UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.G.U., *et al*.,	§	
	§	
Plaintiffs,	§	
	§	No. 18-cv-1458
v.	§	
	§	Civil Action
Kirstjen Nielsen, *et al.*,	§	
	§	
Defendants.	§	

APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs are M.G.U., E.F., and A.P.F., three parents who entered the United States with their children aged 2, 6, 9, 12, and 13.

Defendants are the federal agencies and officials who forcibly separated Plaintiffs from their children, are maintaining this separation indefinitely, and are maintaining separation almost incommunicado. Defendants include the following agencies and their responsible officials: U.S. Department of Homeland Security (DHS); U.S. Immigration and Customs Enforcement (ICE); U.S. Customs and Border Protection (CBP); U.S. Department of Health and Human Services (HHS); and U.S. Office of Refugee Resettlement (ORR).

By this Rule 65(b) application for temporary restraining order, Plaintiffs seek immediate access to basic information about their children's whereabouts and well-being, and frequent, meaningful opportunity to see and hear their children. By application for preliminary injunction to be filed separately in this cause, Plaintiffs will seek prompt reunification with their children.

In compliance with Rule 65(b) and Local Civil Rule 65.1(a), undersigned counsel notified defense counsel of this application and furnished to defense counsel all documents filed in this cause, as described on the last page of this document.

RELIEF REQUESTED

Plaintiffs seek a temporary restraining order requiring Defendants to immediately provide reliable, daily information to each Plaintiff concerning the well-being of each of Plaintiff's children, either orally or in writing with reasonable specificity, as follows:

a. the complete address where each child is currently located;

b. the government's most accurate estimate of the date that it anticipates reuniting each parent with each child;

c. a description of the setting where each child resides, whether home or institutional;

d. the name, age, and gender of each person primarily responsible for each child's care;

e. whether the child has suffered any accident or illness;

f. a description of each child's activities during that day; and

Plaintiffs also seek frequent and meaningful access to or communication with each child via telephone or video link. Plaintiffs have attached a proposed order that conforms to Rule 65(b).

FACTS

As shown by his succinct handwritten declaration, Plaintiff A.P.F. last saw his 12-year-old daughter on June 5, 2018 and he knows almost nothing about what has happened to her. He describes his indefinite and essentially incommunicado separation from her as "torture." Declaration of A.P.F. at 1, attached.

As shown by her attached declaration, Plaintiff E.F. entered the United States near Presidio, Texas on May 14, 2018 together with her 9-year-old son B.Y.A.F. Declaration of E.F. at 1-5 (May 21, 2018), attached. Defendants arrested E.F. and forcibly separated her son from her the next day. She has not seen him since. She does not know where he is, except she believes that he is in New York while she is detained in El Paso, Texas. She does not know

when or how she will ever be able to see him again. Since the separation, Defendants have allowed E.F. to speak with her son but three times for approximately five minutes each time. *Id.* ¶ 9 ("He only asks when we will see each other again and begs to be with me. He is scared and lonely and desperate to be with me. I try to tell him everything will be ok and that I'll see him soon but, the truth is, I don't know what will happen with us."). E.F. endures constant anguish for lack of information about her son's well-being. *Id.* at ¶ 18 ("I wake up from my sleep crying because I remember that he was taken from me. I feel so upset and sad when I remember how he was taken from me. I don't understand how someone could take their child away from their mother. I think, 'Don't they have children too? Don't they know the pain I'm feeling?' Then I say to myself that God has a plan but I still don't understand why my son was taken.").

As shown by her handwritten declaration, Plaintiff M.G.U. has only been able to speak with her three children for 10 minutes two times each week. These communications are costly and unreliable. Of course her two-year-old is unable to provide reliable information about his circumstances, and staff provide only general information to M.G.U., nothing specific about her children's well-being, which causes her anguish.

The attached declarations of medical professionals confirm what is apparent from Plaintiffs' common experience: forced separation traumatizes parents and children, and this trauma is compounded when parents and children are denied basic information about each other's well being and reunification prospects. *See* Declaration of Dr. Aurelie Athan at ¶¶ 5-6 ("When reunification is ambiguous, learned helplessness and hopelessness set in which are precursors to depression along with the already often established anxiety and social distrust . . . . The above separation reactions, both short and long-term, are especially exacerbated when there is a) uncertainty as to when and if reunification is possible, b) access to and communication with

the child is not possible, [and] c) objects belonging to the child have been removed and taken away."); Declaration of Dr. Lisa Fortuna at ¶ 12 ("If individual families are detained separately, a lack of information regarding each other's well-being or status has a negative effect on both children and parents. In addition to the trauma of separation, being detained without information can induce profound hopelessness, despair, depression and even suicidal urges….").

