



Written Testimony of:

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Submitted to the  
U.S. House Committee on Energy & Commerce  
Subcommittee on Oversight and Investigations

For a Hearing on:

“Examining the Failures of the Trump Administration’s Inhumane Family  
Separation Policy”

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The American Civil Liberties Union (“ACLU”) thanks the U.S. House Committee on Energy & Commerce, Subcommittee on Oversight and Investigations, for the opportunity to submit this statement for its hearing addressing the Trump administration’s family separation policy.

The ACLU is a nonpartisan public interest organization with 4 million members and supporters, and 53 affiliates nationwide—all dedicated to protecting the principles of freedom and equality set forth in the Constitution. The ACLU has a long history of defending civil liberties, including immigrants’ rights. The ACLU vigorously defends the constitutional right of due process for all Americans—both citizens and immigrants—and advocates for policies that protect these rights.

The ACLU is currently litigating the case, *Ms. L. v. ICE*<sup>1</sup>, that forced the government to reunify thousands of migrant families it separated at our Southern border and that generally prohibited future separations. We have participated in other litigation over the years concerning the civil liberties of immigrants, and we routinely advocate in Congress and state legislatures for policies that promote due process and protections for immigrants.

## **I. SUMMARY**

I have been working at the ACLU on civil rights issues in the immigration area for more than 25 years. Family separation is the worst practice I have seen during this time, subjecting thousands of children and parents to unbearable hardship and trauma, from which they may never recover. No other administration has implemented a widespread policy to take migrant children away from their parents indefinitely, in a misguided and illegal effort to deter asylum

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<sup>1</sup> *Ms. L v. ICE*, No. 18-cv-00428-DMS-MDD (S.D. Cal. Feb. 18, 2018); case page available at <https://www.aclu.org/cases/ms-l-v-ice>.

seekers from coming to our border. Worse still, we know the administration is continuing this practice, going beyond the few limited circumstances in which it is permissible to separate families.

In the fall of 2017, the ACLU began to see reporting<sup>2</sup> and hear from our partners, that separations were occurring in significant numbers, notwithstanding the administration’s public pronouncements at the time that there was no family separation policy. When we filed a national class action in San Diego in federal court in March 2018 (the *Ms. L.* case)—well before the “zero tolerance” announcement—we were already aware of hundreds of separated families. By the time the court ruled in late June enjoining family separation, the government reported to the court and the ACLU that there were about 2,700 families who had been separated. The process of reunifying these 2,700 families is still not complete, even as we approach the lawsuit’s one-year anniversary.

The family separation crisis was preventable. Although the separation of families began last year,<sup>3</sup> the practice surged after the “zero-tolerance” policy was implemented by the Department of Justice (“DOJ”) in May of 2018.<sup>4</sup> The DOJ policy—implemented via referral from CBP—required that all individuals entering the United States between ports be referred for illegal entry or reentry prosecutions.<sup>5</sup> Moreover, and critically, separations also occurred at ports of entry.

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<sup>2</sup> Lomi Kriel, *Trump Moves to End ‘Catch and Release’, Prosecuting Parents and Removing Children Who Cross the Border*, HOUSTON CHRONICLE (Nov. 25, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>.

<sup>3</sup> *Id.*

<sup>4</sup> Amrit Cheng, *Fact-Checking Family Separation*, ACLU BLOG (June 19, 2018, 5:30 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/fact-checking-family-separation>.

<sup>5</sup> *Id.* The ACLU has long opposed these federal criminal prosecutions for immigration violations. See Letter from National Organizations to Members of Congress (July 11, 2018), [http://nipnl.org/PDFs/community/2018\\_11Jul\\_decrim-signatures.pdf](http://nipnl.org/PDFs/community/2018_11Jul_decrim-signatures.pdf); see also Letter from National Organizations to Attorney Gen. Loretta Lynch (July 28, 2015), <https://www.aclu.org/letter/coalition-letter-attorney-general-171-organizations-end-streamline-prosecutions>. Federal

