

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

D.J.C.V., minor child, and G.C., his father,

Plaintiffs,

v.

United States of America,

Defendant.

No. 1:20-cv-5747

**BRIEF OF *AMICI CURIAE* SIXTEEN ORGANIZATIONS ADVOCATING FOR
ASYLUM SEEKERS IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO
DISMISS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, each *amicus* party states that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of any *amicus*.

Dated: December 22, 2020

/s/ Harrison J. Frahn IV

Harrison J. Frahn IV

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<i>Flores v. Lynch</i> , 828 F.3d 898 (9th Cir. 2016).....	8
<i>Flores v. Sessions</i> , 394 F. Supp. 3d 1041 (C.D. Cal. 2017).....	9
<i>J.S.R. v. Sessions</i> , 330 F. Supp. 3d 731 (D. Conn. 2018)	8, 20
<i>Ms. L v. U.S. Immigration & Customers Enforcement</i> , 310 F. Supp. 3d 1133 (S.D. Cal. 2018)	8, 11, 12, 20
<i>Zabaleta v. Decker</i> , 331 F. Supp. 3d 67, 72 (S.D.N.Y 2018).....	18
REGULATIONS	
E.O. 13841, 83 Fed. Reg. 29435 (June 20, 2018).....	11
OTHER AUTHORITIES	
<i>‘Angel Families’, Trump Aides Rally Against Illegal Crime</i> , FOX NEWS (Sept. 7, 2018), https://www.foxnews.com/politics/angel-families-trump-aids-rally-against-illegal-immigrant-crime	18
<i>America Speaks Out: Stop Trump’s Cruel Treatment of Migrant Children at the Border: Hearing Before the S. Comm. on Democratic Pol’y and Commc’ns.</i> , 116th Congress (2019) (statement of Amy J. Cohen, MD, Physicians for Human Rights).....	8
Anna Flagg, <i>Is There a Connection Between Undocumented Immigrants and Crime?</i> , THE MARSHALL PROJECT (May 13, 2019, 5:00 AM), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime	15
Associated Press, <i>White House Aide Stephen Miller Pushed Racist Immigration Coverage in Leaked Emails</i> , L.A. TIMES (Nov. 12, 2019), https://www.latimes.com/politics/story/2019-11-12/stephen-miller-white-house-racist-immigration-emails	14
Caitlin Dickerson, <i>‘There is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center</i> , N.Y. TIMES (Jun. 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html	9, 10
Camila Domonoske & Richard Gonzalez, <i>What we Know Family Separation and ‘Zero Tolerance’ at the Border</i> , NPR (June 19, 2018),	

<https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> 7

Camila Montoya-Galvez, *How Trump Officials Used CoVID-19 to Shut U.S. Border to Migrant Children*, CBS NEWS (Nov. 2, 2020), <https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19> 16

Camila Montoya-Galvez, *Judge Rules Border Agents Can't Use COVID-19 Order to Expel Migrant Children*, CBS NEWS (Nov. 19, 2020), <https://www.cbsnews.com/news/judge-border-agents-covid-19-order-expel-migrant-kids-immigration/> 16

Clara Long, *Written Testimony: "Kids in Cages: Inhumane Treatment at the Border"* Testimony of Clara Long Before the U.S. House Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, HUMAN RIGHTS WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border#> 9

Coleen Long & Ricardo Alonso-Zaldivar, *Watchdog: Thousands More Children May Have Been Separated*, THE ASSOCIATED PRESS (Jan. 18, 2019), <https://apnews.com/article/c648954057594364b01a38b8d16701ac> 12

Cora Currier, *Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms*, THE INTERCEPT (Sept. 25, 2018), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/> 15

David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C> 16

Donald J. Trump, *President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies*, The White House (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-letter-house-senate-leaders-immigration-principles-policies/> 19

Donald J. Trump, *President Donald J. Trump's State of the Union Address*, The White House (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> 19

Donald J. Trump, *Remarks by President Trump at a Roundtable Discussion on Immigration, Bethpage, NY*, The White House (May 23, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny> 14

Donald J. Trump, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, The White House (Feb. 15, 2019),

<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border> 14

Donald J. Trump, *Statement from the President Regarding Emergency Measures to Address the Border Crisis*, The White House (May 30, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis> 15

Donald Trump (@realDonaldTrump), Twitter (Jun. 24, 2018), <https://twitter.com/realdonaldtrump/status/1010900865602019329?s=21> 14

Donald Trump (@realDonaldTrump), Twitter (Nov. 26, 2018), <https://twitter.com/realdonaldtrump/status/1067015026995879937?s=20> 14

Donald Trump (@realDonaldTrump), Twitter (Oct. 29, 2018), <https://twitter.com/realdonaldtrump/status/1056919064906469376?lang=en> 14

Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), <https://twitter.com/realdonaldtrump/status/1057612657665171457?s=20> 14

Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), <https://twitter.com/realdonaldtrump/status/1057614564639019009?s=20> 14

Ed Pilkington, *Parents of 545 children still not found three years after Trump separation policy*, THE GUARDIAN (October 21, 2020), <https://www.theguardian.com/us-news/2020/oct/21/trump-separation-policy-545-children-parents-still-not-found>..... 13

Hamed Aleaziz, *Border Officials Turned Away Unaccompanied Immigrant Children More than 13,000 Times Under Trump’s Pandemic Policy*, BUZZFEED NEWS (Oct. 28, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/border-officials-turned-away-unaccompanied-immigrants>..... 18

Heim, C., & Nemeroff, C. B. The role of childhood trauma in the neurobiology of mood and anxiety disorders: Preclinical and clinical studies. *BIOLOGICAL PSYCHIATRY*, 49(12), 1023-1039 7

Here’s Donald Trump’s Presidential Announcement Speech, TIME (Jun. 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> 17

Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> (referring to Haiti, El Salvador, and certain African countries). 17

Jacey Fortin, *‘Huddled Masses’ in Statue of Liberty Poem are European, Trump Official Says*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html> 18

James Fredrick, *‘Metering’ At The Border*, NPR (June 29, 2018), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border>..... 18

Jeffrey B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DOJ (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>..... 18

Johayra Bouza, et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (June 20, 2018), available at: <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear> 7

Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> 6, 11, 12

Jonathan Blitzer, *The Activist Effort to Find the Children the Government Took From Their Parents*, THE NEW YORKER (Jul. 13, 2018), <https://www.newyorker.com/news/news-desk/the-activist-effort-to-find-the-children-that-the-government-took-from-their-parents> 12

Jonathan Blitzer, *The Trump Administration’s Sustained Attack on the Rights of Immigrant Children*, THE NEW YORKER (Aug. 22, 2019), <https://www.newyorker.com/news/news-desk/the-trump-administrations-sustained-attack-on-flores-agreement-rights-of-immigrant-children> 19

Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims*, NBC NEWS (Jul. 29, 2019, 4:30 PM), <https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831> (emphasis added)..... 19

Julián Aguilar, *Judge orders Trump administration to stop immediate deportations of unaccompanied immigrant minors*, THE TEX. TRIBUNE (Nov. 18, 2020), <https://www.texastribune.org/2020/11/18/immigration-deportation-minors/> 6, 16

Julie Linton, *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy Congressional Testimony*, AMERICAN ACADEMY OF PEDIATRICS (Feb. 7, 2019) available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Linton%20testimony%20FINAL_1.pdf 8

Michael D. Shear, Katie Benner & Michel S. Schmidt, *‘We Need to Take Away Children,’ No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020)..... 4, 10

Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, SOUTHERN POVERTY LAW CENTER (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>..... 13

Michael T. Light, *Does Undocumented Immigration Increase Violent Crime?*, 56
 CRIMINOLOGY 370, 384 (2018). 15

Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their
 Numbers, Demographics, and Countries of Origin*, IMMIGR. RES. & POL’Y BRIEF, No.
 11, Mar. 4, 2019 15

OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-
 00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE
 (JAN. 17, 2019) available at <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>. 6

Philip Bump, *Here are the Administration Officials Who Have Said That Family
 Separation is Meant as a Deterrent*, WASH. POST (Jun. 19, 2018),
[https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-
 administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/](https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/) 15

PHYSICIANS FOR HUMAN RIGHTS, 2019 ANNUAL REPORT 4 (2019)..... 8

Richard Gonzalez, *DHS Chief Visits U.S.-Mexico Border, Defends Administration’s
 Asylum Rules*, NPR (Nov. 20, 2018), [https://www.npr.org/2018/11/20/669826023/dhs-
 chief-visits-u-s-mexico-border-defends-administrations-asylum-rules](https://www.npr.org/2018/11/20/669826023/dhs-chief-visits-u-s-mexico-border-defends-administrations-asylum-rules) 14

Ted Hesson & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus
 Dominates Campaign*, REUTERS (Aug. 14, 2020), [https://www.reuters.com/article/us-
 usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-
 coronavirus-dominates-campaign-idUSKCN25A18W](https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W) 18

Ted Hesson, *Trump’s Pick for ICE Director: I can Tell Which Migrant Children Will
 become Gang Members by Looking Into Their Eyes*, POLITICO (May 16, 2019, 3:37
 PM), [https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-
 1449570](https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570) 19

Transcript: White House Chief of Staff John Kelly's Interview with NPR, NPR (May 11,
 2018)..... 16

TRUMP ADMIN.’S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS,
 MAJORITY STAFF REPORT, CMTE. ON THE JUDICIARY U.S. H.R. (October 2020),
 available at:
[https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation
 _policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519](https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519)..... passim

U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN:
 AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER
 (Oct. 2018) at 2, available at <https://www.gao.gov/assets/700/694963.pdf>. 5

William Wan, *What Separation from Parents Does to Children: ‘The Effect is
 Catastrophic’*, WASH. POST (June 18, 2018),
<https://www.washingtonpost.com/national/health-science/what-separation-from->

parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.cf5ca597dc72..... 8

INTEREST OF AMICI CURIAE

Amici Curiae are Bet Tzedek; Bronx Defenders; Catholic Charities Community Services, Archdiocese of New York Division of Immigrant and Refugee Services; Catholic Migration Services, Inc.; City Bar Justice Center; The Door; Her Justice; HIAS Pennsylvania; Immigration Justice Corps; Immigration Legal Resources Center; International Refugee Assistance Project, Inc.; LatinoJustice PRLDEF; The Legal Project; The Public Law Center; Safe Passage Project; and UnLocal Inc. (the “*Amici*”).

The *Amici* are non-profit organizations dedicated to ensuring the equitable treatment of immigrants and asylum seekers. They have developed an interest and expertise in the unique issues facing migrants, particularly those from Central America. *Amici* are deeply concerned by Defendant’s multi-faceted attack, of which the Administration’s broader “zero tolerance” immigration stance (the “Family Separation Policy”) was a central part, on this country’s profound legal and moral commitment to principles of asylum law. And if the Family Separation Policy is not recognized for what it truly is—torture and abuse—the *Amici*, all of whom advocate for, or work with, asylum seekers and many of whom focus specifically on asylum claims, will be hamstrung in their ability to ensure that vulnerable refugees have a fair opportunity to seek asylum or other forms of immigration relief. A complete list of the *Amici* and their individual statements of interest are contained in Appendix A hereto.

INTRODUCTION

The *Amici* are non-profit organizations dedicated to ensuring the equitable treatment of immigrants and asylum seekers. They have developed an interest and expertise in the unique issues facing migrants, particularly those from Central America. As the Plaintiffs have well-described, in July 2017, the United States covertly established a pilot initiative in which the U.S. Customs and Border Patrol (“CBP”) was instructed to separate adults and children arriving

together at the U.S.-Mexico border. Aspects of this policy were formalized in 2018 as part of the Administration's broader "zero tolerance" immigration stance (the "Family Separation Policy"). The *Amici* have observed the myriad ways that Defendant—driven by deep-seated animus toward Central and South American immigrants—has sought to limit or foreclose access to the asylum process to these immigrants, including through the implementation of the Family Separation Policy deeply contrary to the United States' commitment to the principles of asylum. The Family Separation Policy has had a severe impact on the lives of thousands of children and parents, who upon reaching the border are torn apart and detained. They wait many months for an opportunity to state their asylum claim—often in deplorable detention facilities—all the while enduring the enormous pain and isolation of being separated from their families.

Our government has not imposed these hardships on asylum seekers because of any legitimate justification or actual danger faced by the children crossing the U.S.-Mexico border. The justifications proffered by Defendant are transparently pre-textual and belied by the stated intentions of top level Trump Administration officials who designed and implemented the Family Separation Policy. The rationale for the implementation of the Family Separation Policy—including the allegedly inherent dangers posed by immigrants and the safety of the children crossing the border—is not supported by Defendant's evidence or the Trump Administration's prior statements, and there is no bona fide effort to reduce crime that can justify such a policy. Rather, the false and fundamentally misguided excuses that Defendant has offered in this litigation for implementing the Family Separation Policy serve only to mask the true motives for this politically driven attempt to render asylum functionally unavailable to anyone attempting to enter through the U.S.-Mexico border: blatant animus toward immigrants,

particularly those from Central and South America, and a desire to deter current and future migrants from seeking asylum in the United States by intentionally tormenting them.

