IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC., Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, and KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security, Defendants.	Civil Action No. 18-cv-2473-RC

PLAINTIFFS' MOTION FOR PRELIMIINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiffs Citizens for Responsibility and Ethics in Washington and Refugee and Immigrant Center for Education and Legal Services, Inc. respectfully move for a preliminary injunction against Defendants U.S. Department of Homeland Security and Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security. The requested injunction would require Defendants to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child. In support of this motion, Plaintiffs submit the attached memorandum of

points and authorities; the Declarations of Jonathan Ryan, Kathrine Russell, Bianca Aguilera, and Noah D. Bookbinder; Exhibits 1-15; and a proposed order.

Pursuant to Local Civil Rule 65.1(d), Plaintiffs respectfully request a hearing on their motion at the Court's earliest convenience and not later than 21 days after the filing of this motion. As explained in the accompanying memorandum, expedition is essential to prevent likely and imminent irreparable harm to Plaintiffs caused by Defendants' ongoing failure to create records adequately documenting child separations in violation of the Federal Records Act.

Date: March 8, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

MANOJ GOVINDAIAH
Refugee and Immigrant Center for Education and Legal Services
802 Kentucky Ave.
San Antonio, TX 78201
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicestexas.org

Counsel for Plaintiffs

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REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

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v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security,

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MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

At the center of the Trump Administration's family separation crisis is a very basic problem: bad recordkeeping. The government now admits that when it implemented the Zero Tolerance immigration enforcement policy ("Zero Tolerance Policy"), the U.S. Department of Homeland Security ("DHS") had no system in place to properly track or document the thousands of migrant families it forcibly separated. As a result, when the court in *Ms. L. v. ICE*, No. 3:18-cv-428 (S.D. Cal.) ordered the government to reunify the families it tore apart, chaos ensued. Complying with the order posed immense challenges for the government, due largely to DHS's failure in the first instance to create adequate records linking the separated families. The government was thus forced to undertake an extensive forensic data analysis—which it has described as a "herculean," "complex," and "resource-intensive"—to piece together the information that DHS should have documented in the first place. And even these extensive efforts have not, to this day, yielded a complete accounting of all the families DHS forcibly separated, nor has the government reunified each of those families.

The problems have not stopped. Recent revelations make clear that child separations are ongoing, and at an alarming rate. While the Administration purportedly halted the practice in June 2018, it continues to separate children based on, among other things, findings of alleged parental criminal history, with the government recently reporting at least 245 new separations between June 27, 2018 and January 31, 2019. These ongoing separations are happening at "more than twice the rate . . . observed in 2016," and have included children ranging from "under 1 year old to 17 years old," according to a January 2019 report by the U.S. Department of Health and Human Services' Office of Inspector General ("HHS OIG").

To make matters worse, DHS's recordkeeping failures have continued as well. Recent reporting confirms that while DHS took steps between April and August 2018 to address its recordkeeping deficiencies, those changes have proven inadequate in several critical respects: (1) there is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), with the agency apparently believing, incorrectly, that it has no legal obligation to document such separations; (2) there is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations—the agencies instead use an amalgam of separate systems that are not fully integrated with one another; (3) DHS components are not properly utilizing new recordkeeping measures designed to document child separations, and DHS agents regularly fail to document child separations in each case file and provide a reason for the separation; and (4) DHS is failing to adequately document the grounds for separations based on, among other things, alleged parental criminal history.

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Refugee and Immigrant Center for Education and Legal Services, Inc. ("RAICES") brought this suit under the Administrative Procedure Act ("APA"), seeking redress for DHS's violations of the Federal Records Act ("FRA") in connection with its implementation of the Zero Tolerance Policy. Because the recent revelations of ongoing separations and recordkeeping failures demonstrate the need for immediate relief to prevent irreparable harm, Plaintiffs now move for a preliminary injunction. Each of the preliminary injunction factors weighs heavily in Plaintiffs' favor.

1. Plaintiffs are highly likely to succeed on their APA claim challenging DHS's failure to create records adequately documenting child separations in violation of the FRA. That law imposes a non-discretionary duty on agencies to create and maintain records sufficient to (1) "[p]rotect the . . . legal[] and other rights . . . of persons directly affected by the Government's actions"; (2) "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government"; (3) "[f]acilitate action by agency officials and their successors in office"; and (4) "[d]ocument the persons" or "matters dealt with by the agency." 36 C.F.R. § 1222.22(a)-(d); *see* 44 U.S.C. § 3101. DHS has indisputably violated each of these obligations, and continues to do so, by systematically failing to create records adequately documenting child separations.

2. DHS's FRA violations have irreparably harmed RAICES, its clients, and CREW, and will likely continue to do so absent a preliminary injunction. As to RAICES, DHS's recordkeeping failures have significantly impaired the organization's ability to fulfill its core mission of providing effective legal representation and services to vulnerable migrant families, forcing RAICES to divert substantial resources to counteract that harm. The recordkeeping deficiencies have also directly harmed RAICES's clients by, among other things, preventing or delaying reunification of separated children with their families (and, in turn, inflicting or exacerbating severe psychological and physiological trauma); prolonging detention of separated adults and children; impeding clients' ability to present information supporting their immigration cases; and impeding clients from obtaining relief to which they may be entitled under the *Ms. L* class settlement. Further, DHS's recordkeeping failures have harmed CREW by depriving it of critical documents and information it is currently seeking through pending Freedom of

Information Act ("FOIA") requests, that it intends to seek through future FOIA requests, and that it requires to fulfill its mission of promoting government transparency and accountability. These harms are, moreover, irreparable. Once they are inflicted, they cannot be undone. And as recent experience has shown, when DHS fails to create adequate and contemporaneous records documenting child separations in the first instance, an irretrievable loss of information is likely.

3. The balance of equities and public interest strongly favor a preliminary injunction. The risk of severe irreparable harm to RAICES, its clients, and CREW substantially outweighs any burden imposed on DHS by merely requiring it to create records adequately documenting child separations pending final disposition of this suit. Such an injunction may in fact *save* DHS from more burdensome work in the long term—i.e., by obviating the type of "herculean" and "resource-intensive" forensic data analysis the government was forced to undertake in *Ms. L*. And there is a substantial public interest in having agencies abide by the laws governing their existence and operations, including the APA and FRA.

For all these reasons, Plaintiffs are entitled to a preliminary injunction requiring DHS to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child.

BACKGROUND

I. The Federal Records Act

The FRA is a collection of statutes governing the creation, management, and disposal of federal records. 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq*. Among other things, the Act is intended to ensure "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C. § 2902(1).

Both the Archivist of the United States (the "Archivist") and the various federal agency heads share responsibility to ensure that an accurate and complete record of agencies' policies and transactions is compiled. *See* 44 U.S.C. §§ 2901-11; §§ 3101-07. The Archivist must "provide guidance and assistance to Federal agencies" and has the responsibility "to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies." 44 U.S.C. § 2904(b)-(c)(1). To that end, the National Archives and Records Administration ("NARA") has promulgated regulations governing the creation and maintenance of federal records. *See* 36 C.F.R. §§ 1222.22, *et seq.*

The key FRA provision at issue here is 44 U.S.C. § 3101, which provides that agencies "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." NARA's regulations detail these obligations as follows:

> To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

> (a) Document the persons, places, things, or matters dealt with by the agency.
>
> (b) Facilitate action by agency officials and their successors in office.
>
> (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
>
> (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
>
> (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
>
> (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

The APA authorizes judicial review of claims that an agency has violated its non-discretionary obligations under the FRA, including the failure to create records required by 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *See Armstrong v. Bush*, 924 F.2d 282, 291-94 (D.C. Cir. 1991); *CREW v. Pruitt*, 319 F. Supp. 3d 252, 257-58 (D.D.C. 2018).

