d 1266; *State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997 NMSC 038, ¶ 29, 123 N.M. 711, 945 P.2d 76. "[T]he parent-child relationship is one of basic importance in our society ... sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *State ex rel. Children, Youth & Families Dep't v. Anne McD.*, 2000 NMCA 020, ¶ 22, 128 N.M. 618, 995 P.2d 1060 (alteration in original) (internal quotation marks and citation omitted). Thus, we have recognized that process is due when a proceeding affects or interferes with the parent-child relationship. *State ex rel. Children, Youth & Families Dep't v. Stella P.*, 1999 NMCA 100, ¶ 14, 127 N.M. 699, 986 P.2d 495; *State ex rel. Children, Youth & Families Dep't v. Rosa R.*, 1999 NMCA 141, ¶ 13, 128 N.M. 304, 992 P.2d 317 (recognizing that constitutionally adequate procedures must be in place before the State can investigate or terminate the parent-child relationship).

192. New Mexico custody determinations are also driven by the best interests of the child. *See Schuermann v. Schuermann*, 1980-NMSC-027, ¶ 6, 94 N.M. 81 ("In any proceeding involving custody, the courts' primary concern and consideration must be for the child's best interests.") (citing NMSA 1978, Section 40-4-9(A) (1977)). "In any case in which a judgment or decree will be entered awarding the custody of a minor, the district court shall, if the minor is under the age of fourteen, determine custody in accordance with the best interests of the child." *Id.*

193. The laws of the State of New Mexico dictate that the best interests of a child, if not properly within the custody of their parents, then lies in the custody of other family members. This policy is not only rooted in the best interests of children generally, but is designed to protect both family unity as well as unique cultural heritage. Under the State's Kinship Guardianship Act, family members have a protected interest in raising a child when neither parent is available. NMSA 1978, Section 40-10B-2 (2001). Where the United States' policy of family separation does not provide a meaningful opportunity for children who are separated from their parents to unite with other members of their family, it is direct contravention of the laws of this state and the policy principles that underlying those laws. Further, because "a kinship guardian possesses the same legal rights and responsibilities of a biological parent," members of separated children's families should be afforded the opportunity to seek custody of their relatives. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003. To reiterate, any policy or practice of the federal government that would serve to deny or otherwise disrupt any family member's ability to take custody of their child relative is an affront to the laws of a sovereign state and the views of the people therein.

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194. New Mexico's Children's Code is structured to promote child safety, recognize cultural diversity, and to ensure that civil and criminal justice systems are coordinated. NMSA 1978, Section 32A-1-3 (2009). All children are to be provided services sensitive to their cultural needs. *Id.*; *see also* NMSA 1978, Section 32A-18-1 (2009) (requiring cross-cultural training for all caregivers and service-providers under the children's code). Families seeking asylum do not face allegations of abuse, neglect, or a crime that allows children to be removed from the custody of their parents under New Mexico law. In New Mexico, the mental and physical wellbeing of children is paramount. NMSA 1978, Section 32A-1-3(A)(2009). Children removed from the home in New Mexico because of a parent's criminal behavior are afforded due process and representation of counsel in every proceeding other than probation. *State v. Doe*, 1977-NMCA-234, 91 N.M. 232, 572 P.2d 960,cert. denied 91 N.M. 249, 572 P.2d 1257 (1978). *See also* NMSA 1978, § 32A 1 7. *State ex rel. Children, Youth & Families Dept. v. Lilli L.*, 1996-NMCA-014, ¶ 14, 121 N.M. 376."[F]ailure to appoint either counsel or a guardian ad litem to protect the interests of a minor may constitute a denial of due process, thereby invalidating such proceedings."

195. The **State of New Jersey** has a longstanding public policy confirming the importance of family integrity and the primacy of the parent-child relationship. New Jersey law declares that "the preservation and strengthening of family life is a matter of public concern as being in the interest of the general welfare." N.J. Stat. Ann. § 30:4C-1(a). It also includes a mandate "to make reasonable efforts … to preserve the family in order to prevent the need for removing the child" from his or her parents, and to return the child safely to his or her parents if possible. N.J. Stat. Ann. § 30:4C-11.1. In determining whether removal of a child is required,

"the health and safety of the child shall be of paramount concern to the court." N.J. Stat. Ann. § 30:4C-11.2. Moreover, any proceeding which may result in even a temporary loss of custody of a child implicates a parent's state constitutional right to appointed counsel. *In re Guardianship of Dotson*, 72 N.J. 112, 123 (1976).

196. New Jersey has also long protected the civil rights and civil liberties of its residents, including by prohibiting discrimination on the basis of race, creed, color, or national origin. *See, e.g.*, N.J. Stat. Ann. § 10:5-12.

197. The **State of Rhode Island** has a longstanding public policy affirming the importance of family integrity and the primacy of the parent-child relationship. For example, R.I. Gen. Law § 42-72-2 (1979) declares that "the state has a basic obligation to promote, safeguard and protect the social well-being and development of the children of the state through a comprehensive program providing for" such items as "the strengthening of the family unit" and "making the home safe for children by enhancing the parental capacity for good child care and services to children and their families to prevent the unnecessary removal of children from their homes". *See* R.I. Gen. Laws § 42-72-2 (1979).

198. Rhode Island has declared that practices that discriminate against any of its persons within the state on the basis of race, color, religion, sex, disability, age, or country of ancestral origin are matters of public concern that threaten the rights and proper privileges of the State and harm the public welfare, health, and peace of the people. *See*. R.I. Gen. Laws § 42-112-1 (1990).

199. The **State of Vermont** has a fundamental, sovereign interest in the welfare of children and families. Vermont has the authority and obligation to intervene where children are

"without proper parental care or subsistence, education, medical, or other care necessary for [their] well-being." 33 V.S.A. § 5102(3)(B). That duty includes bearing "such expenses for the proper care, maintenance, and education of a child, including the expenses of medical, surgical, or psychiatric examination or treatment" as deemed necessary in connection with juvenile care proceedings. 33 V.S.A. § 5116(a). Vermont authorities owe a corollary duty "to preserve the family and to separate a child from his or her parents only when necessary to protect the child from serious harm or in the interests of public safety." 33 V.S.A. § 5101(a)(3).

200. Where children require foster care, Vermont strives to ensure their placement in a healthy, loving environment through strict licensing requirements. *See* 33 V.S.A. § 4905; Vt. Admin. Code § 12-3-501. The Vermont Department of Children and Families closely regulates not only the child's physical environment but also the individuals who may be entrusted to care for the child. *See* Vt. Admin. Code §§ 12-3-501:20; 12-3-501:40.

201. Vermont has long protected its residents from discrimination on the basis of race, color, and national origin irrespective of their citizenship status. *See, e.g.,* 9 V.S.A. §§ 4502-4503 (public accommodations and housing); 21 V.S.A § 495 (employment); and 13 V.S.A. § 1455 (bias-motivated crimes). Vermont continues to reaffirm this commitment through legislation. *See, e.g.,* Vermont Act. 5 (S. 79) (March 28, 2017) ("In Vermont, we celebrate the rich cultural heritage and diversity of our residents. . . . All Vermont residents should be free from discrimination on the basis of their sex, sexual orientation, gender identity, marital status, race, color, religion, national origin, immigration status, age, or disability.").

202. The **State of Minnesota**'s public policy also affirms the importance of family integrity. For example, Minnesota Statutes section 252.32 declares that it is the State's policy

"that all children are entitled to live in families that offer safe, nurturing, permanent relationships, and that public services be directed toward preventing the unnecessary separation of children from their families." Minn. Stat. § 252.32, subd. 1. In addition, Minnesota Statutes section 260C.001 recognizes the importance of "preserv[ing] and strengthen[ing] the child's family ties whenever possible and in the child's best interests . . . ." Minn. Stat. § 260C.001, subd. 1(b)(3).

203. Minnesota has also declared that the State's public policy is that persons be free from discrimination in employment, housing and real property, public accommodations, public services, and education on the basis of, among other things, race, color, creed, or national origin. Minn. Stat. § 363A.02, subd. 1(a). "Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." *Id.* subd. 1(b).

204. The **State of Iowa** has a longstanding policy that favors the protection of the family unit. The State of Iowa only separates parents and children in the most exceptional of circumstances because when we do so we "inflict[] a unique deprivation of a constitutionally protected liberty interest[.]"*In re M.S.*, 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016). "An innocent man can be set free. The landowner can be justly compensated. The childless parent has no recourse." *Id.* To that end, Iowa's child welfare system strives to ensure that every child receives the care, guidance, and control she needs in her own home, with her own parents, whenever possible. Iowa Code § 232.1. "[T]he custody, care, and nurture of the child reside first in the parents" and it is presumed to be in a child's best interest to remain in parental custody. *In re M.S.*, 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016); *In re N.M.*, 528 N.W.2d 94, 96 (Iowa 1995). Under Iowa law, a family cannot be broken up simply upon proof that a parent has

"engaged in immoral or illegal conduct[.]" *In re M.S.*, 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016). "Indeed, due process would be violated if the State 'attempt[ed] to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness'" as a parent. *Id.*

205. The State of Iowa prohibits discrimination based on race, creed, color, national origin, or religion. *See* Iowa Code chapter 216.

206. The **State of Illinois** has a longstanding policy recognizing the importance of maintaining the family relationship.

207. The Illinois Juvenile Court Act of 1987, for example, declares that the State should "secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the safety and moral, emotional, mental, and physical welfare of the minor and the best interests of the community; [and] preserve and strengthen the minor's family ties whenever possible, removing him or her from the custody of his or her parents only when his or her safety or welfare or the protection of the public cannot be adequately safeguarded without removal." 705 ILCS 405/1-2.

208. The Illinois Abused and Neglected Child Reporting Act likewise instructs the Department of Children and Family Services to "protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect, offer protective services in order to prevent any further harm to the child and to other children in the same environment or family, stabilize the home environment, and preserve family life whenever possible." 325 ILCS 5/2(a).

209. In addition, the State of Illinois has a longstanding policy affirming the importance of assisting the state's immigrant population.

210. The Illinois Attorney General Act declares that "[i]t is imperative that State government is aware of the needs of the State's immigrant community and sensitive to the barriers that may prevent them from seeking and obtaining services." 15 ILCS 205/6.6(a). The Act further directs the Office of the Illinois Attorney General to "assist immigrants by increasing accessibility to the Office and providing outreach services to the community, which will serve to educate immigrants as to their rights and responsibilities as residents of the State." *Id.*

211. **New York State** has a strong interest in family unity. It is the long-established policy and practice of the State to prioritize keeping a child with his or her parent or parents. OCFS operates under the principal that families staying together is the most desired outcome for children. Children are some of the most vulnerable residents in New York State and they best develop their unique potential in a caring and healthy family environment with their birth parents or other relatives. The State's first obligation is to help the family with services to prevent its break-up, or to quickly reunite the family if the child has already been separated from his parents. That is because the child's need for a normal family life will usually best be met with his or her birth parent, and parents are entitled to bring up their own children unless the best interests of the child would thereby be endangered. N.Y. Soc. Serv. Law § 384-b(1); N.Y. Exec. Law § 990.

212. New York State has a strong interest in promulgating and operating under non-discriminatory policies. In fact, the legislature has declared that non-discrimination is a guiding principal of policy in New York State. New York's legislature has found that "the state has the responsibility to act to assure that every individual within this state is afforded an equal

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opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." N.Y. Exec. Law § 290. Thus, it is unlawful to discriminate against any person in New York State on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, gender identity, transgender status, and gender dysphoria. N.Y. Exec. Law § 296; 9 N.Y. Comp. Codes R. & Regs. Tit. 9 § 466.13(c)(2)-(3).

213. This principal of non-discrimination is also applied at the agency level. For example, OCFS promulgates regulatory standards that expressly prohibit discrimination or harassment of adults or children involved in child welfare programs and services based on race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status or disability. N.Y. Comp. Codes R. & Regs. Tit. 10 §§ 421.6, 423.4, 441.24

214. The **State of Maryland** has longstanding policies affirming the importance of family integrity and of protecting the wellbeing of children to the greatest extent possible. Maryland's Legislature has declared that "it is the policy of this State to promote family stability, [and] to preserve family unity[.]" Md. Code Ann., Fam. Law § 4-401(1). Maryland's statute governing custody proceedings for children in need of assistance is intended to "conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare," and to "provide for the care,

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protection, safety, and mental and physical development of" children. Md. Code Ann., Cts. & Jud. Proc. § 3-802(a)(3), (1). And under state law, various social programs must be administered to "preserve family unity" or "preserv[e] family integrity." Md. Code Ann., Health-Gen. § 7-702(b); Code of Md. Regs. 07.02.01.01; Code of Md. Regs. 11.02.13.01.

215. Maryland also has a public policy prohibiting discrimination against any of its inhabitants because of their race, age, color, creed, or national origin, and has enacted anti-discrimination laws in a wide array of contexts, ranging from public accommodations, *see* Md. Code Ann., State Gov't §§ 20-304, to employment, *id.* § 20-602, to residential housing, *id.* § 20-702. Maryland law also prohibits any person from retaliating against any person because he or she has exercised or enjoyed the rights granted or protected by Maryland's anti-discrimination laws, *id.* § 20-708(2).

