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The Unconstitutional Prosecution of Asylum-Seeking Parents Under Trump's Family Separation

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Abstract

President Donald Trump's policy of separating families at the border, known as Trump's "Zero Tolerance Policy," was piloted in El Paso, Texas in 2017. Under Trump's policy, the government separates asylum-seeking parents from their children in order to create "unaccompanied minors" and then prosecute parents. Trump's policy is standard practice along the nation's southern border. However, Trump's prosecution and conviction of asylum–seeking parents violate the constitutional criminal law principles and constitute outrageous government conduct. For example, consider the cases of asylum-seeking parents Elba Luz Dominguez–Portillo, Natividad Zavala–Zavala, Jose Francis Yanes–Mancia, Blanca Nieve Vasquez–Hernandez, and Maynor Alonso Claudino–Lopez (collectively referred to as the "El Paso 5").[1] Under Trump's policy, the government separated the El Paso 5 from their minor children, and then prosecuted the El Paso 5 for petty misdemeanor illegal entry despite their expressed fear of persecution in their

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1. Patrick Timmons, *Family Separations: The Parents Fighting in Court to Get Their Children Back,* THE GUARDIAN (July 10, 2018, 3:00 AM), https://www.theguardian.com/us-news/2018/jul/10/border-family-separations-parents-deported-lawsuit; *see generally* U.S. DEP'T OF HEALTH AND HUM. SERVS., OFFICE OF INSPECTOR GEN., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (Jan. 17, 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf (explains the federal policy in family separation in detail).

home countries. In doing so, the government violated the El Paso 5's constitutional rights.

There has been tremendous public outcry against the "Zero Tolerance Policy." As a result, President Trump signed an Executive Order on June 20, 2018 to reunite families that were separated under his policy.[2] However, the order was issued too late to benefit the El Paso 5 because they were already tried and convicted, and four out of the five had been deported without their children. These and other parents have suffered permanent damage. The American Civil Liberties Union ("ACLU") raised constitutional issues on behalf of parents in other family separation cases in a civil law context. In *Ms. L. v. United States Immigration and Customs Enforcement ("ICE")*, the ACLU brought a class action lawsuit in California seeking to reunite parents separated from their children in family separation cases.[3] However, the El Paso 5 cases differ because they are the first parents to raise constitutional violations in a *criminal* context. The El Paso 5 cases were tried in the magistrate court, and the parents were found *criminally* guilty for illegal entry. They appealed their convictions to the district court which affirmed the magistrate court's decision, and then appealed the district court's decision to the Fifth Circuit Court of Appeals. Their criminal convictions were then affirmed by the circuit court.[4] This article argues that the criminal prosecution and convictions of asylum-seeking parents under the "Zero Tolerance Policy," like those of the El Paso 5, violate constitutional criminal law principles and constitute outrageous government conduct.

Introduction

The federal government separates families seeking refuge. On May 7, 2018, former United States Attorney General Jeff Sessions announced a "Zero Tolerance Policy" under which adult asylum-seeking guardians entering the country would be criminally prosecuted, and the children would be separated from their guardians.[5] On June 20, 2018, President Trump signed an Executive Order addressing the family separation practice.[6] On

2. Exec. Order No. 13,841, 83 Fed. Reg. 29, 435 (June 20, 2018).

3. Ms. L. v. U.S. Immigr. and Customs Enf't. ("ICE"), 310 F. Supp. 3d 1133 (S.D. Cal. 2018). In *Ms. L,* the district court held that Class Members were likely to succeed on a due process claim. *Id.* at 1137.

4. U.S. v. Vasquez-Hernandez, 924 F.3d 164 (5th Cir. 2019).

5. Jeff Sessions, *Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

6. Exec. Order No. 13,841, 83 Fed. Reg. 29, 435 (June 20, 2018).

June 23, 2018, the United States Department of Homeland Security ("DHS") issued a "Fact Sheet" outlining the government's efforts to ensure that adults who are subject to removal will be reunited with their children for purposes of removal.[7]

On June 26, 2018, in the *civil action* of *Ms. L.*, where a minor child was separated from her parent and then the parent was prosecuted for illegal entry, the United States District Court for the Southern District of California issued an Order Granting a Motion for a Class wide Preliminary Injunction.[8] The injunction compels United States Immigration and Customs Enforcement to "reunify all Class Members with their minor children."[9] The district court held that Class Members were likely to succeed on a due process claim; that—absent preliminary relief—they were likely to suffer irreparable harm; that the balance of equities weighed in favor of an injunction; and that the public interest favored granting the injunction.[10] However, this type of civil action only helps parents in civil cases, and the decision does not prohibit the federal government from criminally prosecuting parents after separating them from their children.[11] As of the writing of this article, many children remain separated from their parents.[12] Even though President Trump signed an Executive Order to reunite separated families, the separation practice continues.[13] This is not surprising since the Justice Department's goal is to deter asylum seekers.[14]

7. U.S. DEP'T OF HOMELAND SEC., FACT SHEET: FEDERAL REGULATIONS PROTECTING THE CONFIDENTIALITY OF ASYLUM APPLICANTS (June 23, 2018), 2018 WL 3104794.

8. *Ms. L.*, 310 F. Supp. 3d at 1149.

9. *Id.*

10. *Id*. at 1145–47.

11. *Id*. at 1148.

12. Blanca Gómez, *ACLU: Separation of Families is Still Going On, But Now on International Bridges,* RIO GRANDE GUARDIAN (June 29, 2018), https://riograndeguardian.com/aclu-separation-of-families-is-still-going-on-but-now-on-international-bridges/; *see* Tal Kopan, *Hundreds of Separated Children not Reunited Amid Slow Progress,* CNN POLITICS (Aug. 24, 2018), https://www.cnn.com/2018/08/24/politics/hundreds-children-stillseparated/index.html; *see generally* OFFICE OF INSPECTOR GEN., *supra* note 1.

13. U.S. v. Abraham Eliseo Chaj-Us, No. 18-cr-1923 (W.D. Tex. Sept. 19, 2018) (a brother, who is the caretaker of his three minor siblings, was separated from his siblings, prosecuted and convicted because he was not their biological parent); U.S. v. Jimenez-Canan, No. 18-cr-2694 (W.D. Tex. Oct. 17, 2018) (a father was separated from his wife and children, prosecuted, and convicted because the government elected not to separate the mother, who was also apprehended, from the children. The author of this article served as defense counsel in these two family-separation cases.).

14. In 2014, the government unsuccessfully sought permission from federal courts to interfere with asylum law and the *Flores* Settlement, contending that the benefits of the *Flores* Settlement have misled Central American families to think that a "permiso" awaited them in the United States. *See* Flores v. Lynch, 828 F.3d 898, 909–910 (9th Cir. 2016); *see also* Flores v.

Although this article discusses the constitutional violations in the criminal prosecution and convictions of the El Paso 5, these constitutional violations occur in *any* family separation case where the government elects to criminally prosecute asylum–seeking parents. Part I briefly describes the El Paso 5's backgrounds and criminal charges under the "Zero Tolerance Policy." Part II argues that the El Paso 5's option to enter a guilty plea—like that of any other parent similarly situated—violates basic principles of Due Process. Part III argues that the El Paso 5's option to go to trial—like that of any other parent prosecuted in a family separation case—violates a defendant's basic right to a fair trial. Part IV argues that separation of the El Paso 5 from their children—like that of any other similarly situated parent—constitutes punishment that violates Due Process and the Eighth Amendment. Finally, Part V argues that the government's policy and practice of separating asylum seekers from their children in order to prosecute the parents, as the government did in the El Paso 5 cases, constitutes outrageous government conduct.

I. The El Paso 5 and the "Zero Tolerance Policy"

Between October 21, 2017 and October 23, 2017, the El Paso 5 parents and their minor children, all natives of Central America, separately entered the United States by crossing the Rio Grande River from Mexico to Texas and sought asylum.[15] The government prosecuted the El Paso 5 parents for illegal entry and separated them from their children.[16] Ms. Vasquez–Hernandez and her minor son,[17] and Ms. Dominguez–Portillo and her minor daughter are El Salvadorians;[18] and Mr. Claudino–Lopez and his minor son,[19] Mr. Yanes–Mancia and his minor son,[20] and Ms. Zavala–Zavala and her minor grandson are Hondurans.[21]

Sessions, 862 F.3d 863 (9th Cir. 2017). Thus, the government has argued that deporting bona fide asylum seekers, including family units, serves as a deterrent. *Id.*

15. Brief for Appellant at 3, U.S v. Vasquez-Hernandez, 314 F.Supp. 3d 744 (W.D. Tex. 2018) (No. 18-50492), 2018 WL 4830279 (Because all El Paso 5 cases were consolidated for appeal purposes in the district court, and because all documents and arguments are the same in each case, cites in this article are to the documents on Ms. Vasquez-Hernandez's magistrate court docket 17-MJ-4499-MAT and district court docket 17-CR-2660-KC─ *unless* it is necessary to cite to the specific individual docket).