II. DHS's History of Records Management Failures

DHS and its component agencies—including U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE")—have a history of non-compliance with their FRA obligations, which is well documented by NARA. *See* First Am. Compl. ("FAC") ¶¶ 23-25. Most recently, in a July 2018 inspection report of CBP, NARA found that "[i]n its current state, ***the records management program at CBP is substantially non-compliant with Federal statutes and regulations***, NARA policies, Office of Management and

Budget (OMB) Circular A-130, and DHS Records and Information Management policies." Ex. 1 at 2 (emphasis added). NARA's report identified the following deficiencies, among others:

- "CBP has not assigned records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee the creation and implementation of a comprehensive records management program." *Id.* at 3.
- Records management "directives establishing program objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records are out of date or in draft form." *Id.* at 3-4.
- The structure governing its records officers "is not adequately implemented throughout each program to ensure incorporation of recordkeeping requirements and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures." *Id.* at 4.
- "CBP does not integrate records management and recordkeeping requirements into the design, development, and implementation of its electronic systems." *Id.* at 5.
- "CBP does not require records management training for all CBP staff, and the [records management] training it offers does not meet records management training requirements" established by NARA regulations and directives. *Id.* at 6.
- CBP "does not conduct regular records management evaluations of agency components." *Id.* at 7.
- "CBP has no strategic plan for records management." *Id.* at 9-10.

- "Successful implementation of CBP plans for a Records Management Application and Electronic Records Management System [is] at risk of failure due to lack of basic records management fundamentals." *Id.* at 10.

Based on these findings, NARA concluded that CBP's records management program "lacks numerous basic elements of a compliant records management program as prescribed in 36 CFR Chapter XII, Subchapter B." *Id.* at 11. NARA added that it "will require careful strategic planning" for the program "to become effective and compliant in the many areas where it is currently underdeveloped," noting that "[p]rogram plans and studies to institute [records management] throughout the agency have been formulated since 2015, but limited progress has been made to date." *Id.*

It is unclear what steps, if any, CBP has taken to address NARA's findings. What is clear is that DHS's overall culture of non-compliance with its FRA obligations manifested acutely, with disastrous results, in its implementation of the Zero Tolerance Policy.

III. DHS's Failure to Create Records Adequately Documenting Child Separations

A. The Zero Tolerance Policy

From July to November 2017, DHS conducted a secret pilot program of the Zero Tolerance Policy in the "El Paso sector," which spans from New Mexico to West Texas. Ex. 2 at 14 (GAO Report). Under this program, federal prosecutors criminally charged adults who allegedly crossed the border unlawfully in the El Paso sector. *Id.* If accompanied by a minor child, the child would be separated from the adult. *Id.* Over 280 migrants were separated under this initiative. *Id.* at 15. Border Patrol ended the El Paso pilot program in November 2017. *Id.*

In April 2018, the Trump Administration formally announced the Zero Tolerance Policy, without advanced notice to or pre-planning by agency officials. *Id.* at 1, 12. Under the policy, all adults entering the United States illegally would be subject to criminal prosecution. Ex. 3 at 2-3 (DHS OIG Report). If the apprehended adult was accompanied by a minor child, the child would be separated from the adult. *Id.*

CBP, ICE, and HHS all play critical roles in implementing Zero Tolerance. *Id.* at 2-3. Within CBP, the Office of Field Operations ("OFO") inspects foreign visitors entering at established ports of entry, and Border Patrol apprehends individuals who enter the United States between ports of entry. *Id.* at 2. CBP transfers adult migrants in its custody to ICE, which detains certain migrants with pending immigration proceedings and deports migrants who receive final removal orders. *Id.* Children apprehended at the border who are separated from their parents and reclassified as "Unaccompanied Alien Children" ("Unaccompanied Children") are held in DHS custody until they can be transferred to HHS's Office of Refugee Resettlement, which is responsible for the long-term custodial care and placement of Unaccompanied Children. *Id.* at 3.[1]

The Zero Tolerance Policy "fundamentally changed DHS' approach to immigration enforcement." *Id.* Under prior policy, when CBP apprehended a migrant family unit attempting to enter the United States illegally, it usually placed the adult in civil immigration proceedings without referring the adult for criminal prosecution. *Id.* at 2. CBP only separated apprehended

[1] "Unaccompanied Alien Child" is defined by statute as one who has (1) "no lawful immigration status in the United States," (2) "has not attained 18 years of age," and (3) "no parent or legal guardian in the United States; or no parent or legal guardian in the United States . . . available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

parents from children in limited circumstances, such as where the adult had a criminal history or outstanding warrant, or if CBP could not determine whether the adult was the child's parent or legal guardian. *Id.* Thus, in most instances, family units either remained together in ICE family detention centers while their civil immigration cases were pending, or they were released into the United States with an order to appear in immigration court on a later date. *Id.*; *see also* Ex. 4 at 3 (HHS OIG Report) ("Historically, [family] separations were rare . . ."). That changed after Zero Tolerance.

B. Fallout from Zero Tolerance

The fallout from Zero Tolerance was catastrophic, resulting in thousands of children being ripped from their families. Ex. 3 at 3 (DHS OIG Report). Amid intense public criticism and political pressure, President Trump purportedly halted child separations by Executive Order dated June 20, 2018. *See* Exec. Order No. 13841, 83 Fed. Reg. 29,435 (published June 25, 2018) ("EO 13841"). EO 13841 states that the Trump Administration will continue to criminally prosecute illegal entry offenses, but that the Secretary of Homeland Security "shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." *Id.* It adds that the "Secretary shall not, however, detain an alien family together when there is a concern that detention of an alien child with the child's alien parent would pose a risk to the child's welfare." *Id.* EO 13841's definition of "alien family" is limited to children and adults who have "a legal parent-child relationship." *Id.* Thus, the EO does not prevent DHS from separating children from adults who are not parents or legal

guardians, such as non-guardian grandparents, siblings, and other family members. Nor does EO 13841 require reunification of the thousands of children DHS had already separated.

On June 26, 2018, U.S. District Judge Dana Sabraw entered a preliminary injunction requiring DHS and HHS to reunify a certified class of migrant parents and separated children within 30 days (an order that still has not been fulfilled to this day). *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). On October 9, 2018, the court approved a class settlement in *Ms. L* and two related cases. *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 256 (S.D. Cal. Oct. 9, 2018). Like EO 13841, the *Ms. L* class settlement applies only to separations of children from parents or legal guardians, and not to other family members or adult companions. *Id.* at 3. The class definition also excludes "alien parents with criminal histories or a communicable disease, or those encountered in the interior of the United States." *Id.*

C. DHS's Recordkeeping Failures During Zero Tolerance

During the government's family reunification efforts, DHS's recordkeeping failures became readily apparent. These failures are thoroughly documented in a series of reports issued by the DHS OIG, HHS OIG, and GAO, which make the following troubling findings:

1. DHS did "not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to [HHS]," because the agencies "did not have advance notice" of the Zero Tolerance Policy. Ex. 2 at 12 (GAO Report). This is critical because before Zero Tolerance, "DHS and HHS data systems did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and . . . such information was not always provided [to HHS] when children were transferred from DHS to HHS custody." *Id.* at 16.

2. Relatedly, contrary to DHS's public claims that DHS and HHS had a "central database" with up-to-date information regarding family separations, Ex. 5 at 3 (DHS Fact Sheet), the DHS OIG found "no evidence that such a database exists," and noted that DHS eventually "acknowledged to the OIG that there is no 'direct electronic interface' between DHS and HHS tracking systems," Ex. 3 at 2-3, 11. The HHS OIG and GAO made similar findings. *See* Ex. 4 at 5 (HHS OIG Report) ("[N]o centralized system existed to identify, track, or connect families separated by DHS"); Ex. 2 at 23 (GAO Report) (there is "no single database with easily extractable, reliable information on family separations"). As senior HHS officials have recently explained, DHS historically provided only "anecdotal information about their separation of children to [HHS] on a discretionary, *ad hoc* basis by transmitting the information into the child's record on" HHS's Unaccompanied Children Portal, and "did not track separations of children in an aggregated manner." Ex. 6 ¶¶ 12, 13 (White Decl.); *see also* Ex. 10 ¶ 14 (Sualog Decl.). Thus, "when the *Ms. L* court issued its orders on June 26, 2018, there was not an aggregated list of the children who had been separated by DHS and were then in [HHS] care." Ex. 6 ¶ 13 (White Decl.).