216. It is the policy of the State of Maryland, "in the exercise of its police power for the protection of the public safety, public health, and general welfare, for the maintenance of business and good government, and for the promotion of the State's trade, commerce, and manufacturers," to "assure all people equal opportunity in receiving employment" regardless of race, color, religion, age, ancestry, or national origin. Md. Code Ann., State Gov't § 20-602.

217. The **Commonwealth of Pennsylvania** has a longstanding public policy recognizing the significance of family integrity and the parent-child relationship. For example, Pennsylvania law declares that "[t]he family is the basic institution in society in which our children's sense of self-esteem and positive self-image are developed and nurtured" and that "[t]hese feelings and values are essential to a healthy, productive and independent life during adulthood." 62 P.S. § 2172(a)(1). Similarly, Pennsylvania's Domestic Relations Act states that

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"[t]he family is the basic unit in society and the protection and preservation of the family is of paramount public concern." 23 Pa.C.S. § 3102(a).

218. Pennsylvania law further recognizes that children who are separated from their parents are deprived "of the unique bond which exists in the parent-child relationship, leaving emotional scars on such children which may never fully heal" because "children are better off emotionally when their needs can be met by their biological parents." 62 P.S. § 2172(a). This reality is recognized throughout Pennsylvania law. For instance, the Commonwealth's Juvenile Act seeks to "preserve the unity of the family whenever possible" and to separate "the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa.C.S. § 6301(b).

219. To separate a child from her family is among the most intrusive acts that the government can initiate. North Carolina has long committed itself to separating families only as a last resort, and only after exhausting other options, and taking all appropriate measures to ensure the safety of children. In North Carolina, protection of the family unit is guaranteed not only by the U.S. Constitution but also by North Carolina law. *Adams v. Tessner*, 354 N.C. 57, 60 (N.C. 2001). As a result, taking a child away from its parent requires "a showing that the parent is unfit to have custody." *Id.* at 62.

220. Parents of children in North Carolina have due process rights that require "reasonable efforts [to be] made to prevent or eliminate the need for removal of the child" from her parents, but only to allow removal when "necessary to protect the safety and health of the child." *In re Dula*, 143 N.C. App. 16, 17 (N.C. Ct. App. 2001). A parent's "right to retain custody of their child and to determine the care and supervision suitable for their child is a

fundamental liberty interest which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106 (N.C. 1984).

221. The people of North Carolina, in their Declaration of Rights, have stated that "[n]o person . . . shall be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. Art. I, § 19. The State of North Carolina reiterates this commitment in numerous statutes that make it unlawful to discriminate on the basis of, *inter alia*, race, color, religion, or national origin. *See, e.g.*, N.C. Gen. Stat. §§ 75B-2, 41A-4, 95-151, 126-16, 143-422.2.

222. In the **State of Delaware**, "parents have the primary responsibility for meeting the needs of their children and the State has an obligation to help them discharge this responsibility . . ." 29 *Del. C.* § 9001. Delaware law explicitly declares that "the State has a basic obligation to promote family stability and preserve the family as a unit…." *Id.* Delaware law also recognizes that preservation of the family as a unit is "fundamental to the maintenance of a stable, democratic society." 10 *Del. C.* § 902(a). To that end, the state has directed its courts, when possible consistent with the safety of family members, to ensure that homes "remain unbroken." *Id.* The express statutory child welfare policy of the State is to "serve to advance the interests and secure the safety of the child, while preserving the family unit whenever the safety of the child is not jeopardized." 16 *Del. C.* § 901.

223. The State of Delaware has comprehensively prohibited discrimination based on race and national origin in its laws, including the areas of public accommodations (6 *Del. C.* § 4501, housing (6 *Del. C.* § 4601), and employment (19 *Del. C.* § 711). While children forcibly separated from their parents pursuant to the Trump Administration's policy are not presently

located within any facility within the State of Delaware, a business entity that has facilitated such placements has a business location within the State of Delaware. Upon information and belief, this entity has assisted in placing children forcibly separated from their parents in other co-plaintiff States. Should separated children ultimately be placed within Delaware, its education and child welfare systems may be saddled with unanticipated fiscal and operational burdens due to the need to provide care for children who have been psychologically traumatized by involuntary separation from their parents. In order to ensure a complete injunction, to eliminate the chilling effect on the exercise of the fundamental rights of documented and undocumented immigrants presently residing in the State of Delaware, to protect the sovereignty of the State of Delaware by protecting its obligation to assist parents in meeting the needs of children, and to maintain the appropriate licensure and supervision of childcare facilities within the State, Delaware joins this action.

224. The **District of Columbia** is uniquely situated among the Plaintiff States, as it has no sovereign interest to claim as against the Federal Government. *See* Const. art. I, § 8, cl. 17; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982); *District of Columbia ex rel. Am. Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1046 (D.C. Cir. 1986) (Congress acts "as sovereign of the District of Columbia"). Rather, the District asserts its quasi-sovereign interests and its authority to enforce its laws and uphold the public interest under its Attorney General Act, which was intended to incorporate the common law authority of states' attorneys general. D.C. Code. § 1-301.81. *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 n.15 (1982) (recognizing that Puerto Rico "has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State").

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K. Defendants' Policy Harms the States' Proprietary Interests

225. The Policy also harms the States' proprietary interests. ORR places thousands of unaccompanied minors with sponsors (adults who can care for the child during the pendency of immigration proceedings) in the States every year. In FY 2016, ORR placed 52,147 individual children in such placements nationwide. In FY 2017, there were 42,497 placements, and so far there have been almost 20,000 in FY 2018 (October-April). *See* Unaccompanied Alien Children Released to Sponsors by State (June 30, 2017) *available at* https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state, attached hereto as Ex 88. These ORR data are inclusive of children who were separated as a result of the Policy.

226. The States are receiving and will continue to receive an increasing number of separated immigrant parents and children if Defendants are allowed to continue implementing their Policy. The federal government's separation of these families and transfer of separated persons into the States places increased burdens on state resources, particularly because of the acute trauma that children and parents have experienced due to Defendants' unlawful policy. Children who have been separated from their parents and are awaiting immigration proceedings (for example the adjudication of an asylum application or adjustment of status) are entitled to access a variety of state-funded programs. Providing the necessary services to address the legal, educational, physical, and psychological needs of parents and children who have been separated will burden the state systems. The following are non-exclusive examples of state systems that are impacted.

227. **Courts**. Many of the sponsors of these children will need to obtain guardianship through the States' juvenile and family courts. This is not discretionary: ORR's agreement with sponsors requires "best efforts" to establish such guardianships, and sponsors in many states would be unable to access medical and educational records and make important decisions for the children in their care without such court-ordered guardianships. *See* Sponsor Care Agreement *available at* https://www.acf.hhs.gov/sites/default/files/orr/frp_4_sponsor_care_agreement_05_14_18.pdf, and attached hereto as Ex. 89.

228. Children who have been separated from their parents will also access the State courts to obtain orders necessary for their immigration proceedings. For example, some such children are eligible for Special Immigrant Juvenile Status (SIJS), pursuant to federal law. *See* Immigration and Nationality Act (INA) §203(b)(4); INA §101(a)(27)(j); Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457 §235. In these proceedings, the federal immigration system relies on the expertise of state courts in making determinations regarding a child's welfare, requiring SIJS-eligible children to seek SIJS predicate findings from a state's juvenile court.

229. **Education.** Public elementary and secondary schools have a constitutional obligation to educate students irrespective of immigration status. *See Plyler v. Doe*, 457 U.S. 202 (1982), and various statutory obligations to provide particularized services to high needs students, such as through the Individuals with Disabilities Education Act (IDEA). Children separated from their parents and placed with sponsors will attend the States' public schools and receive a variety of educational services, including special education, ESL programs, mental

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health services, and other programs delivered within the school district. Such programs are funded in large part through local levy funds and state dollars. Indeed, state funding for general education delivered in public schools is calculated in part on a per-student basis.

230. The trauma of forcible separation from a parent renders public schooling more difficult and expensive for the States to provide. Research shows that the experience of trauma may severely undercut a child's ability to learn and function in the classroom. *See* Helping Traumatized Children Learn, *available at* https://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf, attached hereto as Ex. 90. Children may require additional mental health services through school guidance counselors and social workers; they may have behavioral problems and trauma-related learning disabilities that would need to be addressed; and they lack the critically important educational advocacy and partnership that parents can provide. Students without parents to care for them are also more likely to arrive at school with housing and food insecurity and require additional attention and resources to address hunger, exhaustion, and increased levels of stress and anxiety.

231. **Healthcare.** Such children are also often eligible for State-funded healthcare programs, including mental health care treatment. Health care costs will be exacerbated for the states because of the Policy, as children who suffer prolonged and unexpected separation from their parents experience particular health effects, including higher levels of anxiety, more susceptibility to physical and emotional illness, and decreased capacity to manage their emotions. These health effects may result in higher levels of care and increase costs to the state. *See* Burke and Mendoa, *At Least 3 tender age shelters set up for child migrants*, the AP (June

20, 2018) *available at* https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e, attached hereto as Ex. 91.

232. **Other programs**. Many States also have programs that provide services specifically directed at helping immigrants and refugees, as well as programs designed to address the consequences of trauma. Some have limited available group care facilities that they stand to lose to ORR placements because of the increase in separated families.

233. The plaintiff States are already experiencing some of these proprietary harms.

234. **Washington**. For example, ORR places hundreds of unaccompanied minors with sponsors in the state of Washington every year. For FY 2017, the last year for which complete data are available, ORR placed almost 500 children with Washington resident sponsors. As of April 30, 2018, ORR's available data show that Washington has already received 278 unaccompanied children during this fiscal year. *See* https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state. *See* Ex. 88.

235. Washington has almost 300 public school districts and serves well over a million children. Per pupil expenditures for 2016-17, for example, were more than $11,800 per child. Of this total, slightly more than 90% of school funding came from state and local resources. *See* Statewide Average Financial Tables and Charts *available at* http://k12.wa.us/safs/PUB/FIN/1617/1617Section1Full.pdf, attached hereto as Ex. 92. For the 2017-19 biennium, state spending for basic education will total over $22 billion, with over $16 billion allocated to basic general education services.

236. Washington State children residing in households with an income less than 312 percent of the federal poverty level are eligible for the Apple Health program, regardless of citizenship and/or documented status. Qualifying children receive access to the full scope of health care coverage including medical, dental, behavioral health, vison, hearing and pharmaceutical benefits. Of the $7.3 billion that Washington state spent in state fiscal year 2017 to support the entire Apple Health program, the cost to cover minor children was $1.6 billion. In state fiscal year 2017, the cost to cover undocumented immigrant children was $31 million. The average cost per undocumented child in state fiscal year 2017 was $1,552 per year.

237. Washington's Office of Refugee and Immigrant Assistance (ORIA) is part of the State of Washington, Department of Social and Health Services (DSHS). ORIA coordinates and facilitates the provision of services for people who are refugees and immigrants to enable them to achieve economic stability and integrate into Washington communities. To do this, ORIA braids federal funding from the ORR with other federal and state dollars, for a total annual budget of $27,925,874. This funding provides services to more than 10,000 refugees and immigrants each year through contracts with more than 60 different organizations across the state to offer 11 distinct programs and services. National immigration policies affect the state's access to federal funding. For example, around August of 2014, the nation experienced an influx of unaccompanied immigrant children being apprehended by immigration officials, and ORR reduced Washington's federal funding to provide refugee social services to cover an increase in costs at the national level.

238. **Massachusetts.** Since 2014, ORR has placed 3,803 unaccompanied children with sponsors in Massachusetts. *See* Ex. 88. These numbers are particularly high in part because

of Massachusetts' large population of residents from which UACs most often come (Honduras, Guatemala, and El Salvador, in particular). *See* Office of Refugee Resettlement Facts & Data, *available at* https://www.acf.hhs.gov/orr/about/ucs/facts-and-data, attached hereto as Ex. 93. For example, Massachusetts has the eighth largest Salvadoran population in the country. *See* Profiles of Boston's Latinos *available at* http://www.bostonplans.org/getattachment/e0019487-138b-4c73-8fe5-fbbd849a7fba, attached hereto as Ex. 94. These residents are more likely than the general population to become sponsors of UACs because sponsors are often family members.

239. A non-profit foster care agency in Massachusetts, which is licensed by the Massachusetts Department of Early Education and Care, also provides long term foster care services to UACs in Massachusetts foster homes. *See* Office of Refugee Resettlement Division of Children Services Legal Resource Guide Legal Service Provider List for UAC in ORR Case, *available at* https://www.acf.hhs.gov/sites/default/files/orr/legal_service_provider_list_for_uac_in_orr_care_english_092016.pdf, attached hereto as Ex. 95.

240. In Massachusetts, all children regardless of immigration status are entitled to a free public education. On average, per pupil expenditures amount to more than $16,000. *See* Massachusetts Department of Elementary and Secondary Education School Finance Statistical Comparisons FY13-FY17 Per Pupil Expenditures All Funds, *available at* http://www.doe.mass.edu/finance/statistics/ppx13-17.html, attached hereto as Ex. 96. Of this total, over 95 percent comes from state and local funding resources, with 39 percent from the state alone. *See* https://www.census.gov/data/tables/2016/econ/school-finances/secondary-education-finance.html. In Massachusetts' Gateway Cities, where a higher population of

immigrants live, state funding amounts to an even higher percent of total per pupil spending. *See* http://www.doe.mass.edu/finance/chapter70/chapter-17.html. For Fiscal Year 2017, state spending on education programs totaled more than $7 billion. *See* http://massbudget.org/browser/index.php.