Amici are deeply concerned by Defendant’s multi-faceted attack, of which the Family Separation Policy was a central part, on this country’s profound legal and moral commitment to principles of asylum law. And if the Family Separation Policy is not recognized for what it truly is—torture and abuse—the *Amici*, all of whom advocate for, or work with, asylum seekers and many of whom focus specifically on asylum claims, will be hamstrung in their ability to ensure that vulnerable refugees have a fair opportunity to seek asylum or other forms of immigration relief. By forcibly tearing families apart upon entry to the U.S., the Family Separation Policy devastates and endangers already vulnerable individuals and families fleeing violence in their home countries. The Family Separation Policy promises lasting damage for already-traumatized families and children.

ARGUMENT

I. The Defendant’s Policy of Forcibly Separating Minor Children from Their Caretakers Intentionally Created a Humanitarian Crisis

A. The Family Separation Policy was Formalized and Adopted by Senior U.S. Government Officials

The Family Separation Policy was first conceived shortly after President Trump took office in January 2017. The concept of family separation was raised in February 2017, and in early March, then Secretary of Homeland Security John Kelly confirmed that the Department of Homeland Security (“DHS”) was considering family separation.¹ By July 2017, CBP had instituted a secret pilot program at the El Paso Southwest Border Patrol Sector that resulted in

¹ TRUMP ADMIN.’S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS, MAJORITY STAFF REPORT, CMTE. ON THE JUDICIARY U.S. H.R. 6 (October 2020), available at: https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519 [hereinafter Judiciary Committee Report].

more than 281 family separations in just over four months, and by August the percentage of separated children in ORR custody had climbed a shocking 1,200% since November 16.²

This policy was formalized later in 2017, when ICE staff were instructed to draft memoranda evaluating family separation options and prepare recommendations for a family separation workgroup at DHS.³ The goal and impact of this policy was widely understood. By August 2017, HHS was maintaining, sharing, and updating weekly a document titled the “Separated Child from Parent Tracking spreadsheet”.⁴ And on October 27, 2017, a Border Patrol officer wrote to the U.S. attorney in New Mexico that “[i]t is the hope that this separation will act as a deterrent to parents bringing their children into the harsh circumstances that are present when trying to enter the United States illegally.”⁵

On April 6, 2018, then Attorney General Sessions announced the “Zero Tolerance” policy on the southwest U.S.-Mexico border that mandated prosecution for all adults crossing the border, leaving the treatment of children by prosecutors open to interpretation in the announcement.⁶ But Attorney General Sessions was clear with prosecutors about what the Administration expected, telling prosecutors that “[w]e need to take away children If [they] care about kids, don’t bring them in. [We] [w]on’t give amnesty to people with kids.”⁷ And in a May 3, 2018 meeting with then Secretary of Homeland Security Kirstjen Nielsen, Mr. Sessions’

² *Id.* at 7-8.

³ *Id.* at 10-11.

⁴ *Id.* at 8.

⁵ Michael D. Shear, Katie Benner & Michel S. Schmidt, ‘*We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html>.

⁶ Judiciary Committee Report at 11.

⁷ Michael D. Shear, Katie Benner & Michel S. Schmidt, ‘*We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (quoting prosecutor’s shorthand notes).

prepared talking points indicated he planned to tell her that “an illegal alien should not get a free pass just because he or she crosses the border illegally with a child.”⁸ The separation of children from their parents was a fundamental component of the Zero Tolerance policy from the beginning, and integral to the goals of the Zero Tolerance policy.

B. The Family Separation Policy has resulted in profound harms to the affected families

The Family Separation Policy implemented by Defendants was and is a humanitarian crisis. Through their extensive work with immigrants including asylum seekers such as the Plaintiffs, the *Amici* are very familiar with the difficult and dangerous circumstances that compel people to flee their homes due to violence and persecution. Asylum seekers arrive at the border scared, tired, and in dire need of the protections the asylum laws were so carefully crafted to provide. It is the experience of the *Amici* that asylum seekers who continue to seek asylum at the U.S.-Mexico border are in more dire need than ever before. Many of these asylum seekers have suffered brutal violence, including rape, abuse, assault, murder of friends and family, extortion, and countless other traumatic experiences. They have a profound fear of being forced to return to their home countries, a fear so great that they had no option other than to flee and travel hundreds or thousands of miles to the United States.

However, the implementation and enforcement of a terribly cruel policy to forcibly separate minor children from their asylum-seeking parents and accompanying adults punishes these families for seeking asylum in the United States.⁹ To deter asylum seekers from Central and South American countries, the Trump Administration implemented a policy that did, and

⁸ *Id.*

⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER (Oct. 2018) available at <https://www.gao.gov/assets/700/694963.pdf>.

was intended to, cause a humanitarian crisis at the U.S.-Mexico border.

Through this policy, DHS and related subsidiary agencies detained parents and children arriving at the U.S.-Mexico border, forcibly removed children, including young children like D.J.C.V. (19-months old at the time of separation) and even infants, from their parents, and referred the parents to be prosecuted.¹⁰ After being separated from their parents, the children were designated as unaccompanied minors and placed in the custody of the Office of Refugee Resettlement (“ORR”).¹¹ ORR accommodations included third-party detention facilities or foster homes, often far away from their parents.¹² What is more, the breadth of the family separations wrought by the Family Separation Policy is staggering: by July 2018 more than 2,500 children were separated from their families¹³—possibly more than 5,000 in total since the start of the pilot program in 2017.¹⁴

1. *The Family Separation Policy was implemented carelessly and chaotically, with little regard to the long-term health effects on the separated families*

Children and their families come to the U.S. because of terrifying, and often life-threatening, conditions faced in their home countries. Separating these children from their parents and subjecting them to prolonged detention amplifies and compounds their trauma.¹⁵ Defendant separated children from their parents during routine activities and without any

¹⁰ OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVS., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 4 (Jan. 17, 2019), available at <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

¹¹ *Id.* at 3.

¹² *Id.*

¹³ Judiciary Committee Report at 20.

¹⁴ Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> (noting that the ACLU has suggested more than 5,000 children have been separated since 2017).

¹⁵ See *America Speaks Out: Stop Trump’s Cruel Treatment of Migrant Children at the Border: Hearing Before the S. Comm. on Democratic Pol’y and Commc’ns*, 116th Congress (2019) (statement of Amy J. Cohen, MD, Physicians for Human Rights), available at <https://phr.org/our-work/resources/11003/>.

warning, further amplifying their trauma.¹⁶ These separations would regularly occur during a meal or bath time and would result in an unsuspecting child being sent to a separate facility, often without any explanation or understanding of their parent’s whereabouts nor a chance to say goodbye.¹⁷

The level of trauma the policy wrought on the separated families is impossible to overstate. Children, such as D.J.C.V., who was just 19 months old at the time of his entry into the United States, were especially endangered by the Family Separation Policy. The stress of family separation puts young children at heightened risk for a wide range of health and psychological impairments, including depression, anxiety, immune system dysfunction, cancer, reduced IQ, reduced physical growth, and more.¹⁸ Certain *Amici* have experienced first-hand through their work with victims of the Family Separation Policy the prolonged psychological effects of separation. For example, in the case of a separated mother and seven-year-old son treated by Catholic Migration Services, Inc., the mother suffered from extreme post-traumatic stress disorder (“PTSD”) and depression as a direct result of being separated from her son for over a month and a half. The seven-year-old boy was similarly traumatized and affected by PTSD and depression. Moreover, an extensive study conducted by Physicians for Human Rights and their clinicians showed that “nearly all the children and parents evaluated . . . had signs and

¹⁶ *Id.*

¹⁷ Judiciary Committee Report at 13; Camila Domonoske & Richard Gonzalez, *What we Know Family Separation and ‘Zero Tolerance’ at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>.