3. CBP officials told the DHS OIG that they "could not feasibly identify children who were separated before . . . April 19, 2018," Ex. 3 at 11 n.23, indicating that the agency failed altogether to create records documenting those separations. This would include the hundreds of migrant families separated during the El Paso pilot program. *See supra* Part II.A.

4. There was poor integration of recordkeeping systems internally within DHS, and externally between DHS and HHS. Internally, "ICE's system did not display data from CBP's systems that would have indicated whether a detainee had been separated from a child. . . . As a

result, ICE officers at the Port Isabel Detention Center stated that when processing detainees for removal, officials initially treated separated adults the same as other detainees and made no additional effort to identify and reunite families prior to removal." Ex. 3 at 9-10 (DHS OIG Report). Externally, CBP did not have a uniform, reliable system for creating records documenting family separations and transmitting them to HHS. CBP officers would instead "manually enter information into a Microsoft Word document, which they then send to HHS as an email attachment. Each step of this manual process is vulnerable to human error, increasing the risk that a child could become lost in the system." *Id.* at 10.

5. CBP does not create records documenting the information it transmits to HHS regarding children transferred to its custody. *Id.* at 10 n.21. CBP told the OIG "it does not store that data and therefore could not provide it to the OIG team." *Id.*

As Judge Sabraw observed in *Ms. L*, DHS's recordkeeping failures during Zero Tolerance are "startling" given that:

> [t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee's release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.

Ms. L., 310 F. Supp. 3d at 1144.

Unsurprisingly, DHS's failure to create adequate records in the first instance significantly impaired the government's efforts to reunify separated families in accordance with the *Ms. L* order. Because "no centralized system existed to identify, track, or connect families separated by

DHS," complying with the *Ms. L* order "required HHS and DHS to undertake a significant new effort to rapidly identify children in [HHS] care who had been separated from their parents and reunify them." Ex. 4 at 5 (HHS OIG Report). This forensic data analysis entailed (1) "min[ing] more than 60 DHS and HHS databases to identify indicators of possible separation, such as an adult and child with the same last name apprehended on the same day at the same location"; (2) "manually review[ing] case files for all of the approximately 12,000 children in [HHS] care at that time"; and (3) asking all HHS-funded "shelters to attest to any separated children that grantees reasonably believed to be in their care." *Id.* at 7. HHS has described its efforts as "herculean," "complex, fast-moving, and resource-intensive." *Id.* at 19; *see also* Ex. 6 ¶ 15 (White Decl.).[2]

DHS's recordkeeping failures have also impeded OIG investigations. For instance, DHS could not fulfill the OIG's request for a "list of every alien child separated from an adult since April 19, 2018, as well as basic information about each child, including the child's date of birth; the child's date of apprehension, separation, and (if applicable) reunification; and the location(s) in which the child was held while in DHS custody." Ex. 3 at 11 (DHS OIG Report). DHS "struggled" to provide the OIG with "accurate, complete, reliable data on family separations and reunifications," and the data DHS did provide "was incomplete and inconsistent, raising questions about its reliability." *Id.* at 9, 11.

[2] The agencies' efforts in response to the *Ms. L* litigation are, of course, tailored to the certified class in that case, and the government has resisted efforts to provide information or otherwise grant relief as to individuals outside its limited interpretation of the class definition. *See* Ex. 7 at 2 (Pl.'s Mot. to Clarify Scope of Class in *Ms. L*); Ex. 8 at 12-13 (GAO Congressional Testimony).

IV. This Suit

CREW instituted this action on October 26, 2018, and filed its First Amended Complaint on December 14, 2018, adding RAICES as a co-plaintiff. Plaintiffs seek relief under the APA based on DHS's ongoing FRA violations. They assert three claims. Claim One alleges that DHS has failed to establish and maintain an FRA-compliant records management program in violation of 44 U.S.C. § 3102 and 36 C.F.R. §§ 1222.26, 1222.34. FAC ¶¶ 62-70. Claim Two, which is relevant to the present motion, alleges that DHS has repeatedly failed, and continues to fail, to create records sufficiently documenting child separations in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 71-80. And Claim Three alleges that DHS failed to create records of agency policy and decisions in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 81-87. DHS's response to the First Amended Complaint is due March 20, 2019. *See* Jan. 30, 2019 Minute Order.

V. DHS's Ongoing Child Separation Practices and Recordkeeping Failures

Despite the Trump Administration's supposed cessation of child separations in June 2018, recent reports reveal that DHS continues to separate families at an alarming rate. A January 17, 2019 report by the HHS OIG found that between June 26, 2018 and December 26, 2018, "***218 children*** . . . were separated by DHS and transferred to [HHS] care." Ex. 4 at 21 (emphasis added).[3] Later, in a February 20 court filing in *Ms. L*, the government revealed that the number of "new separations" had risen to ***245*** as of January 31, 2019. Ex. 9 at 11. The

[3] HHS disclosed the 218 "newly separated children" in its written response to the HHS OIG's report. Ex. 4 at 21. The HHS OIG noted this was "significantly higher than the 118 separated children listed in the tracking documents [the OIG] reviewed for the period of July 1 through November 7, 2018." *Id.* at 14.

government claims that 225 of these separations were based on alleged "[p]arent criminality, prosecution, gang affiliation, or other law enforcement purpose," and thus fall outside the *Ms. L* class settlement. *Id.* at 13.

These ongoing separations are happening at "more than twice the rate that [HHS] observed in 2016," and have included children ranging from "under 1 year old to 17 years old." Ex. 4 at 11 (HHS OIG Report). Although the separations are based on, among other things, alleged "parent criminality," the HHS OIG found that "DHS has provided [HHS] with limited information about the reasons for these separations." *Id.* Specifically, "tracking documents [the OIG] reviewed in November 2018 included multiple cases in which DHS had not responded to [HHS] intake staff requests for additional information about a child's separation." *Id.* This is problematic because "[i]ncomplete or inaccurate information about the reason for separation, and a parent's criminal history in particular, may impede [HHS's] ability to determine the appropriate placement for a child," as "not all criminal history rises to a level that would preclude a child from being placed with his or her parent." *Id.* at 12. Such incomplete or inaccurate information also "hamper[s]" the OIG's "efforts to identify and assess more recent separations." *Id.* at 13.

The HHS OIG's findings are consistent with the firsthand experience of Plaintiff RAICES, which has observed ongoing child separations that are based on poorly-documented and dubious findings of parental "criminal history." *See* Declaration of Kathrine Russell

("Russell Decl.") ¶¶ 5, 8-11, 15-16; Declaration of Bianca Aguilera ("Aguilera Decl.") ¶ 7. Other immigrant-advocacy groups have reported similar findings.[4]

The influx of recent family separations is particularly alarming given reports that DHS's recordkeeping practices remain woefully deficient. Although DHS and HHS "made changes to their data systems" between "April and August 2018" to "help notate in their records when children are separated from parents," Ex. 8 at 9 (GAO Congressional Testimony), those changes have been inadequate in several key respects. For instance:

- There is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), including records necessary to link the children and adults through the duration of their immigration proceedings. Consistent with the government's overall focus on the *Ms. L* class, DHS's efforts appear to have focused exclusively on parental separations—even though DHS frequently separates migrant children from non-parental adult companions who possess information critical to the child's asylum claim. *See* Aguilera Decl. ¶¶ 9-10, 13; Russell Decl. ¶ 7.