241. All undocumented children in Massachusetts are eligible for state-funded health insurance through the Children's Medical Security Plan, MassHealth Limited, or the Health Safety Net. Immigrant children with SIJS and other statuses may be eligible for more robust state-funded health insurance. *See* Understanding the Affordable Care Act: Non-Citizens' Eligibility for Mass Health & Other Subsidized Health Benefits (March 2018) *available at* https://www.masslegalservices.org/system/files/library/Understanding%20eligibility%20of%20non-citizens_0.pdf, attached hereto as Ex. 97.

242. Children separated from their parents pursuant to the Policy will require determinations from the Massachusetts Probate and Family Court or Juvenile Court for purposes of SIJS, *see Recinos v. Escobar,* 473 Mass. 734 (2016), and determinations about guardianship in the best interests of children. Mass. Gen. Laws c. 190B, § 5-206.

243. Undocumented children and other immigrant children who are not eligible for mental health services through state-funded health insurance programs may qualify for mental health services through the state's Department of Mental Health ("DMH"). Under its statutory mandate, DMH provides or arranges for the provision of services to residents who meet certain clinical criteria. Mass. Gen. Laws c. 19 § 1. For Massachusetts youth to meet DMH's clinical criteria, they must have a "serious emotional disturbance…that has lasted or is expected to last at least one year [and] has resulted in functional impairment that substantially interferes with or

limits the child's [or] adolescent's role or functioning in family, school or community activities….". 104 CMR 20.04(2)(b). Many if not all children separated from their parents under the Policy may suffer from such disturbances.

244. **Oregon.** Defendants' Policy also harms Oregon's proprietary interests, because it forces Oregon to expend resources and incur costs that would otherwise not be required. For example, unaccompanied minors detained in Oregon have often suffered severe trauma in their home countries. Children separated from their parents under this Policy have suffered additional trauma from Defendants' actions. Counsel for these minors can and do file petitions with the juvenile court departments of the Oregon Circuit Courts on their behalf to obtain Special Immigrant Juvenile status. This allows the court to transfer custody to the Oregon Department of Human Services, where they can be placed in foster care and receive other necessary services, such as healthcare, education, and other support. This process employs the financial and other resources of the state of Oregon.

245. Children in Oregon, including those separated from parents, are entitled to a public education. The cost of that education as of 2016-17 was $11,715 per student, with 92% from state and local resources.

246. Children in Oregon, including those separated from parents, may be eligible for health care funded in part by the state of Oregon. Children separated from parents who may become wards of the state due to forced separation would become eligible for state-funded healthcare at a cost of approximately $664 per-member per-month. Federal reimbursement is not available for healthcare recipients in this population due to their immigration status. Some children may not become wards of the state and would not have access to any state-funded

healthcare. The average cost of hospitalization for a child in Oregon is $9,370. Oregon bears the entire cost of providing healthcare and/or emergency-related care to children separated from their families.

247. **California.** ORR places more unaccompanied minors with resident sponsors in California than any other State in the country. For FY 2017, ORR placed 6,268 children with California resident sponsors. As of April 30, 2018, California has already received 2,807 unaccompanied children during this fiscal year. *See* Ex. 88.

248. In California, any child, including children who have been separated from their parents, is entitled to a free public education. Per pupil expenditures in 2017-18 exceeded $14,000 per child from all fund sources. Of this total, over 91% came from state and local resources. California has also dedicated educational funds to meeting the needs of unaccompanied immigrant children.

249. In California, undocumented children receive healthcare coverage paid for entirely by the State. *See* Cal. Welf. & Inst. Code § 14007.8. These children are also eligible for and benefit from other state funded public health programs.

250. Children separated from their parents because of the Policy may require determinations by California courts in order to obtain a guardianship or a predicate order enabling the child to apply for Special Immigrant Juvenile Status. *See* Cal. Prob. Code § 1514; Cal. Civ. Proc. Code § 155.

251. The federal government has already placed a number of children separated from their parents pursuant to the Policy at nonprofit facilities in California, including facilities that also serve children in the State child welfare system. In California, both state and county

personnel license and approve homes and facilities for the placement of vulnerable children. Community Care Licensing (CCL) is the division within the California Department of Social Services that has regulatory oversight of the residential facilities for children in California, and is responsible for the health, safety, and welfare of children in out-of-home care facilities, including those facilities who have contacts with ORR to house unaccompanied immigrant children in California. In its role, CCL has three main functions: prevention, compliance, and enforcement.

252. California's Refugee Programs Bureau is part of the Immigration and Refugee Programs Branch of the California Department of Social Services (CDSS). This Bureau provides assistance to newly arrived refugees to support long term social and economic integration. In FY 2017, at least 12,058 refugees arrived in the state of California, and received assistance from the State in the form of nutrition aid, cash assistance, employment services, immigration legal services, medical services, and educational support. The Bureau administers the Unaccompanied Refugee Minors (URM) Program, the Refugee School Impact Grant (RSIG), and the California Newcomer Education and Well-Being (CalNEW), three programs exclusively for minors. The URM provides foster care, case management, mental health, and medical services to certain unaccompanied minors. Through RSIG and CalNEW, the RPB funds programs in schools to provide supplementary educational and social adjustment support services including academic, English-language acquisition, and mental and well-being supports. The CalNEW is funded exclusively by the State. Combined, these programs help ensure that immigrants coming to California are prepared to be full participants in California society and culture, and that they are able to thrive in their new surroundings.

253. California's Immigration Services Unit is also a part of the Immigration and Refugee Programs Branch of the CDSS. The California Legislature has authorized this program to provide assistance to "persons residing in, or formerly residing in, California," including "[s]ervices to obtain . . . immigration remedies." Cal. Welf. & Inst. Code § 13303(b)(1)(B). The program awards funding to California-based legal services organizations to assist in the representation of undocumented immigrants in their immigration proceedings, including targeted funding for unaccompanied undocumented minors present in California after release from the care and custody of ORR pursuant to Cal. Welf. & Inst. Code § 13300. The State has invested $12,000,000 in services for unaccompanied minors since State FY 2014-2015. Legal services providers have provided representation to 2,147 minors.

254. **New Jersey.** ORR released a total of 2,268 Unaccompanied Children (UAC) to sponsors in New Jersey in FY 2017 (October 2016 September 2017), and an additional 1,053 between October 2017 and April 2018. *See* https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state. This is more than any other state except Virginia, Texas, New York, Maryland, Florida and California.

255. **Rhode Island.** In Rhode Island, all children regardless of immigration status are entitled to free public education. Rhode Island has over 300 public schools that serve over 142,000 children. Per-pupil expenditures for 2013-14 were more than $15,000 per child. The majority of these funds come from state and local funding resources. As forcible separation from a parent renders public schooling more difficult and expensive for Rhode Island, Rhode Island

will experience harm. *See* InfoWorks! Rhode Island Education Data Reporting, Rhode Island Public Schools, available at http://infoworks.ride.ri.gov/state/ri.

256. **Vermont.** In Vermont, all children, regardless of immigration status, are entitled to a free public education. On average, Vermont spends over $18,000 per pupil each year. *See* Vermont Agency of Education, *Per Pupil Spending: FY 2017 Report* (2018), available at http://education.vermont.gov/documents/data-per-pupil-spending-fy2017, attached hereto as Ex. 98.

257. Many immigrant children are also eligible to receive free or low-cost health care through Vermont's children's health insurance program, known as Dr. Dynasaur. *See generally* Vt. Health Benefits Eligibility and Enrollment Rules §§ 2.03(b), 7.02(b), 7.03(a)(3), 17.02, 17.03, available at http://humanservices.vermont.gov/on-line-rules/hbee/hbee-all-parts-1-8-adopted-with-toc.pdf. The program includes mental health services, which may face increased demand in cases of family separation.

258. Since 2014, ORR has placed four unaccompanied minors in Vermont. *See* Ex. 88. However, the Policy has seen increasingly large numbers of children scattered across the nation, often in conditions of secrecy. *See* Exs. 23 & 25.

259. Vermont's responsibility to protect the welfare of all children living in the State includes those children who are separated from their parents and moved to Vermont pursuant to the Policy. That responsibility includes, when appropriate, commencing juvenile judicial proceedings and incurring significant costs to ensure that children are receiving safe and adequate care. *See generally* 33 V.S.A. §§ 5102, 5103, and 5116.

260. The Policy's negative impact upon immigrants also threatens Vermont's economic interests. For example, in 2014, immigrant households paid $57.9 million in state and local taxes. Of that amount, undocumented immigrants paid an estimated $2.9 million in state and local taxes that year. Immigrants also greatly contributed to the economy with over $462.5 million in spending power. *See The Contributions of New Americans in Vermont,* New American Economy (2016), available at https://research.newamericaneconomy.org/report/the-contributions-of-new-americans-in-vermont/, attached hereto as Ex. 99. *Undocumented Immigrants' State & Local Tax Contributions, Institute of Tax and Public Policy* (2017), available at https://itep.org/undocumented-immigrants-state-local-tax-contributions-2/, attached hereto as Ex. 100.

261. **Minnesota.** For FY 2017, the last year for which complete data are available, ORR placed over 300 children with Minnesota resident sponsors. As of April 30, 2018, ORR's available data show that Minnesota has already received 164 unaccompanied children during this fiscal year. *See* Ex. 88.

262. In Minnesota, any child, including children who have been separated from their parents, is eligible to a free public education. On average, per pupil expenditures for the current fiscal year is $12,251 per child. Of this total, approximately 96% comes from state and local resources. If, as may be expected, an immigrant child requires services through the English Learners program, the state funds an additional $700 or $950 per child. Children in Minnesota may also require special education, mental health services, and other programs delivered within the school district. Unaccompanied children, including those who are separated from their parents, may also receive child care assistance in certain settings.

263. In addition, unaccompanied children residing in Minnesota, including those who are separated from their parents, are also eligible to receive health care through Minnesota's Emergency Medical Assistance program and support through the Women, Infants, and Children program. They may also receive services through the state's child protection system.

264. Unaccompanied children in Minnesota, including those who are separated from their parents, may also be involved in state court proceedings related to the unaccompanied child's immigration status or the child's sponsor's legal authority.

265. **Iowa.** Likewise, since 2014, ORR has placed 980 unaccompanied children with sponsors in Iowa. *See* Ex. 93.

266. In Iowa, all children regardless of immigration status are entitled to a free public education. On average, per pupil expenditures amounted to nearly $13,000 in federal FY2015. *See* Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2014-15 (Fiscal Year 2015) *available at* https://nces.ed.gov/pubs2018/2018301.pdf, attached hereto as Ex. 101. Of this total, 93% came from state and local funding sources, with 53% coming from the state alone. *Id.*

267. **Illinois.** Illinois's commitment to supporting its immigrant communities is also evidenced by certain state expenditures.

268. In FY 2018, for example, the Illinois Department of Human Services (DHS) was appropriated approximately $13,779,400 for various refugee and immigration services. These funds came from General Revenue Funds and other state funds. *See* Pub. Act 100-21, at 15, 450 (2017), *available at* http://ilga.gov/legislation/publicacts/100/PDF/100-0021.pdf, attached hereto as Ex. 102. In FY 2019, DHS, the Illinois Office of the Secretary of State, and the Illinois

Department of Public Health were appropriated approximately $37,477,900 for various refugee and immigration services. *See* Pub. Act 100-586, at 335, 343 44, 402 03, 433 (2018), *available at* http://ilga.gov/legislation/publicacts/100/PDF/100-0586.pdf, attached hereto as Ex. 103.

269. Services provided by DHS through the Bureau of Refugee and Immigrant Services include helping newly arrived refugees achieve self-sufficiency in the United States and providing outreach and interpretation services to low-income and limited English-proficient individuals requiring supportive services." See *Refugee & Immigrant Services*, ILL. DEP'T OF HUMAN SERVS., *available at* http://www.dhs.state.il.us/page.aspx?item=30363 (last visited June 22, 2018), and attached hereto as Ex. 104.

270. Similarly, within the Illinois Department of Children and Family Services (DCFS) exists the Office of the DCFS Guardian. This Guardian serves as the legal parent of every child in the custody of DCFS, "monitor[ing] and mak[ing] critical decisions based on the child's best interests regarding major medical treatment, … and all other decisions requiring parental consent." *See* ILL. DEP'T OF CHILDREN & FAMILY SERVS., BUDGET BRIEFING FY 2019, at 34 (2018), https://www2.illinois.gov/dcfs/aboutus/newsandreports/Documents/FY19_Budget Briefing.pdf, attached hereto as Ex. 105. To that end, the DCFS Guardian, with assistance from the DCFS Special Counsel and the Immigration Services Unit, acquires adjustment of legal status for foreign-born youth who are under its guardianship. *Id.*

271. Children reunited with a family member residing in Illinois will likely be entitled to access certain state-funded programs. This is also true for children currently sheltered outside of Illinois who are later reunited with a family member residing in Illinois.

272. For example, every child residing in Illinois, including children who have been separated from their parents, is entitled to a free public education. In school year 2015 16, Illinois per-pupil expenditures exceed $12,900 per child. Of this total, over 92% comes from state and local resources. *See* ILL. STATE BD. OF EDUC., ILLINOIS STATE REPORT CARD 3 (2017), http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=2017StateReport_E.pdf, attached hereto as Ex. 106.

