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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

Ms. L. et al.,

Petitioners-Plaintiffs,

v.

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

Respondents-Defendants.

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

Date Filed: October 5, 2018

**THIRD AMENDED COMPLAINT
 FOR DECLARATORY AND
 INJUNCTIVE RELIEF**

CLASS ACTION

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**Motion for Admission Pro Hac Vice Forthcoming*

INTRODUCTION

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1. This case challenges the United States government's forcible separation of parents from their young children for no legitimate reason and notwithstanding the threat of irreparable damage that separation has been universally recognized to cause young children.

2. Plaintiff Ms. L. is the mother of a seven (7) year-old daughter, who was ripped away from her, and then sent halfway across the country to be detained alone. Plaintiff Ms. C. is the mother of a fourteen (14) year-old son, who was also forcibly separated from his mother and detained more than a thousand miles away. Dora is the mother of a thirteen (13) year-old daughter who was forcibly separated from her. Alma is the mother of seven-year old and nine-year old sons who were forcibly separated from her.

3. Ms. L., Ms. C., Dora, and Alma bring this action on behalf of themselves and thousands of other parents whom the government has forcibly separated from their children. Like Ms. L., Ms. C., Dora, and Alma, many of these individuals have fled persecution and are seeking asylum in the United States. Without any allegations of abuse, neglect, or parental unfitness, and with no hearings of any kind, the government is separating these families and detaining their young children, alone and frightened, in facilities often thousands of miles from their parents.

4. Forced separation from parents causes severe trauma to young children, especially those who are already traumatized and are fleeing persecution in their home countries. The resulting cognitive and emotional damage can be permanent.

5. Forced separation can also cause parents to experience symptom of acute stress response and corresponding cognitive impairments, which can in turn impair the ability to meaningfully participate in a credible fear interview.

1 12. Dora is a citizen of Honduras. She is the mother of a 13 year-old
2 daughter.

3 13. Alma is a citizen of Honduras. She is the mother of 7 and 9 year-old
4 sons.

5 14. Defendants U.S. Department of Homeland Security (“DHS”) has
6 responsibility for enforcing the immigration laws of the United States.

7 15. Defendant U.S. Immigration and Customs Enforcement (“ICE”) is the
8 sub-agency of DHS that is responsible for carrying out removal orders and
9 overseeing immigration detention.

10 16. Defendant U.S. Customs and Border Protection (“CBP”) is the sub
11 agency of DHS that is responsible for the initial processing and detention of
12 noncitizens who are apprehended near the U.S. border.

13 17. Defendant U.S. Department of Health and Human Services (HHS) is a
14 department of the executive branch of the U.S. government which has been
15 delegated authority over “unaccompanied” noncitizen children.

16 18. Defendant Office of Refugee Resettlement (“ORR”) is the component
17 of HHS which provides care of and placement for “unaccompanied” noncitizen
18 children.

19 19. Defendant Thomas Homan is sued in his official capacity as the
20 Director of ICE, and is a legal custodian of Plaintiffs.

21 20. Defendant Greg Archambeault is sued in his official capacity as the
22 ICE San Diego Field Office Director, and is a legal custodian of Plaintiff Ms. L.

23 21. Defendant Joseph Greene is sued in his official capacity as the ICE
24 San Diego Assistant Field Office Director for the Otay Mesa Detention Center, and
25 is a legal custodian of Plaintiff Ms. L.

26 22. Defendant Adrian P. Macias is sued in his official capacity as the ICE
27 El Paso Field Office Director, and is a legal custodian of Plaintiff Ms. C.

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1 23. Defendant Frances M. Jackson is sued in his official capacity as the
2 ICE El Paso Assistant Field Office Director for the West Texas Detention Facility,
3 and is a legal custodian of Plaintiff Ms. C.