¹⁸ Johayra Bouza, et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (June 20, 2018), available at: <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear> (citing Heim, C., & Nemeroff, C. B. *The role of childhood trauma in the neurobiology of mood and anxiety disorders: Preclinical and clinical studies*, BIOLOGICAL PSYCHIATRY, 49(12), 1023-1039 (2001)).

symptoms of post-traumatic stress disorder, depression, and anxiety.”¹⁹

Separation can have profound and *permanent* effects on a child’s development. Studies have shown that children who are forcibly removed from their families are nearly twice as likely to be arrested or criminally charged as adults,²⁰ and children separated at a young age from their parents develop much less white and gray matter in their brains.²¹ Events such as family separation “can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health.”²² Physicians for Human Rights and their clinicians have observed a condition called “toxic stress,” which can cause irreversible damage to the brain and mind and even lead to early death.²³

The courts have similarly taken note of the devastating health effects of the Family Separation Policy. For example, in *Ms. L v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018)—discussed at length in Defendant’s Motion to Dismiss—the court noted that the Family Separation Policy caused one father to experience symptoms consistent with a heart attack and another to commit suicide.²⁴ Similarly, in *J.S.R. v. Sessions*, 330 F. Supp. 3d 731 (D. Conn. 2018), the court found being separated from his father had

¹⁹ PHYSICIANS FOR HUMAN RIGHTS, 2019 ANNUAL REPORT 4 (2019).

²⁰ William Wan, *What Separation from Parents Does to Children: ‘The Effect is Catastrophic’*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.cf5ca597dc72.

²¹ *Id.*

²² Julie Linton, *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy Congressional Testimony*, AMERICAN ACADEMY OF PEDIATRICS (Feb. 7, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Linton%20testimony%20FINAL_1.pdf.

²³ PHYSICIANS FOR HUMAN RIGHTS, 2019 ANNUAL REPORT 4 (2019); *America Speaks Out: Stop Trump’s Cruel Treatment of Migrant Children at the Border: Hearing Before the S. Comm. on Democratic Policy and Commc’ns.*, 116th Congress (2019) (statement of Amy J. Cohen, MD, Physicians for Human Rights), available at <https://phr.org/our-work/resources/11003/>.

²⁴ 310 F. Supp. 3d at 1146.

directly caused PTSD and other negative effects for the child.²⁵

2. *Separated children were forcibly detained in deplorable conditions, in violation of long-standing requirements for the detention of children in immigration custody*

Historically, the Flores Agreement has worked to ensure minimum standards of care for children in immigration detention, setting limits on the length of time and the conditions under which children can be incarcerated.²⁶ In implementing and expanding the Family Separation Policy, Defendant has largely violated those requirements.

The conditions that the children were held under was especially cruel and reprehensible. Detention center visitors have described “chaotic scene[s] of sickness and filth.”²⁷ Interviews with children have further revealed that the CBP held “many children, including some who are much too young to take care of themselves, in jail-like border facilities for weeks at a time without contact with family members, or regular access to showers, clean clothes, toothbrushes, or proper beds.”²⁸ Children under the age of ten were charged with caring for even younger children, and sometimes infants, who were complete strangers.²⁹

²⁵ 330 F. Supp. 3d at 743.

²⁶ See *Flores v. Lynch*, 828 F.3d 898, 902–03 (9th Cir. 2016) (laying out the terms of the *Flores* settlement).

²⁷ Caitlin Dickerson, ‘*There is a Stench*’: *Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (Jun. 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>.

²⁸ Clara Long, Written Testimony: “Kids in Cages: Inhumane Treatment at the Border” Testimony of Clara Long Before the U.S. House Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, HUMAN RIGHTS WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border#>; see also Caitlin Dickerson, ‘*There is a Stench*’: *Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (Jun. 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>.

²⁹ Clara Long, Written Testimony: “Kids in Cages: Inhumane Treatment at the Border” Testimony of Clara Long Before the U.S. House Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, HUMAN RIGHTS WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border#>; see also generally Caitlin Dickerson, ‘*There is a Stench*’: *Soiled Clothes and No Baths for Migrant Children*

Even prior to the implementation of the Family Separation Policy federal courts have documented a pattern of injustices against children seeking asylum. For example, in *Flores v. Sessions*, 394 F. Supp. 3d 1041 (C.D. Cal. 2017), the court found that starting in 2015, at the instruction of Defendant, children and families had been held for up to eight months (well over the five- or twenty-day time periods specified in the Flores Agreement); children lacked adequate food, clean drinking water, sanitary facilities, personal hygiene items, and sleep conditions; detention centers were kept at improperly cold temperatures; and children were not offered a list of legal counsel or services—all in violation of the Flores Agreement.³⁰ Children separated from their parents as a result of the Family Separation policy were forced to face these same harsh realities alone.

The extent of the cruelty inherent in the Defendant’s policy shocked the conscience of even the U.S. Attorneys posted at the U.S.-Mexico border tasked with implementing “zero tolerance” prosecutions.³¹ When they became aware of the 2017 family separation pilot program, they were alarmed. One U.S. attorney stated: “We have now heard of us taking breastfeeding defendant moms away from their infants . . . I did not believe this until I looked at the duty log.”³² Notwithstanding the surprise and shock by the Administration’s own employees, the Family Separation Policy continued for many months and it continues to affect thousands of migrants even today.

at a Texas Center, N.Y. TIMES (Jun. 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>.

³⁰ 394 F. Supp. 3d at 1072-73.

³¹ Michael D. Shear, Katie Benner & Michel S. Schmidt, ‘We Need to Take Away Children,’ *No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html>.

³² *Id.*

C. Despite the harm wrought by family separation, Defendant has negligently failed to reunite all of the families that were forcibly separated as a result of the Administration’s Family Separation Policy

During the first four months of the family separation pilot program in 2017, more than 281 families, including D.J.C.V. and his father, were separated, and “[a]t the end of the pilot, CBP headquarters became aware of a ‘deficiency’ in its records systems that prevented government officials from tracking separated children and parents.”³³ Foreseeably, the tracking issues that CBP encountered during the pilot program persisted during the full-scale rollout of the Family Separation Policy in 2018.³⁴ A report from the DHS Inspector General shows that in early May 2018, when the zero-tolerance policy first went into effect, DHS estimated that *more than 26,000* migrant children would be separated from their families during that summer.³⁵ The Administration knew *exactly* what an undertaking the Family Separation Policy would be, and *still* failed to make proper preparations.