Defendants recognize their responsibility to facilitate communication between separated parents and their children, albeit in vague terms. *See* ECF No. 1-4 ("HHS and DHS work to facilitate communication between detained parents and their children in HHS care."). Defendants' efforts to do so are incomplete, for they do not commit to informing parents of the current location of each child, or the date of anticipated reunification. *See* ECF No. 1-4 at 3 ("HHS and ICE can take steps to facilitate family reunification . . . . "); *id.* at 5 ("Where are children going? Alien children who are separated from their parents or legal guardians will be transferred to ... ORR."). Defendants' efforts have also proved ineffective to supply basic information to Plaintiffs, as described in Plaintiffs' attached declarations.

JURISDICTION

The Court has jurisdiction to enjoin unconstitutional action by the Defendant federal agencies. *Trudeau v. Fed. Trade Commn*., 456 F.3d 178, 190 (D.C. Cir. 2006). The government has waived sovereign immunity from suits directly under the Constitution that seek equitable relief. *Id.* at 186 (citing 5 U.S.C. § 702). Plaintiffs invoke this jurisdiction to redress Defendants' Fifth Amendment violations. ECF No. 1 at ¶¶ 95-104.

STANDARD OF REVIEW

"The court considers the same factors in ruling on a motion for a temporary restraining order and a motion for preliminary injunction." *Baker DC v. Nat'l Labor Relations Bd.*, 102 F.

Supp. 3d 194, 198 (D.D.C. 2015). Courts "consider four factors when deciding whether to grant a preliminary injunction: whether the plaintiff will be irreparably harmed if the injunction does not issue; whether the defendant will be harmed if the injunction does issue; whether the public interest will be served by the injunction; and whether the plaintiff is likely to prevail on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981). These factors "interrelate on a sliding scale and must be balanced against each other." *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999). "A district court must balance the strengths of the requesting party's arguments in each of the four required areas." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

The court may include mandatory relief regarding immigration detention in a temporary restraining order. *See, e.g., Mahmood v. Nielsen*, 17-cv-8233, 2018 WL 2148439 at *2 (S.D.N.Y. May 9, 2018).

ARGUMENT

Plaintiffs seek immediate access to the basic information that any separated parent would be desperate to learn about his or her children. Defendants can state no legitimate reason for withholding this information. All four factors strongly favor granting immediate relief.

I. Lack of Basic Information about Children Causes Plaintiffs Immediate, Ongoing, Irreparable Harm

Defendants have not only forcibly separated Plaintiffs from their minor children, Defendants separated Plaintiffs from their children:

(a) indefinitely;

(b) without any statement of what events will produce reunification;

(c) without informing parents exactly where their children are and who is caring for them;

(d) without information about each other's well-being; and

(e) without reliable and sufficient means of communicating with one another by video or telephone.

See Attached Declarations of Plaintiffs. Plaintiffs naturally seek additional information about reunification and their children's -well being, whereabouts, and care. They also seek frequent and meaningful communication to reduce the anguish that they endure every minute they remain separated from their children, and that they are sure their children are also experiencing.

Lack of information about family members itself causes trauma to children and parents alike, particularly when children and parents have been forcibly separated. *See* Attached Declarations of Medical Professionals. ICE so acknowledges when it states that "ICE is augmenting mental health care staffing, to include trained clinical staff, to provide mental health services to detained parents who have been separated from their children." ECF No. 1-4 at 3.

Courts uniformly recognize that separation causes trauma, as does uncertainty about family members. *See also Stanley v. Illinois*, 405 U.S. 645, 647 (1972) ("[P]etitioner suffers from the deprivation of h[er] child[], and the child[] suffer[s] from uncertainty and dislocation."); *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir.1997) ("[F]orced separation of parent from child, even for a short time, represents a serious infringement upon both the parents' and child's rights."); *Nicolson v. Pappalardo*, 685 F. Supp. 2d 142, 145-46 (D. Me. 2010) ("[e]very additional day" of separation causes further harm).