16. Brief for Appellant at 3, U.S v. Vasquez-Hernandez, 314 F.Supp. 3d 744 (W.D. Tex. 2018) (No. 18-50492), 2018 WL 4830279.

17. *Id*.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

On the same day the El Paso 5 parents and their minor children sought asylum, Border Patrol agents arrested the parents. Border Patrol agents made these arrests despite the fact that immigration documents (except for those of Mr. Claudino–Lopez) reflect that, at the time the of the initial encounter between parents and immigration agents, the parents *expressly made* a "credible fear claim" of *persecution if returned* to their respective Central American countries.[22] The immigration agents also documented on immigration forms that each of the El Paso 5 parents were apprehended with either their son, daughter or grandchild.[23]

Shortly after their arrests, however, the government separated these parents from their minor children.[24] The El Paso 5 were taken to the El Paso County Jail and charged with petty misdemeanor illegal entry under 8 U.S.C. Section 1325.[25] The government did not provide them with any information regarding the whereabouts of their minor children.[26] Ultimately, the El Paso 5 were convicted and four of the five parents were deported to Central America without their children.[27] As of the writing of this article, the government has yet to reunite four of the El Paso 5 parents with their children.[28]

II. The Option to Plead Guilty Violates Due Process

In family separation cases, a parent's option to plead guilty violates Due Process. Where the parent is criminally prosecuted, a guilty plea implicates constitutional rights.[29] Under the Fifth Amendment, Due Process guarantees demand and require that a defendant's guilty plea be voluntary and intelligent.[30] Due Process requires that the choice to enter a guilty plea be one option among the alternative courses of action open to the defendant:[31] "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has

22. Brief for Appellant at 3–4, U.S v. Vasquez-Hernandez, 314 F.Supp. 3d 744 (W.D. Tex. 2018) (No. 18-50492), 2018 WL 4830279.

23. *Id.* at 4.

24. *Id.*

25. Brief for Appellant, Vasquez-Hernandez, 314 F. Supp. 3d 744 (No. 18-50492) (Section 1325 makes it a misdemeanor for an alien to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers.").

26. *Id.*

27. Reply Brief for Appellants at 9, U.S. v. Vasquez-Hernandez et al., No. EP-17-cr-2660-KC (W.D. Tex. 2018).

28. This information is known to the author (who served as defendants' counsel at both the district and appellate court levels) via contact with the defendants post-conviction and deportation.

29. Mabry v. Johnson, 467 U.S. 504, 507-08 (1984).

30. Boykin v. Ala., 395 U.S. 238, 242 (1969).

31. *Id.* at 244.

been obtained in violation of due process and therefore void."[32] "[T]he right to due process does not impose strict requirements on the mechanics of plea proceedings. Rather, the right simply requires the record to disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."[33] A district court cannot accept a guilty plea without an affirmative showing that it was intelligent and voluntary.[34]

After the government charged the El Paso 5 with petty misdemeanor illegal entries under 8 U.S.C. Section 1325, the El Paso 5 rejected the government's offered plea agreements because the element of compulsion, which was the separation from their minor children, eliminated their due process right to voluntarily enter guilty pleas.[35] Their guilty pleas could *not* be given voluntarily while their children were being held in unknown places, under unknown conditions, and with unknown individuals.[36]

The government policy of keeping the parents separated from their minor children is a coercive tactic.[37] This procedure is constitutionally impermissible because it coerces parents to plead guilty while under duress.[38] Parents in this situation, like the El Paso 5, long to be reunited with their children,[39] thus the option to plead guilty creates the false impression that efficient case resolutions will lead to efficient reunification with their minor children.[40] The government uses this calculated method to incentivize parents in family separation cases to enter guilty pleas.[41] The law is clear: a conviction based upon a guilty plea induced by threats or fear is inconsistent with due process of law.[42] If a guilty plea is the product of coercion, either mental or physical, or was unfairly obtained through ignorance, fear, or inadvertence, the conviction is void.[43]

Furthermore, when separated, parents have good reason to worry about the health and safety of their children. Not only have children died while in the custody of the government, but a recent published report by the United

32. McCarthy v. U.S., 394 U.S. 459, 466 (1969).

33. Brady v. U.S., 397 U.S. 742, 747 n.4 (1970).

34. *See id.*

35. Brief for Appellants, at 8-9, U.S. v. Vasquez-Hernandez et al., No. EP-17-cr-2660-KC (W.D. Tex. 2018).

36. *Id.*

37. *Id.*

38. Brief for Appellant at 8–9, Vasquez-Hernandez, 314 F. Supp. 3d 744 (No. 18-50492).

39. *Id.* at 10.

40. Appellant Mot. to Dismiss at 10-11, U.S. v. Vasquez-Hernandez et al., No. EP-17-MJ-4499-MAT (W.D. Tex. 2017).

41. *Id.*at 12-13.

42. Murphy v. Wainwright, 372 F.2d 942, 943 (5th Cir. 1967).

43. Kercheval v. U.S., 274 U.S. 220, 223–24 (1927).

States Department of Health and Human Services, Office of the Inspector General, outlined "immediate risks or egregious violations" at detention centers.[44] These violations included: "nooses in detainee cells, overtly restrictive segregation, inadequate medical care, unreported security incidents, and significant food safety issues."[45] Furthermore, an expert on the history of concentration camps recently stated that the government's detention of undocumented immigrants and children at the Mexico-United States border "fits very cleanly" into the historical definition of concentration camps.[46] Undoubtedly, separated parents have cause to be concerned about their children's welfare,[47] and a guilty plea could very well be coerced.

For these reasons, the El Paso 5 parents rejected the government's plea agreement offers and moved to dismiss their cases.[48] The El Paso 5 argued that they left their Central American countries with their minor children to escape violence and to seek asylum protection in the United States, and thus they should not be prosecuted.[49] They argued that their rights were violated under the Due Process Clause, that the missing children who were in the custody of the government were material witnesses, and that their prosecution constituted outrageous government conduct.[50] The magistrate court, however, denied the El Paso 5's motion to dismiss.[51]

44. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (June 3, 2019), https://oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf.

45. *Id.*; *see also* Caitlin Dickerson, *Hundreds of Migrant Children Are Moved Out of an Overcrowded Border Station,* N.Y. TIMES (June 24, 2019), https://www.nytimes.com/2019/06/24/us/border-migrant-children-detention-soap.html.

46. *Lawrence's Last Word: America's History of Concentration Camps,* MSNBC (June 20, 2019), https://www.msn.com/en-us/video/news/lawrences-last-word-americas-history-of-concentration-camps/vi-AAD963Q.

47. *See* Bart Jansen, *Border Patrol Agents Investigated Over 'Disturbing' Facebook Posts Ridiculing Immigrants, Lawmakers,* USA TODAY (July 3, 2019, 3:53 PM), https://www.usatoday.com/story/news/politics/2019/07/03/border-patrol-agents-face-dhs-probe-over-anti-immigrant-facebook-posts/1644323001/; Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes and Caitlin Dickerson, *Hungry Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html; Jacob Soboroff and Julia Ainsley, *Migrant Kids in Overcrowded Arizona Border Station Allege Sex Assault, Retaliation from U.S. Agents*, NBC NEWS (July 9, 2019, 5:44 PM), https://www.nbcnews.com/politics/immigration /migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886.

48. Appellant Mot. to Dismiss, U.S. v. Vasquez-Hernandez et al., No. EP-17-MJ-4499-MAT (W.D. Tex. 2017).

49. *Id.* at 5.

50. *Id.*

51. *Id.*

III. The Option to go to Trial Violates Constitutional Rights

The El Paso 5 elected to go to trial. However, in family separation cases, a parent's option to go to trial also violates due process. Because the El Paso 5 were charged with petty misdemeanors, they were not entitled to a jury trial.[52] At the bench trial, during their case in chief, the El Paso 5 again argued that their missing children were key material witnesses, and that they were being deprived of their right to a fair trial.[53] They argued that the government did not provide information regarding the whereabouts of these key material witnesses in discovery.[54] They again expressed their concerns about their lack of knowledge regarding the location of their children.[55] They stated that the children and their testimony were clearly exculpatory regarding their well-founded fear claims and explanations regarding the reasons they fled from their countries.[56] However, the magistrate court found the El Paso 5 guilty, and the court sentenced them to one year of probation.[57]

The El Paso 5 filed a motion for reconsideration regarding their judgment and sentence,[58] contending that indefinite separation from their children due to their convictions and subsequent deportations was inhumane and violated due process.[59] They contended that their sentences and convictions effectively terminated their parental rights because they would be deported without their children.[60] They argued such punishment was grossly disproportionate for a Section 1325 *misdemeanor* conviction and contrary to universal human standards of decency in civilized society, implicating their Eighth Amendment rights.[61] The magistrate court, however, denied the motion to reconsider.[62]

52. *See* U.S. v. Coates, 573 F.2d 257, 258 (5th Cir. 1978) ("The right to trial by jury, guaranteed by our federal Constitution, does not extend to petty offenses").

