IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MS. Q., et al.,

Plaintiffs,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Defendants.

Civil Action No. 1:18-cv-2409-PLF

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In opposing the demand of a mother and her four-year-old son who are suffering the predictable and traumatizing effects of their long term separation, Defendants submit an 11-page opposition brief that fails to even mention—let alone discuss—"Due Process," the "Fifth Amendment," or the "Administrative Procedure Act" (APA). Defendants have accordingly failed to respond to or rebut the vast majority of Plaintiffs' legal and factual argument on their substantive due process, procedural due process and APA claims. At bottom, Defendants' defense of this cruel separation is little more than a call for the Court to defer to Defendants' unsubstantiated contention that reunification would be dangerous. Though Defendants acknowledge their burden to make this showing—a fundamental-rights deprivation must be narrowly tailored to serve a compelling government interest—they wholly fail to carry that burden.

First, Defendants claim they cannot reunify Ms. Q. with her son J. because this young mother is a danger, but the record plainly shows she is not. *Second*, they argue they cannot reunify because Ms. Q. is a flight risk, but fail to address the many ways to mitigate against any such perceived risk. And *third*, they argue that ICE is entitled to unquestioned deference because the agency is charged with "protecting children from unsafe conditions." (Dkt. 23 [Defs.' Opp. to Mot. for Prelim. Inj.] at 10.) Not only is this argument legally incorrect, it is factually upside down. Defendants have no evidence showing that Ms. Q. is a danger to children, and instead J.'s federally appointed child advocate has consistently emphasized that the true danger to J. is being kept away from his mother. It is Defendants who are inflicting irreparable harm on Ms. Q.'s son J. by forcing the two apart. Defendants' pre-textual arguments expose that their forced separation of Ms. Q. from her son is arbitrary, capricious, unsupported by evidence and punitive, and in violation of the APA and Plaintiffs' due process rights. Plaintiffs are likely to succeed on their claims.

Ms. Q. and J. need a preliminary injunction to stop the ongoing drastic and irreparable psychological and physical harm they are suffering with each passing day, harm that Defendants completely failed to address in opposition. In contrast, Defendants cannot suffer from an injunction that ends an unlawful practice, and their peripheral arguments regarding the public interest are ill-considered and unsupported. Thus, the balance of harms tips overwhelmingly in Plaintiffs' favor. For these reasons, discussed in detail below, the Court should grant a preliminary injunction and order Defendants to immediately reunify Ms. Q. with her son.

II. ARGUMENT

Ms. Q. and J. respectfully request this court enter a preliminary injunction based on the strong likelihood of success on their claims to stop the ongoing irreparable harm they are suffering while apart. An injunction to stop the forcible separation of this family is in the public interest when balanced against the Government's interest.[1]

A. Ms. Q. and J.'s Claims Are Likely to Succeed.

Defendants have not attempted to dispute that their act of forcibly separating Ms. Q. from J. implicates their fundamental right to family integrity—including Ms. Q.'s interest in the care, custody, and control of her child—under the Due Process Clause. *See Troxel v. Granville*, 530 U.S. 57, 65 (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."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that

[1] Defendants' focus on Ms. Q.'s asylum denial is a separate issue from the Government's unlawful separation of Ms. Q. and her four-year-old son. Ms. Q.'s asylum denial is properly on appeal to the Board of Immigration Appeals (BIA). The BIA rejected Ms. Q.'s initial appeal solely because it denied her request for a fee waiver (she was unable to sign the waiver from detention so it was not approved); the appeal was not rejected on any substantive ground. (*See* Koop Suppl. Decl. ¶ 10.) Ms. Q. re-filed the appeal on November 7, 2018 with the appropriate fee, and it is now pending before the BIA. (*Id.*)

the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "Governmental action affecting fundamental rights does not enjoy a presumption of constitutionality; rather, the burden is upon the government to show a compelling governmental interest justifying the intrusion." *Tygrett v. Washington*, 543 F.2d 840, 849 (D.C. Cir. 1974). In particular, Defendants must show that they have a "compelling" and "particularized . . . interest in terminating the parental relationship" and that it is "impossible to accomplish that interest in a less restrictive way." *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 120 (D.D.C. 2018) (citing *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983)); *Jacinto v. ICE*, 319 F. Supp. 3d 491, 500 (D.D.C. 2018) (same).