The administrators of the Family Separation Policy failed to keep track of the families they were separating, and they quickly lost count of the families ultimately separated.³⁶ DHS used a web-based spreadsheet, often edited by many different people at once, to track the whereabouts of the children and their parents.³⁷ As a result of this haphazard record-keeping, the data was riddled with errors, and many entries were “missing essential information, such as the parent’s name or alien registration number, creating significant challenges when ORR later

³³ Judiciary Committee Report at 10.

³⁴ Judiciary Committee Report at 13–14.

³⁵ Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence>.

³⁶ Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence>.

³⁷ Judiciary Committee Report at 13–14.

attempted to reunite children with families.”³⁸ What is more, separate files were created for each child and parent, each with their own respective tracking number, and the files were not linked.³⁹

Practically speaking, this meant that if a government official looked up the file of a child in custody, the official would have no way of knowing who or where the child’s parent was.⁴⁰

Notably, however, the government did carefully track the personal property of detainees in criminal and immigration proceedings—much more effectively than they tracked families.⁴¹

After unrelenting media pressure, President Trump signed an executive order formally ending family separations in June 2018.⁴² A week later, the Administration was ordered by the District Court for the Southern District of California to reunite more than 2,500 children with their parents.⁴³ However, the Administration had no effective way to reunite the separated families,⁴⁴ and more than 600 children still remained in ORR custody even after the court-ordered deadline had passed.⁴⁵ Reunifications for these children were further complicated by the

³⁸ *Id.* at 14.

³⁹ Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence>.

⁴⁰ *Id.*

⁴¹ *Ms. L v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018).

⁴² E.O. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

⁴³ *Ms. L*, 310 F. Supp. 3d at 1149–50 (S.D. Cal. 2018); *see also* Judiciary Committee Report at 18.

⁴⁴ *See* Jonathan Blitzer, *The Activist Effort to Find the Children the Government Took From Their Parents*, THE NEW YORKER (Jul. 13, 2018), <https://www.newyorker.com/news/news-desk/the-activist-effort-to-find-the-children-that-the-government-took-from-their-parents> (explaining the role NGOs played in locating parents and children in the wake of the government’s failure to properly track separated families). Even more separations came to light as the government continued to review its tracking information. As of December 2018, the government had identified at least 2,737 children that had been separated from their parents; however, the actual number is likely much higher. Coleen Long & Ricardo Alonso-Zaldivar, *Watchdog: Thousands More Children May Have Been Separated*, THE ASSOCIATED PRESS (Jan. 18, 2019), <https://apnews.com/article/c648954057594364b01a38b8d16701ac>; Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, THE NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> (noting that the ACLU has suggested more than 5,000 children have been separated since 2017).

⁴⁵ Judiciary Committee Report at 20.

fact that many of their parents had already been deported to their home countries while their children remained in the U.S. in immigration detention.⁴⁶ Many of these families remain separated today. More than three years have now passed since the Family Separation Policy first went into effect, yet—as of October 2020—the parents of 545 children have still not been located.⁴⁷

II. The Family Separation Policy was Adopted by Government Officials to Punish and Deter South and Central American Immigrants

A. The Family Separation Policy demonstrates a desire to punish asylum seekers and deter future immigration rather than a legitimate effort to address bona fide criminal activity

Defendant and the Administration seek to justify the anti-immigrant policies they rigorously enforce, including the Family Separation Policy, by portraying immigrants as a violent group. The claim is both baseless as a matter of fact and totally irrelevant as a matter of asylum law. At bottom, the repeated, baseless insistence that immigrants are “criminal” invaders demonstrates the animus motivating Defendant’s and the Administration’s policies.

Stephen Miller—now President Trump’s chief advisor on immigration matters and the architect of the Family Separation Policy⁴⁸—has a long history of linking immigration with crime, and has been reported to have cited anti-immigrant publications such as VDARE and

⁴⁶ *Id.* at 21.

⁴⁷ Ed Pilkington, *Parents of 545 children still not found three years after Trump separation policy*, THE GUARDIAN (October 21, 2020), <https://www.theguardian.com/us-news/2020/oct/21/trump-separation-policy-545-children-parents-still-not-found>.

⁴⁸ Miller also championed the Administration’s efforts to adopt a “zero-tolerance” policy, set arrest quotas for undocumented immigrants, and enact an executive order effectively banning immigration from several Muslim-majority countries. Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, SOUTHERN POVERTY LAW CENTER (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>.

American Renaissance approvingly in emails and conversations with Breitbart News.⁴⁹ Former Secretary of Homeland Security Kirstjen Nielsen criticized media reports portraying the 2018 migrant caravan as a sympathetic group of women and children, and she instead characterized the caravan participants as a group containing “500 criminals” and “known gang members.”⁵⁰

For his part, President Trump stated that the Central American caravan consisted of “[m]any Gang Members,”⁵¹ “very tough fighters and people,”⁵² “bad thugs and gang members,”⁵³ and “stone cold criminals.”⁵⁴ The President in May 2018, when speaking of unaccompanied minors, said “[t]hey look so innocent; they’re not innocent.”⁵⁵ He also likened immigrants to dangerous invaders on numerous occasions, stating:

- “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.”⁵⁶
- “We’re talking about an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs.”⁵⁷

⁴⁹ Associated Press, *White House Aide Stephen Miller Pushed Racist Immigration Coverage in Leaked Emails*, L.A. TIMES (Nov. 12, 2019), <https://www.latimes.com/politics/story/2019-11-12/stephen-miller-white-house-racist-immigration-emails>.

⁵⁰ Richard Gonzalez, *DHS Chief Visits U.S.-Mexico Border, Defends Administration’s Asylum Rules*, NPR (Nov. 20, 2018), <https://www.npr.org/2018/11/20/669826023/dhs-chief-visits-u-s-mexico-border-defends-administrations-asylum-rules>.

⁵¹ Donald Trump (@realDonaldTrump), Twitter (Oct. 29, 2018), <https://twitter.com/realdonaldtrump/status/1056919064906469376?lang=en>.

⁵² Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), <https://twitter.com/realdonaldtrump/status/1057612657665171457?s=20>.

⁵³ Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), <https://twitter.com/realdonaldtrump/status/1057614564639019009?s=20>.

⁵⁴ Donald Trump (@realDonaldTrump), Twitter (Nov. 26, 2018), <https://twitter.com/realdonaldtrump/status/1067015026995879937?s=20>.

⁵⁵ Donald J. Trump, *Remarks by President Trump at a Roundtable Discussion on Immigration*, Bethpage, NY, The White House (May 23, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny>.