53. Brief for Appellant at 5, U.S v. Vasquez-Hernandez, 314 F.Supp. 3d 744 (W.D. Tex. 2018) (No. 18-50492), 2018 WL 4830279.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 6.

58. *Id.*

59. Brief for Appellant at 5, U.S v. Vasquez-Hernandez, 314 F.Supp. 3d 744 (W.D. Tex. 2018) (No. 18-50492), 2018 WL 4830279.

60. *Id*. at 24.

61. *Id.* at 6.

62. *Id.*

On appeal, the El Paso 5 again contended that their convictions and sentences violated their constitutional rights.[63] The district court denied their appeal.[64] The El Paso 5 appealed the district court's decision to the Fifth Circuit Court of Appeals.[65] The Fifth Circuit, however, affirmed the district court.[66]

A. The Government's Family Separation Practice Deprives Parents of a Fair Trial in Violation of Due Process

In family separation cases where the parent is criminally prosecuted, the government separates the children from their parents, rendering the children unavailable to the parents for court proceedings. The government transfers custody of the children to the United States Department of Health and Human Services, Office of Refugee Resettlement ("ORR").[67] However, the absence of their children as witnesses during their parents' criminal prosecution deprived the El Paso 5 parents of a fair trial. In the El Paso 5 cases, these parents were denied the opportunity to fairly corroborate a duress defense via examination of their key material witnesses─their children.

Despite repeated claims by the El Paso 5 parents that their children's testimony was imperative to present a viable defense, the government refused to provide any specific information as to the whereabouts of the children.[68] At the bench trial, counsel for the El Paso 5 stated:

> Judge, my clients left their countries each with a minor child or grandchild escaping horrible violence in their Central American countries.
>
> As we previously explained at the hearing in our motion to dismiss, key material witnesses, the children, are missing here. The parties' stipulated exhibits support that claim. Information as to the whereabouts of these material witnesses was not provided anywhere in the discovery, and these witnesses under the Government's [custody] are exculpatory regarding the

63. *Id.* at 7. Procedurally, because the El Paso 5 misdemeanor cases were tried before the magistrate court, their cases had to be appealed first to the District Court. *See* FED. R. CRIM. P. 58(g)(2).

64. *See* U.S. v. Vasquez-Hernandez, 314 F. Supp. 3d 744 (W. D. Tex. 2018).

65. *See* U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

66. *Id.*

67. *See Vasquez-Hernandez*, 314 F. Supp. 3d at 760.

68. Brief for Appellants at 10-11, 30, U.S v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

> Defendants well–founded fear for leaving their country and being forced to come here with no alternative to seek safety to avoid [] harm.[69]

Nevertheless, on appeal, the Fifth Circuit concluded that family separation did not deprive the El Paso 5 parents of a fair trial.[70] In doing so, however, the circuit court failed to recognize that a vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf.[71] "The hearing, moreover, must be a real one, not a sham or a pretense."[72] The Supreme Court has long held that a "fair trial in a fair tribunal is a basic requirement of due process."[73] Here, the El Paso 5 made "well-founded fear claims" of persecution from the first point of contact with immigration officers.[74] In fact, these claims were documented by the immigration officers in the El Paso 5's official immigration forms.[75] However, the El Paso 5 parents were not afforded the opportunity to present testimony from the only witnesses they had—their children—to corroborate their claims of persecution and duress.[76]

Duress is "a common-law defense that allows a jury or fact-finder to find that the defendant's conduct is excused, even though the government has carried its burden of proof."[77] The children of the El Paso 5 could have testified to corroborate "credible fear claims" that prompted the El Paso 5 to flee the well-documented dreadful situations in their home countries.[78] The

69. *Id.* at 10.

70. U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

71. U.S. v. Natel, 812 F.2d 937, 943 (5th Cir. 1987).

72. Moore v. Dempsey, 261 U.S. 86, 90–91 (1923).

73. In re Murchison, 349 U.S. 133, 136 (1955).

74. Brief for Appellants at 4, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

75. *Id.*

76. *Id.*at 10-12.

77. Dixon v. U.S, 548 U.S. 1, 12–14 (2006). To establish a duress defense, a defendant must show: (1) he or she was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, (2) he or she had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct, (3) he or she had no reasonable legal alternative to violation of the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of threatened harm. United States v. Liu, 960 F.2d 449, 453-54 (5th Cir. 1992).

78. *See* Lomi Kriel, *Husband Murdered, Son Taken Away, Mother Seeking Asylum Tells Judge, 'I Have Lost Everything*,' SAN ANTONIO EXPRESS-NEWS (Jan. 1, 2018, 10:18 PM), https://www.expressnews.com/news/local/article/Her-husband-murdered-her-son-taken-away-a-12466253.php; Lomi Kriel, *Trump Moves to End 'Catch and Release,' Prosecuting Parents and*

El Paso 5, however, were not given a fair opportunity to directly examine their only witnesses. They were simply not afforded a fair trial. Similarly situated parents face the same barriers when, instead of being sent to asylum officers, they are criminally prosecuted.

B. The Government's Family Separation Practice Violates the Parents' Right Against Self-Incrimination at Trial

In family separation cases, not having the children available to testify at trial impinges on parents' rights against self–incrimination because the parents are forced to testify in order to present a duress defense. At the El Paso 5's bench trial, defense counsel told the magistrate judge:

> The fact that these children, the key material witnesses, are missing is a violation of due process rights for a trial and of their right against defendants' right against self–incrimination. It forces them to take the stand in order to establish their defense and there is prejudice.[79]

The law is clear. "The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself."[80] "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him[.]"[81] The Supreme Court has invalidated impermissible coercive government action which has as its goal compulsion of self-incriminatory statements.[82] The Supreme Court has observed:

> [The privilege against self–incrimination] reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference

Removing Children Who Cross Border, HOUSTON CHRONICLE (Nov. 25, 2017, 9:22 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php; *Family Separation at the Border*, Frontera List (Jan. 2, 2018), https://fronteralist.org/2018/01/02/family-separation-at-the-border-houston-chronicle/; Molly Hennessy-Fiske, *U.S. is Separating Immigrant Parents and Children to Discourage Others, Activists Say*, L.A. TIMES, (Feb. 20, 2018, 3:00 AM), www.latimes.com/nation/la-na-immigrant-family-separations-2018-story.html.

79. Brief for Appellants at 13, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

80. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

81. Holt v. U.S., 218 U.S. 245, 252–53 (1910).

82. *Id.*; *see also* Gardner v. Broderick, 392 U.S. 273 (1968); U.S. v. Balsys, 524 U.S. 666, 690 (1998).

> of an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of human personality and of the right of each individual to a private enclave where he may lead a private life[;] our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes as shelter to the guilty, is often a protection to the innocent.[83]

The Fifth Circuit determined that "nothing in the record suggested that the government prevented the children from testifying."[84] This fails to recognize the essence of the family separation policy or the coercive practices of: (1) separating parents from their minor children in spite of parents' fear of persecution claims, and (2) rendering the minor children unavailable for all proceedings, including trial. The Fifth Circuit acknowledged that "the prosecution did not disclose where the children were located."[85] The Fifth Circuit unfairly blamed the El Paso 5 parents for not subpoenaing their children, despite the fact that the government effectively hid the children and did not disclose the children's locations.[86] Furthermore, it is the law of the land that the government must disclose evidence applicable to a defendant.[87] There is no doubt that, in the El Paso 5 cases, the government knew the minor children were favorable witnesses because: (a) the minor children were in the company of the parents when immigration officers first encountered them, (b) the minors were the children of the El Paso 5, and (c) the children were the only witnesses in the United States who could corroborate the parents' fear of persecution claims. The El Paso 5 repeatedly claimed their children were needed during court proceedings because they were material witnesses.[88] However, the government

83. Balsys, 524 U.S. at 690 (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).

84. *See* U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

85. *Id.*

86. *Id.*

87. Johnson v. Dretke, 394 F.3d 332, 336 (5th Cir. 2004) (citing Strickler v. Greene, 527 U.S. 263, 280 (1999) ("We have since [Brady] held that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.").

88. Reply Brief for Appellants at 8, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018).

consistently maintained that it was not required to provide any information regarding the children.[89]

Contrary to the Fifth Circuit's determination,[90] the trilemma for parents in family separation cases, like the El Paso 5, is to: (1) plead guilty, (2) go to trial and testify against themselves, or (3) go to trial and not testify.[91] Going to trial without their *only* witnesses penalizes parents' self–incrimination privilege because they can only assert a duress defense by taking the stand. The Fifth Circuit's claim that "[n]othing indicates that the government exerted undue pressure on Appellants to testify, whether intentionally or through a policy of family separation,"[92] turns a blind eye not only to the government's tactics, but also to their motive to deter asylum.[93] The Fifth Circuit ignored the heavy penalties of *de facto* termination of parental rights that is inflicted on parent defendants by the family separation policy.