273. Moreover, separated children enrolled in Illinois schools may receive bilingual support services through Transitional Bilingual Education (TBE) Programs and/or Transitional Programs of Instruction (TPI). These programs help English Learners achieve academically, and provide classroom and other forms of support. In FY 2018 and FY 2019, Illinois appropriated approximately $65,540,700 and $48,600,000, respectively to support bilingual education programs in Illinois school districts. *See* Pub. Act 100-21, at 636 37 (Ex. 102); Pub. Act 100-586, at 491 (Ex. 104). Currently, Illinois school districts receive funding on a per-pupil allocation by level of service ranging from $304 758 per pupil. *See* ILL. STATE BD. OF EDUC., FISCAL YEAR 2018 PROPOSED BUDGET 14, 58 (2017), *available at* https://www.isbe.net/Documents/fy2018-budget-book.pdf, attached hereto as Ex. 107. Children who are reunited with family members located in Illinois who attend Illinois schools are likely to receive such services as English Learners.

274. As well, each child who qualifies is entitled to receive free breakfast and lunch pursuant to the Illinois Free Lunch and Breakfast Program, 105 ILCS 125/1. Through this program, the Illinois State Board of Education reimburses all public schools, nonprofit private schools, and residential child care institutions that provided breakfast and lunch to children who

meet the income-level guidelines. In FY 2018 and FY 2019, the Board of Education received $9,000,000 in state funding to provide reimbursements. *See* Pub. Act 100-21, at 435, 634 35 (Ex. 102); *See* Pub. Act. 100-587, at 39, 450 (2018), *available at* http://ilga.gov/legislation/publicacts/100/PDF/100-0587.pdf, attached hereto as Ex. 108. Heartland Alliance is a participant in the Free Lunch and Breakfast Program and receives reimbursement from the State of Illinois for breakfasts and lunches provided to unaccompanied children in Illinois.

275. Separated children may also be eligible for healthcare programs that are partially or fully funded by the State of Illinois, including Medicaid. In FY 2014, for example, Illinois spent an average of approximately $2,108 per Medicaid-eligible child. *See* Medicaid Spending Per Enrollee (Full or Partial Benefit), KAISER FAMILY FOUND., https://www.kff.org/medicaid/state-indicator/medicaid-spending-per-enrollee/ (last visited June 22, 2018).

276. In addition, children who have been separated from their parents may access state courts in Illinois in order to obtain Special Immigrant Juvenile Status (SIJS). In order to petition the U.S. Customs and Immigration Services for a SIJS, a child must first obtain an order from a state court finding that it is not in the child's best interests to return to her home country or to the country she last lived in, and that the child cannot be reunited with a parent because of abuse, abandonment, or neglect. As additional children are brought to Illinois as a result of Defendants' child separation policy, Illinois courts will see an increase in the number of orders being sought.

277. **New York.** In FY 2017, ORR placed 3,938 children with New York resident sponsors. ORR placed another 1,577 UACs with New York resident sponsors from October 2017

through April 30, 2018. *See* Unaccompanied Alien Children Released to Sponsors by State, available at Ex. 88.

278. Once a UAC is placed with a sponsor who resides in New York State, the child is entitled to a variety of services funded by the state, including educational services, early intervention services, and access to healthcare, among others. New York State makes these services available to such children in support of the State's interest in ensuring the health, safety, and well-being of all residents.

279. New York State will incur expenses to educate UACs placed within the state because under state law, children ages six through sixteen who reside in New York must attend school and are entitled to attend school up until age twenty-one. Moreover, the IDEA requires the state to provide special education services to students with learning or emotional disabilities. Under this federal law, children aged three to twenty-one are entitled to special education services when clinically warranted. 20 U.S.C. § 1411. New York State law also entitles qualified students to English Language Learner (ELL) services. N.Y. Comp. Codes R. & Regs. Tit. 8, § 154. There are 692 public school districts in New York that serve approximately 2.6 million students. While costs will vary depending on the school district's location and the child's needs, the statewide average to educate a student in New York is approximately $22,000 per year.

280. New York State also provides a robust early intervention program which UACs utilize when placed in New York State communities. The Part C Early Intervention Program (EIP) was created by Congress in 1986 as part of the IDEA. The IDEA authorizes the discretionary EIP for infants and toddlers with disabilities and requires states to provide a free

appropriate education for all students with disabilities, ages three to twenty-one. 20 U.S.C. §§ 1411, 1419. Each year, New York's EIP serves over 60,000 children ages zero to three who have moderate to severe developmental delays. The EIP includes 1,279 providers that contract with New York State to bill for EI services. Total annual expenditures for New York's EIP total more than $644 million across all payers 45% is covered by Medicaid, 2% by commercial insurance, 26% by state funds, and 27% by county funds. While EIP costs and services vary based on the child's needs and the intensity of services offered, for the 2017 program year the average cost of services delivered ranged from $5,820 to $22,000 per child.

281. New York State also incurs significant medical expenses for each UAC placed in state. UACs who are placed with sponsors in the community are eligible to enroll in the Children's Health Insurance Program (CHIP) operated by New York's Office of Health Insurance Programs. The yearly cost of CHIP per child is $2,607.36 and is financed exclusively by New York State.

282. An influx of UACs also carries with it increased costs for the New York State child welfare system. After a UAC is placed with a sponsor in the community, that placement may be disrupted for a number of reasons. If the child becomes at risk of entering foster care for example, because of allegations of abuse or neglect by the person now legally responsible for the child the child welfare system will provide preventive services to attempt to keep the child safely in the new home; such services are funded, in part, by New York State. If those services are unsuccessful and the child must be removed from the new home, New York State will also partly fund the child's placement and needed services while in the foster system.

283. **Maryland**. For FY 2017, the last year for which complete data are available, ORR placed almost 3,000 children with Maryland resident sponsors the fifth most of any state. As of April 30, 2018, ORR's available data show that Maryland has already received 901 unaccompanied children during this fiscal year. *See* Ex. 88. Maryland is one of the states that is receiving children separated from their parents under the Trump Administration's "zero tolerance" policy. *See* Theresa Vargas, "*I will kiss their boo-boos" Foster Families provide small comforts* (June 22, 2018), attached hereto as Ex. 109; *I really miss my mom*: *What becomes of a 5-year-old in Maryland and the other separated children now?*, The Washington Post (June 21, 2018) available at https://www.washingtonpost.com/local/i-really-miss-my-mom-what-becomes-of-a-5-year-old-in-maryland-and-other-the-separated-children-now/2018/06/21/28afbd54-759d-11e8-9780-b1dd6a09b549 story.html?utm term=.383bb9cc8a01, attached hereto as Ex. 110; "Bethany Continues to Work to Reunify Families Separated at the Border," *available at* https://www.bethany.org/campaigns/refugee, attached hereto as Ex. 111.

284. The Office of Licensing and Monitoring within Maryland's Department of Human Services licenses several organizations that operate shelters at which unaccompanied children including children separated from their parents under the federal government's policy are being placed. At least one such organization receiving children in Maryland is under contract with ORR to provide services for unaccompanied immigrant minors, including children separated from their parents under the policy.

285. As the separated children are placed in foster homes, many will enter the Maryland's public school system. Maryland's 24 public school districts served nearly 900,000

students during the 2016-17 school year. Per pupil expenditures for 2016-17 were over $13,000 per child. Of this total, approximately 95% of school funding came from state and local resources. For the 2016-17 school year, state and local spending for basic education totaled over $12 billion, with nearly $5 billion allocated to general instructional expenditures. *See* Selected Financial Data Maryland Public Schools 2016-2017 *available at* http://marylandpublicschools.org/about/Documents/DBS/SFD/2016-2017/SFD20162017Part3.pdf., attached hereto as Ex. 112.

286. **Virginia**. More than one hundred traumatized, unaccompanied alien children have been transported and are being housed at federal detention centers in Virginia. More than a dozen of those children were separated from their parents at the southern border. *See* Nick Anderson and Marissa J. Lang, *Sen. Tim Kaine tours Virginia shelter housing about 15 separated migrant children,* the Washington Post (June 22, 2018) *available at* https://www.washingtonpost.com/local/immigration/sen-tim-kaine-tours-virginia-shelter-housing-about-15-separated-migrant-children/2018/06/22/7bc1e8f2-763b-11e8-b4b7-308400242c2e_story.html?utm_term=.5be4b43f307c, attached hereto as Ex. 113.

287. ORR reports that they have placed hundreds of unaccompanied alien children with sponsors in the Commonwealth of Virginia every year. For FY 2017, the last year for which complete data are available, ORR placed 2,888 children with Virginia resident sponsors. As of April 30, 2018, ORR's available data show that Virginia has already received 931 unaccompanied alien children during this fiscal year. *See* Ex. 88.

288. Under federal law, states and local educational agencies are obligated to provide all children regardless of immigration status with equal access to public education at the

elementary and secondary level. This includes unaccompanied alien children who may be involved in immigration proceedings. Once these children are released to a sponsor, they have a right to enroll in Virginia schools regardless of their immigration status. In Virginia, some of these unaccompanied alien children under 18 will be classified as homeless under applicable state and federal law. See Va. Code Ann. § 22.1-3. Virginia school divisions are required to immediately enroll homeless students. The Virginia Department of Education provides the state share, and the enrolling local school division is responsible for paying the local share of the cost for educating students enrolled in public schools at a total per pupil statewide average expenditure in excess of $10,000.

289. Unaccompanied alien children may seek a variety of health services in Virginia. For example, they need childhood immunizations and may seek testing and treatment when they present with symptoms of a communicable disease. In Virginia, school divisions are required to help any child classified as homeless obtain necessary physical examinations and immunizations. Va. Code § 22.1-271.2. Moreover, if an unaccompanied alien child needed to be hospitalized for emergency care, including psychiatric care, then Virginia would provide and bear the cost of that care in part by absorption of costs by state-owned hospitals.

290. ORR places hundreds of unaccompanied minors with sponsors in the State of North Carolina every year. For FY 2017, ORR placed approximately 1,290 children with North Carolina-resident sponsors. As of April 30, 2018, ORR's available data show that North Carolina has already received 565 unaccompanied children during this fiscal year. *See* Ex. 88.

291. **North Carolina**. The State of North Carolina has 11 State Refugee and Health Coordinators that are coordinated and organized through the State's Department of Health and

Human Services Refugee Services program. North Carolina's Refugee Services program integrates federal funding from ORR with other federal and state funding. The program services thousands of refugees across the State of North Carolina.

292. **District of Columbia.** ORR places hundreds of unaccompanied minors with sponsors in the District of Columbia every year. For FY 2017, the last year for which complete data are available, ORR placed almost 300 children with District of Columbia resident sponsors. As of April 30, 2018, ORR's available data show that the District of Columbia has already received more than 80 unaccompanied children during this fiscal year. *See* Ex. 88.

293. In the District of Columbia, any child, including children who have been separated from their parents, is entitled to a free public education. The District spends almost $10,000 per child in D.C Public Schools. The overwhelming share of the money spent on public education in the District comes from local taxes, fees, and resources. *See, e.g.*, https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DCOCFO_FY17_Budget_vol_3.pdf.

294. The District of Columbia offers comprehensive health insurance coverage to eligible children who have been separated from their parents through the Immigrant Children's Program, which provides coverage equal to that offered by Medicaid, including: doctor visits, immunizations, mental health services, dental, vision, and prescription drugs. *See* Department of Health Care Finance DHCF Immigrant Children's Program *available at* https://dhcf.dc.gov/service/immigrant-childrens-program, attached hereto as Ex. 114.

L. Defendants' Policy Harms the States' Quasi-Sovereign Interests

295. States have a quasi-sovereign interest in protecting the health, safety, and well-being of their residents, including protecting their residents from harms to their physical, psychological, emotional, or economic health. The States' interests in preventing and remedying injuries to the public's health, safety, and well-being extends to all of their residents who will be harmed by the Policy. The Policy has caused and will continue to cause severe and immediate harm to the States' residents, including parents who are detained, released, or otherwise reside in the States after being forcibly separated from their children; children who are placed in facilities, shelters, homes or otherwise reside in the States after being separated from their parents; extended families and sponsors in the States; and the States' immigrant communities.

296. The States also have an interest in ensuring that their residents are not excluded from the rights and privileges provided by the U.S. Constitution, international laws, federal laws, and state laws. These rights include due process and equal protection rights afforded to alien parents and their minor children, and rights and protections under federal asylum and refugee laws, international human rights laws, and state laws.

297. The Policy causes measurable harm to existing immigrant communities in the States. A 2018 study published in the *Journal of Adolescent Health* finds that recent changes in U.S. immigration policy that appear to target Latino immigrants have triggered serious psychological distress for many resident Latino parents, including those living in the United States legally. A substantial proportion of U.S. Latino parents reported adverse emotional and behavioral consequences from recent immigration actions and news. For example, 66% said that they very often or always worry about family members getting separated. Nearly 40% of parents

said they frequently avoided getting medical care, help from police, or support from social service agencies because of reports about immigration actions. Parents who frequently experienced worries or changes in behavior due to immigration news and policies had at least a 250% increase in the odds of experiencing high psychological distress, including clinical anxiety and depression. The association between U.S. immigration actions and psychological distress in this study held true after controlling for education, residency status, gender and other factors.