The 2,700 separated families reported by the government in the *Ms. L* case are not the whole story. We have now learned from a recent HHS OIG report that there may have been “thousands” of additional unreported separated families. The government’s response to the OIG report is even more troubling. In a filing on February 1, 2019—just last week—to the *Ms. L* court, HHS candidly admits that it had no adequate database system for tracking the families, and that it would therefore have to identify separated children by manually reviewing individual files. This admission adds to the growing evidence that HHS has not been forthright in its descriptions of its ability to track family separations. As the committee knows, the Secretary of HHS testified before the Senate Finance Committee that “There is no reason why any parent would not know where their child is located.”<sup>6</sup> HHS now claims, in response to the OIG report, that it is not worth the resources and effort to do the manual file review needed to identify the thousands of children who may have been separated; and HHS claims it may be better for the children just to leave them in their current placement.

Commander Jonathan White, in a declaration submitted to the court from HHS accompanying the government’s filing, stated that removing children from their sponsors to rejoin their parents would present “grave child welfare concerns” and “would destabilize the permanency of their existing home environment.”<sup>7</sup> It is remarkable that HHS is now using the

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prosecutions for unauthorized entry have become one of the highest drivers of mass incarceration. Michael Light, *The Rise of Federal Immigration Crimes*, PEW (March 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>. Michael Light, *The Rise of Federal Immigration Crimes*, PEW (March 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>. And these prosecutions cost our government an estimated \$1 billion per year, which does not include the costs of diverting federal agents, prosecutors, and court resources toward prosecuting these violations. Chris Rickerd, *Operation Streamline Issue Brief*, ACLU (last visited Aug. 3, 2018), <https://www.aclu.org/other/operation-streamline-issue-brief>. And Border Patrol’s claim that such prosecutions would actually deter people from crossing has been thoroughly debunked. Chris Rickerd, *Operation Streamline Issue Brief*, ACLU (last visited Aug. 3, 2018), <https://www.aclu.org/other/operation-streamline-issue-brief>. Moreover, many separated families were asylum-seekers fleeing political oppression, death and torture, or gang violence in their home countries. *Id.*

<sup>6</sup> Sarah Karlin-Smith, *Health secretary: ‘No reason’ why separated families can’t find children*, POLITICO (June 26, 2018, 5:25 PM), <https://www.politico.com/story/2018/06/26/azar-separated-families-673186>.

<sup>7</sup> See Declaration of Jonathan White, Feb. 1, 2019, *Ms. L*.

“best interests of the child” argument to avoid reuniting some children with their real parents or guardians. This refusal to take necessary, remedial steps to bring families back together again—or even to figure out the scope of the problem that the federal government created through its family separation policy—mirrors the response of the federal government in the aftermath of the federal court’s injunction, when the Department of Justice incredibly informed the court that it would essentially do nothing to help reunify children in the United States with parents already deported to their countries of origin and that that painstaking work should be done by the ACLU and not-for-profit organizations working on this issue.

Beyond all these past separations, it is critical to understand that separations are still happening. Although the court enjoined the government from systematically separating families, the government has continued to unilaterally declare parents a danger to their child and then take the child away, without any oversight. There is an “overwhelming body of scientific literature” that is “replete with evidence of the irreparable harm and trauma to children caused by separation from their parents.”<sup>8</sup> Such separations should almost never occur, according to the American Academy of Pediatrics,<sup>9</sup> and yet from the end of June through December, there have been at least 218 more separations, according to HHS’s response to the OIG report.

