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

19 Ms. L. et al.,

20 *Petitioners-Plaintiffs,*

21 v.

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

24 *Respondents-Defendants.*
25
26
27
28

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

Date Filed: April 15, 2019

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' PROPOSED
PLAN REGARDING
IDENTIFICATION OF
EXPANDED MS. L. CLASS**

INTRODUCTION

1
2 The government has proposed a plan that will take at least one year — and
3 possibly up to two full years — to identify separated parents whose children were
4 released prior to June 26, 2018. Dkt. 394-1 at 2. That incredible request shows a
5 callous disregard for these families and should be rejected. These children were
6 separated at least 10 months ago, before June 26, 2018. For some of these children,
7 that may be nearly a lifetime.

8 Specifically, the government proposes a plan that would (1) allow an initial
9 three months just to build a statistical model to prioritize the order in which the
10 government will review files, and then (2) give the government another 21 months
11 to review the files. Everything about the plan is flawed.

12 First, a list of separated children already very likely exists for children who
13 were separated from their parents and released from ORR custody between April
14 and June 26, 2018. This is because the government began assigning Family Unit
15 numbers in April of 2018, enabling CBP to track families that were separated. By
16 cross-referencing CBP's list of separated children with ORR's list of children
17 released from ORR custody, the government could immediately identify the
18 separated children it released to sponsors between April and June 2018, assuming
19 that list does not already exist. That would immediately reduce the number of cases
20 the government has to review. It is a serious breach if that list does in fact exist (or
21 could have been immediately generated) and has not been mentioned by the
22 government.

23 Second, even if the government must review all the cases for the full period
24 at issue here (July 2017 – June 26, 2018), the government should be able to perform
25 this task in three months or less based on its past practice during the initial
26 reunification period last summer. Yet the government wants three months just to
27 create a statistical model before even beginning to review any files. If the
28 government wants to prioritize how it reviews files, that of course is fine. But its

1 time estimates are wholly insufficient given that the entire review of every file can
2 be done within 3 months.

3 Moreover, and critically, the government's plan will not only take far too
4 long, but it also will not be effective. That is because the government is not
5 proposing to review the paper files kept by case managers at the individual ORR
6 facilities where the children were held. Rather, the government is proposing to look
7 only at a computer portal maintained by ORR. Dkt. 394-2 at ¶ 9. But those portals
8 contain only a portion of the case managers' paper files and frequently will contain
9 no information about whether or not the child was separated.

10 The government should therefore issue an immediate directive to case
11 managers at ORR facilities around the country to review their paper files for
12 separations, like the government did in the days immediately following the issuance
13 of the preliminary injunction. The files are generally very thin and Plaintiffs'
14 experts conservatively estimate, based on their own review of files, that each should
15 take on average no more than 30 minutes. Moreover, the case managers will be
16 familiar with where they recorded information about separated parents in their own
17 files, so can likely do their review in less than 30 minutes. Notably, this is similar
18 to what the government did when the court ordered the government to reunite the
19 initial group of children (the approximately 2,500 in ORR custody on June 26);
20 ORR's case managers conducted a file review for more than 11,000 children within
21 a week.

22 Third, the government is proceeding as if HHS is solely responsible for
23 undertaking the task of identifying families. But ICE and CBP also have records of
24 separations, and DHS was of course the agency that separated the children. In
25 particular, the I-213 Form that DHS agents fill out to document apprehensions may
26 often contain a notation that the child was separated. Consequently, if the ORR
27 files do not indicate whether the child was separated, the government should be
28 required to immediately check the I-213 Form – along with any other information

1 in DHS’s possession. This information includes an “Event ID number,” which is
2 issued to every person arrested by CBP and shows who they were arrested with.
3 Because children arrested with their parents will share the same Event ID number,
4 the government can find additional separations by looking for children who were
5 arrested with an adult who shares a last name. These numbers thus provide a
6 critical backstop if the case manager file and I-213 Form are not conclusive.

7 In sum, the government’s unnecessarily long timeframe will only compound
8 the harm the government has already inflicted on separated families. Ultimately,
9 the government is simply refusing to prioritize the welfare of these children and
10 families. The government initially argued that it should not even have to identify
11 these families. Now it has submitted a plan that shows little regard for them and
12 certainly not the urgency warranted where the lives of young children are at stake.
13 The process of identifying the victims of the government’s separation policy is the
14 first step to ensuring that no child is permanently orphaned.