298. Many of the States have resident Latino and Hispanic populations that are affected by the Policy and attendant distress. For example, as of 2010, 10.2 percent of the total population of Washington State was of Hispanic origin, with some counties over 45%. Indeed, roughly one in seven Washington residents is an immigrant, while one in eight residents is a native-born U.S. citizen with at least one immigrant parent. The other States also have resident Latino and Hispanic communities who are impacted by the Policy, as well.

299. Indeed, the States are already acting to try to protect the health, safety, and well-being of persons separated and harmed by the Policy. As a result of the Policy, thousands of immigrant parents and children are being separated and moved to a range of facilities or homes in the States or being released to live in the States. Transfer of these separated immigrant parents and children into the States will continue into the future as long as Defendants' Policy remains in place. *See* Exs. 55, 8, 21. In May 2018 alone, DHS took nearly 51,912 immigrants into custody, nearly three times the number detained in May 2017. Ex. 55. The number of families apprehended at the Southwestern border increased by 435% in May 2018 in comparison to May 2017. Ex. 8. The States have an interest in protecting those immigrants who are resident, or will soon settle, in their jurisdictions.

300. Traumatized immigrant parents and children are already present in the States' shelters and in federal detention centers in the States. On June 7, 2018, ICE spokeswoman Danielle Bennett confirmed that because of "implementation of the U.S. Department of Justice's zero-tolerance Policy . . . ICE has entered into inter-agency agreements with [the Bureau of Prisons (BOP)] to acquire access to more than 1,600 additional beds at [five] BOP facilities." These include 220 beds at the Federal Detention Center SeaTac in Seattle, Washington; 130 beds in Sheridan, Oregon; and 1,000 beds at the Federal Correctional Institution Victorville Medium Security Prison in Victorville, California. *See* Robert Moore, Immigration Officials Taking Over 1,600 Beds in Federal Prison System, Texas Monthly (June 8, 2018) available at https://www.texasmonthly.com/news/immigration-officials-taking-1600-beds-federal-prison-system/, attached hereto as Ex. 115.

301. Defendants' Policy causes severe and lasting psychological and emotional harm to immigrant parents in Washington who have been separated from their children. For example, of the approximately 200 immigrants detained in Seattle as of June 19, 2018, 174 were women, and dozens of those women were mothers who had been forcibly separated from their children, whose ages range from one-year-old to teenagers. *See* Jayapal Goes Inside Federal Detention Center to Meet with Asylum Seeking Women: "the mothers could not stop crying" (June 9, 2018), *available at* https://jayapal.house.gov/media/press-releases/jayapal-goes-inside-federal-detention-center-meet-asylum-seeking-women-0, attached hereto as Ex. 116. Many were asylum seekers from Latin American countries. *Id.* Most had been in detention for more than two weeks and many for over a month. *Id.* A majority of the mothers have not spoken with their

children in weeks, and Defendants had not provided the mothers with any information regarding the whereabouts or well-being of their children. *Id.*

302. These women described the horrific and inhumane conditions at the Border Patrol facilities where they were previously detained, including fenced cages; lack of blankets and mats notwithstanding frigid temperatures; and lack of access to food and water. *Id.* Some suffered verbal abuse from border agents who called them "filthy" and "stinky." *Id.* And they endured further intentionally inflicted trauma when agents told them their "families would not exist anymore" and that they would "never see their children again." *Id.*

303. The specific stories of two immigrant mothers who are being detained in Seattle confirm this horrifying experience. These two mothers crossed the border in Texas, immediately turned themselves in, and were taken to a holding facility. The mothers were each separated from their daughters upon arrival and held in a facility they describe as similar to a dog kennel. The following week, the mothers appeared in federal court, were charged with illegal entry, found guilty, and served time in Texas. After approximately three weeks, the mothers were flown to SeaTac, where they remain in prison without their daughters.

304. A growing number of children separated from their parents pursuant to Defendants' Policy have been placed in facilities in Washington. These children have suffered severe psychological and emotional trauma.

305. Similarly, a Brazilian woman who recently arrived in Massachusetts presented herself for asylum at the U.S.-Mexico border and was detained and then separated from her 8-year-old son. Immigration authorities determined that she has a credible fear of persecution if she is returned to Brazil, so she has since been released pending adjudication of her asylum

claim. As of June 22, 2018, she had not, however, been reunited with her son, who remains in a facility in Chicago, where he hasn't been able to see his mother for almost a month. *See* Akilah Johnson, *A Brazilian Mother Seeking Asylum Was Freed from Detention. Her son was not.* The Boston Globe (June 22, 2018) *available at* https://www.bostonglobe.com/news/nation/2018/06/22/brazilian-mother-seeking-asylum-was-freed-from-detention-her-son-was-not/kIYT1F4fHTsHxdkfmHh73I/story.html, attached hereto as Ex. 117.

306. In Massachusetts, two Guatemalan children were recently released to their father, a Massachusetts resident, after being separated from their mother, with whom they crossed the border to seek asylum. She is still in detention in Texas. The children were held in facilities in Texas and then Michigan for five weeks until they were released to their father. The young girl, who is 9 years old, has been particularly affected by the experience and still cries for her mother. *See* Mark Sullivan, *Guatemalan in Westboro Sees the Effects of Separation Policy Firsthand,* The Worcester Telegram & Gazette (June 20, 2018) *available at* http://www.telegram.com/news/20180620/guatemalan-in-westboro-sees-effects-of-separation-policy-firsthand, attached hereto as Ex. 118.

307. Defendants' abhorrent and indefensible family-separation Policy has already had an impact on Oregon in a variety of ways, and will continue to do so. There are at least 123 immigrant men detained at the federal prison in Sheridan, Oregon. At least six of these are fathers, from Mexico, Guatemala and Honduras, who have been separated from their children pursuant to the Policy. Oregon's federal lawmakers have been able to visit these detainees, and report that they have been denied access to lawyers and health care and are confined to cells for

up to 22 hours a day. Oregon immigration lawyers also report that they have been repeatedly denied access to detainees. The Mexican Consulate reports that one of the detained men had his newborn infant, only 15 days old, taken from him. Another detainee was separated from his 18-month-old toddler. Another reports his wife is detained in San Antonio, Texas, and he does not know the whereabouts of their 4-year-old child.

308. There are a number of children in Oregon who have been separated from their parents by the defendants' implementation of its Policy, including two children who saw their mother being taken away in chains. At least three others have been separated from their parents at the border pursuant to the Policy.

309. Defendants' unlawful Policy also cruelly affects the wellbeing of Oregon residents, including its immigrant and Hispanic and Latinx populations. For example, a substantial number of Oregon residents are survivors of the Japanese-American internment camps of World War II, or family members of such survivors. Many of those survivors and/or family members have experienced significant emotional and psychological distress as a result of the government's family-separation Policy.

310. Similarly, some Oregonians are survivors of Nazi concentration camps. Many of those survivors are also experiencing profound psychological and emotional distress as a result of the federal government's family-separation Policy. For all these Oregon survivors and their families, the Policy echoes the ethnic-based targeting that they experienced in the twentieth century, and causes them to relive the trauma of one of the darkest times in history. Many survivors are also profoundly afraid for the safety of minority communities targeted by the current Administration.

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311. Defendants' Policy similarly harms immigrant parents and children in California who have been separated by federal immigration officials. For example, at least 50-60 children are being served in group homes and family homes approved by foster family agencies in California as a result of Defendants' Policy.

312. Additionally, parents, including asylum-seekers, who have been separated from their children are being housed at facilities throughout Southern California. There is a particularly large number of immigration detainees being held at the Victorville facility, but unlike the SeaTac facility, attorneys have been denied access to determine how many of those individuals are parents.

313. Several asylum-seeker parents who arrived at a port of entry with a migrant caravan in April 2018 were separated from their children. While their children have been placed by ORR in facilities across the nation, the parents are being detained in other immigration detention facilities in California. Parents are not provided with information about their children's whereabouts or how to locate them. As a result, parents have been unable to locate or communicate with their children, are not receiving regular in-person visitation or phone contact with their children, and have not been told if or when their families will be reunified.

314. Likewise, New Mexico has a right to ensure that no one within its border is excluded from the rights and privileges provided by the U.S. Constitution, international, federal or state law. State resources are used without statutory authority if used in furtherance of unconstitutional federal policies contravening the purposes of New Mexico's constitution and laws. There is well documented evidence to suggest that these interests are currently being infringed upon with the boundaries of the State of New Mexico.

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315. The federal Office of Refugee Resettlement reported that 15 Unaccompanied Children (UAC) taken into custody in New Mexico were released to U.S. sponsors between October 2017 and April 2018, but those children were not released to caregivers licensed by the State of New Mexico. One Brazilian grandmother held at the Santa Teresa border crossing in New Mexico was separated from her 16-year-old ward almost a year ago. The child, who has severe epilepsy, neurological problems and is autistic, was placed in Connecticut. *See* Angela Kocherga, *Zero-tolerance policy impacts New Mexico,* Albuquerque Journal June 20, 2018, page 4 (citing Maria Vandelice de Pastos' attorney Eduardo Beckett), *available at* https://www.abqjournal.com/1186875/zerotolerance-policy-impacts-new-mexico.html, attached hereto as Ex. 119.

316. Approximately fifty mothers, some with valid claims for asylum have had their children separated from them at border crossings and are being held in a private jail in Otero County, New Mexico. One of the Mothers details health issues her child faces and that she is completely unaware of where he is or whether his health needs are being addressed. *See* Jonathan Blitzer, "Mothers in a New Mexico Prison Do Not Know How to Find Their Children," New Yorker Magazine (June 21, 2018) *available at* https://www.newyorker.com/news/dispatch/mothers-in-a-new-mexico-prison-do-not-know-how-to-find-their-children, attached hereto as Ex. 120.

317. New Mexico also has an interest in ensuring that New Mexico citizens continue to be afforded their rights to cross the U.S.-Mexico border unmolested. Because many New Mexico families visit their relatives in Mexico and because these families traditionally visit with

their own children in tow, such New Mexico citizens face the potential of separation in derogation of their rights to travel and to maintain their familial ties.

318. Because there is direct evidence of harm to these families, occurring within the borders of New Mexico, the state has a distinct interest in ensuring that no violations of law occur. This notion is grounded in general principles of federalism, and are distinctly the obligations of the state in ensuring that its constitution and laws are upheld. This interstitial framework is well grounded in law and is the underpinning of our system of government.

319. Fathers who were forcibly separated from their children at the border are currently being detained at the Elizabeth Detention Center in Elizabeth, New Jersey. *See* Brenda Flanagan, *At Detention Center Rally, Family Reunification Left in Question*, NJTV News June 22, 2018, clip *available at* https://www.njtvonline.org/news/video/at-detention-center-rally-family-reunification-left-in-question/.

320. In addition, children who were forcibly separated from their parents at the border have been placed at the Center for Family Services in Camden, New Jersey, which contracts with ORR to provide shelter to children who crossed the border. *See* Kelly Heyboer and Erin Banco, *20 Immigrant Children Have Arrived in N.J. in the Last 30 Days. Here's What We Know*, NJ Advance Media for NJ.com, Updated June 22, 2018 at 12:24PM, https://www.nj.com/news/index.ssf/2018/06/are_immigrant_kids_being_held_in_nj_heres_how_trum.html, attached hereto as Ex. 121.

321. Defendants' Policy causes severe and potentially permanent emotional and psychological trauma to children in Rhode Island who have been separated from their parents pursuant to Defendants' Policy. Unaccompanied Alien Children are released to sponsors in

Rhode Island by the Office of Refugee Resettlement of the United States Department of Health and Human Services each year. For example in FY 2017, 234 total Unaccompanied Minor Child were released in Rhode Island and thus far in FY 2018 that total already stands at 129. These children have suffered severe psychological and emotional trauma. *See*. Unaccompanied Alien Children Released to Sponsors by State (June 30, 2017) Ex. 88.

322. In Vermont, reports are emerging that federal authorities' animus toward Latino migrants is taking a psychological and medical toll on migrant workers essential to Vermont's dairy industry and economy. *See* J. Dillon, *For Undocumented Workers On Vermont Farms, 2017 Was A Year Filled With Anxiety*, Vermont Public Radio (January 5, 2018), (public health screening of migrant workers found 80% exhibiting elevated levels of stress), available at http://digital.vpr.net/post/undocumented-workers-vermont-farms-2017-was-year-filled-anxiety#stream/0, attached hereto as Ex. 122. The Policy will likely increase the strain on an already vulnerable population.

323. Children who have been forcibly separated from their parents at the border have already arrived in Minnesota and other children who have been separated from their parents are likely to come to Minnesota in the future.

324. For example, an 8 year-old girl experienced the most "traumatic moment of her life" when she was forcibly separated from her father at the U.S.-Mexico border. *See* Chris Serres and Mary Lynn Smith, the Star Tribune (June 23, 2018) *available at* http://www.startribune.com/migrant-children-separated-from-parents-start-to-arrive-in-minnesota/486365431/, attached hereto as Ex. 123. The father "begged the officer to be able to stay with his child. He was crying. She was crying." *Id.* After they were separated, her father

was deported to Guatemala. The girl remains in Minnesota, but wants to be reunited with her family.

325. As one lawyer who represents unaccompanied minors in Minnesota explained, "[s]o many of these children, they just want their parents. They really, really, really want to be reunited with their families." *Id.*

326. Illinois has also received children affected by the Policy. As of June 22, 2018, approximately 66 minor children, who have been separated from their parents or guardians and are awaiting immigration proceedings, are currently under the care of Heartland Alliance. Currently, Heartland is housing these separated children in the cities of Chicago and Des Plaines.