4 24. Defendant Kirstjen Nielsen, is sued in her official capacity as the
5 Secretary of the Department of Homeland Security. In this capacity, she directs
6 each of the component agencies within DHS: ICE, USCIS, and CBP. As a result,
7 Respondent Nielsen has responsibility for the administration of the immigration
8 laws pursuant to 8 U.S.C. § 1103, is empowered to grant asylum or other relief, and
9 is a legal custodian of the Plaintiffs.

10 25. Defendant Jefferson Beauregard Sessions III is sued in his official
11 capacity as the Attorney General of the United States. In this capacity, he has
12 responsibility for the administration of the immigration laws pursuant to 8 U.S.C. §
13 1103, oversees the Executive Office of Immigration Review, is empowered to grant
14 asylum or other relief, and is a legal custodian of the Plaintiffs.

15 26. Defendant L. Francis Cissna is sued in his official capacity as the
16 Director of USCIS.

17 27. Defendant Kevin K. McAleenan is sued in his official capacity as the
18 Acting Commissioner of CBP.

19 28. Defendant Pete Flores is sued in his official capacity as the San Diego
20 Field Director of CBP.

21 29. Defendant Hector A. Mancha Jr. is sued in his official capacity as the
22 El Paso Field Director of CBP.

23 30. Defendant Alex Azar is sued in his official capacity as the Secretary of
24 the Department of Health and Human Services.

25 31. Defendant Scott Lloyd is sued in his official capacity as the Director of
26 the Office of Refugee Resettlement.

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FACTS

1
2 32. Over the past year, the government has separated thousands of migrant
3 families for no legitimate purpose. The government’s true purpose in separating
4 these families was to deter future families from seeking refuge in the United States.

5 33. Many of these migrant families fled persecution and are seeking
6 asylum. Although there are no allegations that the parents are unfit or abusing their
7 children in any way, the government has forcibly separated them from their young
8 children and detained the children, often far away, in facilities for “unaccompanied”
9 minors.

10 34. There is overwhelming medical evidence that the separation of a
11 young child from his or her parent will have a devastating negative impact on the
12 child’s well-being, especially where there are other traumatic factors at work, and
13 that this damage can be permanent.

14 35. The American Association of Pediatrics has denounced the
15 Administration’s practice of separating migrant children from their parents, noting
16 that: “The psychological distress, anxiety, and depression associated with
17 separation from a parent would follow the children well after the immediate period
18 of separation—even after the eventual reunification with a parent or other family.”

19 36. Prior Administrations detained migrant families, but did not have a
20 practice of forcibly separating fit parents from their young children.

21 37. There are non-governmental shelters that specialize in housing and
22 caring for families—including asylum seeking families—while their immigration
23 applications are adjudicated.

24 38. There are also government-operated family detention centers where
25 parents can be housed together with their children, should the government lawfully
26 decide not to release them. The government previously detained, and continues to
27 detain, numerous family units at those facilities.

28

1 39. In April 2018, the New York Times reported that more than “700
2 children have been taken from adults claiming to be their parents since October [of
3 2016], including more than 100 children under the age of 4.” Caitlin Dickerson,
4 *Hundreds of Children Have Been Taken from Parents at U.S. Border*, N.Y. Times,
5 Apr. 20, 2018.

6 40. On May 7, 2018, Defendant Sessions announced “a new initiative” to
7 refer “100 percent” of immigrants who cross the Southwest border for criminal
8 immigration prosecutions, also known as the “zero-tolerance policy.” Defendant
9 Sessions stated that as part of that prosecution, all parents who are prosecuted
10 would be separated from their children. U.S. Dep’t of Justice, Attorney General
11 Sessions Delivers Remarks to the Association of State Criminal Investigative
12 Agencies 2018 Spring Conference (May 7, 2018). The purpose of this new policy
13 was to separate families in the hope that it would deter other families from seeking
14 refuge in the United States.

