

May 10, 2021

Hon. Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Hon. Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th Street SW
Washington, DC 20528

Re: Meaningful Accountability and Redress for the Harms of Family Separation

Dear Attorney General Garland and Secretary Mayorkas:

We are attorneys and advocates from dozens of law firms, corporations, and non-profit organizations. We represent, referred for representation, or plan to represent hundreds of the estimated 800 parents and children who have pending administrative claims under the Federal Tort Claims Act (FTCA) based on their separation from one another by immigration authorities between 2017 and 2021. These families filed administrative claims with the Department of Homeland Security (DHS), Department of Health and Human Services (HHS), and/or Department of Justice (DOJ) seeking compensation for the trauma and other harms they experienced when federal agents unlawfully, intentionally, and forcibly separated them.

All of these families have exhausted their administrative remedies, but none have been compensated for the horrific mistreatment they suffered at the hands of the United States under policies President Biden has called “unconscionable,” “abhorrent,” and a “human tragedy.”¹ Although there is capacity among the undersigned groups to begin litigating in federal court imminently, we are encouraged to see the government exploring an alternative path.²

Settlement negotiations offer a unique and historic opportunity for this administration to realize its values and promote reconciliation. As Secretary Mayorkas has aptly explained, “It is our moral imperative to not only reunite the families, *but to provide them with the relief, resources, and services they need to heal.*”³ To that end, we ask that the administration prioritize meaningful settlements of families’ administrative claims to ensure that families receive adequate monetary compensation for the harms they experienced, as well as immediate and long-term immigration relief to ensure that families are returned to the United States if needed and can remain in the country without fear of deportation. By embracing this opportunity, the administration can begin the vital process of providing redress, promoting healing, and ensuring accountability.

¹ Joe Biden, Facebook (June 20, 2018), <https://www.facebook.com/joebiden/posts/10155305481581104>; Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021) [hereinafter “Task Force EO”].

² See Second Stipulated Motion to Hold Action in Abeyance, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. May 3, 2021), ECF No. 104; Second Stipulated Motion to Hold Action in Abeyance, *A.P.F. v. United States*, No. 2:20-cv-00065-SRB (D. Ariz. May 3, 2021), ECF No. 101; Stipulated Motion to Hold Action in Abeyance, *E.S.M. v. United States*, No. 4:12-cv-00029-JAS (D. Ariz. Apr. 27, 2021).

³ Press Release, DHS, DHS Secretary Mayorkas Announces Family Reunification Task Force Principles and Executive Director (Mar. 1, 2021), <https://www.dhs.gov/news/2021/03/01/dhs-secretary-mayorkas-announces-family-reunification-task-force-principles-and> [hereinafter “Mayorkas Press Release”].

The Horrors of Family Separation

The prior administration’s policy of intentionally separating families is a stain on our nation’s history. The policy began as a pilot program in 2017,⁴ expanded across the southern border through the Zero-Tolerance policy in 2018,⁵ and continued with intentional family separations well past the formal rescission of the Zero-Tolerance policy.⁶ The prior leadership of DOJ was “a driving force in DHS’s decision” to implement these policies, with full knowledge that they “would result in children being separated from families.”⁷ In total, the prior administration separated over 5,500 families with the explicit aim of deterring them and others from seeking asylum.⁸

In each of these separations, the government intentionally harmed children and parents who continue to suffer today. Beyond the immediate, acute psychological impacts of forcible separation from one’s parents, it is well-recognized that such separations — which the government inflicted upon “acutely vulnerable” children “in their most formative years”⁹ — have lasting effects on children’s brain development, resulting in higher likelihoods of long-term distress, cognitive delays, and emotional issues.¹⁰ Parents, too, were traumatized, with many developing Post-Traumatic Stress Disorder, Major Depressive Disorder, and other mental health diagnoses

⁴ DOJ OFF. OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 12 (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf [hereinafter “DOJ OIG Report”].