327. Heartland is endeavoring to reunite the 66 separated children with family members in the United States. Certain of these children will likely remain in Illinois, given the fact that 1,568 unaccompanied minors were released to sponsors located in Illinois between October 2014 and April 2018. *See* Ex. 88.

328. New York State relies on the same agencies that the federal ORR relies on for provision of foster care services. ORR currently contracts with eleven provider agencies in New York State to care for UACs, including those children whom Defendants have separated from their parents: Abbott House; Catholic Family Center; Catholic Guardian Services; Cayuga Home for Children; Children's Home of Kingston; Children's Village; Jewish Child Care Association of New York; Rising Ground (formerly Leake and Watts Services); Lincoln Hall; Lutheran Social Services of New York; and MercyFirst. These agencies either run residential congregate care programs that house the children or place the children with family or sponsors in the community, or do both. These agencies also provide residential care and placement services for

children who enter New York's child welfare system because they are abandoned, abused, neglected, delinquent or dependent children. OCFS has confirmed that at least 321 children who have been separated from their parents at the Southwestern border are currently in the care of one of these eleven agencies and thus residing in New York State. Since the State was unable to obtain this information from HHS or ORR, OCFS undertook efforts to create a census of separated children in New York State. Specifically, OCFS's Acting Commissioner issued a directive to the agencies to confirm the total number of UACs in their care. Upon receipt of that information, OCFS staff verbally verified with each voluntary agency how many of those children were in fact separated from their families at the border. To accomplish this, OCFS staff took a hiatus from their regular duties and, in a single day, physically went to each of the 11 agencies to review records and interview children in order to obtain a current head count. ORR has still not confirmed this number or shared data regarding how many children have already come through these voluntary agencies, or how many it plans to send to these voluntary agencies in the future.

329. Staff at one voluntary agency have informed local government officials that the ages of most children newly placed at their agency, many of whom were separated from family at the border, are between four and twelve. The youngest child so far was a nine-month-old baby, in addition to multiple not-yet-verbal toddlers.

330. The children whom Defendants have separated from their parents and sent to New York are suffering extreme trauma. For example, a South American boy who was separated from his father at the Mexican border was rushed to the hospital because he was about to jump out of the second-story window of the group home where he was sent in early June after being forcibly

separated from his family. The distraught child verbalized that he wanted to jump because he missed his parents. Twelve other young immigrant children who were separated from their parents at the border have been treated for physical and mental illnesses at New York City hospitals. One child was suicidal and others were treated for depression and anxiety. *See* Jillian Jorgensen, *City hospitals have treated 12 immigrant children who were taken from parents, including a suicidal child*, N.Y. Daily News (June 21, 2018) *available at* http://www.nydailynews.com/news/politics/ny-pol-immigrant-children-treated-20180621-story.html, attached hereto as Ex. 124.

331. New York State has a quasi-sovereign interest in the health, safety and well-being of all children within its borders, and Defendant's separation policy directly undermines that interest by causing severe trauma to these children. New York State goes to great lengths to provide significant due process protections for both parents and children when families are separated as a result of government action. When a child is placed in foster care in New York, state statutes and regulations afford both the parent and the child a range of rights, including the right of visitation. Indeed, the child's *family* service plan must include a plan for regular visitation between the parents and child. N.Y. Soc. Serv. Law § 409-e; N.Y. Comp. Codes R. & Regs. Tit. 18 § 428.3. *See also* N.Y. Fam. Ct. Act § 1030(a) (providing that a parent has a right of regular and reasonable visitation with a child in foster care unless otherwise prohibited by court order). This right of regular visitation is afforded even when one or both parents is incarcerated in a prison or jail. In that situation, the child welfare agency must make suitable arrangements with the correctional facility for a parent to visit with the child, unless the visiting would be harmful to the child. 11 OCFS ADM 07. Moreover, parents who are incarcerated are

entitled to participate in the planning for their child in foster care by participating in family court proceedings and periodic family service plan reviews. *See* N.Y. Comp. Codes R. & Regs. Tit. 18 § 428.9. To protect these vital rights, state law provides that the parent of a child in foster care has a right to assigned counsel by the court where such parent is financially unable to obtain one. N.Y. Family Court Act § 26. Such rules are premised on the importance of the parent-child bond, and the parent's critical, indispensable role in assuring that the needs of his or her child are met. Here, by contrast, the parents and children whom Defendants have separated at the border are afforded no visitation procedure and have no process to recognize or protect their rights. Due to Defendant's illegal policy, the separated children who are currently residing in New York are being treated differently than other children in foster care in the State, to their great detriment and in direct contravention of the state's interest in ensuring the health, safety, and well-being of all its residents.

332. Upon information and belief, family members of separated children currently reside in New York State. An HHS spokesman stated that "[t]here's an effort to place [children who were separated at the border] as closely as possible to where they're going to be eventually reunified with a sponsor or a family member" and that if a child was placed in New York it usually means that there is a family member residing in the state who is a possible placement option for the child. *See* Tal Kopan, *Why some children have been sent to states far away from the US border*, CNN (June 22, 2018) *available at* https://www.cnn.com/politics/live-news/immigration-border-children-separation/h_714fd2e091af7813fb8df5fc587c7b8b, attached hereto as Ex. 125. New York has a quasi-sovereign interest in ensuring that children

residing in New York State, who have been separated from their parents, are placed with family members also residing in the State if the children cannot be quickly reunified with their parents.

333. **Maryland** has an interest in the health, safety, and wellbeing of all its residents, including any parents or children being placed in Maryland under the Policy. Immigration agents are reported to have sent dozens of children to Maryland during the implementation of the Trump Administration's family separation policy. The children often have no family connection to the state; they are sent here because the system has capacity. Some of the children have been placed with foster families coordinated by care organizations, while others are placed in residential group child care.

334. Immigration officials are sending separated children to Maryland without the most basic information about the children or their parents, or how to connect them with one another. And many of the children have come with little or no information and are too young as young as 18 months to communicate with caregivers or social workers trying to track down relatives who could take them in. Thus, the sheltering organizations that are housing the children do not know how to identify, let alone locate, the children's parents, who risk deportation before they can find or be reunited with their children.

335. Care organizations report that children who have been separated from their parents suffer greater trauma than other unaccompanied minors whom the organizations care for. For some of these children, their suffering is immediately apparent, as has been shown in publicly available videos and other recordings. For others, their suffering emerges over time, as they become more comfortable with the staff of the care organizations. And when those organizations can track down a parent and arrange for a call with his or her child, the children

are reportedly so upset afterwards that they need counseling. *See* Andrea K. McDaniels, *Border separations could have traumatic impact on children, doctors say*, The Balt. Sun (June 22, 2018) at A9, *available at* http://www.baltimoresun.com/health/bs-hs-border-separation-trauma-20180621-story.html, attached hereto as Ex. 126; Ian Duncan, ", The Balt. Sun, June 21, 2018, at A1, available at http://www.baltimoresun.com/news/maryland/bs-md-border-separations-20180620-story.html, attached hereto as Ex. 127.

336. Parents who have been separated from their children are also being sent to Maryland and detained in local facilities that contract with ICE to hold detainees, mostly pending criminal process. Anne Arundel, Frederick, Howard, and Worcester counties have all agreed to hold immigration detainees, and the Anne Arundel Detention Center is reportedly holding at least two parents who have been separated from their children under the Trump Administration's policy. *See* Ex. 127. In addition, Maryland is the location of a Federal Correctional Institution and the Chesapeake Detention Facility where, by contract, the federal government houses federal pre-trial detainees, which might be affected by ICE's policy of housing separated parents in federal detention facilities. Parents held in Maryland have little contact with their children and no information about where they are being held. One was reportedly separated from his five-year-old daughter by force and has not had any contact with, or information about, her in the two months since. *See* Patricia Sullivan, *Md., Va. congressmen hear stories of family separation*, the Washington Post (June 21, 2018) at B4, *available at* https://www.washingtonpost.com/local/immigration/md-va-congressmen-hear-stories-of-family-separation/2018/06/20/af3fe0ae-74aa-11e8-b4b7-308400242c2e story.html?noredirect=on&utm term=.fa6d5bb19919, attached hereto as Ex. 128.

337. In other respects, as well, ORR is using facilities in Maryland to facilitate the Administration's family separation policy without providing the transparency that would allow Maryland to ensure the safety and security of its residents, including the parents and children who have been separated from one another under the policy. ORR has provided no information about the care and circumstances of immigrant children detained within Maryland's borders where they are being held; what condition they are in; where their parents are; whether they have adequate food, clothing and shelter; whether they have access to medical care and legal representation; or when and how they will be reunited with their families.

338. Children separated from their families as a result of Defendants' actions have been sent to organizations in **Pennsylvania**. For instance, 50 child immigrants separated from their families are being housed at the Holy Family Institute in Emsworth, Pennsylvania, a Catholic social services organization that is under contract with Defendant ORR. *See* Paula Reed Ward and Ashley Murray, *Child migrants separated from families housed at Holy Family Institute in Emsworth,* Pittsburg Post-Gazette (June 17, 2018) *available at* http://www.post-gazette.com/news/faith-religion/2018/06/17/Child-migrants-separated-from-families-being-housed-at-Holy-Family-Institute/stories/201806160074, attached hereto as Ex. 129. The children, who range in age from 4 to 17, are from Honduras, Guatemala, El Salvador, and other countries. Other child immigrants separated from their parents as a result of Defendants' actions have been placed with a shelter in Pennsylvania's Lehigh Valley. *See* Laura Benshoff, *As Trump ends family separation policy*, *children removed from their parents are already in Pa.*, (June 21, 2018), *available at* https://whyy.org/segments/as-trump-ends-family-separation-policy-children-removed-from-their-parents-are-already-in-pa/, attached hereto as Ex. 130.

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339. The **District of Columbia** places an emphasis on preserving families and reunifying families even when children become involved with the state due to child abuse or neglect. *See* D.C. Code § 4-1303.03(a)(11) and (a)(13). The District of Columbia follows the United States Supreme Court's holdings that there is "a presumption that fit parents act in the best interests of their children," *Troxel v. Granville*, 530 U.S. 57, 68, (2000), and recognition that the state may not "inject itself into the private realm of the family" absent a finding of unfitness. Id. at 68 69. The Court has frequently emphasized the importance of the family, and has held that individuals have a fundamental right to parent their own children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This important relationship may not be terminated without a predicate determination, by clear and convincing evidence that the individual is unfit to parent. *Santosky v. Kramer*, 455 U.S. 745 760, 768 71 (1982).

340. The District of Columbia also prohibits discrimination based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, or political affiliation, source of income, status as a victim of an intrafamily offense, and place of residence or business of any individual. D.C. Code § 2-1401.01.

341. Defendants' Policy causes severe and potentially permanent emotional and psychological trauma to children who have been separated from their parents, some of whom are placed with sponsors in the District of Columbia. The number of children placed with sponsors in the District will increase as the sponsors are identified and vetted, and approved to receive these children.

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V. CAUSES OF ACTION

Count I: Violation of Fifth Amendment – Substantive Due Process

342. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

343. State residents who are parents have a fundamental liberty interest in the care, custody, and control of their children. This includes current state residents and those who may arrive in the States following separation pursuant to Defendants' Policy.

344. State residents who are minors have a reciprocal liberty interest in their parents' care. This includes current state residents and those who may arrive in the States following separation pursuant to Defendants' Policy.

345. State residents who are minors have a right to be free of unreasonable risk of harm, including trauma from separation and detention, as well as the risk of harm from housing them in unlicensed facilities.

346. Defendants' Policy offends the Due Process Clause by separating parents from their children without any showing that the parent is unfit or is otherwise endangering the child.

347. Defendants' violation causes ongoing harm to the States and their residents.

Count II: Violation of Fifth Amendment – Procedural Due Process

348. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

349. The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving individuals of their liberty interests without due process of law.

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350. Defendants' Policy deprives the States' residents of a fundamental liberty interest with no hearing whatsoever. This includes current state residents and those who will arrive in the States following separation pursuant to Defendants' Policy.

351. Defendants have violated the procedural due process guarantees of the Fifth Amendment.

352. Defendants' violation causes ongoing harm to the States and their residents.

Count III: Violation of Fifth Amendment – Equal Protection

353. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

354. The Due Process Clause of the Fifth Amendment prohibits the federal government from denying equal protection of the laws.

355. The Policy burdens a fundamental right and targets individuals for discriminatory treatment based on their nationality or ethnicity, without lawful justification, and is therefore not narrowly tailored to achieve a compelling governmental interest. The Policy is also unconstitutional because it disparately impacts immigrants from Latin America arriving at the Southwestern border and is motivated by animus and a desire to harm this particular group.

356. Alternatively, the discriminatory terms and application of the Policy are arbitrary and do not bear a rational relationship to a legitimate federal interest.

357. Through their actions above, Defendants have violated the equal protection guarantee of the Fifth Amendment.

358. Defendants' violation causes ongoing harm to the States and their residents.

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Count IV: Violation of the Administrative Procedure Act

359. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

360. The Administrative Procedure Act, 5 U.S.C. § 706(2), prohibits federal agency action that is arbitrary, unconstitutional, and contrary to statute.