The Supreme Court has consistently held that a penalty may not be placed upon one for exercising his or her privilege against self-incrimination.[94] In *Spevack v. Klein*, the Supreme Court stated: "in this context 'penalty' is not restricted to fine or imprisonment, it means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'"[95] The fact that the El Paso 5 did not take the stand was ultimately "costly" because they were convicted, and four were deported without their children as a result of their guilty verdicts.[96] Had the children testified and corroborated the duress defenses, the magistrate court, as the trier of fact, may have reached a different verdict. The trier of fact, however, never had an opportunity to hear from the El Paso 5's children.[97]

The government contended that the El Paso 5's claim regarding their right against self–incrimination failed simply because they did not testify.[98] However, the Fifth Amendment is implicated when the government implements coercive action that puts a defendant in a

89. *Id.*

90. *See* U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

91. *See* Garrity v. State of N.J., 385 U.S. 493, 497–98 (1967).

92. Garrity, 385 U.S. at 497–98.

93. Brief for Appellants at 23, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

94. Spevack v. Klein, 385 U.S. 511 (1967); Slochower v. Bd. of Educ., 350 U.S. 551 (1956).

95. 385 U.S. at 515.

96. Brief for Appellants at 15, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

97. *Id.*at 30.

98. Reply Brief for Appellants at 8-9, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018) (No. EP-17-cr-2660-KC).

position where she must engage in self-incrimination regardless of whether he or she actually testifies.[99]

The district court claimed that the El Paso 5's rights against self-incrimination were not violated simply because there was no increase in penalty.[100] However, that notion is misguided because it assumes that the magistrate judge, the trier of fact at the bench trial, would have found the El Paso 5 guilty with or without the children's testimony. Furthermore, and contrary to the district court's assertion, there *was* an increase in penalty for the El Paso 5 because, in addition to their sentences of one year of probation, four of the El Paso 5 were deported subsequent to their conviction *without* their children.[101]

C. The Government's Refusal to Make the Children Available as Witnesses Violates *Brady* and Constitutes Bad Faith

The government violates *Brady v. Maryland*[102] in family separation cases and acts in bad faith by failing to make the children available or provide *specific* information as to their whereabouts.

The government consistently maintained that it was not required to provide any information pertaining to the children. The following colloquy from the evidentiary hearing in the magistrate court illustrates the government's position:

> THE COURT: And so—and you indicated there's no statutory or regulatory authority that compels the government to provide this—just information, and I—generally, with regard to the well–being or the location of—of the defendant parent's kids, there's no authority that compels the government to do that. Correct?
>
> [THE GOVERNMENT]: We did not find any such authority in our research, Your Honor.[103]

99. *Lefkowitz*, 414 U.S. at 77; *Gardner*, 392 U.S. at 273.

100. *See* U.S. v. Vasquez-Hernandez, 314 F.Supp.3d at 759-760.

101. Reply Brief for Appellants at 9, U.S. v. Vasquez-Hernandez et al., No. EP-17-cr-2660-KC (W.D. Tex. 2018).

102. 373 U.S. 83 (1963).

103. Brief for Appellants at 28, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

In fact, the government stated "that the issue as far as providing [defendant parents] notice as to the status of the child that they were accompanied with [was] not ripe."[104]

The magistrate court ultimately decided that it had "no authority to require the reunification of these family units."[105] The government's refusal to provide information regarding the children in family separation cases undoubtedly constitutes bad faith and violates due process.

1. The Government's Brady Violation

First, under *Brady v. Maryland,* "[a] defendant need not request the favorable and material evidence to trigger the prosecution's duty to disclose."[106] Second, the Supreme Court has stated: "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[107] And, third, "[i]n order to comply with *Brady,* [ ] 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case."[108] In this case, "others" obviously includes the ORR, the government agency that maintains custody of separated children, and presumably had custody of the El Paso 5's minor children. A prosecutor cannot use the pretext that he or she cannot provide evidence simply because the evidence is under the custody of another government agency.[109]

"A valid *Brady* complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense."[110] The Fifth Circuit explained: "[Any contention by the prosecution] that it was not in possession of the information requested by the defendant because it was in possession of another government agency is *not* an excuse or lack of knowledge for purposes of the disclosure requirements" (emphasis added).[111]

104. Brief for Appellants at 29, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018); *see also El Paso Five Case a Road Test for Prosecuting Migrant Parents,* UNITED PRESS INT'L (July 14, 2018), https://gephardtdaily.com/national-international/el-paso-five-case-a-road-test-for-prosecuting-migrant-parents.

105. Brief for Appellants at 29, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018).

106. Johnson, 394 F.3d at 336 (citing *Strickler*, 527 U.S. at 280 ("We have since [Brady] held that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.")).

107. U.S. v. Agurs, 427 U.S. 97, 108 (1976).

108. *Strickler*, 527 U.S. at 281; Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

109. *Strickler*, 527 U.S. at 281; Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

110. *U.S. v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980).

111. *Auten*, 632 F.2d 478 at 481.

The El Paso 5's children were in the custody of the ORR, a government agency.[112] Accordingly, by being in the government's custody, the witnesses were within the government's possession.[113] The government did not provide any specific information to defense counsel or the court regarding their whereabouts. As of the writing of this article, the government has yet to provide defense counsel with any information as to the specific whereabouts of the El Paso 5's minor children.[114] Despite the El Paso 5's repeated claims that they needed their children's testimony to be able to present a defense, the government refused to provide any specific information regarding the location of the children.

Citing Section 1232,[115] the district court excused the government's failure to produce the El Paso 5's children by stating that the government "transferred custody of the children to ORR."[116] However, ORR is under the umbrella of the same government that prosecuted these cases. The Supreme Court has ruled that the government cannot hide under the pretext that material witnesses are in the custody of another government agency.[117] Here, the government informed the magistrate court that neither the government nor its ORR agency were obligated to produce the minor children.[118]

Furthermore, the district court's reference to Section 1232 in its opinion was inapplicable. Section 1232 addresses "unaccompanied minors" in order to combat child trafficking.[119] Here, the minor children were not "unaccompanied" nor were they subject to trafficking. They were separated from their parents under the "Zero Tolerance Policy" in order to prosecute the El Paso 5 and punish them for seeking asylum.[120]

The district court also stated that "because [the El Paso 5] did not possess documentation establishing a familial relationship with the minor children, [United States Customs Border Protection ("CBP")] concluded that they were unaccompanied minors and transferred custody of the children to the Office of Refugee Settlement."[121] This is simply false.

112. Brief for Appellants at 31, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018).

113. *See Auten*, 632 F.2d at 481.

114. This information is known to the author (who served as defendants' counsel at both the district and appellate court levels) via contact with the defendants post-conviction and deportation.

115. 8 U.S.C. § 1232 (2012). This statute is titled "Enhancing efforts to combat the trafficking of children."

116. U.S. v. Vasquez-Hernandez, 314 F.Supp.3d 744 (W. D. Tex. 2018).

117. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 437–38; *Auten*, 632 F.2d at 481.

118. Brief for Appellants at 32, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018).

119. *See* 8 U.S.C. § 1232 (2012).

120. Brief for Appellants at 20-21, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

121. *See Vasquez-Hernandez*, 314 F.Supp.3d at 750.

Customs and Border Protection agents specifically documented (except in the case of Claudino–Lopez) that the El Paso 5 were apprehended with either their son or daughter.[122] In fact, these particular immigration forms were stipulated to by the government at trial.[123] There was never a question of familial relationships.

The children's anticipated testimonies were both favorable and material to the El Paso 5's duress claims because they could have corroborated the El Paso 5's claims. Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[124] "Prosecutorial suppression of evidence favorable to the defense violates due process where the evidence is material to guilt or to punishment . . . ."[125] *"Brady* requires disclosure of evidence favorable to the accused on the issue of guilt, as well as evidence which serves to impeach the testimony of adverse witnesses."[126]

The district court stated the El Paso 5 "have not demonstrated that there is a reasonable probability that the outcome of the bench trials would have been different had the children testified in support of a duress defense."[127] However, it is undisputed that the El Paso 5 made "credible fear of persecution" claims.[128] Thus, the testimony of their children would have certainly been favorable to the El Paso 5's duress claims since the children could have corroborated the claims. The horrific living conditions and violence in their Central American countries have been well documented.[129] Citizens of Honduras and El Salvador face extreme danger.[130] Ms. Vasquez–Hernandez fled from El Salvador with her 13-year-old son because her

122. *See* Brief for Appellants at 32-33, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018). Furthermore, the government's stipulation to immigration documents reflecting this fact constituted a waiver of that issue. *See* Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 300 (5th Cir. 2005).

123. *See* Brief for Appellants at 33, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 (2018).

124. U.S. v. Bagley, 473 U.S. 667, 682 (1985).

125. *Johnson*, 349 F.3d at 226.