⁵ Press Release, DOJ, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

⁶ MAJ. STAFF OF H.R. COMM. ON THE JUDICIARY, THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 2 (Oct. 2020), https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519 [hereinafter “House Judiciary Report”]; KIND, Family Separation: Two Years Later, the Crisis Continues 9-10 (2020), <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf>; Ginger Thompson, *Families Are Still Being Separated at the Border, Months After “Zero Tolerance” Was Reversed*, PROPUBLICA (Nov. 27, 2018), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed>.

⁷ DOJ OIG Report, *supra* note 4, at 69.

⁸ Miriam Jordan, *Separated Families: A Legacy Biden Has Inherited from Trump*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/us/immigration-family-separations-biden.html>.

⁹ “*It’s an Important Beginning*”: *Four Migrant Families to Be Reunited This Week*, MSNBC (May 4, 2021), <https://www.msnbc.com/morning-joe/watch/four-migrant-families-to-be-reunited-this-week-separated-under-trump-administration-111305797541> (statements of DHS Secretary Alejandro Mayorkas).

¹⁰ *E.g.*, American Academy of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf>.

due to separations.¹¹ The government’s forcible separations led at least one parent to die by suicide.¹²

The government compounded these harms by detaining separated parents and children in sickening, unsanitary, and unsafe conditions where federal agents and their contractors abused their power over separated parents and children. DHS, HHS, and federal contractors confined traumatized children without their parents in “unspeakable environments”¹³ in which children went weeks without bathing,¹⁴ infants went without diapers,¹⁵ and many even reported sexual abuse.¹⁶ Detained parents, too, reported abuses including mockery, use of racist and xenophobic epithets, false promises of reunification illegally conditioned on waivers of asylum claims, and deprivation of medical care.¹⁷ The government also failed to track which children had been separated from which parents,¹⁸ and it deprived children and parents of meaningful opportunities to communicate with one another.¹⁹ Adding to the trauma, many hundreds of parents were deported without their children — a number of whom report that they accepted deportation believing they would be

¹¹ E.g., Physicians for Human Rights, “You Will Never See Your Child Again”: The Persistent Psychological Effects of Family Separation 22 (Feb. 2020), <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>; Complaint ¶¶ 112, 167, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. Sept. 9, 2019), ECF No. 1 [hereinafter “*C.M. Complaint*”]; Complaint ¶ 15, *A.I.I.L. v. Sessions*, No. 4:19-cv-00481-JCH (D. Ariz. Oct. 3, 2019), ECF No. 1 [hereinafter “*A.I.I.L. Complaint*”]; Complaint ¶¶ 96-99, *D.J.C.V. v. United States*, No. 1:20-cv-05747-PAE (S.D.N.Y. July 24, 2020), ECF No. 1; Complaint ¶ 78, *E.L.A. v. United States*, No. 2:20-cv-01524-RAJ (W.D. Wash. Oct. 15, 2020), ECF No. 1; Complaint ¶¶ 99-103, 129-32, *Fuentes-Ortega v. United States*, No. 4:20-cv-00266-MLB (N.D. Ga. Nov. 17, 2020), ECF No. 1; Complaint ¶¶ 11, 53-55, *Nuñez Euceda v. United States*, No. 2:20-cv-10793-VAP-GJS (C.D. Cal. Nov. 25, 2020) [hereinafter “*Nuñez Euceda Complaint*”]; Complaint ¶¶ 90, 127, 129-30, 148-50, *C.D.A. v. United States*, No. 5:21-cv-00469-EGS (E.D. Pa. Feb. 1, 2021), ECF No. 1 [hereinafter “*C.D.A. Complaint*”].

¹² Carlos Sanchez, *Family of Migrant Father Who Died by Suicide Sues Federal, Local Authorities*, TEXAS MO. (Aug. 20, 2019), <https://www.texasmonthly.com/news/honduran-immigrant-suicide-during-family-separation-lawsuit/>.

¹³ Nila Bala & Arthur Rizer, *Trump’s Family Separation Policy Never Really Ended. This Is Why*, NBC (July 1, 2019), <https://www.nbcnews.com/think/opinion/trump-s-familyseparation-policy-never-really-ended-why-ncna1025376>.

¹⁴ Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids*, AP (June 21, 2019), <https://apnews.com/article/46da2dbe04f54adbb875cfbc06bbc615>.