361. Defendants' Policy constitutes final agency action for purposes of the Administrative Procedure Act.

362. Defendants have offered no legitimate basis for their Policy.

363. Defendants' Policy is arbitrary and capricious because it conflicts with various laws requiring Defendants and the States to consider the best interests and well-being of children arriving to the United States.

364. The Policy is not authorized or required by the TVPRA, which only applies to unaccompanied minors. The minors subject to Defendants' Policy are not "unaccompanied," as they are accompanied by a parent or guardian. Indeed, in a White House Press Release, dated October 8, 2017, Defendants released a "detailed outline of President Trump's immigration principles and policies" which states Defendants' agreement that "alien minors [] are not UACs [if they are] accompanied by a parent or legal guardian." *See* Immigration Principles & Policies, *available at* http://www.aila.org/infonet/wh-immigration-principles-and-policies, attached hereto as Ex. 131.

365. Further, as alleged herein, the separation Policy contravenes the spirit and purpose of the TVPRA, which seeks to protect children. In general, the TVPRA requires,

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whenever possible, family reunification or other appropriate placement for unaccompanied alien children. *See* 8 U.S.C. § 1232(c)(2)(A).

366. In implementing the Policy, federal agencies have taken or will take unconstitutional and unlawful action, as alleged herein, in violation of the Administrative Procedure Act.

367. In implementing the Policy, federal agencies have applied or will apply provisions arbitrarily, in violation of the Administrative Procedure Act.

368. Defendants' violation causes ongoing harm to the State and its residents.

Count V: Violation of Asylum Laws

369. Under United States law, noncitizens with a well-founded fear of persecution shall have the opportunity to obtain asylum in the United States. 8 U.S.C. § 1158 ("[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section."). Federal law also prohibits the return of a noncitizen to a country where he may face torture or persecution. *See* 8 U.S.C. § 1231(b); United Nations Convention Against Torture (CAT), implemented in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

370. In enacting these statutes, Congress created a right to petition our government for asylum that at the very least requires that asylum seekers be able to present themselves at ports of entry to request asylum. Defendants are preventing asylum-seekers from presenting themselves at ports of entry that are allegedly "full," thus preventing asylum claims from being heard, in violation of 8 U.S.C. § 1158.

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371. Another effect of turning asylum-seekers away prior to their reaching a port of entry is that the immigrants are then forced to cross the border outside a port of entry, in a claimed violation of 8 U.S.C. § 1325, in order to present their asylum claim. But under the Policy, all such border-crossing violations are referred to the Department of Justice and prosecuted. By criminalizing the pursuit of asylum, this Policy runs counter to established immigration and refugee laws that allow a person to present themselves to immigration officials to request asylum wherever they are able.

VI. PRAYER FOR RELIEF

Plaintiffs request that the Court enter a judgment against Defendants and award the following relief:

a. Enjoin Defendants from refusing to accept applications for asylum at a valid port of entry, and from criminally charging asylum applicants with illegal entry or re-entry if they present themselves at a valid port of entry;

b. Declare Defendants' family separation Policy unauthorized by or contrary to the Constitution and laws of the United States;

c. Enjoin Defendants from enforcing the family separation Policy, including at all United States borders and ports of entry, pending further orders from this Court;

d. Order Defendants to expeditiously reunite all children with parents from whom they have been separated pursuant to the Policy, unless a court of competent jurisdiction has found the parents to be unfit;

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e. Enjoin Defendants from conditioning family reunification on an agreement not to petition for asylum or other relief available under the INA, or on an agreement to withdraw a petition or other request for that relief;

f. Enjoin Defendants from removing separated parents from the United States without their children, unless the parent affirmatively, knowingly, and voluntarily waives the right to reunification before removal after consultation with an attorney;

g. Enjoin Defendants from placing children in unlicensed facilities;

h. Order Defendants to provide specific information to parents who are lawfully separated from their children about the nature and purpose of the separation, the process by which they can be reunified, and the whereabouts of their children at all times, absent a finding by a court of competent jurisdiction that such information would be dangerous to a child's welfare;

i. Award such additional relief as the interests of justice may require.

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Respectfully submitted this 26th day of June, 2018.

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Pro Hac Vice motions forthcoming for all counsel of record not barred in the Western District of Washington.

June 20, 2018

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

Dear Attorney General Jeff Sessions,

The Department of Homeland Security's decision to implement substantial changes to immigration policies, which include a coordinated effort to separate children from parents fleeing war-torn countries, is an amoral affront to our country's founding values.

These policies are mean-spirited and cruel, and as Mayors of three of California's largest cities, we will never support irresponsible anti-immigrant policies that target families and innocent children, jeopardize public safety and perpetuate trauma conditions in our nation.

The recent federal policies on border enforcement have separated 2,000 children from their families, including hundreds under the age of four. It is absolutely inhumane to implement these strategies without any support on reunifications or sponsorship programs.

We have been informed by the Office of Inspector General and Government Accountability Office of horror stories where pregnant women are being detained and are losing their unborn children due to thirst and mistreatment in detention centers. Children should not become the pawns to showcase and suffer from ineffective deterrence methods. The American Academy of Pediatrics noted these policies cause "irreparable harm" and we must stop this coldhearted and insensitive treatment to children.

We urge you to immediately end immigration policies impacting children at our neighboring Mexican border as these abhorrent strategies separate families, heartlessly remove children from their parents and do nothing to address recent immigration patterns. Under federal law, all children in the U.S. are entitled to basic protections to thrive and remain healthy, regardless of immigration status.

San Francisco, Oakland and San Jose are committed to serving all immigrants, both newcomers and longtime residents, and especially children seeking refuge. We will demonstrate the ideals that this nation and city were built on—justice, dignity and compassion for all. We are committed to making the Bay Area and the rest of our country a welcoming and safe place for all.

Sincerely,

Mark Farrell
Mayor
City and County of San Francisco

London Breed
Mayor-Elect
City and County of San Francisco

Sam T. Liccardo
Mayor
City of San José

Libby Schaaf
Mayor
City of Oakland

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June 28, 2018

The Honorable Alex M. Azar, II
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The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
300 7th Street SW
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The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
Robert F. Kennedy Department of Justice Building
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Washington, DC 20530

Dear Secretary Azar, Secretary DeVos, Secretary Nielsen, and Attorney General Sessions:

We write seeking information on the oversight mechanisms and processes of the U.S. Departments of Health and Human Services (HHS), Education (ED), Homeland Security (DHS) and Justice (DOJ) to ensure the provision of educational, health, and other services to unaccompanied alien children (hereafter referred to as "unaccompanied minors"), as required by federal law, Supreme Court precedent, and the 1997 settlement Flores v. Sessions, CV 85-4544 ('Flores settlement').

The Trump Administration's "zero tolerance" immigration policy that separated children from their parents upon entry to the United States, including those seeking asylum, has resulted in thousands of children who are now "unaccompanied" by virtue of forced separation, including infants and toddlers. Mounting evidence and conflicting statements from administration officials raise serious concerns regarding the administration's capacity and willingness to ensure compliance with all applicable requirements regarding the rights, remedies, and services for these children while in the custody of care provider facilities (CPFs) under contract or cooperative agreement with HHS' Office of Refugee Resettlement (ORR). Unanswered questions remain about the health and safety of these separated children, including trauma caused by family separation, the provision of general and special education services, and the process for family reunification.

The President issued an Executive Order on June 20th purported to halt these practices. However, the Order is silent on reunification for children presently in ORR's custody; calls for the modification of the Flores settlement, which could result in the detention of holding children well beyond the 20-day limit; and, does not address the ongoing questions regarding the health and safety of detained children. As such, this Executive Order has the effect of replacing one avoidable and manufactured crisis with another.

To that end, we look forward to receipt of the administration's written responses by the close of business on Friday, July 6th. In the interim, we urge you to swiftly reunify unaccompanied children who are currently in the care of the U.S. government with their parents or family members.

Oversight of Tender-Age Facilities

Media reports have detailed that hundreds of very young children, including toddlers and infants, are being detained in CPFs, referred to as "tender age" facilities.[1] The Department of Defense has also reportedly agreed to house migrant children at military bases.[2]

1. Please list the specific guidance and/or regulations the federal government is following to ensure the health and safety of infants and toddlers detained in tender age facilities. Please indicate whether any aforementioned guidance and/or regulations were developed for or are approved for the long-term and indefinite care of toddlers and infants.
2. Please detail the training that is provided to tender age facility personnel, including the tools and skills provided to facility personnel in order to meet the health and safety needs of infants and toddlers.
3. What is the administration's process for ongoing evaluation, oversight, and monitoring of these facilities to ensure compliance with all relevant child welfare and health and safety standards?
4. Is HHS currently housing, or does it intend to house, infants and toddlers at military sites?

Trauma and Health Services for Unaccompanied Minors

Forced family separation causes additional trauma to unaccompanied minors. Studies show that the trauma of separation "interrupts the brain's architecture at a critical time of development, when neural circuits … are forming rapidly … in infants and toddlers."[3] According to the American Academy of Pediatrics and other child welfare organizations, "forced separation disrupts the parent-child relationship and puts children at increased risk for both physical and mental illness" and is recognized to a "precursor of negative health outcomes later in life," including "psychological distress, anxiety, and depression" that impacts children even after

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[1] MarketWatch, *Trump administration holding hundreds of babies, toddlers at 'tender age' migrant facilities*, (Jun. 19, 2018) https://www.marketwatch.com/story/trump-administration-holding-hundreds-of-babies-toddlers-at-tender-age-migrant-facilities-2018-06-19

[2] The Washington Post, *Pentagon will make room for up to 20,000 migrant children on military bases*, (June 21, 2018) https://www.washingtonpost.com/news/checkpoint/wp/2018/06/21/pentagon-asked-to-make-room-for-20000-migrant-children-on-military-bases/?noredirect=on&utm_term=.88d807ed75c2

[3] PBS, *How the toxic stress of family separation can harm a child*, (Jun. 18. 2018) https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child

eventual reunification.[4] As you know, the Flores settlement requires CPFs to assess for and address youth trauma.[5] It further requires CPFs to provide "appropriate routine medical and dental care…including a complete medical examination (including screenings for infectious disease) within 48 hours of admission."[6]

1. What services are available to children who have experienced or are experiencing trauma?
2. Please detail the training that is provided to facility personnel regarding youth trauma, including the tools and skills provided to personnel to address the psychological trauma resulting from forced family separation.
3. Please indicate any training or tools provided to specifically address trauma in infants and toddlers.
4. What is the process for assessing, evaluating, and meeting the health care needs of unaccompanied minors, including the provision of essential vaccinations and prescriptions, identification of chronic and acute conditions, and assessments of general well-being? How are the health care needs of unaccompanied minors being met at CPFs?

Safety of Unaccompanied Minors at CPFs

According to federal court filings, Shiloh Treatment Center, a CPF south of Houston, Texas, is alleged to have forcibly injected unaccompanied children with medications that CPF personnel described as "vitamins."[7] Shiloh Treatment Center is one of more than seventy companies that receive federal funds to operate as a CPF to house and supervise children deemed unaccompanied. According to an investigation by the Center for Investigative Reporting, roughly half of the nearly $3.5 billion federal dollars paid to such companies in the last four years went to CFPs facing "serious allegations of mistreating children."[8]

1. What is ORR's process for reviewing contracts and cooperative agreements with companies operating CPFs that have been accused of mistreatment?
2. Is DOJ presently investigating any allegations of child abuse or mistreatment in facilities operated by companies under contract or cooperative agreement with ORR?
3. What specific policies or guidelines has ORR established regarding the provision of health care services to unaccompanied minors? Please list and detail the oversight processes ORR has in place to ensure that contracted companies operating CPFs are providing high quality health care services for each unaccompanied minor.

Educational Needs of Unaccompanied Minors

The Flores settlement requires CPFs to conduct an educational assessment of each unaccompanied minor within 72 hours of the child's admission. CPFs are then required to provide "educational services based on the individual academic development, literacy level, and

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[4] Letter to Secretary Nielsen (Jan. 16, 2018) https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5a5e55cf0d9297a44bbb8d3e/1516131791958/2018_01_16+Child+Welfare+Juvenile+Justice+Opposition+to+Parent+Child+Separation+Plan.pdf

[5] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 3*, (Published Apr. 20, 2015) https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3

[6] *id.*

[7] Federal Court Filings; Shiloh Treatment Center https://www.documentcloud.org/documents/4525292-420-2-Exhibit-Vol-2-Exs-21-30-Pages-109-73.html

[8] The Center for Investigative Reporting, *Migrant children sent to shelters with histories of abuse allegations,* (Jun. 20, 2018) https://www.revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/

linguistic ability" of each unaccompanied minor.[9] Current ORR policy specifies that each unaccompanied minor must (1) receive "a minimum of six hours of structured education, Monday through Friday, throughout the entire year in basic academic areas (Science, Social Studies, Math, Reading, Writing, Physical Education, and English as a Second Language (ESL), if applicable);" and, (2) receive educational services using learning materials that "reflect cultural diversity and sensitivity," among other requirements.[10]

1. What is the administration's process to ensure that every unaccompanied minor at a CPF receives –
    a. an educational assessment within 72 hours of admission to a CPF; and
    b. the required educational services, including provision of the required learning materials, while detained in ORR custody?
2. What is ORR's process for evaluation, monitoring, and oversight of required educational services, including curriculum, content, and instruction, provided to unaccompanied minors while in custody to ensure equality of services and appropriateness of services for each unaccompanied minors' individualized needs, including his or her native language?
3. What are the credentials and educational experience of the individuals providing educational services to unaccompanied minors in CPFs or in DHS custody? Please detail the recruitment and selection of these educators and the educational experience required.
4. In the event of indefinite family detention in DHS custody, what are the processes in place to ensure timely assessment and delivery of educational services for each unaccompanied minor? What is DHS's oversight process to ensure quality of assessments and related services?