15 DISCUSSION

16 **A. The Government Must Produce Any Existing Lists of Separated 17 Families Who Are Members of the Expanded Class.**

18 Plaintiffs believe that government agencies outside of HHS likely have
19 already compiled lists of all, or nearly all, separations from April 2018 to June 26,
20 2018. That is because, according to a GAO report, the government in April
21 instituted a more formal family identification system that allowed them to generate
22 lists of parents and children who were separated. *See* GAO Report,
23 *Unaccompanied Children: Agency Efforts to Reunify Children Separated from*
24 *Parents at the Border* (October 2018) [hereinafter “GAO Report”] at 17, available at
25 <https://www.gao.gov/assets/700/694918.pdf> (“According to Border Patrol officials,
26 Border Patrol modified its system on April 19, 2018, to include yes/no check boxes
27 to allow agents to indicate that a child was separated from their parent(s).”). *See*
28 *also* Brané Dec. ¶3. When this court ordered the government to reunify the original
class of children, the government created a list that it provided to Plaintiffs of

1 separated children still in ORR custody on June 26. But it is likely that a list was
2 also generated for all family units separated since the government started assigning
3 identification numbers to separated families in April 2018. That list would include
4 children who were released from ORR between April and June.

5 Accordingly, the Court should order all three relevant agencies – ORR, CBP
6 and ICE – to provide an account of any lists of separated children, or provide
7 declarations from high-level agency officials testifying that such lists do not exist
8 for *any* subset of the expanded class definition. And if such lists do exist (or could
9 have been generated in a matter of hours or days), the declarations should also
10 explain why they were not mentioned in the government’s proposal.

11 Even a limited list of families separated between April and June 26 would go
12 a long way towards identifying at least a portion of the expanded class.

13 **B. The Government Should Start Reviewing Paper Case Files Immediately
14 Instead of Waiting Three Months to Perform a Statistical Analysis.**

15 1. Even taken on its own terms, the government’s extended timeline is
16 unreasonable. The government initially proposes that manual review begin only
17 after a three-month statistical analysis. But this delay is too long, and in any case
18 unnecessary. The government says that after three months of development it would
19 “*try to apply [its data model] it to the available data for. . . approximately 47,000*
20 *children,*” and that “[i]t is *possible* that it *could* [] reduce the overall time required
21 for manual review.” Graubard Dec. (Dkt. 394-3) ¶¶ 13, 15 (emphasis added). But
22 the government does not deny that it needs to review all children’s files regardless
23 of the results of the statistical analysis. Nor can it, because even a low error rate in
24 the government’s statistical model could lead to hundreds, if not thousands, of
25 missed separations.

26 In other words, the government appears to acknowledge that *all* children’s
27 files must be reviewed anyway because their proposed data models will necessarily
28 be imperfect. Waiting three months to prepare a data model is therefore needless.
That is especially so since all the files can be reviewed manually within three

1 months, as described further below. If the government is going to try to prioritize
2 how it manually reviews cases, then it must do so quickly and in a way that does
3 not lengthen the three-month period for completing review of all the files.¹

4 2. As importantly, the government's plan for reviewing cases by looking solely
5 at ORR's UAC portal will not come close to identifying all the separated families.²
6 The portal contains only the subset of information that case managers chose to
7 upload from their paper files. Between July of 2017 and April 2018, there was no
8 field on the portal to record separations. Any information in the portal about
9 separations would have therefore been included only if the case manager happened
10 to upload it, which did not happen on a regular basis.

11 The paper case files developed by ORR case managers are therefore far more
12 likely to include notations of separation, but not all of these documents are

13
14 ¹ Moreover, to prioritize, the government need not spend the time creating a
15 statistical model that it acknowledges will be imperfect. The government can
16 quickly prioritize by simply looking at the age of the child. For instance, most
17 children under 10 do not come by themselves, making it more likely that they were
18 separated from a parent or legal guardian. Additionally, the government could
19 prioritize records of children transferred to ORR from the El Paso area, where the
20 government implemented a family-separation pilot project before the zero tolerance
21 policy began, and where the bulk of the known early separations occurred
22 beginning in the Fall of 2017.

23 ² Although Plaintiffs do not believe the portal should be used, the
24 government's estimates for the time it will take to review portal files is
25 unreasonable. The government states that each child's UAC portal contains about
26 10-20 documents, and that it would take at least 5 to 15 minutes to download each
27 document. Sualog Dec. (Dkt. 351-1) ¶ 18. The government apparently envisions
28 that each analyst who is reviewing the files will first download the files and then
review them. Based on this estimate, the government estimates that each analyst
will review only one or two files per work day. At this pace, 100 analysts would
need one to two years to review 46,000 files, at a pace of a maximum of two files a
day. Sualog Dec. ¶ 18; 4/5/19 White Dec. (Dkt. 394-2) ¶ 21. But there is
absolutely no reason for the process to move at such a glacial pace, even if portals
were going to be used. For example, the government can allocate resources up
front to have employees download and copy documents for analysts to then review.

1 accessible through the ORR portal system, and in fact they frequently will not be.
2 Consequently, it is thus imperative that the government perform a manual review of
3 ORR paper files compiled by case managers at the various facilities around the
4 country.