126. *Id.* (citing U.S. v. Gaston, 608 F.2d 607 (5th Cir. 1979); U.S. v. Anderson, 574 F.2d 1347 (5th Cir. 1978); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

127. *See Vasquez-Hernandez*, 314 F.Supp.3d at 758.

128. *See* Brief for Appellant at 4-5, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d. 744 (W.D. Tex. 2018) (No. EP-17-cr-2660-KC).

129. *See* Rocio Cara Labrador and Danielle Renwick, *Central America's Violent Northern Triangle,* COUNCIL ON FOREIGN REGIONS (June 26, 2018), https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle.

130. *Id.*

husband was murdered there.[131] Ms. Dominguez–Portillo fled from El Salvador with her 16-year-old daughter because her daughter received threats after her friend was murdered.[132] Mr. Claudino fled with his 11-year-old son because Mr. Claudino's uncle was decapitated and castrated.[133] Mr. Claudino received threats and feared his son would be recruited by gang members.[134] The children's testimony regarding the tragedies that prompted them to seek asylum in the United States could have impacted the trier of fact's ultimate decision. Incredibly, the Fifth Circuit and the district court determined that the El Paso 5 parents were safe at the border in Juarez, Mexico. This is ludicrous and out of touch with reality. It is well documented that the border city of Juarez, Mexico, is a city controlled by the Mexican drug cartels and one of the most dangerous cities in the world.[135] As one court recently recognized, "asylum seekers experience high rates of violence and harassment while waiting to enter, as well as the threat of deportation to the countries from which they escaped" while waiting to enter the United States.[136]

The district court faulted the El Paso 5 for not seeking entry specifically at the port of entry, but at the same time, recognized that "[t]here are reports that CBP agents are preventing immigrants from presenting themselves to immigration agents at appropriate border crossing checkpoints in order to stop them from seeking asylum."[137] Mindful of instances when a person fleeing his or her country to escape persecution may not be close in proximity to a designated port of entry, Congress wrote the asylum statute without requiring that asylum be sought at a port of entry.[138] With respect to this contention by the government, a California federal district court recently stated that the government "may not rewrite the immigration laws to impose a condition that Congress has expressly

131. Brief for Appellants at 35-36, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018)

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* Angelo Young, *Juarez Among the 50 Most Dangerous Cities in the World*, EL PASO TIMES (July 17, 2018, 8:27 AM), https://www.elpasotimes.com/story/news/world/2018/07/17/juarez-50-most-dang

erous-cites-world/791543002/.

136. East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018).

137. U.S. v. Vasquez-Hernandez, 314 F. Supp. 3d 744, n.6 (2018); *See* John Burnett, *After Traveling 2,000 Miles For Asylum, This Family's Journey Halts At A Bridge*, NPR (June 15, 2018, 10:12 PM), https://www.npr.org/29=018/06/15/620310589/after-a-2-000-mile-asylum-journey-family-is-turned-away-before-reaching-u-s-soil.

138. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) and (B)(ii) (2009); *see 8* C.F.R § 208.30(d) (2019).

forbidden."[139] Under such requirement, "[a]sylum seekers will be put at increased risk of violence and other harms at the border, and many will be deprived of meritorious asylum claims."[140]

Dismissing the need for the material witnesses, the district court also stated: "[The El Paso 5] were aware of the facts that would have formed the basis of the children's testimony," thus, the children's testimonies were unnecessary.[141] However, there are serious flaws with this assertion. First, if the children had been available, the El Paso 5 would not have been in the position to choose whether to testify. Second, if the district court's notion is to be accepted, material trial witnesses would never be necessary because defendants usually know the content of their witnesses' testimonies. Third, and most importantly, the district court underestimated the impact of witness testimony on the trier of fact. The descriptions of torture, violence, and murder support duress claims, particularly because these families reasonably believed they could also become victims.

The Fifth Circuit, like the district court, also faulted the El Paso 5 for not subpoenaing the children.[142] However, this *clearly* demonstrates a lack of understanding of *Brady*. First, *Brady* does not require a defendant to ask for a subpoena to compel prosecutorial compliance with their duties under *Brady*. Second, this position shifts the duties regarding exculpatory evidence in the government's possession from the prosecution to the defense.

2. Bad Faith Violation

In family separation cases, even if the children's testimony is considered *only* potentially useful rather than exculpatory, the government's failure to make the children available for the parents' trial constitutes bad faith under due process.[143] The El Paso 5 presented a bad faith argument to the magistrate court.[144] The district court stated that this claim only works if evidence is "lost, destroyed, or otherwise unavailable."[145] The Fifth Circuit then opined that "[t]he children's testimony was not physical evidence capable of being destroyed by the government."[146] These determinations

139. *See* East Bay Sanctuary Covenant at 844.

140. *Id.*

141. *Vasquez-Hernandez*,314 F.Supp. 3d at 765; *See* U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

142. *Vasquez-Hernandez*,314 F.Supp. 3d at 765; *See* U.S. v. Vasquez-Hernandez et al., 924 F.3d 164 (5th Cir. 2019).

143. *See* Cal. v. Trombetta, 467 U.S. 479, 489 (1984).

144. *See* Brief for Appellants at 38, U.S. v. Vasquez-Hernandez et al., 314 F.Supp.3d 744 No. 18-50492 (5th Cir. 2018).

145. *See Vasquez-Hernandez*, 314 F.Supp. 3d at 766.

146. *Vasquez-Hernandez et al.*, 924 F.3d at 172.

support Trump's family separation policy. Under Trump's policy, it is a fact that children have been lost and, in fact, died.[147] While it is true there is no indication that the government destroyed the evidence, it is evident the government either hid or lost the El Paso 5's children.[148] The Fifth Circuit chose to disregard the fact that the evidence was indeed "otherwise unavailable" due to government action.[149] In fact, the Office of the Inspector General published a report that indicates that the government lost some of the children it separated from their families.[150] For whatever reason, the children witnesses were not available to the El Paso 5 parents simply because the government would not, or could not, provide information regarding their whereabouts.

The fact that the government knowingly kept these witnesses hidden is enough to establish "a conscious effort to suppress exculpatory evidence," and thereby establish that the government acted in bad faith.[151] In fact, the government never intended to reunite the El Paso 5 children and their parents under the "Zero Tolerance Policy." In the words of a Trump administration official: "The expectation was that the kids would go to the Office of Refugee Resettlement, that the parents would get deported, and that no one would care."[152]

In *California v. Trombetta*, the Supreme Court held that the government violates a defendant's due process rights if the unavailable evidence

147. *See* Oliver Laughland, *Outcry After Trump Officials Reveal Sixth Migrant Child Died in US Custody*, THE GUARDIAN (May 23, 2019, 7:20 AM), https://www.theguardian.com/us-news/2019/may/23/migrant-child-us-custody-deaths-hhs-outcry.

148. *See* Nour Malas & Alicia A. Caldwell, *Inside the Trump Administration's Chaotic Effort to Reunite Migrant Families*, WALL STREET JOURNAL (July 27, 2018, 9:38 AM) (explaining the problems caused by the Trump administration's lack of a reunification plan after a federal judge ordered that more than 2,600 children be reunited with their parents), https://www.wsj.com/articles/inside-the-trump-administrations-chaotic-effort-to-reunite-migrant-families-1532709507; *see* Catherine E. Shoichet, *Why It's Taking So Long for The Government to Reunite the Families It Separated*, CNN POLITICS (July 10, 2018, 2:36 PM), https://www.cnn.com/2018/07/09/politics/family-separation-reunion-hurdles/index.html; *See also* Stephen Collinson, *The Trump Administration Separated Families. Reuniting Them Is a Giant Mess* (July 7, 2018, 10:13 PM), https://www.cnn.com/2018/07/07/politics/donald-trump-immigration-separations-crisis-politics/index.html; *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf (explains in detail the federal policy regarding family separation).

149. *Vasquez-Hernandez et al*., 924 F.3d at 172.

150. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 148 (concluding that the total number of children separated from their parents cannot be tracked and is unknown).

151. *See Trombetta*, 467 U.S. at 488.

152. Jonathan Blitzer, *Will Anyone in the Trump Administration Ever Be Held Accountable for the Zero-Tolerance Policy?*, NEW YORKER (Aug. 22, 2018), https://www.newyorker.com/news/daily-comment/will-anyone-in-the-trump-administration-ever-be-held-accountable-for-the-zero-tolerance-policy.

possessed potential exculpatory value, and its nonproduction was in bad faith.[153] The element of bad faith turns on the government's knowledge of the apparent exculpatory value of the unavailable evidence; without knowledge of the potential usefulness of the evidence, the government could not have held the evidence in bad faith.[154]

The government acts in bad faith when it separates children from their parents pursuant to the "Zero Tolerance Policy." The government is cognizant of the fact that many of these families are asylum seekers. In the cases of the El Paso 5, the government demonstrated bad faith when it failed to provide information concerning the locations of the children, and when it claimed before the magistrate court that it questioned the familial relationships of the parents and children.[155] The government's sole focus in many other asylum seekers' cases, including the El Paso 5 cases, was to enforce Trump's "Zero Tolerance Policy" and criminalize asylum law.