[4] *See* Statement of Jennifer Podkul, Kids in Need of Defense, U.S. House Comm. On Energy & Commerce, at 7 (Feb. 7, 2019), *available at* https://bit.ly/2EpZjeT (noting "current policies and practices . . . require no justification or documentation" for child separations, and that the organization "continues to see cases in which neither [HHS] nor the attorney are notified that DHS separated a child from a parent," as well as "several recent cases, post-[Zero Tolerance], of children separated from their parents for unknown reasons"); Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 10-15 (Feb. 2019), *available at* https://bit.ly/2STfyd7 (reporting several separations based on unsupported claims of criminal history, and other separations lacking any documented justification).

- There is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations. The agencies instead use an amalgam of separate systems, which are not fully integrated with one another. *See* Ex. 4 at 13 (HHS OIG Report) (noting the "lack of an existing, integrated data system to track separated families across HHS and DHS").
- Although "Border Patrol modified its system on April 19, 2018, to include yes/no check boxes to allow agents to indicate that a child was separated from their parent(s)," Border Patrol officials told GAO "that information on whether a child had been separated is not automatically included in the referral form sent to [HHS]. Rather, agents may indicate a separation in the referral notes sent electronically to [HHS], but they are not required to do so." Ex. 8 at 9 (GAO Congressional Testimony).
- Similarly, while HHS updated its "Unaccompanied Children Portal" to "include a check box for indicating that a child was separated from his or her parents" that both DHS and HHS may utilize, HHS officials told GAO that "DHS components with access to the [Unaccompanied Children] Portal are not yet utilizing the new check box consistently." *Id.* at 10.
- "Border Patrol agents and CBP officers provide packets of information to [HHS] when unaccompanied children are transferred to [HHS] custody that include information about separation from a parent; however, [HHS] officials told [GAO] that [HHS] rarely receives some of the forms in the packets to which CBP officials referred. In addition, the forms themselves do not contain specific fields to indicate such a separation." Ex. 2 at 18-19 (GAO Report).

- As recently as February 2019, HHS officials and immigration attorneys have reported to the media that DHS agents "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation." Ex. 11 at 4.
- The above reports comport with the firsthand experiences of RAICES, whose staff have continued to observe inadequate recordkeeping of child separations that persists to this day. Russell Decl. ¶ 5; Aguilera Decl. ¶ 7.

An equally troubling revelation in the HHS OIG report was that that there are "thousands" of separated children not previously reported or accounted for who were released from HHS custody before the June 2018 *Ms. L* order, and thus "[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to [HHS's] care" remains "unknown." Ex. 4 at 1, 13. The government claims these "thousands" of separated children are outside of the *Ms. L* class, an issue that is currently being litigated in that case. *See* Ex. 7 at 2; Ex. 8 at 12-13. The government argues that identifying and reunifying these children may be outside "the realm of the possible," partly because DHS failed to create proper records linking separated families in the first place and piecing together that information now would, in its view, be excessively burdensome or impossible. *See* Ex. 10 ¶¶ 13-20, 25 (Sualog Decl.).

Because these recent revelations of ongoing separations and recordkeeping failures demonstrate the need for immediate relief to prevent irreparable harm, Plaintiffs now move for a preliminary injunction.

ARGUMENT

"A party seeking a preliminary injunction must make a 'clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). Here, each factor weighs heavily in Plaintiffs' favor: Plaintiffs are likely to establish that DHS has violated the FRA by failing to create records adequately documenting child separations; these violations have irreparably harmed RAICES, its clients, and CREW, and will likely continue to do so absent immediate injunctive relief; and the balance of equities and public interest weigh strongly in favor of granting a preliminary injunction.[5]

I. Plaintiffs Are Likely to Succeed on their APA Claim Challenging DHS's Failure to Create Records Adequately Documenting Child Separations in Violation of 44 U.S.C. § 3101

As pertinent to the present motion, Plaintiffs are likely to succeed on Claim Two of the First Amended Complaint, seeking relief under the APA for DHS's failure to create records adequately documenting child separations in violation of 44 U.SC. § 3101. *See* FAC ¶¶ 71-80;

[5] The continued validity of the "'so-called 'sliding-scale' approach to weighing the four preliminary injunction factors, which 'allow[s] that a strong showing on one factor could make up for a weaker showing on another,'" is an open question in this Circuit. *Newby*, 838 F.3d at 7. But because Plaintiffs "satisfy each of the four preliminary injunction factors, this case presents no occasion for the court to decide whether the 'sliding scale' approach remains valid." *Id.* Moreover, it is immaterial whether Plaintiffs' requested injunction is characterized as "mandatory" or "prohibitory" because the D.C. Circuit has "rejected any distinction between a mandatory and prohibitory injunction" and thus does not impose a "higher burden of persuasion" on movants seeking mandatory injunctions. *Id.*; *accord Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). And even if such a higher burden applied here, Plaintiffs would readily meet it.

see also M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 118 (D.D.C. 2018) (party seeking preliminary injunction need only show likelihood of success on claim for which injunctive relief is sought).

A. The APA Provides a Cause of Action for Violations of § 3101

The APA provides a private cause of action to seek redress for certain FRA violations. *See Armstrong*, 924 F.2d at 291-94; *CREW v. Pruitt*, 319 F. Supp. 3d at 257-58. In *Armstrong*, the D.C. Circuit held that the "APA authorizes judicial review" of claims that an agency's "recordkeeping guidelines and directives" fail to comply with 44 U.S.C. § 3102, which requires agencies to establish and maintain an FRA-compliant records management program. 924 F.2d at 297. The court reasoned that "the FRA reflects a congressional intent to ensure that agencies adequately document their policies and decisions," and that "[a]llowing judicial review of the adequacy of an agency's recordkeeping guidelines will frustrate neither the intent of Congress nor the FRA statutory scheme designed to implement that intent." *Id.* at 292-93. It added that the "FRA provides sufficient law to apply," and there was "no reason to conclude that Congress intended to commit the development of recordkeeping guidelines and directives to the agencies' complete discretion." *Id.* at 294; *see also CREW v. Exec. Office of President ("EOP")*, 587 F. Supp. 2d 48, 57 (D.D.C. 2008) (noting that under *Armstrong*, a "district court is . . . authorized to review the adequacy of an agency's recordkeeping guidelines and directives," among other things).

The APA also authorizes judicial review where, as here, the plaintiff alleges that an agency failed to create records in violation of § 3101. Indeed, although *Armstrong* concerned § 3102, its reasoning applies equally to § 3101, as Judge Boasberg recently held in *CREW v. Pruitt*, 319 F. Supp. 3d at 257-59. There, as in *Armstrong*, the court found no "'clear and

convincing evidence' that Congress intended to preclude judicial review of a practice of refusing to create records," and determined that "[p]ermitting judicial review . . . comports with longstanding precedents concerning APA review generally." *Id.* at 259. Judge Boasberg thus concluded that an agency's policy or practice of failing to "'make . . . records' in accordance with the FRA is reviewable.'" *Id.* at 260; *see also id.* ("[F]uture plaintiffs may challenge the [agency's] actions, in the aggregate, of refusing to create certain records . . ."). Following the reasoning of both *Armstrong* and *CREW v. Pruitt*, then, Plaintiffs may pursue an APA claim here challenging DHS's failure to create records in violation of § 3101.

B. DHS Has Violated § 3101 by Systematically Failing to Create Records Adequately Documenting Child Separations

DHS has systematically failed to create records adequately documenting child separations in violation of § 3101 and its implementing regulation, 36 C.F.R. § 1222.22. The factual predicate for these violations is well established. To begin, there is no question that DHS failed to create adequate records documenting child separations starting at least from the inception of the El Paso pilot program in July 2017 until issuance of the *Ms. L* preliminary injunction in June 2018. That fact has been confirmed by the DHS OIG, the HHS OIG, GAO, and current HHS officials—all of whom have recognized that when Zero Tolerance was implemented, DHS "did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and . . . such information was not always provided [to HHS] when children were transferred from DHS to HHS custody." Ex. 2 at 16 (GAO Report); *see also* Ex. 3 at 2-3, 11 (DHS OIG Report); Ex. 4 at 5 (HHS OIG Report); Ex. 6 ¶¶ 12, 13 (White Decl.); Ex. 10 ¶ 14 (Sualog Decl.). It is precisely because of these recordkeeping failures that DHS and HHS were forced to undertake, in response to the *Ms. L* reunification order, the "complex" and "resource-

intensive" forensic data analysis necessary to "identify children in [HHS] care who had been separated from their parents and reunify them." Ex. 4 at 5-7 (HHS OIG Report); Ex. 6 ¶ 15 (White Decl.). It is also due in part to these recordkeeping failures that the government is currently resisting efforts to reunify "thousands" of separated children released from HHS custody before June 2018, asserting that doing so would require an even more burdensome forensic data analysis than the one previously undertaken. *See* Ex. 10 ¶¶ 14-20 (Sualog Decl.). Had DHS complied with the FRA and created adequate records in the first instance, no such retrospective analysis would be necessary to reunite separated families. This is a problem entirely of DHS's own making.