Defendants do not even attempt to show their interests are sufficiently compelling to overcome Plaintiffs' due process rights, instead asserting—without citation—an unqualified entitlement to "deference" to government decision-making. This proposed deference is contrary to the very nature of the Court's role in applying strict scrutiny. Parental rights are fundamental and are not subject to deference to the sort of conclusory assertions of government interest proffered here. *See Stanley*, 405 U.S. at 656–57 (1972) (government attempts to interfere with parental rights through a "[p]rocedure by presumption is always cheap[] and eas[y]" but "it needlessly risks running roughshod over the important interests of both parent and child"). And if any Government decision should be entitled to deference, it is the immigration judge's finding that Ms. Q. is not a danger and that she testified credibly that she is not in any way affiliated with a gang.

As explained below, each of Defendants' arguments fail to establish that Ms. Q. is a danger, or otherwise disqualified from reunification with her son.

1. Ms. Q. Is Not a Danger, and Defendants Cannot Show Otherwise.

This Court and others have unequivocally held that Defendants' forcible separation of parents from their children is patently unconstitutional and shocks the conscience. *See M.G.U.*, 325 F. Supp. 3d at 120 n.4; *Jacinto*, 319 F. Supp. 3d at 499; *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018). Despite these holdings, Defendants posit that this case is different because of a single unsubstantiated arrest warrant from El Salvador, which they claim makes Ms. Q. a danger and ineligible for reunification. Defendants' position is unsupported by the record, which not only establishes that the Salvadoran warrant is unreliable and inaccurate, but also proves that reunification is appropriate and in the best interests of Ms. Q. and her son.

One unsubstantiated Salvadoran warrant is all Defendants have. Defendants concede the only evidence they have in support of their argument that Ms. Q. is a danger is derived from a single Salvadoran arrest warrant. It is undisputed that Ms. Q. has never been convicted of, nor faced trial for, any crime in El Salvador or the United States. (Dkt. 7-2 [Koop. Decl.] ¶ 12.) Moreover, Ms. Q. has now been in detention for nearly eight months without a single report of a violent incident, and she has never been disciplined or reported for violating the detention facility's rules. (Dkt. 7-1 [Ms. Q. Decl.] ¶ 39.) Accordingly, Defendants—having held Ms. Q. in custody for the better part of a year with every opportunity to investigate her background—rest their entire argument that Ms. Q. is a danger on one unsubstantiated foreign arrest warrant.

As explained more fully in Plaintiffs' opening brief, the arrest warrant contains nothing more than allegations of affiliation in a gang; there is no evidentiary support for the allegation on the face of the warrant or in the underlying Salvadoran record. (Dkt. 7 [Pls.' Mot. for Prelim. Inj.] at 7.) Rather, the warrant appears to be the product of aggressive Salvadoran police practices whereby police issue a wide dragnet of warrants to various individuals near suspected gang activity, with the goal of forcing people to appear in court and potentially obtaining testimony that

can be used in anti-gang operations. (*Id.* at 26–27; Dkt. 7-8 [Rikkers Decl.] ¶ 8.) Once prosecutors are put to actually supporting these warrants with evidence, judges in El Salvador routinely throw out these cases. (Dkt. 7-8 [Rikkers Decl.] ¶ 8.) And that is exactly what has happened for several individuals caught up in the same dragnet operation as Ms. Q.[2] When ten people (including Ms. Q.) were issued arrest warrants and ordered to appear for a preliminary hearing testing the evidence, all six of the individuals that appeared at hearing had the charges against them suspended because the prosecution failed to meet its evidentiary burden. (Dkt. 7-7 [Palacios Decl.] ¶¶ 3–5.) Ms. Q. has since retained Salvadoran counsel and sought a hearing as soon as possible to challenge the evidence and suspend the charges. Procedural issues and an overloaded court docket have prevented the hearing from occurring yet in El Salvador, but Ms. Q.'s Salvadoran counsel continues to seek a hearing from the court as soon as possible. (*See id.* ¶ 7.)

