



January 26, 2023

Hon. Paul A. Engelmayer
 United States District Judge
 Southern District of New York
 40 Foley Square
 New York, New York 10007

Re: **D.J.C.V., et al. v. United States of America, No. 20-cv-5757 (PAE)**

Dear Judge Engelmayer:

Plaintiffs write to respond to the Government's Letter Motion for Reconsideration of the Court's January 13, 2023 Order authorizing limited Rule 30(b)(6) testimony.¹ Now that Plaintiffs have deposed agents involved in the separation of 19-month-old D.J.C.V. from his father G.C., it is even more apparent that the Court's Order (ECF 152) is properly tailored to resolve the jurisdictional questions. Document discovery has yielded **no written policy authorizing separation of children from their parents because of "criminal history,"** and depositions of two RGV sector agents has yielded **no evidence of any verbal policy authorizing such separation where parents are not prosecuted.** Because the Government continues to claim that the separation of D.J.C.V. and G.C. was driven by G.C.'s misdemeanor conviction rather than by the nationwide policy of separating all families at the border, binding testimony from DHS is necessary. Such national-level testimony has a direct and clear factual nexus to Plaintiffs' separation in the Rio Grande Valley ("RGV") sector and is appropriately limited in time frame and scope.

I. Document Production and Agent Testimony Have Failed to Produce Evidence of a Written or Verbal Policy Authorizing Family Separation Based on a Parent's Criminal History Alone, Thus Necessitating a 30(b)(6) Deposition.

On January 11 and January 18, 2023, Plaintiffs deposed the two RGV border patrol agents directly involved in the decision to separate D.J.C.V. from G.C. Specifically, Plaintiffs deposed Border Patrol Agent [REDACTED] who initiated the request for separation on May 1, 2018 at 9:31 AM, and former Watch Commander [REDACTED] who gave approval to separate on May 1, 2018 at 10:35 AM in order to [REDACTED] (USA057424, Separation Email, Exhibit A). Although United States Customs & Border Protection ("CBP") became aware that prosecution of G.C. was declined that same day, (USA057418, I-213 Excerpt, Exhibit B), D.J.C.V. and G.C. were physically separated without justification the following day, May 2, 2018 (ORR0056, CBP to ORR Custody Transfer Paperwork, Exhibit C). Despite their first-hand involvement, neither local RGV agent had any recollection of what family separation policies, if any, were in place on, around, before or after May 1-2, 2018, much less any facts specific to the Plaintiffs.

¹ Plaintiffs agree that the Government "should be permitted to choose its own [30(b)(6)] deponent(s)," ECF 153 at 3, and do not oppose selection of a 30(b)(6) deponent other than Deputy Chief Roggow.





In his deposition, Mr. [REDACTED] stressed that he [REDACTED]" (Tr. 79:24) in what he described as an [REDACTED] [REDACTED] (Tr. 43:20). Though he was the agent to initiate the request for family separation of D.J.C.V. and G.C., he could not explain what the family separation criteria were, how they changed over time, or how he became aware of any such criteria. *See, e.g.*, [REDACTED] Tr. 80:2-8 (regarding how he knew what factors to consider before requesting separation, he stated, [REDACTED] can't remember [REDACTED] (emphasis added); 80:9-23 (unable to remember any directives, guidance, rules, or meetings on family separation criteria); 117:21-24 (unable to recall hearing about any guidance on family separations around May 1, 2018); 148:17-149:20 (unable to recall when he heard about Zero Tolerance, whether it brought about any changes in case processing in RGV, or whether he received any training, guidance, directives, or meetings on it). Excerpts from Mr. [REDACTED] deposition are attached as Exhibit D.

Similarly, former Watch Commander [REDACTED] explained that [REDACTED] [REDACTED] [REDACTED]... [REDACTED] [REDACTED] (Tr. 27:18-28:6) (emphasis added). Yet, he was unable to recall any such policies regarding family separation, how he was made aware of family separation procedures, what the procedures were, or when he was made aware of them (Tr. 31:23-32:7; 32:9-34:4). The only specific criteria relating to family separation Mr. [REDACTED] could remember were limited to the situation in which the parent was in fact **prosecuted** and [REDACTED] (Tr. 34:1-34:15). Excerpts from Mr. [REDACTED] deposition are attached as Exhibit E.

The Department of Justice ("DOJ") declined to prosecute G.C. before he was separated from D.J.C.V. Neither Mr. [REDACTED] nor Mr. [REDACTED] were able to recall what policy if any was in place for handling such a situation. (Tr. 87:25-89:3; Tr. 90:10-13). In addition, Mr. [REDACTED] could not recall any specific guidance from the U.S. Attorney's office as to what the criteria for prosecution were (Tr. 42:8-25), but noted that the criteria [REDACTED] [REDACTED] (Tr. 35:20-36:1).