Moreover, the facts show that DHS's recordkeeping failures have continued past June 2018, and will likely persist absent injunctive relief. It is undisputed that child separations are ongoing, with the government recently reporting at least "245 new separations" between June 27, 2018 and January 31, 2019. Ex. 9 at 11. Although DHS changed its data systems between April and August 2018 to "help notate in their records when children are separated from parents," Ex. 8 at 9, those changes have proven inadequate in several respects. First, there is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), with the agency apparently believing, incorrectly, that it has no legal obligation to document such separations. *See* Aguilera Decl. ¶ 9; Russell Decl. ¶ 7. Second, there is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations; the agencies instead use an amalgam of separate systems, which are not fully integrated with one another. *See* Ex. 4 at

13; Ex. 8 at 9. Third, HHS officials have reported as recently as February 2019 that DHS components are not properly utilizing new recordkeeping measures designed to document child separations, Ex. 8 at 8; Ex. 2 at 17, and that DHS agents "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation," Ex. 11 at 4. Fourth, DHS is failing to adequately document the grounds for separations based on, among other things, alleged parental criminal history. *See* Ex. 4 at 11-12; Russell Decl. ¶¶ 8-13, 16. These reports of ongoing failures are consistent with RAICES's firsthand experience. *See* Aguilera Decl. ¶ 7 (DHS's "recordkeeping failures have directly harmed RAICES's clients, have persisted even after the [*Ms. L* court] issued its preliminary injunction in June 2018, and they continue to this day."); Russell Decl. ¶ 5 (same).

DHS's past and ongoing conduct violates several of the recordkeeping obligations enumerated in 36 C.F.R. § 1222.22. Specifically:

1. DHS has indisputably failed to create records sufficient to "[p]rotect the . . . legal[] and other rights" of the migrant children and adults "directly affected by [DHS's] actions." 36 C.F.R. § 1222.22(d). Under the Due Process Clause of the Fifth Amendment, "parents have a fundamental liberty interest in family integrity, and in the care, custody, and control of their children." *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 499 (D.D.C. 2018); *see Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). To safeguard this fundamental right, the government must, at minimum, take the basic step of creating records necessary to ensure that any family it separates can eventually be reunified. DHS's failure to do so here has led to thousands of separated

migrant families whom the government is either unable or unwilling to reunite, causing irreparable harm to the families' due process rights. *See Ms. L*, 310 F. Supp. 3d at 1144 (government's lack of a "system in place to keep track of, provide effective communication with, and promptly produce alien children . . . cannot satisfy the requirements of due process"). Similarly, DHS's failure to create records sufficiently documenting the grounds for any separation based on a parent's alleged criminal history also implicates the due process right to family integrity, because it delays and otherwise complicates HHS's child placement decisions. *See* Ex. 4 at 12 (HHS OIG Report).

Proper recordkeeping is also necessary to protect migrants' rights in connection with their immigration proceedings. *See Ms. L*, 310 F. Supp. 3d at 1144 (noting, as part of due process analysis, family separation's "profoundly negative effect on the parents' criminal and immigration proceedings, as well as the children's immigration proceedings"). It bears emphasizing that this is an exceedingly vulnerable population. Aguilera Decl. ¶ 8. Indeed, DHS routinely separates very young children—including infants and toddlers—who are pre-verbal, lack knowledge or records relevant to a potential asylum claim, and are otherwise incapable of protecting their own rights. *Id*. Because these are individuals of limited means who are entangled in the complex machinery of the immigration process, they and their legal counsel often rely heavily on records or information supplied by the government. *Id.* DHS, in particular, has a critical role in creating such records, because it is the first agency that encounters and processes these individuals before they are separated and transferred to other components. *Id.*

Against this backdrop, it should come as no surprise that DHS's systematic failure to create proper records has significantly harmed migrant families in myriad ways. It prevents or

delays reunification of separated children, as well as HHS's placement of those children with sponsors. Russell Decl. ¶¶ 5-7; Aguilera Decl. ¶¶ 7, 9-11. It prolongs the detention of both separated adults and children, the latter of which increases the likelihood the child will face removal proceedings while still in HHS custody. Russell Decl. ¶¶ 5-7; Aguilera Decl. ¶¶ 10-12. It impedes migrants' ability to present information supporting their asylum claims, and to obtain relief to which they may be entitled under the *Ms. L* class settlement. Russell Decl. ¶¶ 5-6; Aguilera Decl. ¶ 13. And it impairs the ability of immigrants-rights group, such as RAICES, to protect the legal rights of separated migrant families. Declaration of Jonathan Ryan ("Ryan Decl.") ¶¶ 8-11; Aguilera Decl. ¶¶ 8-16; Russell Decl. ¶¶ 15-16. For all these reasons, DHS has plainly violated the FRA by failing to create records sufficient to "[p]rotect the . . . legal[] and other rights" of migrant children and adults "directly affected by [DHS's] actions." 36 C.F.R. § 1222.22(d); *see infra* Part II (explaining that these harms are irreparable).

2. DHS has also failed to create records that "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government," 36 C.F.R. § 1222.22(c), including agency inspectors general and the GAO. Both the DHS and HHS OIGs have stated as much. *See* Ex. 3 at 11 (DHS OIG Report) (finding that DHS could not adequately fulfill OIG's data requests, and data the agency did provide "was incomplete and inconsistent, raising questions about its reliability"); Ex. 4 at 13 (HHS OIG Report) (finding that DHS's failure to provide complete and accurate information about the reasons for child separations "hamper[s]" the OIG's "efforts to identify and assess more recent separations"). Congress's oversight efforts have likewise been frustrated by DHS's poor recordkeeping, as recent hearings have

demonstrated.[6] Moreover, "[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to [HHS's] care" remains "unknown," Ex. 4 at 1, 13, and may never be known if the government succeeds in its efforts to exclude "thousands" of children from the *Ms. L* class. That means DHS's recordkeeping failures may prevent Congress and government agencies from ***ever*** understanding the true scope of the family separation crisis, precluding "proper scrutiny" of that critical issue. *See* 36 C.F.R. § 1222.22(c).

3. DHS has failed to create records that "[f]acilitate" legally required "action by agency officials." *Id.* § 1222.22(b). As noted, DHS's recordkeeping failures have significantly impeded the reunification efforts of DHS and HHS in response to the *Ms. L* litigation. *See* Ex. 4 at 5-7; Ex. 6 ¶ 15. Likewise affected are HHS's decisions concerning the care and placement of Unaccompanied Children. As one senior HHS official recently noted, "[t]he facts behind the separation may be important to know for case planning purposes, especially since they may mean the parent is unavailable or unable to take custody," and "may be important factors in determining the child's individual needs, which are then incorporated into service planning that [HHS] develops for and provides to the child." Ex. 12 at 3 (Statement of Scott Lloyd before U.S. House Comm. on Judiciary). HHS also needs these facts to fulfill its "responsibility to determine the suitability of potential sponsors" to which Unaccompanied Children may be

[6] For example, at a congressional hearing concerning family separations held on February 26, 2019, DHS and HHS officials could not answer basic questions about the number of children separated during the El Paso pilot program, with HHS official Jonathan White testifying that "neither I nor anyone at HHS knows" the number of children separated during the pilot program and released from HHS custody before June 2018, and noting that only DHS, if anyone, would have that information. *See* Video of Hearing Before House Comm. on Judiciary, Oversight of the Trump Administration's Family Separation Policy, *CSPAN* (Feb. 26, 2019), at 3:31:35-3:32:27, *available at* https://cs.pn/2HfuEmd.

released under the Trafficking Victims Protection Act of 2008, which requires HHS to determine if "a sponsor is capable of providing for the child's physical and mental well-being." *Id.* Critically "[t]he best way for HHS to determine whether a child was separated at the time of referral is if DHS provides this information," which it "[h]istorically . . . had not consistently" done. *Id.* at 4. The HHS OIG made similar findings. *See* Ex. 4 at 12 ("Incomplete or inaccurate information" from DHS "about the reason for separation, and a parent's criminal history in particular, may impede [HHS's] ability to determine the appropriate placement for a child," since "not all criminal history rises to a level that would preclude a child from being placed with his or her parent.").