The "fugitive" warrant and Salvadoran "certification" are merely derivative of the original warrant. While Defendants have offered various additional Salvadoran documents as though they are new evidence and further corroboration of the original warrant (*see* Dkt. 23 at 3; 21-6 [Fugitive Warrant], 21-7 [Interpol Red Notice]), 21-8 [Salvadoran "Certification" of Fugitive Warrant]) they are derivative of the original warrant. The fugitive arrest warrant was issued on June 21, 2018, three days after Ms. Q. was unable to appear for her initial preliminary hearing on June 18, 2018 regarding the original warrant (she was detained in Texas at the time). (Dkt. 7-7 [Palacios Decl.] ¶ 3–4.) The fugitive warrant indicates only that she is in contempt for failure to

[2] Even U.S. courts express skepticism, finding that allegations of gang membership involve a "considerable risk of error," as the "informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful fact-finding." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1045–46 (9th Cir. 2013).

appear on the original charge, which was a ministerial act triggered by her absence at the hearing. (*Id.*; *see also* Dkt. 23-8 [Salvadoran "Certification" of Fugitive Warrant].)[3] The October 3, 2018 letter from El Salvador to DHS attaching this warrant also adds nothing; it merely attaches the document "[w]ithout any other particulars." (Dkt. 23-8 [Salvadoran "Certification" of Fugitive Warrant].)

The INTERPOL Red Notice is also entirely derivative of the warrant, and was requested under questionable circumstances. An Interpol Red Notice is not an arrest warrant; it is a means for a country to share information with other countries regarding a national arrest warrant. *See* Interpol, Red Notices, http://interpol.int/INTERPOL-expertise/Notices/Red-Notices ("Interpol, *Red Notices*"). However, "Interpol does not independently vet the governmental request for a Red Notice for its factual and legal justification," *United States v. Mohamud*, 843 F.3d 420, 424 n.5 (9th Cir. 2016). Thus, Interpol itself cautions that—for Red Notices issued "for criminal prosecution" (as in this case)—an "individual . . . *should be considered innocent until proven guilty*." Interpol, *Red Notices* (emphasis added).[4] Indeed, some have questioned the legitimacy of

[3] The translation of the fugitive warrant differs in the two different copies of the fugitive warrant that Defendants submit. (*Compare* Dkt. 23-6 [Fugitive Warrant] *with* Dkt. 23-8 [Salvadoran "Certification" of Fugitive Warrant].) The correct version translates the fact that Ms. Q. has been declared a "*Rebelde*," a legal term of art, as meaning that Ms. Q. was "in contempt" for failure to appear for her hearing. (*See* Dkt. 23-6 [Fugitive Warrant] (indicating Ms. Q. was "declared in contempt of court"); Dkt. 7-7 [Palacios Decl.] ¶ 4 (explaining Ms. Q. was held in contempt for her failure to appear at hearing, which triggered the issuance of the "second" fugitive warrant).) In a second version of the translation, "*Rebelde*" is misleadingly translated as "Rebel." (Dkt. 23-8 [Salvadoran "Certification" of Fugitive Warrant].)

[4] Defendants grossly mischaracterize what the Red Notice actually says, claiming it "specified that Ms. Q. is an active member of the MS-13 gang and participates in activities such as extortion, homicides, and other acts in violation of Salvadoran law." (Dkt. 23 at 3.) Though the Red Notice by itself is not judicially reviewed or evidence of anything, it vaguely cites unnamed and unspecified "information obtained at the scene" suggesting that Ms. Q. was a member of the MS-13 gang. (Dkt. 23-7 [Interpol Red Notice].) The Red Notice then claims that members of the MS-13 gang in many cases participate in murder and extortion. (*Id.*) Thus,

Red Notices that are prone to "misappropriat[ion]" by foreign governments. *See, e.g.*, *Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 280 (3d Cir. 2018) (Roth, J., dissenting) (noting that Interpol Red Notices can be "misappropriated by" foreign governments and that an individual should not be held in custody based solely on a Red Notice). Thus, contrary to Defendants' suggestions, the Red Notice has no independent probative value and has no bearing on the veracity or reliability of the Salvadoran warrant.