IV. The Government's Family Separation Practice is Punishment That Violates Due Process and the Eighth Amendment

A. Separating Families Results in Pretrial Punishment for Detainee Parents in Violation of Due Process

In family separation cases, the government inflicts inhumane punishment prior to the parents' convictions. This punishment is in violation of due process. At the pretrial stage, the government separates parents from their minor children and deprives them of any useful information about the location of their children.[156] From the outset, the El Paso 5 argued before the magistrate court that the separation from their children was a harsh, prejudicial punishment in violation of due process because they were bona fide asylum seekers.[157]

The Supreme Court has long recognized constitutional limits on pretrial detention in relation to the protections under the Due Process Clause. In the case of pretrial detainees, "the proper inquiry is whether those conditions

153. 467 U.S. at 488.

154. *See* Ariz. v. Youngblood, 488 U.S. 51, n.3 (1988).

155. *See* Brief for Appellants at 40, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

156. Appellant Mot. to Dismiss at 9-11, U.S. v. Vasquez-Hernandez et al., No. EP-17-MJ-4499-MAT (W.D. Tex. 2017).

157. *Id.*

amount to punishment of the detainee."[158] In *Bell v. Wolfish,* the Supreme Court explained:

> For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process law. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite [the] extended restraint of [his] liberty following arrest.' And, if he is detained for a suspected violation of a federal law, he also has had a bail hearing. Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do *not* amount to punishment, or otherwise violate the Constitution.[159]

The Supreme Court has stated that we must first look to legislative intent when determining whether a pretrial restriction amounts to punishment.[160] In *U.S. v. Salermo,* the Supreme Court explained:

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.[161] Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'[162]

Congress has expressly stated its intent regarding asylum seekers. Under 8 U.S.C. Section 1225(b)(1)(A)(ii) and (B)(ii), when an alien arriving in the United States indicates to an immigration officer that he or she fears persecution or torture if returned to his or her country, the officer "shall refer

158. Bell v. Wolfish, 441 U.S. 520, 535 (1979) (citing Ingraham v. Wright, 430 U.S. 651, 671–72 n.40, 674 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–67, 186 (1963); Wong Wing v. U.S., 163 U.S. 228, 237 (1896); Gerstein v. Pugh, 420 U.S. 103, 114 (1975); Va. v. Paul, 148 U.S. 107 (1893); 18 U.S.C. §§ 3146, 3148)).

159. 441 U.S. at 535-37.

160. U.S. v. Salermo, 481 U.S. 739, 747 (1987).

161. *Id.*

162. Salermo, 481 U.S. at 747.

the alien for an interview by an asylum officer" to determine if he or she "has a credible fear of persecution."[163]

Unable to articulate compelling reasoning for its interpretation of the statute's mandates, the Fifth Circuit relies on what is not explicitly stated in the statute, finding: "[n]othing in [the asylum statute] prevents the government from initiating a criminal prosecution before or even during the mandated asylum process."[164] However, the mandated asylum process was never realized, and the Fifth Circuit *ignores* what the statute says. "It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms."[165] In the asylum statute, Congress used the word "shall" for a purpose. Statutory language is generally construed according to the plain meaning of the words used by Congress "[a]bsent a clearly expressed legislative intention to the contrary."[166] "The word 'shall' is ordinarily the language of command."[167] The use of the word "shall" "normally creates an obligation impervious to judicial discretion."[168] Had the government complied with Congress's mandate, the El Paso 5 parents would have been referred to asylum officers to evaluate their asylum claims. This could have prevented the prosecution and deportation of the El Paso 5 parents who made a well-founded fear of persecution claims and had no criminal history. Above all, it would have prevented the cruel, indefinite, and permanent separation of the El Paso 5 parents from their minor children during the pretrial stage.

Citing to 6 U.S.C. Section 279(g)(2), the statute that defines an "unaccompanied alien child," the Fifth Circuit states the El Paso 5's "children became unaccompanied."[169] However, at the same time, the court contradicts itself by also recognizing that the statute defines an unaccompanied child as one with "no parent or legal guardian in the United States."[170] Here, Trump's "Zero Tolerance Policy" directly created unaccompanied children by separating them from their parents. The El Paso 5 children did not arrive "unaccompanied" at the border. These minor children arrived at the border with their parents.

In an effort to distract from the El Paso 5's argument that separation from their children while detained pretrial is punishment that violates due

163. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) and (B)(ii) (2009); *see* 8 C.F.R § 208.30(d) (2019).

164. *Vasquez-Hernandez et al.,*924 F.3d at 169.

165. Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999).165.

166. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

167. Ala. v. Bozeman, 533 U.S. 146, 153 (2001).

168. Lexecon Inc. v. Millberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

169. *Vasquez-Hernandez et al.,* 924 F.3d at 168.

170. *Id.*

process, the Fifth Circuit stated that the El Paso 5 did not "show[] that qualifying for asylum would be relevant to whether they improperly entered."[171] However, this claim is simply a rubber stamp on the main objective of Trump's "Zero Tolerance Policy," which is to criminalize asylum law. Here, the El Paso 5 made a "credible fear claim" of persecution as soon as they encountered immigration agents and before they were charged with a misdemeanor.[172] The El Paso 5 were bona fide asylum seekers. Thus, Border Patrol agents should have referred the El Paso 5 to asylum officers for interviews, rather than prosecutors.[173] "An alien granted asylum gains a number of benefits, including pathways to lawful permanent resident status and citizenship."[174] Accordingly, contrary to the Fifth Circuit's assertion, qualifying for asylum was very relevant to an asylum seeker's criminal charge of improper entry.

The Supreme Court has held that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees."[175] Separating pretrial detainee–parents from their minor children punishes the parents and is a condition that is not reasonably related to congressional goals regarding asylum law.[176] The "Zero Tolerance Policy" targets asylum seekers in family separation cases and is designed to punish parents who seek asylum in the United States.[177] Trump's policy

171. In an era of fear of the Executive Branch, this three-judge Fifth Circuit panel desperately cited to the unpublished and non-precedential decision of *United States v. Brizuela* to support the position that the asylum statute here was completely irrelevant. U.S. v. Brizuela, 605 F. App'x, 464 (5th Cir. 2015). However, this unpublished case is easily distinguishable from the El Paso 5 cases because, unlike the El Paso 5: (1) Brizuela is not a family separation case, (2) Brizuela had a prior removal, (3) Brizuela did not raise a claim of pre-trial punishment in violation of the Due Process Clause, and (4) most importantly, Brizuela was an ex-convict and, thus, did not qualify for asylum benefits. *See Vasquez-Hernandez et al.*,924 F.3d at 169; *see also* 8 U.S.C. § 1158(b)(2)(A)(ii) (2009).

172. Brief for Appellant at 4-5, U.S. v. Vasquez-Hernandez et al., No. EP-17-cr-2660-KC (W.D. Tex. 2018).

173. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) & (B)(ii) (2009); 8 C.F.R. § 208.30(d) (2019).

174. *See* East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1236 (9th Cir. 2018).

175. *Bell*, 441 U.S. at 539.

176. *Id.* at 535.

177. *See Closing Off Asylum at the U.S.-Mexico Border*, REFUGEES INTERNATIONAL (Aug. 29, 2018) (stating that the Trump administration started a campaign to deter refugees from seeking asylum protection), https://www.refugeesinternational.org./reports/2018/8/29/closing-off-asylum-at-the-us-mexico-borderJeff Sessions, *Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

unabashedly attempts to change asylum laws enacted by Congress. However, the "Executive [may not] legislate from the Oval Office."[178]

In addition, the El Paso 5 argued they were punished at the pretrial stage because they could have been released on bond if they had been allowed to pursue asylum proceedings.[179] The Supreme Court has held that, generally, alien asylum seeking parents with no criminal history should be considered for release on bond along with their children.[180] The Supreme Court observed:

> The Board of Immigration Appeals has stated that 'an alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk'. . . In the case of arrested alien juveniles, however, the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together[.][181]

In family separation cases, the government inflicts pre–conviction punishment on asylum–seeking parents when they are pre–trial detainees, in violation of due process.

B. Permanently Separating Parents From Their Minor Children Violates the Eighth Amendment of the United States Constitution

The government's permanent separation of parents from their children in family separation cases, like those of the El Paso 5, violates the Eighth Amendment. Four of the El Paso 5 were deported without their children.[182] The El Paso 5 argued that the *de facto* termination of their parental rights by way of deportation was extreme and excessive punishment.[183] The El Paso

178. *See* East Bay Sanctuary Covenant, 909 F.2d at 1250.

179. *Id.*

180. Reno v. Flores, 507 U.S. 292, 295 (1993) (Such release "is easily done when the juvenile's parents have also been detained and the family can be released together . . . .").

181. *Flores*, 507 U.S. at 295.