4. DHS has also plainly failed to create records that adequately "[d]ocument the persons . . . dealt with by the agency," 36 C.F.R. § 1222.22(a)—namely, migrant children and adult companions who are apprehended together at the border, and later separated by DHS. This failure occurs not just with respect to separations of children from parents and legal guardians, but also non-parental adults accompanying the child at the time of apprehension.

For all these reasons, Plaintiffs are highly likely to succeed on their APA claim challenging DHS's failure to create records adequately documenting child separations in violation of § 3101 of the FRA.

II. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

"The party seeking a preliminary injunction must make two showings to demonstrate irreparable harm": (1) "the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm'"; and (2) "the harm 'must be beyond remediation.'" *Newby*, 838 F.3d at 7-8. Here,

Plaintiffs have already been severely harmed by DHS's FRA violations, and will likely continue to be harmed absent a preliminary injunction. This harm is, moreover, "beyond remediation." The injuries to RAICES, its clients, and CREW cannot be undone. And as recent experience has shown, when DHS fails to create adequate and contemporaneous records documenting child separations in the first instance, an irretrievable loss of information is likely.

A. Irreparable Harm to RAICES

An organization can demonstrate an "injury for purposes both of standing and irreparable harm" by showing that the defendant's actions (1) "have 'perceptibly impaired' the [organization's] programs," and (2) "directly conflict with the organization's mission." *Newby*, 838 F.3d at 8-9; *see also PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (framing inquiry as "first, whether the agency's action or omission to act 'injured the [organization's] interest' and, second, whether the organization 'used its resources to counteract that harm'"). "[O]bstacles [that] unquestionably make it more difficult for [an organization] to accomplish [its] primary mission" suffice to show irreparable harm. *Newby*, 838 F.3d at 9.

RAICES readily meets this burden. RAICES's mission is to provide effective, free and low-cost legal services to underserved immigrant children, families, and refugees in Texas. Ryan Decl. ¶ 2. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas, with offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio. *Id.* To further its mission, RAICES provides consultations, direct legal services, representation, assistance, and advocacy to communities in Texas and to clients after they leave the state. *Id.* RAICES has provided legal representation and services to hundreds of migrant families forcibly separated by

DHS. *Id.* ¶ 4; *see also id.* ¶¶ 4-7 (describing various RAICES programs created in response to family separation crisis).

As explained in the declarations of Jonathan Ryan, Bianca Aguilera, and Kathrine Russell, DHS's recordkeeping failures have perceptibly and irreparably impaired RAICES's efforts to provide legal services to separated migrant families—in direct conflict with its mission—and required RAICES to devote substantial resources to counteract that harm. To understand this impact, context is crucial. Because the migrant families with whom RAICES works are exceedingly vulnerable, have limited means, and are entangled in the complex machinery of the immigration process, RAICES often must rely on records or information supplied by the government in representing its clients. Ryan Decl. ¶ 8; Aguilera Decl. ¶ 8. As a result, DHS's failure to create records in compliance with the FRA has impeded RAICES's core functions in several respects. For instance:

1. When DHS separates migrant children from adult companions (including not only parents, but other adult family members or caretakers) and fails to create records sufficient to later identify and locate those adults, RAICES's representation of those children is frustrated. Aguilera Decl. ¶ 10. That is because migrant children apprehended at the border often lack information about family or potential sponsors in the United States to whom HHS might release the child; knowledge of the reasons why the family fled their home country that may support a potential asylum case, as well as documents or evidence supporting such a case; and the communicational abilities to fully protect their interests. *Id.* ¶¶ 10, 13. Typically, it is the separated adult companion who possesses any documents or information that would aid RAICES in representing the child. *Id.* So, when DHS fails to create records from which such a separated

adult companion can be readily located, it impedes RAICES's ability to, among other things, prepare applications for relief and obtain evidence for the children it represents in removal proceedings. *Id.* ¶ 13.

To take just one example, RAICES represents a six-year-old boy who DHS separated from his adult brother in December 2018 without documenting the separation. Aguilera Decl. ¶ 9. Although the older brother had knowledge that would have been instrumental to RAICES's representation of the child (including the language he spoke), DHS's records gave no indication that the child was apprehended with his brother, let alone where the brother was detained by DHS. *Id.* So RAICES had no opportunity to utilize the older brother as a resource in representing the six-year-old boy. *Id.* Such recordkeeping failures impede RAICES's ability to represent vulnerable migrant children and require it to expend efforts to independently track down separated adults to gather relevant information, which it must do quickly in order to protect the child's interests. *Id.* ¶¶ 9-10.

2. DHS's recordkeeping failures also impair RAICES's ability to timely refer detained Unaccompanied Children to federal foster care. Aguilera Decl. ¶ 14. In making these referrals, RAICES is typically required to corroborate certain facts provided by the child with an adult relative, preferably a parent. *Id.* But in numerous cases, DHS's poor recordkeeping has prevented or delayed RAICES's efforts to locate a knowledgeable adult who can provide such corroboration, which delays the entire referral process. *Id.*

3. DHS's recordkeeping failures also complicate RAICES's efforts to comply with certain grant requirements. Aguilera Decl. ¶ 15. RAICES receives federal funding from HHS to provide legal services to Unaccompanied Children. *Id.* In turn, RAICES is expected to provide

"know your rights" presentations and intakes to all Unaccompanied Children within a certain number of days after their arrival at an HHS detention center. *Id.* When working with children under 13, it is nearly impossible to accurately complete an intake without support or assistance from a parent or adult relative. *Id.* Here again, DHS's failure to create adequate records from which such adults can be readily identified has complicated RAICES's ability to complete this essential task. *Id.*

4. DHS's failure to adequately document the reasons for separations, particularly those based on alleged parental criminal history, has likewise impeded RAICES's representational efforts. Russell Decl. ¶ 15. When DHS separates a family based on a parent's alleged criminal history, RAICES must determine, among other things, whether DHS's finding has any basis and, if so, the circumstances of the alleged criminal offense. *Id.* RAICES needs this information to either contest the finding or determine whether it is severe enough to warrant parental separation. *Id.* These efforts are hindered when DHS's criminal history finding is cursory and poorly documented, and RAICES must expend extra time and effort investigating the issue. *Id.* RAICES's efforts are similarly impeded when DHS fails altogether to provide a reason for separation. *See id.* ¶¶ 8-12, 16 (identifying several cases where parental separations either had no documented basis or were based on poorly-documented findings of parental criminal history); Aguilera Decl. ¶ 16 (describing case where RAICES's efforts to reunify child with father were complicated by lack of records documenting basis for separation or identifying father's location).

5. DHS's recordkeeping failures and attendant delay in the release of Unaccompanied Children from HHS custody has had a ripple effect causing an increase in removal proceedings against detained migrant children. Aguilera Decl. ¶¶ 10-12. This is critical because removal

proceedings for *detained* Unaccompanied Children are demonstrably more difficult than they are for *released* Unaccompanied Children, as detained children undergo the proceeding without the support of their family, and, since they are detained at government expense, the immigration court process happens quickly, usually within just a few weeks. *Id.* ¶ 11. The increase in such proceedings has correspondingly increased RAICES's workload and required it to reallocate resources. *Id.* ¶ 12.