Moreover, the fact that the Red Notice was issued *after* Ms. Q. had already been detained in the United States for over five months casts significant doubt on its legitimacy. A Red Notice "is a request to locate and provisionally arrest an individual pending extradition." Interpol, *Red Notices*. The whole purpose of issuing a Red Notice is to request that member countries preventatively detain someone, which is exactly what the Ms. Q. Red Notice purports to do.[5] (*See* Dkt. 23-7 [Interpol Red Notice] (specifying "measures to be taken if this person is located" and asking Interpol member countries to "[i]mmediately notify . . . El Salvador . . . in case this individual is located").)

But a Red Notice was entirely unnecessary for Ms. Q., which raises doubts as to the bona fide reasons for its issuance. The Government admits that "[o]n August 20, 2018, the government of El Salvador verified the warrant and verified that the identity of the person on the warrant matched [Ms. Q.]" and that "[t]he government of El Salvador also gave permission to use both warrants in relation to removal proceedings." (*See* Ex. 5 to Koop Suppl. Decl. [Aug. 28, 2018 E-

to cite the already questionable Red Notice as evidence that Ms. Q is accused of participating in "extortion, homicides, and other acts in violation of Salvadoran law" is baseless and unsupported by the record.

[5] In the United States, a Red Notice is not needed to initiate extradition proceedings. *See* Office of the Inspector General, *Review of the Office of International Affairs' Role in the International Extradition of Refugees* at App. 1 (Mar. 2002), https://oig.justice.gov/reports/OBD/e0208/app1.htm.

mail from DOJ Counsel Sarah Fabian].) *See also* Defs.' Br. Regarding Criminal Exclusions for Ms. Q. and Mr. C. at 5–6, *Ms. L.*, No. 18-428 (Sept. 13, 2018), ECF No. 223. So by at least August 20—if not significantly earlier—the United States and El Salvadoran governments were already in communication about Ms. Q. and El Salvador was well aware that she was in Defendants' custody. Nevertheless, *ten days later*, on August 30, El Salvador asked Interpol to issue a Red Notice for Ms. Q. (*See* Dkt. 23-7 [Interpol Red Notice].)

This makes the timing and issuance of the Red Notice highly suspect. Given that the only purpose of the Red Notice is to request preventative detention, Plaintiffs have serious doubts as to why the Red Notice was issued well after El Salvador already knew Ms. Q. was in U.S. custody. The fact that the Red Notice was cited just two weeks later in the Government's September 13 briefing to keep Ms. Q. out of the *Ms. L.* class, and continue to rely on it for their defense in this action, only compounds those questions. *See* Defs.' Br. Regarding Criminal Exclusions for Ms. Q. and Mr. C. at 5–6, *Ms. L.*, No. 18-428 (Sept. 13, 2018), ECF No. 223. (*See also* Dkt. 23 at 3, 9.)[6] The Court should therefore accord no weight to the Red Notice and recognize that the underlying Salvadoran warrant does nothing to meet the Government's burden to show Ms. Q. is a danger.

[6] Defendants' consistent refusal to provide the underlying evidence they rely on to separate Ms. Q. from her son is further evidence of the shifting, pretextual nature of the separation. Though the Government was aware of Ms. Q.'s arrest warrant since late March when it first detained her, it refused to notify Ms. Q. or her counsel of the warrant's existence—or provide a copy—until late July. (Koop Suppl. Decl. ¶ 4.) Then in mid-August the Government began referring to a second "renewed" warrant, but failed to provide a copy of that "renewed" warrant to Ms. Q.'s counsel until Defendants filed their opposition in this case on November 9—just two court days before the initially scheduled hearing in this case. (*Id.* ¶ 6; *see also* Ex. 5 to Koop Suppl. Decl.) Similarly, Defendants failed to provide a copy of the Interpol Red Notice until their November 9 filing. (Koop Suppl. Decl. ¶ 9.) Defendants' extended withholding of these documents for more than two months has prejudiced Plaintiffs' ability to litigate this case and therefore Plaintiffs reserve all rights to raise additional arguments upon further examination of these documents.