15 41. At a Senate Judiciary Committee hearing in May, a deputy chief of
16 Defendant U.S. Customs and Border Protection testified that between May 6 and
17 May 19 alone, a total of 658 children were separated from their family members
18 pursuant to this policy. The Washington Post reported that in the city of McAllen,
19 Texas, 415 children were taken from their parents during a two week period.¹ And
20 in June 2018, the Department of Homeland Security reported that in the six weeks
21 between April 19 and May 31, the administration took almost 2,000 children away
22 from their parents.²

23 42. Defendant Sessions and other government officials, including
24 Defendant Nielsen, have repeatedly defended the separation of children from their
25 parents in speeches and interviews with various media outlets. Among other

26 ¹ [https://www.washingtonpost.com/world/national-security/trumps-zero-tolerance-at-the-
27 border-is-causing-child-shelters-to-fill-up-fast/2018/05/29/7aab0ae4-636b-11e8-a69c-
b944de66d9e7_story.html?utm_term=.d52d94c37d05](https://www.washingtonpost.com/world/national-security/trumps-zero-tolerance-at-the-border-is-causing-child-shelters-to-fill-up-fast/2018/05/29/7aab0ae4-636b-11e8-a69c-b944de66d9e7_story.html?utm_term=.d52d94c37d05).

28 ² <https://ca.reuters.com/article/topNews/idCAKBN1JB2SF-OCATP>.

1 justifications for the practice, they have stated that separating families would be a
2 way to “discourage parents from bringing their children here illegally,”³ and that it
3 would help “deter more movement” to the United States by asylum seekers and
4 other migrants.⁴ Administration officials told the New York Times in May, “[t]he
5 president and his aides in the White House had been pushing a family separation
6 policy for weeks as a way of deterring families from trying to cross the border
7 illegally.”⁵

8 43. Even if the separated child is released from custody and placed in a
9 community setting or foster care, the trauma of the ongoing separation continues.

10 44. By taking away their children, Defendants are coercing class members
11 into giving up their claims for asylum and other legal protection. Numerous class
12 members have been told by CBP and ICE agents that they will see their children
13 again sooner if they withdraw their asylum applications and accept earlier
14 deportation.⁶

15 45. Many class members have given up their asylum claims and stipulated
16 to removal as a way to be reunited with their children faster.

17 46. For class members who have not been coerced into giving up their
18 asylum claims, separation from their children has made those applications much
19 more difficult. Separation prevents parents from helping their children apply for
20 asylum and navigate removal proceedings. Separation also makes it harder for

21
22 ³ <http://transcripts.cnn.com/TRANSCRIPTS/1801/16/cnr.04.html>.

23 ⁴ <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/>

24 ⁵ <https://www.nytimes.com/2018/05/10/us/politics/trump-homeland-security-secretary-resign.html>

25 ⁶ This practice has been widely reported. *See, e.g.,* Dara Lind, *Trump Will Reunite Separated Families—*
26 *But Only if They Agree to Deportation*, Vox.com (June 25, 2018),
27 <https://www.vox.com/2018/6/25/17484042/children-parents-separate-reunite-plan-trump>; Jay Root &
28 Shannon Najmabadi, *Kids in Exchange for Deportation: Detained Migrants Say They Were Told They*
Could Get Kids Back on Way Out of U.S., Texas Tribune (June 24, 2018),
https://www.texastribune.org/2018/06/24/kids-exchange-deportation-migrants-claim-they-were-promised-they-could/?utm_campaign=trib-social&utm_medium=social&utm_source=twitter&utm_content=1529859032.

1 parents to present facts involving their children which support their own asylum
2 claims.