Going forward, Congress’s oversight of HHS and family separation is critical. First, the Committee should ensure that HHS account for the thousands of families identified in the OIG Report. Second, it is critical that proper procedures and standards be adopted so that separations occur only where there is a genuine reason to believe the parent is unfit or presents a danger to

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<sup>8</sup> Declaration of Lauren Shapiro, Exhibit 6, *Ms. L.*

<sup>9</sup> Policy Statement, Am. Acad. of Pediatrics, Detention of Immigrant Children, Mar. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

the child—the traditional child welfare standard.<sup>10</sup> Third, in the extremely limited circumstances where separations must occur, HHS and the other relevant agencies must develop a database and tracking system so families can quickly be reunited. Fourth, parents who were deported without their children and who were misled or coerced into giving up their own asylum rights should be permitted to return to the United States and given an opportunity to seek asylum. Fifth, funds should be allocated for the families that were separated to assist them with obtaining medical and other assistance for the trauma they suffered and continue to suffer even after reunification. It is highly likely that, without meaningful support, children and parents will suffer irreparable harm thanks to our government’s family separation policy. As one of our plaintiffs explained after she was reunited with her children, her 4-year-old boy would ask her at night whether people were going to come and take him away from her again. Without help, these children may carry this trauma and fear for the rest of their lives.<sup>11</sup>

## **II. BACKGROUND OF THE *MS. L.* LITIGATION AND FAMILY SEPARATION PRACTICE**

The ACLU initially filed its family separation case in February 2018 on behalf of one mother, Ms. L., a Congolese woman who travelled with her then 6-year-old daughter over months to reach the United States. When she arrived after a brutal journey through many countries, she applied for asylum legally at a port of entry in San Ysidro, California. On the fourth day of detention, she and her daughter were placed into separate rooms. Ms. L was

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<sup>10</sup> See, e.g., Declaration of Martin Guggenheim, Exhibit 17, *Ms. L.*

<sup>11</sup> The Trump administration’s family separation policy is emblematic of its deeply troubling treatment of immigrants more generally, and encompasses more than just the horrifying separation of families. Through family separation, the public has begun to understand the unchecked power of CBP and ICE: the horrific images of children sleeping on floors under tin-foil blankets, the stories of babies ripped from their mothers’ arms, the audio of children crying out for their parents, and the unnecessary detention of parents and families.

handcuffed and told she was going to an adult detention center. At that moment, she heard her daughter in the next room frantically screaming, “Mommy don’t let them take me away!”

Ms. L was not told why her daughter was taken or where she was going, learning only after a few days that her daughter was taken to a government facility in Chicago. The young girl spent nearly five months in Chicago by herself, celebrating her seventh birthday in an HHS facility without her mother. When I met with Ms. L. in the San Diego detention center, she had at that point been separated for about three months, and was barely eating or sleeping, constantly worrying about her daughter all alone in a strange place. They were only able to talk a few times during this period, and never by video hook-up.

At the first court hearing in the case, the government claimed that the child had been separated for her own good, because Ms. L. did not have papers demonstrating parentage; the government claimed that it had to protect the girl against possible traffickers or unscrupulous adults. But asylum seekers often will not have papers when they arrive, either because they had to leave their home countries too quickly, or lost the papers on the journey, or as is common, had their belongings stolen along the way. And, in this case, there could not have been any serious doubt about parentage given the resemblance between mother and daughter, and the fact that the daughter was screaming for her mother when she was taken away. Federal District Court Judge Dana Sabraw asked the government why it had not simply given the mother a DNA test if they genuinely doubted parentage, rather than leaving a little girl sitting in Chicago all by herself in a strange country for months. After the court-ordered DNA test, which of course established parentage, Ms. L. and her daughter were reunited, but only after inexplicably spending five months apart.

Two weeks later, in March 2018, the ACLU expanded its lawsuit into a national class action, alleging that there were hundreds of families who had been separated. On June 26, 2018, the court held that the family separation policy violated the Constitution, and that separations could only happen where the parent was genuinely unfit or a danger to his or her child. Calling the family separations “brutal” and “offensive,” the court ruled that the practice “shocked the conscience” and violated the Due Process Clause of the Fifth Amendment to the Constitution.

At the time the court ruled, the government claimed there were approximately 2,700 children still in the custody of HHS who had been separated from a parent. The court ordered HHS and the other relevant agencies to reunify these families in 2 stages, giving HHS 14 days to reunify the 100 plus children under 5 years old and the remaining children within 30 days. HHS missed both deadlines.