An Immigration Judge Considered Defendants' Evidence, Rejected It, and Found Ms. Q. Credible. Defendants seek to discredit the finding of the immigration judge, whom they claim "did not have a complete picture" of the facts surrounding the warrant because the August 30 Interpol Red Notice and the October 3 "renewed" arrest warrant had not been issued at the time of the July 31 immigration court bond hearing. (*See* Dkt. 23 at 10.) But Defendants ignore the fact that Ms. Q. had a second, and far more in depth, immigration court hearing on October 16, which was *after* both documents were issued. At that hearing, the Government cross-examined Ms. Q. extensively about her alleged gang connections and Ms. Q. testified that she has never been affiliated with a gang. (Dkt. 7-2 [Koop Decl.] ¶ 9.) Not only did the immigration judge decline to find that Ms. Q. was in a gang or had engaged in criminal behavior, but he also made an affirmative finding that her testimony was credible. (*Id*. ¶¶ 10–12.)[7] In addition, he did not find that any of the criminal or national security bars to asylum applied to Ms. Q. (*Id.* ¶ 10.)

The immigration judge's finding is entitled to great weight, and the Court should issue a decision consistent with the findings of the immigration judge. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (Government cannot ask the court to affirm on grounds inconsistent with the agency findings below); *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011) (separate federal agencies can and should consult and speak with one voice, as they "are parts of a single Executive Branch headed by one President"). Defendants' inconsistent view of the El Salvador arrest warrant is arbitrary agency action, *see Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) ("[T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance

[7] Defendants do not refute the immigration judge's credibility finding or his October 16, 2018 order. (*See generally* Dkt. 23 at 10.)

of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses."), and the Court should defer to the immigration judge, who is a neutral decision-maker trained to make credibility determinations and assess evidence. *See Wang v. Attorney Gen. of U.S.*, 423 F.3d 260, 270 (3d Cir. 2005) (reversing and remanding where an immigration judge abandoned his role "as neutral and impartial arbiter").

2. Because Any Purported Flight Risk Can Be Easily Mitigated, Concurrent with Reunification, Defendants Have Not Met the Narrow Tailoring Requirement.

Having failed to show that Ms. Q. is a danger, Defendants next try to claim that any potential flight risk Ms. Q. might present precludes her from being reunited with J. in a Family Residential Center (FRC). (Dkt. 23 at 11.) In support of their argument, Defendants rely on a declaration from Ms. Harper, which states that "FRC[s] are non-secure," implies that residents are not supervised, and claims that "[i]f a resident wishes to leave, employees are instructed to allow them to do so."[8] (Dkt. 23-1 [Harper Decl.] ¶ 8.) These conclusory proclamations cannot be credited because they do not satisfy the Defendants' burden under strict scrutiny: that the continued separation is the least restrictive means of effectuating what Defendants assert is a compelling government interest. *See M.G.U.*, 325 F. Supp. 3d at 120 (government has burden of showing that it is "impossible to accomplish [its] interest in a less restrictive way").

[8] In fact, employees do not simply allow detainees to leave upon request. "The three primary ways in which an individual would be discharged from [an FRC] are: (1) if an immigration judge grants them bond and the individual posts the bond; (2) if ICE grants the individual parole; or (3) if the individual is subject to an order of removal and he or she is released from the facility for purposes of deportation from the country." (Fluharty Decl. ¶ 8; *see also* Govindaiah Decl. ¶¶ 8, 11 (stating that the Government has contracted with the Geo Group, a private prison corporation, to run the Karnes FRC, and that individuals cannot leave the facility "without being escorted by an ICE officer or a Geo staff member").)