¹⁵ *Id.*

¹⁶ Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

¹⁷ E.g., *C.M. Complaint*, *supra* note 11, at ¶¶ 79-80, 90 (officers laughing and mocking parent while informing her of separation and asking “What’s wrong with you?” after separation); *A.I.I.L. Complaint*, *supra* note 11, at ¶¶ 77, 86, 96, 118, 169 (officers saying “dirty Guatemalans” and “Fuck these Salvadorans,” laughing at separated parents and children, failing to provide medical care despite repeated requests, and telling parents that waiving asylum claims and consenting to removal was only path to reunification with children); *Nuñez Euceda Complaint*, *supra* note 11, at ¶ 38 (officers failing to respond to multiple requests for basic medical care); Complaint ¶ 58, *R.Y.M.R. v. United States*, No. 1:20-cv-23598-KMW (S.D. Fla. Aug. 28, 2020), ECF No. 1 (officer failing to offer medical attention).

¹⁸ E.g., *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019).

¹⁹ E.g., *id.* at 1144-45; *C.M. Complaint*, *supra* note 11, at ¶¶ 86-88, 91-93; *Nuñez Euceda Complaint*, *supra* note 11, at ¶¶ 41-47; *C.D.A. Complaint*, *supra* note 11, at ¶¶ 57, 88, 94-96, 138, 141-42; *see also* HHS OFF. OF THE INSPECTOR GEN., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 10-11 (Sept. 2019), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> (noting that “[c]hildren who did not understand why they were separated from their parents suffered elevated levels of mental distress,” in part due to “[t]he difficulties that some facilities had in locating parents in detention and scheduling phone calls”).

reunited with their children beforehand.²⁰ Even today, an estimated 1,500 children remain separated from their parents or have yet to be located.²¹

Separating and abusing migrant families violated the Constitution²² and international prohibitions against crimes against humanity, including torture.²³ Individuals in the Trump Administration knew of the harms these policies would inflict²⁴ and had “full knowledge that hundreds of children would likely be lost to their families forever.”²⁵ The government nevertheless proceeded in order to deter people from seeking refuge in our nation. The cruelty was intentional.²⁶

The Need for Accountability

We commend the Biden Administration for firmly opposing these policies and beginning to reunify still-separated families.²⁷ We also appreciate the administration’s recognition, through its engagement in settlement negotiations with separated families,²⁸ that reunification alone hardly

²⁰ Cindy Carcamo, *In Mountains of Guatemala, Searching for Parents Deported from U.S. Without Children*, L.A. TIMES (Aug. 31, 2018), <https://www.latimes.com/world/la-fg-guatemala-separated-families-20180831-htlstory.html>; Alex Wagner, *The Lost Ones*, ATLANTIC (July 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-lost-ones/566219/>.

²¹ Jordan, *supra* note 8.

²² See, e.g., *Ms. L.*, *supra* note 18, at 1137; *J.P. v. Sessions*, No. LA-CV-18-06081-JAK-SKx, 2019 WL 6723686, at *37 (C.D. Cal. Nov. 5, 2019).

²³ See generally, e.g., Brief of Doctors Beth Van Schaack et al. as *Amici Curiae*, *D.J.C.V. v. United States*, No. 1:20-cv-05747-PAE (S.D.N.Y. Dec. 22, 2020), ECF No. 46-1 (explaining that government’s forced separation of asylum-seeking parents from children for purpose of deterring immigration constituted torture in violation of international law); Brief of International Human Rights Organizations and International Law Scholars as *Amici Curiae*, *D.J.C.V. v. United States*, No. 1:20-cv-05747-PAE (S.D.N.Y. Dec. 22, 2020), ECF No. 47-2 (outlining that government’s discriminatory policy of intentional family separation constituted persecution in violation of international law); U.N. Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ¶ 20, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018), https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf (explaining that mistreatment of migrants can amount to torture if “based on discrimination . . . or for the purpose of deterring, intimidating, or punishing migrants or their families” or “coercing them into withdrawing their requests for asylum”).