3 47. The trauma of separation also renders asylum-seeking class members
4 too distraught to effectively pursue their asylum applications. *See, e.g.,* Angelina
5 Chapin, *Separated Parents Are Failing Asylum Screenings Because They're So*
6 *Heartbroken*, Huffington Post (June 30, 2018).⁷

7 48. Defendants have deported class members without their separated
8 children. Their children are now stranded in the United States alone. Many of these
9 parents are now struggling to make contact with their children, who are being
10 detained thousands of miles away across multiple international borders. *See* Miriam
11 Jordan, *"I Can't Go Without My Son, "a Mother Pleaded as She Was Deported to*
12 *Guatemala*, N.Y. Times (June 17, 2018).⁸

13 49. On June 20, 2018, President Trump signed an Executive Order ("EO")
14 purporting to end certain family separations going forward.⁹ The EO directs DHS to
15 "maintain custody of alien families during the pendency of any criminal improper
16 entry or immigration proceedings."

17 50. The EO directs DHS to separate families any time DHS determines
18 that separation would protect "the child's welfare." It does not, however, set forth
19 how that standard will be applied. In prior cases the government has applied that
20 standard in a manner that is inconsistent with the child's best interest, including in
21 Ms. L's case.

22 51. The EO makes no provision for reunifying the thousands of families
23 who were separated prior to its issuance.

24 ⁷ https://www.huffingtonpost.com/entry/separated-parents-too-grief-stricken-to-seek-asylum-experts-say_us_5b379974e4b08c3a8f6ad5d9.

25 ⁸ <https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html>. *See also* Nelson
26 Renteria, *El Salvador Demands U.S. Return Child Taken from Deported Father*, Reuters (June 21, 2018),
27 <https://www.reuters.com/article/us-usa-immigration-el-salvador/el-salvador-demands-us-return-child-taken-from-deported-father-idUSKBN1JH3ER>.

28 ⁹ <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

1 61. In detention, Ms. L. was distraught and depressed because of her
2 separation from her daughter. As a result, she did not eat properly, lost weight, and
3 was not sleeping due to worry and nightmares.

4 62. In one moment of extreme despair and confusion, Ms. L. told an
5 immigration judge that she wanted to withdraw her application for asylum,
6 realizing her mistake only a few days later. She is seeking to reopen her case before
7 the Board of Immigration Appeals.

8 63. The government had no legitimate interest in separating Ms. L. and her
9 child.

10 64. There has been no evidence, or even accusation, that S.S. was abused
11 or neglected by Ms. L.

12 65. There is no evidence that Ms. L. is an unfit parent or that she is not
13 acting in the best interests of her child.

14 66. After Ms. L. filed this lawsuit and moved for a preliminary injunction,
15 Defendants abruptly released her from custody on March 6, 2018, due to the filing
16 of the lawsuit. Defendants informed her that she would be released mere hours in
17 advance, with no arrangements for where she would stay. S.S. was released to Ms.
18 L.'s custody several days later. Both are now pursuing their claims for legal
19 protection.

20 67. Ms. C. and her 14 year-old son, J., are another one of the families who
21 have been separated by the government. Like Ms. L. and her daughter, Ms. C. and
22 her son are seeking asylum in the United States.

23 68. Ms. C. and J. fled Brazil and came to the United States to seek asylum.
24 A few feet after Ms. C. entered the United States, a border guard approached her,
25 and she explained that she was seeking asylum. Ms. C. subsequently passed a
26 credible fear interview, and was put in removal proceedings, where she is applying
27 for asylum.

28

1 69. Despite having communicated her fear of persecution to border guards,
2 the government prosecuted Ms. C. for entering the country illegally, took her son J.
3 away from her, and sent him to a facility for “unaccompanied” children in Chicago.

4 70. The government continued to separate Ms. C. from her son even after
5 she completed serving her criminal misdemeanor sentence on September 22, 2017,
6 and was sent to an immigration detention facility, the El Paso Processing Center. In
7 early January 2018, she was transferred again, to another immigration facility, the
8 West Texas Detention Facility (also known as Sierra Blanca), but still was not
9 reunited with her son. Even after Ms. C was released from immigration detention
10 on April 5, 2018, the government did not reunify her with her son for another two
11 months, until June 9.