"[L]oss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (citations omitted). As a result, "[w]hen an alleged deprivation of a constitutional right is

involved, most courts hold that no further showing of irreparable injury is necessary." 11A WRIGHT & MILLER, FED. PRAC. & PROC. § 2948.1 (2d ed. 2004).

II. Plaintiffs Are Likely to Succeed on the Merits of their Fifth Amendment Claims

The Fifth Amendment's Due Process guarantee protects noncitizens who are present on U.S. soil. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("there are literally millions of aliens within the jurisdiction of the United States" and "the Fifth Amendment . . . protects every one of these persons") (internal references omitted). Plaintiffs seek this Court's protection of two of their due process rights: the right to family integrity and the right to be free of punishment.

A. Defendants' Withholding of Information from Parents is Not Narrowly Tailored to Serve a Compelling Government Interest

The parent-child relationship is a "basic civil right[] of man" and "far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "[T]he relationship between parent and child is constitutionally protected" by the Fifth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Indeed, "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by" the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Government may only interfere with family integrity in ways that are narrowly tailored to serve a compelling government interest. *Pittman v. Cuyahoga County Dept. of Children and Fam. Services*, 640 F.3d 716, 728 & n.6 (6th Cir. 2011); *U.S. v. Breeden*, No. 16-cr-0008, 2016 WL 8943168 at *2 (D.D.C. June 3, 2016); *U.S. v. Godoy*, No. 10-cr-16, 2014 WL 12618708 at *5 (D.D.C. June 13, 2014); *O'Donnell v. Brown*, 335 F. Supp. 2d 787, 821 & n.16 (W.D. Mich. 2004).

Two compelling state interests in interfering with family integrity are widely recognized: the state's legitimate interest in protecting children from dangerous parents, and the state's

interest in administering criminal justice to parents. Neither rationale explains Defendants' continued interference with any Plaintiff's parental rights.

Defendants' own previous policy indicates that they have no compelling state interest in withholding information about children from parents, and preventing them from readily communicating with one another. In 2013, Defendant ICE committed to "ensure that the agency's immigration enforcement activities do not unnecessarily disrupt the parental right of both alien parents or legal guardians of minor children." ECF No. 1-1 at 1 ¶ 2. ICE defined "parental rights" as "[t]he fundamental rights of parents to make decisions concerning the care, custody, and control of their minor children without regard to the child's citizenship, as provided for and limited by applicable law." *Id.* at 2 ¶ 3.3. ICE policy was that "ICE will maintain a comprehensive process for identifying, placing, monitoring, accommodating, and removing alien parents . . . while safeguarding their parental rights." *Id.* at 1 ¶ 2. ICE operated under this policy until 2017. On August 29, 2017, ICE retracted all of the language quoted in the previous paragraph without explanation. ECF No. 1-2 at 1. This suggests that ICE is no longer committed to "ensure that the agency's immigration enforcement activities do not unnecessarily disrupt" parental rights, and that it is no longer committed to maintaining "a comprehensive process for identifying, placing, monitoring, accommodating, and removing alien parents . . . while safeguarding their parental rights."

Nor is Defendants' failure to provide information to Plaintiffs about their children or provide for frequent and meaningful communication narrowly tailored to serve any legitimate interest, even if Defendants were able to articulate any conceivable legitimate interest in maintaining indefinite separation of parents from their young children.

B. Defendants Punish Parents by Withholding Information About Their Children

Defendants are detaining Plaintiffs and their children civilly, not under any criminal process. The Fifth Amendment prohibits the government from inflicting punishment on detainees who are not serving sentences for crime. *Bell v. Wolfish*, 441 U.S 520, 536 (1979) (detention conditions cannot "amount to punishment"). Detention conditions amount to punishment if either: (1) the government expresses an intent to punish; or (2) the conditions are excessive in relation to a legitimate non-punitive purpose. *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). Both tests show that the indefinite, virtually incommunicado, family separation that Defendants are inflicting on Plaintiffs amounts to unconstitutional punishment.