⁵⁶ Donald Trump (@realDonaldTrump), Twitter (Jun. 24, 2018), <https://twitter.com/realdonaldtrump/status/1010900865602019329?s=21>.

⁵⁷ Donald J. Trump, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, The White House (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border>.

- “As everyone knows, the United States of America has been invaded by hundreds of thousands of people coming through Mexico Gang members, smugglers, human traffickers, and illegal drugs and narcotics of all kinds are pouring across the Southern Border and directly into our communities. Thousands of innocent lives are taken every year as a result of this lawless chaos. It must end NOW!”⁵⁸

While these xenophobic claims have been repeatedly debunked by actual social science⁵⁹—and are otherwise irrelevant to the regular processing of asylum claims—they only underscore relevant decision-makers’ animus towards Central and South American immigrants.

B. The clear motivation of the policy is to deter and punish immigrants at the U.S.-Mexico border

Consistent with the administration’s public statements of animus, official documents show that the true motives behind the Family Separation Policy were to deter asylum seekers at the U.S.-Mexico border; and Former Secretary Nielson signed off on the policy after receiving a memo that concluded such a policy would “have the greatest impact on current flows.”⁶⁰ Other Administration officials have similarly provided support for such a conclusion. White House Chief of Staff, John F. Kelly told NPR that the Family Separation Policy “could be a tough deterrent—would be a tough deterrent,” and that a “big name of the game is deterrence.”⁶¹

⁵⁸ Donald J. Trump, *Statement from the President Regarding Emergency Measures to Address the Border Crisis*, The White House (May 30, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis>.

⁵⁹ Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, THE MARSHALL PROJECT (May 13, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime>; Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, IMMIGR. RES. & POL’Y BRIEF, No. 11, Mar. 4, 2019, at 1 (“The data show that all immigrants—legal and illegal—are less likely to be incarcerated than native-born Americans relative to their shares of the population.”); Michael T. Light, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 384 (2018).

⁶⁰ Cora Currier, *Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms*, THE INTERCEPT (Sept. 25, 2018), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/> (containing excerpts of the Department of Homeland Security memo).

⁶¹ Philip Bump, *Here are the Administration Officials Who Have Said That Family Separation is Meant as a Deterrent*, WASH. POST (Jun. 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/>.

Steven Wagner, the then-Acting Assistant Secretary to HHS stated, “We expect that the new policy will result in a deterrence effect, we certainly hope that parents stop bringing their kids on this dangerous journey and entering the country illegally. So we are prepared to continue to expand capacity as needed.”⁶² President Trump himself has indicated that he believes family separation is necessary to secure the U.S.-Mexico border. He has made unsubstantiated claims that migrants were “grabbing children and they’re using children to come into our country in many cases.”⁶³ And he has said, “If [migrants] feel there will be separation, they don’t come.”⁶⁴ John Kelly explained that family separation “is a technique” to deter immigration, but helpfully pointed out that “[t]he children will be taken care of – put into foster care or whatever.”⁶⁵

What is more, the government has used the COVID-19 pandemic as a pretext to reinstitute extremely harsh immigration procedures.⁶⁶ Unaccompanied migrant children seeking asylum have been summarily expelled to their home countries without the opportunity to present their case.⁶⁷ According to news reports compiled in October 2020 more than 13,000 unaccompanied children have been turned away at the border since March.⁶⁸

⁶² *Id.*

⁶³ David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>.

⁶⁴ *Id.*

⁶⁵ *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018) <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

⁶⁶ See Camila Montoya-Galvez, *Judge Rules Border Agents Can't Use COVID-19 Order to Expel Migrant Children*, CBS NEWS (Nov. 19, 2020), <https://www.cbsnews.com/news/judge-border-agents-covid-19-order-expel-migrant-kids-immigration/>.

⁶⁷ See, e.g., Camila Montoya-Galvez, *How Trump Officials Used CoVID-19 to Shut U.S. Border to Migrant Children*, CBS NEWS (Nov. 2, 2020), <https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/> (describing the case of a 12-year-old boy with substantial physical and learning disabilities who was returned to Guatemala alone after presenting at the U.S.-Mexico border).

⁶⁸ Julián Aguilar, *Judge orders Trump administration to stop immediate deportations of unaccompanied immigrant minors*, THE TEX. TRIBUNE (Nov. 18, 2020), <https://www.texastribune.org/2020/11/18/immigration-deportation-minors/>.

Defendant's measures and rhetoric have placed extreme strain on *Amici's* constituent populations. *Amici* are uniquely situated to help migrants from Central and South America seek asylum and transition to a life free from persecution and constant worry, in the United States. However, these efforts have been severely hampered by Defendant's continued attempts to turn away asylum seekers at the border.

C. Defendant and the Administration have expressed particular hostility toward asylum seekers

Defendant's justifications for the Family Separation Policy are consistent with the Administration's pattern of hostility toward immigrant groups, as expressed from the earliest days of President Trump's presidential campaign to the present. Animus towards vulnerable immigrants is the true—and *only*—justification for the Family Separation Policy and for other policies designed to prevent and deter asylum seekers. This has never been well concealed. President Trump famously kicked off his 2016 presidential campaign with a speech in which he exclaimed:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. *They're bringing drugs. They're bringing crime. They're rapists.*⁶⁹

Since then, the President and his Administration have not tempered their language whatsoever; instead, they have laid bare for all to see the hostile and discriminatory reasoning for their anti-asylum-seeker agenda. The President in 2018 criticized immigrants from “shithole countries” for seeking refuge in the United States,⁷⁰ and Administration officials have stated

⁶⁹ *Here's Donald Trump's Presidential Announcement Speech*, TIME (Jun. 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> (emphasis added).

⁷⁰ Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> (referring to Haiti, El Salvador, and certain African countries).

“open borders leads to massive crime.”⁷¹ Ken Cuccinelli, then the acting director of the U.S. Citizenship and Immigration Services (“USCIS”), made this plainer, stating that the poem inscribed on the Statue of Liberty “was referring back to people coming from Europe.”⁷² The Trump Administration has continued to double-down on its anti-immigrant stance amidst the 2020 election campaign, instituting new restrictive policies in the middle of the COVID-19 pandemic,⁷³ and criticizing Joe Biden’s “[p]ermissive immigration policies.”⁷⁴

In light of the Family Separation Policy and other recently enacted immigration policies, it is clear that Defendant’s overarching goal is to deter migrants from seeking asylum at all.⁷⁵ Defendant has specifically attacked asylum as “an easy ticket to illegal entry into the United States,” “swamped” with “vague, insubstantial, and subjective claims.”⁷⁶ And the

⁷¹ ‘Angel Families’, *Trump Aides Rally Against Illegal Crime*, FOX NEWS (Sept. 7, 2018),

<https://www.foxnews.com/politics/angel-families-trump-aids-rally-against-illegal-immigrant-crime>.