To date, the Government has produced no written policies mandating or recommending that children be separated from a single parent where there was no prosecution, and neither local RGV CBP witness was aware of any written or verbal policies regarding the same. Plaintiffs have repeatedly asked the Government to provide such policy documents, if they exist, and to date, Plaintiffs have not received any such documents, including the RGV sector prosecutorial guidelines described in CD-US-0052620. Plaintiffs have requested these guidelines from the government orally and in writing several times, beginning in October 2022 and through Mr. [REDACTED] deposition on January 18, 2023 (Tr. 43:1-10).

II. The Requested 30(b)(6) National-Level Testimony Has A Direct Factual Nexus to Plaintiffs' Separation in the RGV Sector.

Answering the question of "whether plaintiffs G.C. and D.J.C.V. were separated pursuant to the Zero Tolerance Policy or as a result of G.C.'s criminal history" (ECF 127 at 21, 48) requires probing whether the government had a policy to separate families based on a parent's criminal history, and if so, under what circumstances. The standard under the Federal Torts Claim Act is





not why CBP line agents subjectively decided to separate D.J.C.V. and G.C., but whether they had the discretionary authority to do so. *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Answering this question requires probing (1) what family separation policies were in place by May 1, 2018; (2) how and when such policies were communicated to the local sectors, including RGV; and (3) what steps were taken to implement those policies in each of the sectors, including in RGV.

The two Rule 30(b)(6) topics proposed by Plaintiffs and adopted by the Court in its January 13 Order are narrowly tailored to elicit this information. Specifically, what policies were in existence on and leading up to May 1, 2018 are directly relevant to whether Mr. [REDACTED] and Mr. [REDACTED] had discretionary authority to separate D.J.C.V. and G.C. In their depositions, both Mr. [REDACTED] and Mr. [REDACTED] explained that they saw themselves as merely following orders from above, yet neither could identify any policies that drove the decision to separate D.J.C.V. and G.C. Given their recognition of [REDACTED] [REDACTED] (Tr. 27:22-23) and their inability to concretely identify any such policies, Plaintiffs should have an opportunity to depose the national-level agency officials responsible for formulating CBP's changing family separation policies and procedures. Communications about such policies and their implementation are also directly relevant to the question of whether RGV agents had discretionary authority to separate D.J.C.V. and G.C. on May 1-2, 2018.

III. The Requested 30(b)(6) Testimony is Appropriately Limited in Scope, and Further Limitations Requested by the Government Will Wrongly Exclude Important and Relevant Evidence about the Family Separation Policy.

In the alternative, the Government asks the Court to limit the two proposed 30(b)(6) deposition topics to the timeframe of January 1, 2018 to May 2, 2018 and to the geographical scope of the RGV sector. ECF 153 at 3. Plaintiffs' review of thousands of government-produced documents makes clear that January 1, 2018 is an artificial date with no nexus to the factual timeline of the implementation of the national family separation policy. For instance, RGV started tracking family separations in [REDACTED] [REDACTED], yet [REDACTED] was unable to explain why this change occurred at that time ([REDACTED] Tr. 48:12-14). Additionally, the discovered documents make clear that [REDACTED]

[REDACTED]. Indeed, evidence that the government was implementing "zero tolerance" in practice beyond the El Paso Pilot region is borne out by the case of *Ms. L*, who was separated from her minor child in San Diego in November 2017. *Ms. L v. ICE*, Case 3:18-cv-00428-DMS-MDD, Order on Defendants' Motion to Dismiss, ECF 71 at 2 (June 6, 2018). While Plaintiffs' focus has been and will remain on RGV, it is not appropriate to artificially limit deposition testimony to one sector given the clear evidence that the policy was driven at the national level across all sectors along the Southwest Border.

Accordingly, Plaintiffs respectfully request that the Court deny the Government's request for reconsideration of the Court's January 13 Order, and grant an extension of the January 30, 2023 discovery deadline to allow Plaintiffs to depose Matthew Roggow before the jurisdictional filings in this case are due on February 27, 2023.²

² Pursuant to the Court's January 13 Order, the parties have had two meet-and-confer calls (January 19 and 23, 2023) to discuss Roggow's deposition, the scope of which is dependent upon the Court's ruling on the Government's pending request for reconsideration.





Respectfully submitted,

/s/

Meena Roldan Oberdick
Attorney for the Plaintiffs

Enclosures

cc: All counsel (via ECF)



Exhibit A

Separation Email [REDACTED]

Exhibit B

I-213 Excerpt [REDACTED]

Exhibit C

CBP to ORR Custody Transfer Paperwork [REDACTED]

Exhibit D

[REDACTED] Deposition Transcript
[REDACTED]

Exhibit E

[REDACTED] Deposition Transcript

[REDACTED]