²⁴ E.g., DOJ OIG Report, *supra* note 4, at 2 (“Multiple DOJ leaders told us that Sessions understood at the time the zero tolerance policy was issued” that it would “result in family separations.”); Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE (July 31, 2018), <https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html> (noting former senior HHS official testified before Congress that he had warned the administration that implementing a family separation policy would involve a significant risk of harm to children).

²⁵ House Judiciary Report, *supra* note 6, at 3.

²⁶ E.g., Task Force EO, *supra* note 1 (noting separations were “intentional[]”); STAFF OF H.R. COMM. ON OVERSIGHT & REFORM, CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION 2 (July 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019_Immigrant_Child_Separations-Staff_Report.pdf (“[T]he policy of separating children from their parents appears to be a deliberate, unnecessary, and cruel choice by President Trump and his Administration.”); Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, WASH. POST (June 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/> (listing officials including Attorney General, White House chief of staff, and acting assistant secretary of HHS describing deterrent aims of intentional family separation).

²⁷ Press Release, DHS, Biden Administration Begins This Week to Reunite Families Separated Under the Prior Administration (May 3, 2021), <https://www.dhs.gov/news/2021/05/02/biden-administration-begins-week-reunite-families-separated-under-prior> (announcing first reunifications and noting Task Force’s consideration of options to secure “long term legal stability for reunified families”).

²⁸ See sources cited *supra* note 2.

remedies the severe harms families have endured at the hands of the government. We urge the administration to act swiftly and collaboratively to ensure that victims of family separation can secure both monetary compensation and durable immigration relief in tandem.

Furthermore, we urge the administration to retreat from the Justice Department's initial, adversarial approach to separated families seeking to vindicate their rights in court.²⁹ The Justice Department's aggressive efforts to dismiss these families' lawsuits are directly at odds with the Attorney General's comments, the DHS Secretary's commitments, and the Biden Administration's goals. For example, in February, the Justice Department asserted in a public filing that its separation of a two-year-old from his father "[did] not constitute torture" because it was done "for a lawful, reasonable purpose."³⁰ In March, in oral argument in the same case, the government stated explicitly that, in the Biden Administration's view, the prior administration's intentional policy of family separation was constitutionally valid.³¹ In another case, the Justice Department recently compared family separation to any other routine policy decision, arguing that allowing separated families to be compensated "would chill important governmental functions" by undesirably "deter[ring] [government] officials" as they formulated future policies.³²

This administration would betray its commitment to healing if it reverted to this path and required all separated families to litigate in federal court in order to receive redress. Rather, now is the time for the government to make all affected families whole — and deter future administrations from separating families again — by settling administrative claims for damages, providing long term immigration relief, and retracting prior litigation positions seeking dismissal of families' claims. Full accountability and redress are needed to meaningfully promote healing and prevent future abuses.³³

²⁹ In FTCA suits that affected families have already filed, the government has aggressively opposed redress. On this point, in addition to the cases cited *supra* notes 2, 11, and 17, *see, e.g., D.A. v. United States*, No. 1:20-cv-03082-MMP (N.D. Ill. filed May 22, 2020); *S.E.B.M. v. United States*, No. 1:21-cv-00095 (D.N.M. filed Feb. 5, 2021); *B.A.D.J. v. United States*, No. 2:21-cv-00215-SMB (D. Ariz. filed Feb. 8, 2021); and *C.M. v. United States*, No. 5:21-cv-00234-JKP-ESC (W.D. Tex. filed Mar. 8, 2021).

³⁰ Reply Memo. of Law in Support of Def.'s Mot. to Dismiss at 25 n.20, *D.J.C.V. v. United States*, No. 1:20-cv-05747-PAE (S.D.N.Y. Feb. 12, 2021), ECF No. 77. The government's brief further argued that the prior administration's actions were "not conscience shocking" and not "extreme or outrageous." *Id.* at 5, 16-17, 18.

³¹ Specifically, the government stated on March 5 that the "position of this administration" was that it was "not unconstitutional to separate a parent and child" in immigration detention, even if done "across the board" as a matter of policy, and again argued that family separation was not the kind of "extreme and outrageous act" that could justify monetary damages. Transcript of Oral Argument at 8-12, 32, *D.J.C.V. v. United States*, No. 1:20-cv-05747-PAE (S.D.N.Y. Mar. 5, 2021), ECF No. 84-5.