⁷² Jacey Fortin, ‘Huddled Masses’ in Statue of Liberty Poem are European, *Trump Official Says*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html>.

⁷³ New policies include “broad shutdowns of America’s legal immigration system” under the guise of protections against COVID-19, including “blocking the entry of a range of temporary foreign workers and some applicants for permanent residence.” Ted Hesson & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14, 2020),

<https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W>; see also Hamed Aleaziz, *Border Officials Turned Away Unaccompanied Immigrant Children More than 13,000 Times Under Trump’s Pandemic Policy*, BUZZFEED NEWS (Oct. 28, 2020),

<https://www.buzzfeednews.com/article/hamedaleaziz/border-officials-turned-away-unaccompanied-immigrants>.

⁷⁴ Ted Hesson & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14, 2020), <https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W>

⁷⁵ See e.g., *Zabaleta v. Decker*, 331 F. Supp. 3d 67, 72 (S.D.N.Y. 2018) (pointing out that an immigration law judge “unambiguously mischaracterized a central element of the record” as part of a decision that revoked an asylum-seeker’s bond as a result of a driving without a license; James Fredrick, ‘Metering’ At The Border, NPR (June 29, 2018), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border> (describing a policy where asylum seekers are required to wait in Mexico for a limited number of turns to request asylum).

⁷⁶ Jeffrey B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DOJ (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

Administration has consistently referred to important protections for unaccompanied minors as “dangerous loopholes” that have been exploited by gang members posing as vulnerable children.⁷⁷ In August 2019, the Administration removed these protections and subjected certain children to expedited removal proceedings.⁷⁸

The National Security Council and Stephen Miller have laid out a persistent strategy to deny requests for asylum, if the asylum seeker is processed at all. In July 2019, a National Security Council official told CBP officials that, “[m]y mantra has persistently been presenting aliens with *multiple unsolvable dilemmas* to impact their calculus for choosing to make the arduous journey to begin with.”⁷⁹ What is more, USCIS began training CBP agents to conduct initial asylum screenings (*i.e.*, credible fear interviews, an initial step in the asylum process), purportedly because of a lack of capacity and manpower due to the supposed surge of immigrants. However, in reality, the Administration indicated that they hoped CBP agents

⁷⁷ Donald J. Trump, *President Donald J. Trump’s Letter to House and Senate Leaders & Immigration Principles and Policies*, The White House (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-letter-house-senate-leaders-immigration-principles-policies/>; *see also* Donald J. Trump, *President Donald J. Trump’s State of the Union Address*, The White House (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> (as prepared for delivery) (asking Congress to close the “deadly loopholes” that allow for MS-13 members to enter the U.W.). For example, the Former Chief of CBP, Mark Morgan, said during an interview on Fox News: “I’ve been to detention facilities where I’ve walked up to these individuals that are so-called minors, 17 or under. I’ve looked at them and I’ve looked at their eyes . . . and I’ve said that is a soon-to-be MS-13 gang member. It’s unequivocal.” Ted Hesson, *Trump’s Pick for ICE Director: I can Tell Which Migrant Children Will become Gang Members by Looking Into Their Eyes*, POLITICO (May 16, 2019, 3:37 PM), <https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570>.

⁷⁸ Jonathan Blitzer, *The Trump Administration’s Sustained Attack on the Rights of Immigrant Children*, THE NEW YORKER (Aug. 22, 2019), <https://www.newyorker.com/news/news-desk/the-trump-administrations-sustained-attack-on-flores-agreement-rights-of-immigrant-children>.

⁷⁹ Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims*, NBC NEWS (Jul. 29, 2019, 4:30 PM), <https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831> (emphasis added).

would be more likely to make negative credible fear determinations, thereby reducing asylum claims.⁸⁰

The xenophobic family separation policy enforced by the Defendant in this case is just one part of a broader strategy to deter and punish asylum seekers. In the totality of these anti-asylum structures it can be clearly seen that the sole motivation for the Family Separation and other policies is animus towards South and Central American immigrants. It is unsurprising, then, that multiple courts have found the Family Separation Policy to be unconstitutional. *See, e.g., Ms. L v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018); *J.S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 740–41 (D. Conn. 2018) (granting preliminary injunctive relief to address the unconstitutional separation of the parties).

The *Amici* respectfully request that this Court recognize Defendant’s actions for what they are—a misbegotten effort to deter vulnerable immigrants from seeking asylum in the U.S. in service of an unfounded animus towards asylum seekers.

CONCLUSION

The Family Separation Policy is devastating to many migrants including the most vulnerable asylum seekers—young children. The policy was created to knowingly and needlessly torture and torment many young migrants and their parents, and will have far-reaching effects that may affect many migrants including D.J.C.V. for years to come. For the foregoing reasons, the Court should deny Defendant’s motion to dismiss.

Dated: December 22, 2020

Respectfully submitted,

By: /s/ Harrison J. Frahn IV

⁸⁰ *Id.* (“One current and former DHS official, both speaking on the condition of anonymity, said Miller has long seen asylum officers as soft and believes border agents would be tougher critics on asylum seekers.”).

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APPENDIX A

Bet Tzedek, Hebrew for “House of Justice,” has for nearly forty-five years provided free legal services and counsel in a comprehensive range of practices areas. Today, Bet Tzedek represents unaccompanied immigrant children who qualify for asylum, Special Immigrant Juvenile Status, and other forms of relief.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders’ representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal petitions for writs of habeas corpus challenging unlawful immigration detention.

Catholic Charities Community Services, Archdiocese of New York Division of Immigrant & Refugee Services provides immigration legal assistance in New York City and the Lower Hudson Valley to adults, children, and families seeking protection from violence, abuse, and persecution, and to those seeking family reunification, employment authorization, release from detention, or residence and citizenship; we also provide resettlement support to newly arrived refugees and asylees, job development and employment prep to vulnerable newcomers,

integration and ESL assistance to adults and children, and hotline and information services to over 65,000 people each year.

Catholic Migration Services Inc. ("CMS"), a not-for-profit legal services provider affiliated with Catholic Charities Brooklyn and Queens and the Roman Catholic Diocese of Brooklyn, has for nearly 50 years provided free legal services to low-income individuals regardless of race, religion, ethnicity, national origin, or immigration status. We assist immigrants applying for immigration benefits before the United States Citizenship and Immigration Services and individuals facing removal from the United States before the Executive Office for Immigration Review. Currently, our office represents more than two hundred non-detained individuals with cases docketed before the NYC Immigration Courts, including asylum seekers and their family members.

City Bar Justice Center ("CBJC") is a nonprofit affiliate of the New York City Bar Association that provides free legal services to those in need; mobilizes pro bono lawyers, law firms, and corporate legal departments; educates the public on legal issues; and impacts public policy. CBJC serves more than 20,000 low-income New Yorkers annually, including those seeking asylum and other humanitarian immigration relief.