The reunification process was exceedingly difficult for a variety of reasons, including the lack of any centralized database to track the families. Commenting on the lack of a proper system, Judge Sabraw stated: “There were three agencies, and each was like its own stovepipe. Each had its own boss, and they did not communicate. What was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know either.”<sup>12</sup>

The government has resisted reunification at every step of the way. It missed both reunification deadlines for a substantial number of families. It initially said it would put parents through a months-long administrative process before they could get their kids back, until the court ordered them to do it faster. At one point, HHS even stated that it might require parents to

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<sup>12</sup> *Ms. L* Status Conference, July 27, 2018.



pay for their children’s reunification flights, because the agency lacked a budget line for reunification expenses.

Further complicating reunification was the fact that the government deported approximately 400 parents without their children, who were left stranded in the United States. Many of these parents were misled or coerced into giving up their own asylum rights. Some of these parents were even told their child would be on the plane with them when they were returned to their home country, only to have the flight take off without their child. Remarkably, the government claimed that these parents should not be part of the case and that if the ACLU wanted to find these parents, it should “should use [its] considerable resources” to do so.<sup>13</sup>

This statement from the government is particularly striking when one compares the budget of a national nonprofit with the record levels of funding this administration has received. Since the agency’s inception in 2003, there has been a tripling of the budget of Customs and Border Protection (CBP) and doubling of the budget of Immigration and Customs Enforcement (ICE)—two agencies at the heart of carrying out the detention and separation of families.

Judge Sabraw flatly rejected the government’s suggestion that it bore no responsibility for these deported parents. He pointedly stated that “the government is at fault for losing several hundred parents in the process.”<sup>14</sup> A week later, he reiterated: “The reality is that for every parent who is not located, there will be a permanently orphaned child. And that is 100 percent the responsibility of the administration.”<sup>15</sup>

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<sup>13</sup> Joint Status Report, Aug. 2, 2018, *Ms. L.*

<sup>14</sup> Status Conference, July 27, 2018, *Ms. L.*

<sup>15</sup> Status Conference, Aug. 3, 2018, *Ms. L.*

Ultimately, however the government did little to locate these deported parents leaving the task to the ACLU and its partners, including a court-approved steering committee.<sup>16</sup> The committee and other NGOs have spent countless hours—without financial or other support from the government—tracking these parents by telephone and on the ground in Central America. At one point, Judge Sabraw had to order the government to provide us with basic information. Indeed, the government sat on the phone numbers of the deported parents while NGOs searched on the ground in Central America. Now that the HHS OIG has estimated that thousands more families may have been separated, there likely will be more parents the administration deported without their children.

### **III. THE HARDSHIP INFLICTED ON THE FAMILIES AND CHILDREN**

The sheer number of children separated tell only part of the story. The real story is the unbearable trauma suffered by these families, especially the children, some of whom were just babies or toddlers. Children were ripped from their families often begging not to be taken from their mom or dad. Often it would be so bad that guards would tell parents they were just taking the child for a bath, only to whisk the child away to another facility, frequently thousands of miles away. Here are just a few examples of separations:

- Mirian fled Honduras with her 18-month-old son, after the military tear-gassed her home. Despite having her son's birth certificate, U.S. officials separated them. They told Mirian to strap her son into a car seat before driving him away, the desperate toddler looking out the window to see if his mother would be getting in the car. They did not see each other again for more than three months.<sup>17</sup>
- Mrs. C., a Brazilian mother, sought asylum with her 14-year old son, James. They were separated, with Mrs. C. detained in a Texas detention center while James was

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<sup>16</sup> The Steering Committee consists of Kids in Need of Defense, Women's Refugee Commission, Justice in Motion, and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

<sup>17</sup> Amrit Cheng, *ICE Separates 18-Month-Old From Mother for Months*, ACLU BLOG (April 23, 2018, 5:00 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-separates-18-month-old-mother-months>.

brought to a government facility in Chicago. When officers were taking James away, Mrs. C. remembers him looking back at her, as if to say “Mom, help me.” They spent more than nine months apart.