Unaccompanied Minors with Disabilities

Media reports have also found that unaccompanied minors with disabilities have been forcibly separated from their families. One report includes a grandparent who was separated from her grandson, a child with disabilities, after making an asylum claim made at an official Port of Entry.[11] This presents new challenges for CPFs, which, even prior to this policy, often failed to identify unaccompanied minors with disabilities, such as Down syndrome or autism spectrum disorders. These incidences also raise new concerns about CPFs' compliance with applicable federal law and regulations governing the rights, remedies, and special education services for children with disabilities.

1. Are you aware that each state in receipt of funds under the Individuals with Disabilities Education Act (IDEA) must comply with statutory requirements to locate, identify, and evaluate all children with disabilities located within the state, including unaccompanied minors? As such, what is the coordination between ORR, IDEA Part C Lead Agencies, IDEA primary referral sources, and state and local educational agencies to ensure compliance with the IDEA Child Find mandate[12] to identify, locate, and evaluate all

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[9] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 3*, (Published Apr. 20, 2015) https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3

[10] *id.*

[11] Texas Tribune, *A grandmother seeking asylum was separated from her disabled grandson at the border. It's been 10 months*, (Jun. 13, 2018) https://www.texastribune.org/2018/06/13/immigrant-child-asylum-disabilities-separated-grandmother-border/

[12] 20 U.S.C. § 1412(a)(1)(3)

children with disabilities (including unaccompanied minors) who need early intervention or special education services under the IDEA?

2. Federal law requires parental consent prior to a child's disability evaluation[13] and parental involvement in development of each child's individualized educational plan (IEP)[14] to determine the special education services provided. What is the process by which ORR obtains parental consent prior to evaluations for IDEA services?
3. What training is provided to CPF personnel, including personnel working with infants and toddlers, regarding –
    a. assessment and placement of unaccompanied minors with disabilities in the appropriate setting; and
    b. the provision of special education services aligned to the individualized educational needs of each unaccompanied child requiring provision of such services?
4. If families are detained in DHS custody as a result of the Executive Order, what processes are in place to ensure compliance with all IDEA requirements for identification, evaluation, and provision of special education services for unaccompanied minors with disabilities?

Family Reunification

Forced family separation raises questions about the government's capacity to reunify all parents and children. Because adults are processed through detention and deportation proceedings at a faster rate than children, there is great concern for the possible permanent familial separation in instances where a parent is deported while the child remains in the United States.[15] While the Flores settlement calls for the placement of unaccompanied minors with foster families or licensed child-care facilities after a short time, the Executive Order directs the Attorney General to "file a request with the U.S. District Court for the Central District of California to modify the Settlement Agreement in the Flores settlement in a manner that would permit the Secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings." According to news reports, on June 22, 2018, HHS formed a family reunification task force to include the HHS Assistant Secretary of Preparedness and Response and HHS' Emergency Management Group.[16] Additionally, a June 26th preliminary injunction requires nearly all children under five to be returned to their parents within 14 days and older children to be returned within 30 days.[17] In light of these developments, a clear and comprehensive unification plan must be developed and promptly implemented.

1. Please list the membership of this task force including agencies, offices, and officials; task force objectives; and the resources available for use by the task force.

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[13] 20. U.S.C. § 1414(a)(1)(D); 20 U.S.C. § 1436(e)
[14] 20. U.S.C. § 1414(d)(1)(B)(i)
[15] NBC, *Former ICE Director: Some migrant family separations are permanent*, (Jun. 19, 2018) https://www.nbcnews.com/storyline/immigration-border-crisis/former-ice-director-some-migrant-family-separations-are-permanent-n884391
[16] Politico, *HHS creates task force to reunify migrant families*, (Jun. 22, 2018) https://www.politico.com/story/2018/06/22/separated-families-migrants-reunite-667172
[17] CNN, *Federal judge orders reunification of parents and children, end to most family separations at border,* (June 27, 2018) https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html

2. How will this task force achieve family reunification of parents and their children, particularly within the timeframe required by the preliminary injunction? Specifically, how will the task force address family separations where a parent has been deported, but the child has remained in the U.S.?
3. With the announcement of the Executive Order and June 26th Court Order, what is the administration's plan for unaccompanied minors who are in ORR custody beyond 20 days, in violation of the Flores settlement?
4. What process will the administration employ to determine "fitness" as the term is used in the June 26th Court Order to ensure that such reading is congruent with child welfare best practices and not used as a loophole to continue detention of unaccompanied minors separate from their parents?
5. According to ORR's case processing and placement guidelines,[18] children under age 13 and sibling groups with one sibling under age 13 are given priority for transitional foster care placements. What is ORR's process to ensure all young children (including children who are not yet verbal and children too young to know identifying details, such as a parent's name or address) who are placed into foster care receive sufficient documentation to allow for successful family reunification?

We thank you for your immediate attention to these questions and look forward to your prompt and detailed response by close of business on Friday, July 6th.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

SUZANNE BONAMICI
Vice Ranking Member

SUSAN A. DAVIS
Member of Congress

RAUL M. GRIJALVA
Member of Congress

JOE COURTNEY
Member of Congress

MARCIA L. FUDGE
Member of Congress

[18] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1*, (Published Jan. 30, 2015) https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1

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(VICE RANKING MEMBER)

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

SUBCOMMITTEE ON INFORMATION TECHNOLOGY

SUBCOMMITTEE ON THE INTERIOR, ENERGY AND ENVIRONMENT

COMMITTEE ON HOUSE ADMINISTRATION

June 18, 2018

Attorney General Jefferson B. Sessions, III
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Secretary Kirstjen Nielsen
United States Department of Homeland Security
3801 Nebraska Avenue, N.W.
Washington, D.C. 20528

Dear Attorney General Sessions and Secretary Nielsen,

I urge you to rescind the now-infamous practice of separating children from their parents at the border which follows from your "zero tolerance" policy of criminally prosecuting every affected adult, including those who have arrived at lawful ports of entry with valid asylum claims. The assertion that you have no choice in the matter is demonstrably false.

Under the rules of prosecutorial discretion, you are not compelled in any way to prosecute everyone who crosses the border, much less to tear apart families in the process. You have thus replaced a policy favoring keeping families together "as long as operationally possible" with a policy of immediate and indefinite separation of children from their parents.[1] This is shocking.

The policy of promoting what constitutes bureaucratic child abuse[2] is putatively to deter illegal immigration, but the practice of breaking up families not only violates American legal norms but bedrock principles of international law, thus inflaming the civilized nations of the world against us.

The U.S. Supreme Court recognized in *Troxel v. Granville* (2000) that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[3] This understanding makes your policy a massive assault on Due Process.

Your policy clearly contradicts the United Nations Convention on the Rights of the Child, which obligates the governments of the world to "ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review" determine that "such separation is necessary for the best interests of the child."[4] The office of the U.N. High Commissioner for Human Rights has called for an immediate halt to your policy, noting that there is "nothing normal about detaining children."[5] Your "zero tolerance" policy also violates the 1951 Convention Relating to the Status of Refugees and the subsequent 1967 Protocols, which clearly prohibit the criminal prosecution of refugees when they are "coming directly from a territory where their life of freedom was threatened."[6]

Under your "zero tolerance" policy, the number of migrant children taken from adults claiming to be their parents has increased exponentially.[7] So has the number of children placed in shelters that are already reaching capacity[8] and the Administration is planning to erect "tent cities" to shelter the increasing number of unaccompanied children being held in detention.[9]

The stories of family separation—forcibly wrenching the children out of their parent's arms or deceptively telling parents that the children are leaving to be bathed but are actually never returned—stir up terrible memories and arouse the nations of the world against us.[10]

Again, I urge you to immediately rescind this cruel policy of forced family separation. Additionally, in an effort to better understand the scope and consequences of your policy, I request that you provide answers to the following questions no later than June 30, 2018:

1. How many children have been separated from their families since January 1, 2017? Please provide this data broken down by month, include the children's ages and indicate whether they were separated from their parents after presenting at a point of entry or elsewhere.
2. How many children have been detained separate from their families at DHS-maintained facilities? How many children were not released to the Department of Health and Human Services (HHS) custody after 72 hours? For both questions, please include ages of the children and length of detention at each facility.
3. How is DHS providing information to parents and children who have been separated as to each other's whereabouts? What actions are being taken to facilitate communication between separated family members? What actions are being taken to ensure that family members are able to jointly file for relief?
4. What actions are DHS and the Department of Justice (DOJ) taking to coordinate with HHS to identify family separation and facilitate release and reunification?
5. Have DHS and DOJ considered any alternatives to family separation that would minimize or avoid prolonged and expensive separations during the processing period for adults facing prosecution?
6. Has any office in DHS or DOJ undertaken any investigations related to the mistreatment of separated families seeking asylum? If yes, when do you expect the results of such investigation to be made public?
7. Is the DHS Office of the Inspector General or any other office conducting any investigations into reported abuses of Customs and Border Protection (CBP) agents turning away asylum seekers at the border through misinformation, coercion, or intimidation? If yes, when do you expect the results of such investigation to be made public?

8. What steps have been taken to implement the provisions of the DHS-HHS February 2016 Memorandum of Agreement regarding transfer of children from DHS custody to HHS's Office of Refugee Settlement (ORR) to ensure consistency in processing, transfer and oversight of these children, to ensure that families can be reunited after detention?
9. For adults who were separated from their minor family members (including siblings, aunts, uncles, and grandparents), how many adults were reunited with their families prior to removal?

Thank you in advance for your attention to this matter and I look forward to your response.

Sincerely,

Jamie Raskin
Member of Congress

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[1] Tal Kopan, *DHS secretary clarifies circumstances for separating immigrant families*, CNN, Apr. 11, 2018, https://www.cnn.com/2018/04/11/politics/dhs-separating-families-immigrants-kirstjen-nielsen/index.html (Statement of DHS Secretary Kirstjen Nielsen, "The standard is to – in every case – is to keep that family together as long as operationally possible.").

[2] Experts have concluded that "even brief detention can cause psychological trauma and induce long-term mental health risks for children" and the American Academy of Pediatrics has found that the care provided for children held in detention centers often does not meet the standards of care outlined by Immigrations and Customs Enforcement. This includes inadequate or inappropriate immunizations, delayed medical care, inadequate educational services, and limited mental health services. Qualitative reports found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and behavioral problems among detained accompanied children in the U.S. Julie M. Linton, MD, et al. *Detention of Immigrant Children*, American Academy of Pediatrics, http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf.

[3] 530 U.S. 57, 65 (2000); *see also, Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. [ ]. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

[4] United Nations Convention on the Rights of the Child (Sept. 2, 1990) (Art. 3 – "In all actions concerning children… the best interests of the child shall be a primary consideration.") (Art. 9 – "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when… such separation is necessary for the best interests of the child.").

[5] Associated Press, *UN office calls on US to stop separating families at the border*, New York Times, June 5, 2018, https://www.nytimes.com/aponline/2018/06/05/world/europe/ap-eu-united-nations-us-migrant-children.html

[6] This Administration has shown no interest in aiding families seeking asylum. It dismantled programs that assist families including the very successful Family Case Management Program (FCMP), which provided a least restrictive alternative to detention for 630 families with young children. Families thrived in FCMP, with 99 percent of participants appearing at ICE check-ins and court dates. Frank Bajak, *Ice shutters helpful family management program amid budget cuts*, The Christian Science Monitor, June 9, 2017, https://www.csmonitor.com/USA/Foreign-Policy/2017/0609/ICE-shutters-helpful-family-management-program-amid-budget-cuts.

[7] Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border,* New York Times, Apr. 20, 2017, https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html. Joshua Breisblatt, *DHS Prosecutes Over 600 Parents in Two-Week Span and Seizes their Children*, American Immigration

Counsel Immigration Impact, May 25, 2018, http://immigrationimpact.com/2018/05/25/dhs-prosecutes-over-600-parents-in-two-week-span-and-seizes-their-children/.

[8] Nick Miroff, *Trump's 'zero tolerance' at the border causing child shelters to fill up fast*, Washington Post, May 29, 2018, https://www.washingtonpost.com/world/national-security/trumps-zero-tolerance-at-the-border-is-causing-child-shelters-to-fill-up-fast/2018/05/29/7aab0ae4-636b-11e8-a69c-b944de66d9e7_story.html?utm_term=.8a290b06fd7a.

[9]Franco Ordonez, *Exclusive: Trump looking to erect tent cities to house unaccompanied children*, McClatchy June 12, 2018 https://www.mcclatchydc.com/news/politics-government/white-house/article213026379.html.

[10] *See* Letter of 8-Non-Profit Organizations, *infra* at fn. 21-22; Fernando Ramirez, *Texas border agents tell migrant moms they'll bath their kids. Instead, they separate them*, Houston Chronicle, June 12, 2018, https://www.chron.com/news/politics/texas/article/Texas-border-patrol-bath-separate-children-ICE-CBP-12984971.php.