6. Finally, DHS's systematic recordkeeping failures have required RAICES to implement its own programs and initiatives to assist separated migrant families—all in an attempt to fill the void left by DHS's noncompliance with the FRA. Ryan Decl. ¶¶ 10-12. These include two new tools, launched in July 2018, to help "match" separated family members: the National Families Together Hotline and the Separated Parents Intake database. *Id.* ¶ 10. The National Families Together Hotline allows members of the public to call RAICES and seek assistance with locating their loved ones inside of DHS's detention system. *Id.* The Separated Parents Intake database allows lawyers working with separated children to seek assistance in locating their clients' parents who are detained by DHS. *Id.* Between July 2018 and today, RAICES has received over 1,350 calls to the National Families Together Hotline, and inquiries on over 600 separated parents through the Separated Parents Intake database. *Id.* ¶ 11. To run and maintain these new resources, RAICES diverted its staff away from their existing work so that they could create new systems, train volunteers, and maintain data. *Id.* RAICES has therefore devoted significant time and resources to these new efforts, which would not have been required if DHS had done its job and created adequate records in the first place. *Id.*

In sum, DHS's ongoing FRA violations have "unquestionably ma[d]e it more difficult for" RAICES "to accomplish [its] primary mission of" providing effective legal representation and services to migrant families. *Newby*, 838 F.3d at 9. This "provide[s] injury for purposes both of standing and irreparable harm," *id.*, as courts routinely find in analogous circumstances. *See, e.g.*, *id.* (voting-rights organization established irreparable harm and Article III injury in APA challenge to voter registration laws where laws imposed "new obstacles" that "unquestionably ma[d]e it more difficult for the [plaintiffs] to accomplish their primary mission of registering voters"); *Action All. of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (organization established Article III injury where "the challenged regulations den[ied]" plaintiffs, among other things, "access to information" that "they wish[ed] to use in their routine information-dispensing, counseling, and referral activities" and, in turn, inhibited their "daily operations"); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (fair-housing organization established irreparable harm in APA challenge to agency's delay of rule governing calculation of housing vouchers, where "delay frustrate[d] [plaintiff's] ability to assist voucher holders gain access to greater opportunity in several ways"); *Beverly Enterprises v. Mathews*, 432 F. Supp. 1073, 1079 (D.D.C. 1976) (finding irreparable injury where health care provider's "ability to render effective medical services to those in need would be significantly hampered by the suspension of regular payments to which plaintiff would otherwise be entitled"); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19, 1029 (9th Cir. 2013) (organizations established irreparable harm and Article III injury in challenge to state law criminalizing transporting undocumented immigrants, where organizations' "core activities

involve[d] the transportation and/or provision of shelter" to undocumented immigrants, and they "diverted resources" to counter the law's effects).

The harm to RAICES is, moreover, not merely theoretical—it has already been inflicted, and risks being further inflicted every time DHS forcibly separates a migrant child without creating adequate records documenting the separation. DHS's recent efforts to fix its deficient recordkeeping practices do not alter this conclusion. Given DHS's undisputed history of FRA noncompliance generally and relating to child separations specifically, as well as the facts outlined above showing that those violations continue to this day, *see supra* Part I.B, future FRA violations are likely, if not inevitable. That suffices to show irreparable harm. *See Newby*, 838 F.3d at 8-9 ("[A] preliminary injunction requires only a *likelihood* of irreparable injury.").

The harm is also beyond remediation, in two respects. First, the harm to RAICES's mission, and consequent diversion of resources, is by itself irreparable. *See Newby*, 838 F.3d at 9; *Valle del Sol*, 732 F.3d at 1029; *Open Cmtys. All.*, 286 F. Supp. 3d at 178. Second, recent experience demonstrates that DHS's failure to create records properly documenting child separations will likely lead to an *irretrievable* loss of records or information that RAICES requires for its organizational work, because the government is either unable or unwilling to create those records after the fact. *See* Aguilera Decl. ¶ 8 (it is "critical" for DHS to create proper records because it is the "first agency that encounters and processes migrant families before they are separated and transferred to other components," and the "failure to do so creates a significant risk that information will be irretrievably lost or otherwise cause hardship."); *id.* ¶ 17 (same). Just look to the *Ms. L* litigation, where the government was forced to undertake a self-described "herculean" and "resource-intensive" forensic data analysis to make up for DHS's

systematic failure to create proper records in the first instance. Even those efforts—which were compelled by court order—have not yielded a complete accounting of family separations. Requiring DHS to create adequate records pending resolution of this case is therefore necessary to prevent a likely unrecoverable loss of records or information that RAICES requires for its organizational work. *See Am. Friends Serv. Comm. v. Webster*, 485 F. Supp. 222, 233-34 (D.D.C. 1980) (threatened permanent loss of records qualifies as irreparable harm); *accord CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 2008 WL 2932173, at *2 (D.D.C. July 29, 2008) (Report & Recommendation).

For all these reasons, RAICES has demonstrated that DHS's FRA violations have already caused it irreparable harm and will likely continue to do so absent a preliminary injunction.

B. Irreparable Harm to RAICES's Clients

RAICES's clients have also suffered severe and irreparable harm, which will likely persist absent an injunction. As noted, DHS's failure to create adequate records documenting child separations has had numerous harmful effects on the migrant families that RAICES represents, including: (1) preventing or delaying reunification of separated children with their parents or legal guardians; (2) prolonging detention of separated adults; (3) prolonging detention of separated children and, in turn, increasing the likelihood the children will face removal proceedings while still in HHS custody; (4) impeding the clients' ability to present information supporting their asylum claims; and (5) impeding the clients from obtaining relief to which they may be entitled under the *Ms. L* class settlement. *See* Russell Decl. ¶¶ 4-16 (describing several cases where DHS's recordkeeping failures have harmed RAICES's clients); Aguilera Decl. ¶¶ 9-11, 14. These effects, in turn, have grave and long-lasting consequences, including severe

psychological and physiological trauma associated with family separation and prolonged detention. *See* Exs. 13-15 (congressional testimony of medical professionals describing extensive evidence of harm caused by family separation). This Court and others have deemed such harms irreparable, including in cases where RAICES represented separated parents. *See M.G.U.*, 325 F. Supp. 3d at 121 (holding that "there can be no dispute" that mother separated from her child due to Zero Tolerance Policy "is likely to suffer irreparable harm" and citing "overwhelming evidence . . . from medical experts describing the grave and lasting consequences of separating parents from their young children");[7] *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 502-503 (same); *Ms. L.*, 310 F. Supp. 3d at 1146-47 (same); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 155-56 (D.D.C. 2018) (Contreras, J.) (finding irreparable injury based on the "'major hardship posed by needless prolonged detention,'" and noting such detention "surely cannot be remediated after the fact"); *Ramirez v. ICE*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (Contreras, J.) (same).

These considerations bolster a finding of irreparable harm here because the interests of RAICES and its clients are so closely intertwined. Courts routinely employ such reasoning in analogous circumstances, such as the healthcare context. *See Int'l Long Term Care, Inc. v. Shalala*, 947 F. Supp. 15, 18 (D.D.C. 1996) (finding irreparable harm to healthcare provider based partly on harm caused to its patients, because the "interests of health care providers and Medicare beneficiaries are closely intertwined"); *accord New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 409 (E.D. La. 2012); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 572 (S.D.N.Y. 2009); *Mediplex of Massachusetts, Inc. v. Shalala*, 39 F.

[7] RAICES represented M.G.U. during her immigration proceeding. Russell Decl. ¶ 12.