12 71. While separated from J., Ms. C. was desperate to be reunited with him.
13 She worried about him constantly and did not know when she would be able to see
14 him. They spoke on the phone only a handful of times while they were separated by
15 Defendants.

16 72. J. had a difficult time emotionally during the months he was separated
17 from his mother.

18 73. The government had no legitimate interest for the separation of Ms. C.
19 and her child.

20 74. There is no evidence, or even accusation, that J. was abused or
21 neglected by Ms. C.

22 75. There is no evidence that Ms. C. is an unfit parent or that she is not
23 acting in the best interests of her child.

24 76. Dora fled Honduras with her thirteen-year-old daughter due to
25 persecution on account of her political opinion. She was separated from her
26 daughter when she arrived in the United States in May 2018. It was the first time in
27 their lives that they had been separated. Dora was unable to obtain information
28 about her daughter’s whereabouts.

1 All adult parents who enter the United States at or between designated ports
2 of entry who (1) have been, are, or will be detained in immigration custody
3 by the DHS, and (2) have a minor child who is or will be separated from
4 them by DHS and detained in ORR custody, ORR foster care, or DHS
5 custody, absent a determination that the parent is unfit or presents a danger
6 to the child.

7 85. Ms. L., Ms. C., Dora, and Alma are each adequate representatives of
8 the proposed class.

9 86. The proposed class satisfies the requirements of Rule 23(a)(1) because
10 the class is so numerous that joinder of all members is impracticable. There are at a
11 minimum hundreds of parents who fit within the class.

12 87. The class meets the commonality requirements of Federal Rule of
13 Civil Procedure 23(a)(2). The members of the class are subject to a common
14 practice: forcibly separating detained parents from their minor children absent any
15 determination that the parent is unfit or presents a danger to the child. By definition,
16 all class members have experienced that practice, and none has been given an
17 adequate hearing regarding the separation. The lawsuit raises numerous questions
18 of law common to members of the proposed class, including: whether Defendants'
19 family separation practice violates class members' substantive due process right to
20 family integrity; whether the practice violates class members' procedural due
21 process rights; whether the practice violates the federal asylum statute; and whether
22 these separations are unlawful or arbitrary and capricious under the APA.

23 88. The proposed class meets the typicality requirements of Federal Rule
24 of Civil Procedure 23(a)(3), because the claims of the representative Plaintiffs are
25 typical of the claims of the class. Ms. L., Ms. C., Dora, and Alma, and the proposed
26 class members are all individuals who have had or will have their children forcibly
27 taken away from them despite there being no proven allegations of abuse, neglect,
28 or any other danger or unfitness. Plaintiffs and the proposed class also share the
same legal claims, which assert the same substantive and procedural rights under
the Due Process Clause, the asylum statute, and the APA.

1 89. The proposed class meets the adequacy requirements of Federal Rule
2 of Civil Procedure 23(a)(4). The representative Plaintiffs seek the same relief as the
3 other members of the class—namely, an order that they be reunified with their
4 children, whether through release or in family detention facilities. In defending their
5 own rights, Ms. L., Ms. C., Dora, and Alma will defend the rights of all proposed
6 class members fairly and adequately.

7 90. The proposed class is represented by counsel from the American Civil
8 Liberties Union Immigrants’ Rights Project and the ACLU of San Diego and
9 Imperial Counties. Counsel have extensive experience litigating class action
10 lawsuits and other complex cases in federal court, including civil rights lawsuits on
11 behalf of noncitizens.

12 91. The members of the class are readily ascertainable through
13 Defendants’ records.

14 92. The proposed class also satisfies Federal Rule of Civil Procedure
15 23(b)(2). Defendants have acted on grounds generally applicable to the class by
16 unlawfully separating parents from their young children. Injunctive and declaratory
17 relief is thus appropriate with respect to the class as a whole.

18 **CAUSES OF ACTION**
19 **COUNT I**

20 **(Violation of Due Process: Right to Family Integrity)**

21 93. All of the foregoing allegations are repeated and realleged as though
22 fully set forth herein.