182. *See* Patrick Timmons, *Family Separations: The Parents Fighting in Court to Get Their Children Back*, THE GUARDIAN (July 10, 2018, 3:00 PM), https://www.theguardian.com/us-news/2018/jul/10/border-family-separations-parents-deported-lawsuit.

183. Brief for Appellants at 14-15, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

5's permanent separation from their children was both: (1) an unnecessary infliction of pain as it could have been avoided through government compliance with the asylum statute, and (2) extreme and excessive given that the El Paso 5 were only convicted of misdemeanors.

The focus of excessive punishment is two prong: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."[184] The Supreme Court has instructed that "the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'"[185] The focus is "on the lack of proportion between the crime and the offense."[186] "[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[187] Therefore, "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."[188] The Supreme Court concludes, "this assessment does not call for a subjective judgment. Rather, it requires that we look to objective indicia reflecting the public sentiment toward a given sanction."[189] In order to analyze whether a punishment violates the Eighth Amendment, the Supreme Court instructed:

> [O]ur cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' This means, at least, that the punishment not be 'excessive.' When a form of punishment in the abstract [] rather than in the particular [] is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.[190]

184. Gregg v. Ga., 428 U.S. 153, 173 (1976).

185. *Id.* at 171.

186. *Id.*

187. *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

188. *Id.* at 173.

189. Gregg, 28 U.S. at 173.

190. *Id.* (citing *Trop,* 356 U.S. at 100, Furman v. Ga., 408 U.S. 238, 392–93 (1972), Wilkerson v. Utah, 99 U.S. 130, 136 (1879), Weems v. U.S., 217 U.S. 349, 367 and 381 (1910)).

The Amendment thus "imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not."[191]

Trump's inhumane "Zero Tolerance Policy" targeting asylum seeker—including the El Paso 5—has been widely rejected by American citizens.[192] Trump issued an executive order on June 20, 2018, ordering the reunification of separated parents and children which was partially in response to the public outcry.[193] However, the reunification remedy came too late for the El Paso 5. And, unfortunately, they are not alone. Other parents have been deported without their children as a result of the "Zero Tolerance Policy."[194] The government has yet to reunify hundreds of children with their parents.[195] The parents' permanent separation from their children in family separation cases is punishment barred by the Eighth Amendment. Such punishment is both an unnecessary infliction of pain and grossly disproportionate to the severity of the crime.

The district court opined in the El Paso 5 cases that every imprisoned parent would arguably have a claim if parent-child separation was actionable under the Eighth Amendment.[196] However, not every imprisoned parent facing a *misdemeanor* charge is separated from their minor children. More importantly, after being convicted of a misdemeanor, not every parent is prevented from learning about their child's location, nor is each parent at risk of losing permanent custody of their minor children. The El Paso 5 are unsophisticated, indigenous parents from Honduras and El Salvador who do not speak English. The El Paso 5 parents consistently maintained that, once convicted and deported, regaining custody of their children from the United

191. *Id.* at 174 (citing *Furman,* 408 U.S. at 313–14 and 433).

192. The United States District Court for the Southern District of California issued an Order granting a Motion for a Classwide Preliminary Injunction compelling the government to reunite all Class Members with their minor children in family separation cases. *See* Ms. L., 310 F.Supp.3d 1133. In *Ms. L,* the district court held that Class Members were likely to succeed on a due process claim; that—absent preliminary relief—they were likely to suffer irreparable harm, that the balance of equities weighed in favor of an injunction, and that the public interest favored granting the injunction. *Id.*

193. *See* President Donald J. Trump's Exec. Order No. 13841 (June 20, 2018), http://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

194. Indeed, the El Paso 5 parents are not the sole victims of the current administration's "Zero Tolerance Policy." Other parents have lost their children as a result of this policy. *See* Shoichet, *supra* note 148; *see also* Collinson, *supra* note 148.

195. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE, (Jan. 17, 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf (which explains in detail the federal policy in family separation).

196. *Vasquez-Hernandez,* 314 F.Supp.3d at 763.

States government would be a formidable, if not impossible, task.[197] Here, four of the El Paso 5's parental rights have been effectively terminated.

The Fifth Circuit defended the district court's decision and Trump's policy, claiming that "deportation was not a punishment imposed or even caused by [the parents'] misdemeanor convictions."[198] However, this decision ignores the fact that the government failed to comply with the law from the outset by not referring the El Paso 5 to asylum officers to evaluate their claims. Asylum officers never evaluated these parents "credible fear claims" in accordance with the law. These parents, who have no criminal history, may have obtained asylum benefits under immigration law. Such benefits include the privilege of being able to legally remain in the United States, thus avoiding criminal prosecution for remaining in the country illegally. But for Trump's "Zero Tolerance Policy," the El Paso 5 parents would not have been prosecuted and deported without their children. The El Paso 5 parents argued that they were "not contending that the district court entered an official order terminating their parental rights or a deportation order."[199] "Rather, they contend[ed] that their permanent separation from their children, which resulted from their [unnecessary] conviction, was both: (1) an unnecessary infliction of pain because it could have been avoided had the government complied with congressional mandate under the asylum statute, and (2) extreme and excessive considering that [these parents] were only convicted of a misdemeanor."[200] Under Trump's "Zero Tolerance Policy," family separation is punishment that is both cruelly inhumane and disproportionate.[201]

V. The Government's Policy of Separating Families to Prosecute and Deport Parents Without Their Children Constitutes *Outrageous* Government Conduct

The deportation of parents without their children in family separation cases is outrageous government conduct. The government separated the El

197. Reply Brief for Appellants at 5, U.S v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

198. *Vasquez-Hernandez*, 924 F.3d at 169.

199. Reply Brief for Appellants at 5, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

200. Reply Brief for Appellants at 5, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

201. *See Gregg*, 428 U.S. at 173.

Paso 5 from their children to prosecute the parents for Section 1325 misdemeanors.[202] Because of their Section 1325 convictions, the El Paso 5 were deported. Four of the El Paso 5 were deported *without* their children, and their parental rights were effectively terminated. Clearly, this is outrageous behavior.[203]

Outrageous government conduct is "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction."[204] It "violat[es] fundamental fairness, shocking the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment."[205] Simply put, it is conduct so unjust that a court must intervene.[206]

The Fifth Circuit rejected the El Paso 5's outrageous government conduct claim stating that "[t]he standard for proving outrageous governmental conduct is extremely demanding."[207] In doing so, the Fifth Circuit cited the Supreme Court's decision in *United States v. Russell.*[208] The Fifth Circuit stated that, in *Russell,* the Supreme Court found outrageous government conduct because there was a "forcible extraction of defendant's stomach to recover narcotics."[209] Here, however, the government *permanently* "extracted" the El Paso 5's children from their custody with no plan to return them. The government *indefinitely* separated the El Paso 5 from their minor children and placed the children in shelters. Four out of the El Paso 5 have not seen their children for nearly two years. This in itself "is bound to offend even hardened sensibilities."[210] The government's conduct under the "Zero Tolerance Policy," which creates orphans, is outrageous according to legal standards and social standards. In a recent report, the Officer of the Inspector General admits that the government actually lost some of the children it separated from their families.[211] In fact, some minor children have died while in the government's custody.[212] A Department of

202. 8 U.S.C. § 1325 (1996).

203. *See* Timmons, *supra* note 1; *see* Shoichet, *supra* note 148; *see also* Collinson, *supra* note 148.

204. U.S. v. Russell, 411 U.S. 423, 432–433 (1973).

205. *Id.* at 432 (citing Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234, 246 (1960)).

206. Rochin v. Calif., 342 U.S. 165, 172 (1952).

207. *Vasquez-Hernandez*, 924 F.3d at 170.

208. *Id.*

209. *Id.*

210. *Id.* at 172.

211. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 148.

212. Daniella Silva, *16-year-old Migrant Boy Dies in U.S. Custody, 5th Child to Die Since December,* NBC NEWS (May 20, 2019, 2:50 PM), https://www.nbcnews.com/news/latino/16-year-old-migrant-boy-dies-u-s-custody-5th-n1007751.

Homeland Security agent, who resigned in disgust, stated that family separations were "executed with astounding casualness about precise tracking of family relationships—as though eventual reunification was deemed unlikely or at least unimportant."[213] Another officer, who also resigned, described the government's conduct as "child kidnapping, plain and simple."[214] If pumping a defendant's stomach to retrieve narcotics is outrageous conduct, kidnapping a defendant's child in order to prosecute a parent for a misdemeanor offense is exceedingly outrageous.[215]

Furthermore, the government's family separation policy is particularly outrageous because it criminalizes the act of seeking asylum protections.[216] It is undisputed that the El Paso 5 made a "credible fear claim" of persecution when they encountered immigration agents.[217] They argued from the outset that they and their minor children should have been referred to an asylum officer for asylum proceedings, *not* to a prosecutor for criminal proceedings.[218] At the motion to dismiss hearing, counsel for the El Paso 5 stated: "We're arguing in our motion that we shouldn't even be here. These defendants should be in immigration court."[219] They argued that the denial of an opportunity to be heard regarding their asylum claim would likely result in their deportation without their minor children and, thus, a *de facto* termination of their parental rights without due process of law and an opportunity to be heard.[220]

Failing to recognize the El Paso 5's asylum rights under the Due Process Clause, the Fifth Circuit turned a blind eye to its own precedent which holds

213. Nick Miroff, Amy Goldstein & Maria Sacchetti, *'Deleted' Families: What Went Wrong With Trump's Family-Separation Effort*, WASH. POST (July 28, 2018), https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.215954243ff4.