³² United States of America's Reply in Support of Mot. to Dismiss at 3, *A.I.I.L. v. Sessions*, No. 4:19-cv-00481-JCH (D. Ariz. Feb. 5, 2021), ECF No. 62.

³³ *See, e.g.,* Civil Liberties Act of 1988, Pub. L. No. 100-383, §§ 1-2, 102 Stat. 903 (recognizing that internment of Japanese Americans "resulted in significant human suffering for which appropriate compensation ha[d] not been made" and providing monetary restitution, in part to "discourage the occurrence of similar injustices and violations of civil liberties in the future"); S. REP. NO. 100-202, 1987 WL 61493, at *7-8 (1987) (explaining that "ultimate goal" of Civil Liberties Act was "to prevent the occurrence of another similar event"); Bilal Qureshi, *From Wrong to Right: A U.S. Apology for Japanese Internment*, NPR (Aug. 9, 2013), <https://www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress> (quoting John Tateishi, survivor of internment, on campaign for Civil Liberties Act: "It's the legacy we're handing down to [the next generation] and to the nation to say that, 'You can make this mistake, but you also have to correct it — and by correcting it, hopefully not repeat it again.'").

Redress, Reconciliation, and Healing

The Biden Administration has the opportunity to stand behind its words, do right by these families, and “dig out of the cruelty of the past administration.”³⁴ The administration can and should settle administrative claims filed by families who suffered forcible separation and other harms arising from the intentional, cruel actions of officials at every level of the prior administration, in line with its “moral imperative” to provide families with “the relief, resources, and services they need to heal.”³⁵ Families who have not yet filed claims should have the opportunity to participate in settlement. In addition to settling for monetary damages, the administration must grant families immediate and long-term immigration relief in order to protect against future separations under the guise of immigration enforcement.³⁶

We ask that the government:

- Use all tools at its disposal to protect families who suffered forcible separation by providing immigration relief both in the short term (using tools such as humanitarian parole, deferred action, and employment authorization) and in the long term (using tools such as stipulations to asylum, U Visas, and other durable forms of status that ensure family unity).
- Sufficiently compensate all affected families for the full range of harms they experienced.
- Retract its efforts to pursue dismissal of litigation seeking damages on behalf of victims of family separation, including by allowing plaintiffs in any case in which the government has succeeded on a motion to dismiss to pursue their claims to resolution in settlement.
- Decline to assert available defenses on administrative FTCA claims, including statutes of limitations, so as to ensure that adequate compensation is distributed to all families harmed by separation regardless of whether they have claims currently pending.

By expeditiously addressing each separated family’s claims to compensation and relief, you can begin to achieve a measure of redress for the mental, emotional, and physical harms these families experienced at the hands of the United States. In addition, you can advance a truth and reconciliation effort to heal from this shameful atrocity and ensure that it will never be repeated.

³⁴ White House, Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas (Mar. 1, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/01/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas/> [hereinafter “Mayorkas Briefing”]; see also Maggie Jo Buchanan, Philip E. Wolgin & Claudia Flores, *The Trump Administration’s Family Separation Policy Is Over — What Comes Next?*, CTR. FOR AM. PROGRESS (Apr. 12, 2021), <https://www.americanprogress.org/issues/immigration/reports/2021/04/12/497999/trump-administrations-family-separation-policy/> (“Providing families with adequate compensation during the administrative FTCA process and working to settle pending litigation would be appropriate steps for the U.S. government to take to accept collective responsibility for the [family separation] policy and for the damage it caused and continues to cause. Moreover, compensating these families would demonstrate clearly that the current administration’s approach is to remedy and ameliorate the policy’s harmful effects.”).

³⁵ Mayorkas Press Release, *supra* note 3.

³⁶ 28 U.S.C. § 2672; 28 C.F.R. § 14.6; see also Mayorkas Briefing, *supra* note 34 (committing to “exploring lawful pathways for [separated families] to remain in the United States” and to “address[ing] [their] needs”).

Sincerely,

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