The Door, founded in 1972, is an organization that provides comprehensive youth development services in the New York City area. Among other services, including family law, public benefits and landlord-tenant law, The Door represents young people in immigration matters, including direct representation of clients applying for Special Immigrant Juvenile Status ("SIJS"), asylum, U- and T-visas, and other forms of humanitarian relief. One of The Door's core missions is to obtain lawful immigration status and a pathway to permanent residency and citizenship for

young immigrants in New York City and the surrounding areas. Hundreds of The Door's clients are unaccompanied minors from Mexico and Central America, many of whom are eligible for asylum, but whose asylum cases have been impacted by recent federal policies and regulations altering United States asylum law. In 2018, The Door represented 18 children, as young as 5 years old, who had been separated from a parent at the southern border pursuant to the "zero tolerance" policy, and worked to help these children reunify with their families.

Her Justice has, since 1993, been dedicated to making a real and lasting difference in the lives of women living in poverty in New York City, many of whom are victims of gender-based violence, by offering them legal services designed to foster equal access to justice. Her Justice recruits volunteer attorneys from New York City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. In fiscal year 2020 alone, Her Justice provided advice and counsel, assistance with court documents, and legal representation in the areas of family, matrimonial and immigration law to more than 7,000 women and children living in poverty in New York City. Informed by clients' experiences, Her Justice works to reform the civil justice system such that it produces the most favorable outcomes for women like our clients, through processes that are as equitable, empowering, and as efficient as possible.

With respect to the particular issues raised in this litigation, 61% of Her Justice's clients in fiscal year 2020 were born outside the United States. Pursuing remedies for immigrant survivors of gender-based violence has been a substantial part of the organization's practice since its founding. Many families impacted by the Family Separation policy are fleeing extreme forms of gender-based violence in their home countries. This policy further harms and re-traumatizes families who are seeking safety for themselves and their children by deterring them from seeking

asylum in the U.S., forcing them to stay in life-threatening situations. For those families who do travel to the U.S. border to seek safety, they are re-traumatized by being separated from their children/caretakers upon their arrivals. The policy also exposes children who were already subjected to abuse in their home countries to further abuse in custody without the protection and support of their caretakers/ parents.

HIAS Pennsylvania supports low-income immigrants of all backgrounds as they build new lives in our community. Through immigration legal services and an array of social services, we work to address their needs, defend their rights, and advocate for their equitable inclusion in American society. Driven by the Jewish value of “welcoming the stranger,” HIAS Pennsylvania advocates for just and inclusive practices. HIAS Pennsylvania provides representation and legal counseling before immigration agencies and courts; provides resettlement and other social services to newly arriving immigrants, refugees, and those recently granted asylum; and advocates for and educates the public about immigrant issues and rights. Among HIAS Pennsylvania's several immigration legal services initiatives is an initiative that focuses solely on immigrant youth. As such HIAS Pennsylvania had first-hand contact with some of the children that were separated from their families at the border and sent to a Pennsylvania shelter.

Immigration Justice Corps (“IJC”) is the country’s first immigration legal fellowship program. IJC Fellows regularly represent asylum-seekers from around the world including families from Honduras, El Salvador, and Guatemala. Through this representation, IJC Fellows have extensive knowledge of the dire and violent circumstances that force individuals to flee their countries of origin to seek asylum in the United States.

Immigrant Legal Resources Center (“ILRC”) is a national organization that provides trainings, legal resources, and advocacy to advance immigrant rights and to build the capacity of immigration advocates to assist asylum seekers. The ILRC supports immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrants. The ILRC provides technical assistance on asylum through webinars and the ILRC Attorney of the Day service, in which the ILRC works with advocates on their specific cases and questions. As experts in the field, the ILRC publishes *The Essentials of Asylum Law*, a manual which provides a thorough review of asylum law with practice tips. The ILRC has a significant interest in protecting the rights of immigrants to apply for asylum and related protections and to have their applications fully and fairly considered.

The International Refugee Assistance Project, Inc. (“IRAP”) is a nonprofit organization dedicated to advancing and defending the rights of refugees and other displaced people through systemic litigation, direct representation, and policy and media advocacy. As counsel to hundreds of refugees and asylum seekers before administrative agencies and in the federal courts since its founding in 2008, IRAP has direct insight into the worldwide refugee crisis and a strong interest in ensuring that the Refugee Act and related laws are enforced in a manner that is consistent with Congress’s humanitarian objectives.

LatinoJustice PRLDEF is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. LatinoJustice has engaged in and supported law reform litigation opposing expanded federal immigration enforcement and challenging government policies and practices seeking to arbitrarily curtail and limit immigrants’ rights.

The Legal Project is a private non-profit in Albany, NY that provides legal representation and advice to both documented and undocumented individuals, including non-detained asylum applicants. TLP has represented and continues to represent asylum seekers who have crossed the southern border into the U.S. both at and outside of a port of entry.

The Public Law Center (“PLC”) provides free legal services to low-income residents of Orange County, California. Annually, over 8,000 of the most vulnerable residents of the county, including immigrants, minorities, veterans, seniors, and children, receive services from PLC. PLC’s work includes counseling, individual representation, community education and strategic policy advocacy and impact litigation to challenge societal injustices, in the areas of domestic violence, human trafficking, immigration, guardianship, housing, health, bankruptcy, asylum, family law, consumer fraud, and discrimination. PLC's Immigration Unit’s mission is to empower immigrants through direct legal services and community-centered lawyering. In performing its work, PLC partners work with a network of over 1400 volunteer private attorneys, law students and others in providing the highest quality services to our clients seeking the greatest possible impact for the community at large. Our immigration program works on a variety of issues, including relief under the Violence Against Women Act (VAWA), U-Visas, T-Visas, Special Immigrant Juvenile Status (SIJS), asylum, Deferred Action for Childhood Arrivals (DACA), naturalization assistance and removal defense, including families who have suffered under the family separation policy.

Safe Passage Project is a non-profit legal services organization based in New York City and Long Island with a single mission: to ensure that no child faces the immigration process alone. Safe Passage provides free legal representation to immigration children; with a staff of 40, along with 550 attorney volunteers, Safe Passage represents over 1,200 young people in the New York

area. Considered a national expert on Special Immigrant Juvenile Status and child-specific asylum rules, Safe Passage conducts legal trainings, mentors pro bono attorneys, advises lawmakers, and participates in litigation of national importance to immigrant youth.

UnLocal Inc. is a non-profit organization that provides direct immigration legal representation, legal consultations, and community education to New York City's undocumented immigrant communities. UnLocal attorneys currently represent more than 200 asylum seekers. The majority of these individuals are from Honduras, Guatemala, and El Salvador.