But even taking Ms. Harper's statements at face value, they are misleading and lack support. For one, the Family Residential Standards ("FRS") that Defendants admit "FRCs operate under" (Dkt. 23 at 4) appear to contradict Ms. Harper's statements. Under the FRS, residents cannot simply ask to leave an FRC and be shown an open door, as Defendants suggest. In fact, the FRS explicitly states that the "use of physical force" *is* permitted for "the prevention of escapes." FRS 2.10, *Use of Physical Force and Restraints*, https://www.ice.gov/doclib/dro/family-residential/pdf/rs_use_of_force.pdf. Other FRS provisions confirm that there are "safety and security" precautions in place to ensure the security of the facilities. *See, e.g.*, FRS 2.4, *Key and Lock Control*, https://www.ice.gov/doclib/dro/family-residential/pdf/rs_key_and_lock_control.pdf (outlining precautions relating to the control and maintenance of locks and keys in "resident-accessible areas"); FRS 5.5, *Recreation*, https://www.ice.gov/doclib/dro/family-residential/pdf/rs_recreation.pdf (noting that residents are "under continuous supervision by staff"). (*See also* Fluharty Decl. ¶¶ 3, 6 (explaining that the South Texas FRC is a "secure facility . . . surrounded by fences[,] floodlights[,] . . . high-barbed wire fencing[,] and locked gates" and detained families are "strictly monitored.").) In addition, attorneys working with clients detained at FRCs have observed that "[d]etainees are not free to leave the detention center," and that even parents with criminal histories have been detained at FRCs with their children. (Govindaiah Decl. ¶¶ 10, 12.) Thus, it is clear that—contrary to Defendants' implication—FRCs have appropriate security measures in place to house Ms. Q. and J.

Moreover, Defendants' laser focus on FRCs fails to consider other less restrictive alternative to detention programs (ATDs) that could mitigate any potential flight risk, while still allowing Ms. Q. to be reunited with J. These ATDs include periodic check-ins with caseworkers, electronic ankle monitoring, and other measures as part of ICE's Intensive Supervision

Appearance Program (ISAP). A 2015 study on ISAP conducted by the Office of Inspector General specifically identified people "in removal proceedings, not issued final removal orders, who are at high risk of absconding"—the category Defendants claim Ms. Q. is in—as high priority individuals to enroll in the program. *See* Office of Inspector General, *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)* at 4 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.[9] Having Ms. Q. participate in ISAP monitoring would provide yet another alternative that would allow Defendants to reunite Ms. Q. with J., while mitigating any perceived flight risk. Defendants' claim that Ms. Q.'s perceived flight risk makes her ineligible for reunification with her son rings hollow.

3. Defendants Are Not Entitled to Unquestioned Deference to Their Decision Not to Reunify Ms. Q. with Her Son.

Defendants also cannot use the guise of vague deference—without citation—to shield their actions from this Court's review. While Defendants may have some latitude over decisions concerning management of people in detention, this discretion cannot be "arbitrary and capricious" and entirely unbounded from judicial review. *Rubenstein v. Brownell*, 206 F.2d 449, 455 (D.C. Cir. 1953) (citing *Carlson v. Landon*, 342 U.S. 524 (1952)); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (agency action may not be "based on speculation" or "conclusory or unsupported suppositions"); *see also United States v. Esperdy*, 202 F.2d 109, 112 (2d Cir. 1953) (noting that "[i]in the absence of clear language to the contrary, we cannot . . . give the Attorney General unbridled license to exercise his discretion as to detention in whatever arbitrary or capricious way he might see fit, provided only that he act with reasonable dispatch to

[9] This study suggested that participation in ISAP II is highly effective, concluding that the number of immigrants who absconded dropped from 10.79% in 2010 to 4.86% in 2012 as a result of their participation in ISAP II. *Id.* at 6.

obtain a decision as to the alien's deportability."). At a minimum, constitutional due process acts as a constraint on the Government's detention decisions. *See Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1303 (W.D. Wash. 2018) ("[D]ecisions that violate the Constitution cannot be 'discretionary' . . . ." (quoting *Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004)) (alterations in original)). Given both the procedural and substantive due process claims brought by Ms. Q. and the arbitrary and capricious nature of the Government's decision-making here, Defendants are not entitled to limitless deference.