- Jessika, a single mother from El Salvador, had been beaten up by MS-13 gang members in front of her two sons, ages 4 and 10. The gang threatened to take her 10-year-old from her. She had family in the United States, so she did what any responsible parent would do—fled to the U.S. in search of safety. When she arrived, both of her sons were taken from her and placed in separate facilities. They were held for two months before being released to her relatives. She was eventually reunited with them a month later, after people from all over the country donated the money to pay the \$12,000 bond she needed to pay for release. They are together now, but both constantly ask the same question: when will someone be coming to take their mother away again? The 4-year-old suffers regularly from nightmares.
- Another parent was reassured his separation from his 6-year-old daughter would only be temporary—she would be taken away and he would follow her soon. He would replay that conversation for weeks after he was returned to El Salvador without his daughter, and without knowing where she was.

#### **IV. ONGOING SEPARATIONS**

The government continues to separate families, as confirmed by the recent HHS OIG report. The court in *Ms. L.* made clear that separations may only occur where there is a genuine reason to believe the parent is unfit or presents a danger to the child. But the government is unilaterally declaring parents unfit or a danger, without stating precisely what standard it is applying; without any process to contest the finding; and without showing what evidence it is using to try to justify a separation. Moreover, when children are dropped off at HHS facilities, the facilities are not always being informed about the child’s parents or why the child was separated, making it difficult to contest the separation or facilitate eventual reunification. And there is serious reason to doubt that all of these ongoing separations are lawful and based on hard evidence. Some children have even been separated where the parent has committed only an immigration violation or some minor criminal offense (or even where there is simply an

unproven allegation that the parent is a gang member—made worse by the fact that some of these families actually fled their home countries to escape gang violence).

## V. HHS OIG REPORT AND THE GOVERNMENT’S RESPONSE

A January 17, 2019, report from the HHS Office of the Inspector General makes clear that HHS is unwilling to account for all separations, and that children are still today being taken from their parents without good reason.

- The report estimates that there may be “thousands” of separations that have not been accounted for or reported. This estimate comes from HHS employees.
- The report confirms that before 2017 separations of families were “historically rare,” and happened in medical emergencies or in rare cases of a parent who was a current threat to their child.
- The report says it’s still not clear that ORR, HHS, and DHS can track separated families across agencies, even today.
- The report confirms that separations are ongoing. The government has disclosed at least 218 separations from June 26 through December, the youngest involving a baby less than 1 year old. Some new separations were on the basis of the parent’s “immigration history,” or are not explained.

The government’s court-ordered response to the report, filed February 1, 2019, is perhaps even more troubling. The government does not even address the ongoing separations. And for the potentially thousands of newly disclosed separations, the government is fighting against any obligation to account for those children by claiming they are not part of the *Ms. L* lawsuit. The government candidly says that there is no tracking system or database, so it would have to examine thousands of files. Doing so, in HHS’s view, is not worth the effort. HHS also says that most children in those thousands of separations are “probably” with some family member and that for the good of the children it is best not to try and reunite them with their parents.

## **VI. FUTURE STEPS AND NEED FOR OVERSIGHT**

Congress's oversight at this juncture is essential.

First, the Committee should ensure that HHS account for the potentially thousands of families identified in the OIG Report. It is not sufficient for the agency to say it is not worth the effort, not when children are at stake.

Second, it is critical that proper procedures and standards be adopted so that separations occur only where there is a genuine reason to believe the parent is unfit or presents a danger to the child—the traditional child welfare standard. It is not satisfactory or lawful for Customs and Border Protection agents and officers to make unilateral decisions to separate families.

Third, in the rare instance where separations do occur, HHS and the other relevant agencies must develop a database and tracking system, so families can quickly be reunited with their parents.

Fourth, parents who were deported without their children and who were misled or coerced into giving up their own asylum rights should be permitted to return to the United States and given an asylum hearing.

Fifth, funds should be allocated for the families that were separated to assist them with obtaining medical and other assistance for the trauma they suffered and continue to suffer even after reunification.