Defendants have repeatedly stated that they decided to inflict separation on families as a means of deterring immigration to the United States. Transcript: White House Chief of Staff John Kelly's Interview with NPR, National Public Radio (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr; *see also* Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN (Mar. 7, 2017), video clip at 00:55 to 01:05, https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html. Indeed, no other rationale can explain the costly and embarrassing spectacle that Defendants' separation policy has produced. Harmful actions taken for purposes of deterrence are punishment that is proscribed by the Fifth Amendment. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (civil detention may not "become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment") (citations omitted); *Bell*, 441 U.S. at 570 & n.20 (deterrence is "not [a] legitimate

nonpunitive governmental objective"); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015) (The government "maintains that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration. This appears out of line with analogous Supreme Court decisions.").

And independent of punitive intent, the extreme nature of Defendants' separation policy on its face— which does not even permit parents to have reliable information about where their children are or when they will ever see them again—is patently excessive in relation to any conceivable legitimate objective. *See, e.g., Valentine v. Englehardt*, 474 F. Supp. 294, 301-02 (D.N.J. 1979) ("The rule forbidding incarcerated parents from seeing their children is not only arbitrary, it is an exaggerated response to a concern which does not properly rest with the jail authorities."). Plaintiffs naturally experience their indefinite, incommunicado separation from their children as torture.

Defendants have deprived Plaintiffs of their right to family integrity as a means of inflicting punishment on innocent children and their parents, simultaneously violating two constitutional rights at once.

III. The Balance of Harms and Public Interest Favor Informing Parents of Basic Information About Their Children

The government itself, of which Defendants are a part, has an important interest in promoting family integrity:

> the state also shares the interest of the parent and child in their family's integrity, *see Santosky [v. Kramer*, 455 U.S. 745, 766-67 (1982)] ("the *parens patriae* interest favors preservation, not severance of natural familial bonds"), because the welfare of the state depends in large part on the strength of the family.

Jordan by Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994); *see also id*. ("The forced separation of parent from child, even for a short time, represents a serious impairment on

[parental] rights."). This basic commitment to family values, enshrined in our Constitution, expresses the public interest in this case. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'") (citation omitted).

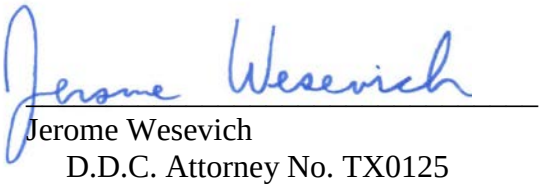
Defendants cannot name any harm that they could face by an injunction requiring them to provide parents with daily basic information about how and where, and how long, the government intends to detain their young children, nor can Defendants suffer any harm from allowing Plaintiffs reliable, consistent communication with their children.

CONCLUSION

Plaintiffs urge the Court to enter immediate relief and permit them basic information about their children.

June 22, 2018

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.



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HOMELAND SECURITY, *et al.*,	§	
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CERTIFICATE OF NOTICE TO DEFENDANTS

I, Jerome Wesevich, counsel for Plaintiffs, certify that I took the following actions to furnish the information and documents to the adverse parties as required by Local Civil Rule 65.1(a):

On June 21, 2018 at 3:15 p.m. EST I made telephone contact with Sarah B. Fabian, Senior Litigation Counsel in the U.S. Department of Justice's Office of Immigration Litigation by dialing (202) 532-4824. I informed Ms. Fabian that I represent M.G.U. in a case filed in the U.S. District Court and she stated that she is aware of the existence of this litigation. I notified her that our clients intend to seek a temporary restraining order and offered to email her all filings to date, or to communicate this information to any other appropriate counsel at DOJ. Ms. Fabien recommended that I contact Daniel van Horn at (202) 252-2506 and I immediately reached him using this number. I provided the same information to Mr. van Horn that I provided to Ms. Fabian regarding Plaintiffs' anticipated application for a Temporary Restraining Order. Mr. van Horn stated that his email address as daniel.vanhorn@usdoj.gov and warned me that emailing documents to him does not constitute service.

On June 22, 2018 at about noon EST, I emailed all documents that have been filed in this litigation to Ms. Fabian using sarah.b.fabian@usdoj.gov and to Mr. van Horn using daniel.vanhorn@usdoj.gov. If the Court sets this application for hearing, undersigned counsel will immediately notify Ms. Fabian and Mr. van Horn by telephone.

I also certify that I will serve Defendants with all documents as required by the Federal Rules of Civil Procedure.

/s/ Jerome Wesevich
Counsel for Plaintiffs