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8. Basis of Claims

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

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

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

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

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

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

In early May 2018, E.S.M. and H.S.S. fled their home in Guatemala, where E.S.M. had suffered an attempt on his life and his family had received threats, to seek refuge in the United States. They reached the U.S. border near Lotha YmpE 1 M] .

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

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

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

H.S.S. told his father that he did not want to be separated from him and that he didn't want to leave. As E.S.M. and H.S.S. began crying, E.S.M. tried to comfort his son by telling him that the separation would only be for a short time. The officers instructed E.S.M. and the other parents to pack up their children's belongings. In that moment, E.S.M. fully realized that the officers were going to separate him from his son, and he began panicking. E.S.M. felt his heart rate increase with fear, and H.S.S. began crying even harder. Officers momentarily returned to E.S.M. his backpack, which had been confiscated from him upon his arrival. He was instructed to put H.S.S.'s belongings in a separate plastic bag provided by the officers. E.S.M. began gathering H.S.S.'s belongings and putting them in the plastic b. D

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

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

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

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

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

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

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

From Port Isabel, E.S.M. and H.S.S. traveled together to New York City to attempt to rebuild their lives together. As they traveled to New York, H.S.S. asked his dad many questions about his father's time in detention: if he had been able to sleep well, if the food they gave him was good, and how he would New York

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

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

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

Keeping parents separated from their children with “little or no direct access to basic information about their health or general well-being, *plainly causes irreparable harm.*”⁵ Children attach to their caregiver from the time they are born, and the

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

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

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

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

that level of stress.” (quoting child psychiatrist Dr. Amy Cohen)); Allison Abrams, LCSW-R, *Damage of Separating Families: The Psychological Effects on Children*, PSYCHOL. TODAY (June 22, 2018), <http://tinyurl.com/y844pqsk> (Because a child’s “secure attachment comes from the child’s perceptions of his or her caregiver’s availability (physical accessibility) . . . separations as brief as one week in duration could negatively impact the quality of attachments.”); *id.* (Children who are separated from a parent “develop insecure/disorganized attachment and persisting high levels of stress.”) (quotations omitted).

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

¹³ Moreover, here, the harm caused by the forced separation o ” vh a

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- In February 2017, having noticed a marked uptick in young children separated from parents at the border, a high-ranking HHS official expressed his concerns

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

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

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

²² Policy Options to Respond to Border Surge of Illegal Immigration, <https://assets.documentcloud.org/documents/5688664/Merkleydocs2.pdf>; see Anne Flaherty & Quinn Owen, *Leaked*

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

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

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

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

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

²⁹ *Oversight of the Trump Administra7Who istra7Who* 3

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

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

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

³³ Trafficking Victims Protection Reauthorization Act, 8 U.S.C.A. § 1232(b)(3); see SARAH HERMAN PECK & BEN HARRINGTON, - ? H

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these deficiencies posed “serious safety and health vulnerabilities.”⁴⁰ At one detention center, a staff member was drunk while he was involved with care for separated children.⁴¹ The Justice Department has received reports of unwanted sexual touching, staff members having sexual relationships with children detainees, and staff members showing children pornographic

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

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

11. Witnesses

[REDACTED]

13b. Phone Number of Person Signing the Form

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