Supp. 2d 88, 98-99 (D. Mass. 1999); *Libbie Rehab. Ctr., Inc. v. Shalala*, 26 F. Supp. 2d 128, 132 (D.D.C. 1998); *Peak Med. Oklahoma No. 5, Inc. v. Sebelius*, 2010 WL 4809319, at *3 (N.D. Okla. Nov. 18, 2010). The same logic applies to organizations such as RAICES, which provide critical legal services to vulnerable and underserved migrant families.

C. Irreparable Harm to CREW

DHS's recordkeeping failures have also irreparably harmed CREW and will likely continue to do so absent a preliminary injunction. Under the "informational injury" doctrine, "a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016); *see FEC v. Akins*, 524 U.S. 11, 21 (1998). Applying this doctrine, judges of this Court have uniformly held that an FRA plaintiff—and CREW in particular—can establish an Article III injury sufficient to obtain injunctive relief where the plaintiff (1) has sought records from an agency (through FOIA requests or other means), (2) plans to do so again in the future, and (3) challenges an agency action that may deprive it of access to such records. *See CREW v. EOP*, 587 F. Supp. 2d at 58-61 (CREW established Article III injury in FRA suit seeking injunctive relief to recover, restore, and preserve White House emails, based on allegations that CREW "will request federal records in the future and the records are likely to be missing due to defendants' conduct"); *accord CREW v. SEC*, 858 F. Supp. 2d 51, 60 (D.D.C. 2012); *CREW v. Cheney*, 593 F. Supp. 2d at 227; *Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 6 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999).

Such an injury qualifies as irreparable where it deprives the plaintiff of timely access to responsive documents. *See Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (finding irreparable harm where plaintiff would be "precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to [a] current and ongoing debate" on issue of public importance); *see also Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("The fact that Payne eventually obtained the information it sought provides scant comfort when stale information is of little value . . ."). The injury is also irreparable if it will likely result in an irretrievable loss of records or information. *See Am. Friends Serv. Comm.*, 485 F. Supp. at 233-34; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *CREW v. EOP*, 2008 WL 2932173, at *2.

CREW can readily make this showing. As set forth in the Declaration of Noah Bookbinder, CREW's Executive Director, CREW's mission is to protect the right of citizens to be informed about the activities of government officials and to ensure the integrity of government officials. Declaration of Noah D. Bookbinder ("Bookbinder Decl.") ¶ 2. To further its mission, CREW frequently files FOIA requests, and disseminates the documents it receives through these requests on its website, www.citizensforethics.org, and on social media, and uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public. *Id.* ¶ 8. As a frequent FOIA requester, CREW has a unique operational interest in agencies' compliance with the FRA, because when an agency fails to create records documenting its functions, policies, decisions, procedures, and essential transactions in compliance with the FRA, CREW's FOIA requests yield fewer or no responsive documents. *Id.* ¶ 9. Deprivation of these records frustrates CREW's ability to fulfill its

organizational objectives, including its goal of shedding light on the formulation and implementation of agency policies, and to educate the public about those activities. *Id.*; *see also id.* ¶¶ 4-7 (discussing CREW's longstanding and demonstrated interest in FRA compliance).

CREW has a particularly strong interest in DHS records, and records relating to family separations. Since January 2017, CREW has submitted 18 separate FOIA requests to DHS, many of which remain outstanding. *Id.* ¶ 11. Those pending FOIA requests include two that bear directly on the records at issue in this case, *see id.* ¶¶ 12-17, and seek, among other things, documents identifying "(a) the number of alien minors who were apprehended at ports of entry following DHS's implementation of the Zero Tolerance Policy; (b) the number of such minors who were separated from their parents or legal guardians after being apprehended by DHS; (c) the number and locations of such minors who have been reunited with their parents or legal guardians, and the dates of those reunifications; and (d) the number and locations of such minors who remain, as of the date of th[e] FOIA request, separated from their parents or legal guardians," *id.* ¶ 12. CREW seeks these documents to "shed light on [the] 'serious deficiencies in DHS's record management policies and practices" documented in the DHS OIG's September 2018 report, and to determine "whether DHS currently possesses critical data relating to alien family separations that it should possess if it were complying with applicable law and records management requirements." *Id.* ¶¶ 13, 16. CREW has made clear that it will continue to submit FOIA requests to DHS, and other agencies, on matters relating to CREW's ongoing research, litigation, advocacy, and public education efforts, and has a continuing interest in agency compliance with the FRA. *Id.* ¶ 20.

As outlined above in Part I, DHS has indisputably failed, and continues to fail, to create records documenting child separations, including records that would be responsive to CREW's pending FOIA requests and requests CREW plans to submit in the future. Consequently, CREW's current and future FOIA requests will yield fewer or no responsive documents, depriving CREW of critical documents and information that it needs to fulfill its mission. *Id.* ¶ 18. This is a cognizable injury to CREW. *See CREW v. EOP*, 587 F. Supp. 2d at 58-61; *CREW v. SEC*, 858 F. Supp. 2d at 60; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *Public Citizen v. Carlin*, 2 F. Supp. 2d at 6.

Moreover, the harm to CREW is irreparable in two respects. First, even if DHS later creates records that it failed to create in the first instance, and CREW eventually obtains those records, CREW will still be deprived of *timely* access to them. Bookbinder Decl. ¶ 19. Such a deprivation is itself harmful to CREW, because stale information has less value to CREW's public education and advocacy efforts. *Id.*; *see Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 41; *Payne Enterprises*, 837 F.2d at 494. Second, if the agency fails to create proper and contemporaneous records in the first instance, there is a significant risk that the agency will not be able to fully recreate those records after the fact, resulting in an irretrievable loss of records or information. Bookbinder Decl. ¶ 19; *see Am. Friends Serv. Comm.*, 485 F. Supp. at 233-34; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *CREW v. EOP*, 2008 WL 2932173, at *2. As noted, such irretrievable loss is particularly likely in this case, where the government's efforts in the *Ms. L* litigation have demonstrated the difficulties of trying to create records documenting child separations *post hoc*. *See supra* Part II.A.

In sum, DHS's FRA violations have already caused CREW irreparable harm, and will likely continue to do so absent a preliminary injunction.

III. The Balance of Equities and Public Interest Favor a Preliminary Injunction

Finally, the balance of equities and public interest—which "merge" when "the [g]overnment is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in favor of a preliminary injunction.

The risk of further irreparable harm to RAICES, its clients, and CREW substantially outweighs any burden a preliminary injunction would cause DHS. As outlined above, the likely harm to Plaintiffs—including the irrevocable effect on RAICES's mission of providing effective legal services to vulnerable migrant families, prolonged detention and separation of migrant families that RAICES represents, complications to those families' immigration cases, and permanent loss of records and information—is severe. By contrast, merely requiring DHS to create records adequately documenting child separations pending disposition of this suit would impose minimal burdens, if any. Such an injunction may in fact *save* DHS from far more burdensome work in the long term—i.e., by obviating the type of "herculean" and "resource-intensive" forensic data analysis the government was forced to perform in the *Ms. L* suit because of DHS's recordkeeping failures. At any rate, DHS "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All.*, 286 F. Supp. 3d at 179; *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015).

The public interest also strongly favors an injunction. "[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations,'" including the APA and FRA. *Newby*, 838 F.3d at 12; *Ramirez*, 310 F. Supp. 3d

at 33 (Contreras, J.); *Aracely*, 319 F. Supp. 3d at 156 (Contreras, J.). The "public also has an interest in ensuring that its government respects the rights of immigrants to family integrity while their removal proceedings are pending." *M.G.U.*, 325 F. Supp. 3d at 124. "The public interest in upholding and protecting such rights in the circumstances presented here is served by issuing the requested injunction." *Id.*

CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction requiring DHS to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child.[8]

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Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

[8] The Declaration of RAICES's Bianca Aguilera outlines specific data points concerning child separations that there is a critical need for DHS to document. Aguilera Decl. ¶¶ 17-18.

MANOJ GOVINDAIAH
Refugee and Immigrant Center for
Education and Legal Services
802 Kentucky Ave.
San Antonio, TX 78201
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicestexas.org

Counsel for Plaintiffs