214. *Id.*

215. *See* Lisa Riordan Seville & Hannah Rappleye, *Trump Admin. Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 1:30 AM), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616; Patrick

Timmons, *Family Separations: The Parents Fighting in Court to Get Their Children Back*, THE GUARDIAN (July 10, 2018, 3:00 PM), https://www.theguardian.com/us-news/2018/jul/10/border-family-separations-parents-deported-lawsuit; Lomi Kriel, *Husband Murdered, Son Taken Away, Mother Seeking Asylum Tells Judge, I Have Lost Everything*, HOUS. CHRON. (Jan. 1, 2018, 10:18 PM), http://www.houstonchronicle.com/news/local/article/Her-husband-murdered-her-son-taken-away-a-12466253.php; Miroff, Goldstein & Sacchetti, *supra* note 213.

216. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) & (B)(11) (2008); 8 C.F.R.§ 208.30(d) (2019).

217. *Vasquez-Hernandez*, 314 F. Supp. 3d at 750.

218. *See* Brief for Appellants at 21, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

219. *Id.*

220. *Id.*

that petitioning for asylum is "a constitutionally protected right" under the Due Process Clause of the Fifth Amendment.[221] There is no dispute as to the El Paso 5's asylum claims. In fact, the district court recognized that they were asylum seekers when it stated: "[The El Paso 5] sought asylum based on a fear of persecution in their home countries."[222]

This point was substantiated when a voluntary nonprofit organization helped one of the El Paso 5, Ms. Vasquez–Hernandez, secure an immigration bond after her Section 1325 conviction.[223] Had the government complied with Congress's command to refer her to an asylum officer to determine her "credible fear claim" of persecution or torture, Ms. Vasquez–Hernandez would not have spent time in federal prison away from her son, and she would not have obtained a federal conviction under Section 1325. Furthermore, an immigration judge would not have granted her a bond if he concluded that Ms. Vasquez–Hernandez lied about the fact that she and her child had a viable "credible fear claim" of persecution. Unfortunately, no one helped the remaining four of the El Paso 5 pursue immigration proceedings once they were convicted; thus, they were deported *without* their children.[224] Aliens in the United States are entitled to due process.[225] "[T]he Due Process Clause [] was intended to secure the individual from the arbitrary exercise of the powers of government."[226] Had these parents' constitutional rights to petition for asylum been protected, their convictions and deportations without their children could have been avoided entirely.

The government claimed that the prosecution of the El Paso 5 did not preclude them from seeking asylum after their convictions.[227] In other words, the government proposed that the courts ignore Congress' asylum statute and support Trump's "Zero Tolerance Policy" which was implemented to "dismantle the U.S. asylum system."[228] The government's proposal that wrongfully convicted parents are still able to claim asylum in deportation proceedings does not change the fact that they were *wrongfully convicted*. Also, the government fails to opine on how these parents are supposed to pursue asylum while in the custody of the very government that

221. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1037–38 (5th Cir. 1982).

222. *Vasquez-Hernandez*, 314 F.Supp.3d at 750.

223. *See* Brief for Appellants at 22-23, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

224. *See* Brief for Appellants at 22-23, U.S. v. Vasquez-Hernandez et al., No. 18-50492 (5th Cir. 2018).

225. Zadvydas v. Davis, 533 U.S.678, 693 (2001).

226. Daniels v. Williams, 474 U.S. 327, 331 (1986).

227. Brief for Government at 50, U.S. v. Vasquez-Hernandez et al., No. EP-17-cr-2660-KC (W.D. Tex. 2018).

228. *See* Blitzer, *supra* note 152.

ignored their initial asylum claims. Here, four of the El Paso 5 were deported after their Section 1325 misdemeanor convictions and were never given an opportunity to pursue their "constitutionally protected right" to seek asylum under the Due Process Clause of the Fifth Amendment.[229]

The district court stated that the government's conduct was not outrageous because the El Paso 5 were willing participants in criminal conduct.[230] The district court goes on to say that "the [outrageous] doctrine overwhelmingly turns on the extent to which the government itself had a hand in the activity leading to a criminal defendant's arrest and prosecution."[231] Here, the "Zero Tolerance Policy" *directly* created unaccompanied minors by separating them from their parents, and then criminally prosecuted the parents for misdemeanor illegal entry for simply seeking asylum. The government deliberately deprived the El Paso 5, as well as other parents in family separation cases, of their benefits under asylum law, and it assuredly had a hand in the activity leading to their arrests and criminal prosecutions.[232]

Furthermore, the government knew it was operating under a policy to separate families in order to deter asylum seekers at the time the El Paso 5 parents were separated from their children.[233] The government, however, did not apprise the El Paso 5 or the court of the policy. Failing to disclose the family separation policy to the court is a lack of complete candor to the tribunal.

The government attempted to further muddy the waters by telling the magistrate court that they "do not know" if the minors are the real children of the El Paso 5. If the government truly doubted the relationship of these minors to the El Paso 5, the government would have prosecuted the El Paso 5 for child trafficking, not for misdemeanors. All lawyers, including government lawyers, owe duty of candor to the tribunal, and a prosecutor for the government cannot argue facts or inferences unsupported by the evidence or that the prosecutor knows are false or has strong reason to doubt.[234] The government's claim that the minors involved may not be the El Paso 5's children displayed a blatant lack of candor to the tribunal. Over 80 years

229. Haitian Refugee Center, 676 F.2d at 1037–38.

230. *Vasquez-Hernandez,* 314 F.Supp.3d at 767–68.

231. *Id.* at 768.

232. *See* Isaac Stanley-Becker, *Who's Behind the Law Making Undocumented Immigrants Criminals? An Unrepentant White Supremacist,* WASH. POST (June 27, 2019), https://www.washingtonpost.com/nation/2019/06/27/julian-castro-beto-orourke-section-immigration-illegal-coleman-livingstone-blease/?utm_term=.ec914f5ac346.

233. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 148.

234. *See* U.S v. Corona, 551 F.2d 1386, 1390 (5th Cir. 1977).

ago, with respect to a United States Attorney's use of unfair and calculated methods, the Supreme Court said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[235]

Throughout the El Paso 5's criminal process, the government insisted that a court should focus solely on the elements of conviction. However, the Supreme Court has rejected the *sinister sophism* advanced by the government that the end justifies the employment of illegal means.[236] Justice Brandeis wrote:

> To declare that in the administration of criminal justice the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against the pernicious doctrine this Court should resolutely set its face.[237]

Trump's policy of indefinite separation of parents from their minor children, some of whom have died during the implementation of this policy,[238] clearly constitutes outrageous conduct by the government that must be rectified.

235. Berger v. U.S., 295 U.S. 78, 88 (1935).

236. *See* Sugar Inst. v. U.S., 297 U.S. 553, 599 (1936); Collins v. Beto, 348 F.2d 823, 831 (5th Cir. 1965).

237. Olmstead v. U.S. 277 U.S. 438, 485 (1928).

238. *See* Laughland, *supra* note at 147.

Conclusion

As of the writing of this article, four of the El Paso 5 are currently living in Central America and their children are somewhere in the United States. Although President Trump signed an executive order on June 20, 2018 to reunite parents and their children, that order came too late for the El Paso 5 parents. They have suffered permanent, irreparable damage. Moreover, there is no evidence that the government has rescinded its "Zero Tolerance Policy." To the contrary, in a 60 Minutes interview, Trump stated: "[F]rankly . . . when you allow the parents to stay together, okay, when you allow that, then what happens is people are gonna pour into our country."[239] Trump has gone so far to state: "If they feel there will be separation, they won't come."[240] It appears that Trump's executive order to reunite families constitutes "fake news" with very real consequences for families who seek asylum in the United States.

239. Lesley Stahl, *Leslie Stahl Speaks with President Trump About a Wide Range of Topics in his First 60 Minutes Interview Since Taking Office,* CBS NEWS (Oct. 15, 2018), https://www.cbsnews.com/news/donald-trump-interview-60-minutes-full-transcript-lesley-stahl-jamal-khashoggi-james-mattis-brett-kavanaugh-vladimir-putin-2018-10-14/.

240. Philip Rucker, *Trump Says He is Considering a New Family Separation Policy at U.S.-Mexico Border,* WASH. POST. (Oct. 13, 2018), https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html?utm_term=.6cda065695f4.