23 94. The Due Process Clause of the Fifth Amendment applies to all
24 “persons” on United States soil and thus applies to Ms. L., Ms. C., their children
25 S.S. and J., and all proposed class members.

26 95. Plaintiffs, their children, and all class members have liberty interests
27 under the Due Process Clause in remaining together as families.
28

COUNT III

(Violation of Right to Seek Protection Under the Asylum and Withholding of Removal Statutes, and the Convention Against Torture)

103. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

104. Under United States law, noncitizens with a well-founded fear of persecution shall have the opportunity to apply for asylum in the United States. 8 U.S.C. § 1158(a). In addition, noncitizens have a mandatory statutory entitlement to withholding of removal where they would face a probability of persecution if removed to their country of nationality, 8 U.S.C. § 1231(b)(3), or withholding or deferral of removal where they would face a probability of torture. Foreign Affairs Reform and Restructuring Act (“FARRA”), Pub. L. No. 105-277, Div. G., Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

105. Class members have a private right of action to challenge violations of their right to apply for asylum under § 1158(a). That right is not barred by 8 U.S.C. § 1158(d)(7), which applies to only certain procedural requirements set out in Section 1158(d).

106. Defendants’ separation of families violates federal law that provides for asylum and other protection from removal, as well as their due process right to seek such relief. Separation severely impedes their ability to pursue their asylum and other protection claims in a number of ways, including by denying them the ability to coordinate their applications with their children, present facts related to themselves and their children, and creating trauma that hinders their ability to navigate the complex process. This is in violation of due process and other federal law, including the Rehabilitation Act, 29 U.S.C. § 701 et seq. and Immigration and Nationality Act, 8 U.S.C. § 1101.

107. The government is also using the trauma of separation to coerce parents into giving up their asylum and protection claims in order to be reunited

1 with their children.

2
3 **PRAYER FOR RELIEF**

4 Plaintiffs request that the Court enter a judgment against Defendants and
5 award the following relief:

6 A. Certify a class of all adult parents nationwide who enter the United
7 States at or between designated ports of entry who (1) have been, are, or will be
8 detained in immigration custody by the DHS, and (2) have a minor child who is or
9 will be separated from them by DHS and detained in ORR custody, ORR foster
10 care, or DHS custody, absent a determination that the parent is unfit or presents a
11 danger to the child.

12 B. Name Ms. L., and Ms. C., Dora, and Alma as representatives of the
13 class, and appoint Plaintiffs' counsel as class counsel;

14 C. Declare the separation of Ms. L., Ms. C., Dora, and Alma, and the
15 other class members from their children unlawful;

16 D. Preliminarily and permanently enjoin Defendants from continuing to
17 separate the class members from their children;

18 E. Order Defendants either to release class members along with their
19 children, or to detain them together in the same facility;

20 F. Enjoin Defendants from removing any class members from the country
21 who have received final removal orders until they are reunited with their children,
22 unless the class members knowingly and voluntarily decide that they do not want
23 their children removed with them;

24 G. Enjoin Defendants from removing any class member who received a
25 final removal order prior to the issuance of this Court's preliminary injunction on
26 June 26, 2018, or prior to receiving notice of their rights under the injunction, until
27 they have had an opportunity to consult with class counsel, or a delegate of class
28 counsel, to insure that these class members have knowingly and voluntarily chosen

1 to forego any further challenges to removal, rather than feeling coerced into doing
2 so as a result of separation from their children.

3 H. Order Defendants to provide Ms. L, Ms. C., Dora, Alma, and the other
4 class members with a reasonable opportunity to pursue claims for asylum.

5 H. Require Defendants to pay reasonable attorneys’ fees and costs;

6 I. Order all other relief that is just and proper.

7
8 Dated: October 5, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk for the United States District Court for the Southern District of California by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court’s CM/ECF system on all counsel of record.

/s/ Lee Gelernt
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