5 This review of the paper files in the various ORR facilities can be done
6 within three months, and certainly need not take one to two years. Plaintiffs'
7 experts have reviewed ORR files (produced by the government in response to
8 records requests). Turner Dec. ¶ 3. A conservative estimate is that it takes 30
9 minutes, at most, to review an ORR file to identify indicia of separation; in many
10 cases, it takes as little as ten minutes. *Id.* ¶ 5. But even assuming it will take a full
11 30 minutes per file, 100 case managers could review all 47,000 files within 29 work
12 days, or six work weeks. And case managers at the ORR facilities, given their
13 greater familiarity with their own notations, organizational methods, and the
14 children formerly in their care, will likely be able to perform this task even faster.

15 Significantly, when the government put together the original list of separated
16 families last summer, it used the case managers at ORR's facilities to conduct a
17 similar review. As Commander White stated in a previous declaration about
18 compiling the original class list last summer:

19 To ensure that every separated child in ORR custody who belongs to a
20 class member is identified and reunified, HHS has had each grantee at
21 one of ORR's approximately 110 shelters certify the separated children
22 who the grantee reasonably believes are in its care. HHS has also
23 conducted a full manual review of the case management file for each
24 one of the approximate 11,800 children in ORR custody—the
25 substantial majority of whom were not separated from a putative parent
26 at the border—to confirm or rule out any indicia of separation. The
27 manual review was conducted by dozens of HHS personnel working
28 nights and over the weekend. The results of both the manual review
and the grantee certifications are undergoing validation.

Dkt. 86-1 (July 5, 2018 White Dec.) ¶ 18. Commander White gave this
testimony on July 5, 2018, a mere ten days after the preliminary injunction

1 issued. So apparently ORR performed this review of nearly 12,000 files
2 within approximately ten days.

3 **C. The Government Should Also Review ICE/CBP Files.**

4 In addition to reviewing ORR case manager files, the government should
5 simultaneously review CBP and ICE files, or at an absolute minimum, review them
6 whenever the ORR file is not determinative.

7 For instance, DHS files will contain Form I-213, “Record of
8 Deportable/Inadmissible Alien,” which is completed upon apprehension and may
9 often include a notation from the agent about separation. Unlike many other DHS
10 forms, it contains a narrative section where the officer and agents processing
11 parents and children can record information that is not otherwise captured in data-
12 entry fields. Although the I-213 may occasionally be sent to ORR and end up in
13 the case manager’s file, that will not always be true. *See* GAO Report at 19, n. 49
14 (“CBP officials reported that prior to May 5, 2018, the Form I-213 was provided to
15 ORR on a case-by-case basis and CBP did not require agents to include this form in
16 its transfer packet.”). A review of the Form I-213—which can be electronically
17 pulled up from DHS’s computer systems based on the alien identification number
18 attached to each child who was transferred to ORR—is thus a critical backstop.

19 The government also should use the Event ID number assigned by DHS for
20 each incident because, prior to April 2018, CBP did not always note a separation on
21 the I-213. But when CBP arrests a group, every individual arrested during that
22 incident receives the same Event ID number. Brané Dec. ¶4. Consequently, by
23 using the child’s Event ID number, the government can determine if any adult was
24 arrested at the same time with a same name, thus indicating they are a potential
25 class member.³

26 ³ The government has previously used similar methods. Immediately after the
27 June 26, 2018 injunction, a “data team (with the support of ORR, other HHS
28 operating and staff divisions, and DHS sub-agencies) mined more than 60 DHS and
HHS databases to identify indicators of possible separation, such as an adult and

1 In sum, review of the ORR case manager paper files will hopefully be
2 sufficient, but DHS should not be allowed to skirt responsibility for remedying the
3 problem it created by unconstitutionally separating families and then not keeping
4 accurate, accessible records. DHS records must be utilized in conjunction with the
5 ORR file review.

6 CONCLUSION

7 The Court should order the government to complete the identification process
8 within three months and provide the information on a rolling basis. And if a list
9 exists for separated children who were released from ORR custody between April
10 and June 2018 (or can be generated in hours or days), that list should be provided
11 within 7 days.

12 Specifically: Plaintiffs respectfully ask the Court to order that the
13 government:

- 14 - Instruct case managers immediately to begin reviewing the ORR files in their
15 possession;
- 16 - Assign DHS to review I-213s and Event ID numbers in the event that review
17 of ORR files is inconclusive;
- 18 - Immediately produce any lists of children who were separated and released
19 between April and June 2018, and if such lists exist, to explain in a
20 declaration why they were not previously mentioned; and
- 21 - Complete the identification process within three months and provide the
22 information on a rolling basis.

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28 child with the same last name apprehended on the same day at the same location.”
GAO Report at 7.

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Dated: April 15, 2019

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, 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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Dated: April 15, 2019

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