Defendants have offered no compelling reason why they are entitled to deference in this case, relying solely on a Salvadoran warrant and derivative documentation as pretexts to separate Ms. Q. from her son. By contrast, an immigration judge has already determined, relying on essentially the same evidence before this Court, that Ms. Q. is *not* a threat to her son or others in the community, holding that "the Court is not convinced that there is sufficient evidence to find [Ms. Q] is a danger to the community." (Dkt. 7-4 [Sept. 14, 2018 Bond Memorandum of the Immigration Judge] at 4.) Additionally, Defendants have failed to identify any objective criteria or standards that they used to determine that Ms. Q. and J. should be deprived of their fundamental right to family integrity in this case. Indeed, separating young children from their parents was "extremely rare" prior to the enactment of the Trump Administration's "Zero Tolerance" and family separation policies, and even then, only when there was "credible evidence that the parent was a serious danger to their own child." Carey Decl. ¶¶ 6–8, *Ms. L.*, No. 18-428 (Sept. 17, 2018), ECF No. 233-1.

Defendants also disingenuously claim that their "authority to choose the appropriate place of detention is paramount in this context because it involves protecting children from unsafe conditions." (Dkt. 23 at 10.) Defendants have no such authority and cite no case or law that

supports this proposition. In fact, under the Trafficking Victims Protection Reauthorization Act, "the Secretary of Health and Human Services is authorized to appoint independent child advocates," who "effectively advocate for the best interest of the child" and are "presumed to be acting in good faith." 8 U.S.C. § 1232(c)(6)(A). Thus, as J.'s federally appointed child advocate, the University of Chicago's Young Center for Immigrant Children's Rights is best positioned for deference on the issue.

In this case, the Young Center has repeatedly emphasized that J.'s reunification with Ms. Q. is essential to his health and wellbeing (Dkt. 7-6 [Oct. 23, 2018 Young Center Best Interests Recommendation] at 3–4), and has done so again after reviewing the documentation submitted with Defendants' November 9 Opposition. (Ex. 6 to Koop Suppl. Decl. [Nov. 12, 2018 Young Center Best Interests Recommendation] at 1–2.) In reaching this conclusion, the Young Center has not only evaluated J.'s well-being since he arrived in the United States, but also conducted a thorough investigation into J.'s history of care while in El Salvador (including interviews with J.'s family members), and found that "Ms. Q. has a positive relationship with J. and has been a loving and affectionate mother." (Dkt. 7-6 at 3–4.) As an independent third party whose legal responsibility is to determine what is in the J.'s best interest, the Young Center's recommendation of reunification is worthy of significant weight, while Defendants' claim that they are acting to "protect[] children from unsafe conditions" (Dkt. 23 at 10) is empty.

* * *

Therefore, given Defendants' failure to carry their burden and/or materially respond to the arguments in the opening brief, Plaintiffs' substantive due process claims, procedural due process claim, and APA claim are all highly likely to succeed.

B. Defendants Concede Ms. Q. and J. Continue to Suffer Irreparable Harm Every Day They Are Separated, and That Reunification Would Mitigate This Harm.

Defendants offer no response to the significant irreparable harm that Ms. Q. and J. are suffering. Their brief does not even mention the immense emotional and psychological toll that family separation is having on Ms. Q. and J., and they certainly have not rebutted Plaintiffs' multiple pieces of evidence—including a declaration from Ms. Q. (*see* Dkt. 7-1 [Ms. Q Decl.]), the Young Center best interest recommendations for J. (*see* Dkt. 7-6), and nine declarations from medical and mental health professionals (*see* Dkt. 7 at 31 n.9)—that prove the significant trauma that Defendants' policy is inflicting on Ms. Q. and J. for each day they remain separated.

Unable to contest the predictable consequences of their cruel and inhuman practices, Defendants instead respond like a hostage-taker. They state that Ms. Q. "can" reunify with her son, with "HHS concurrence" if she "elect[s] to" surrender her and her son's pending asylum claims, and ICE will reunite them prior to removal. (Dkt. 23 at 11.) Defendants thereby put Ms. Q. to a choice: continue enduring her and her son's severe physical and psychological suffering apart in detention, or forfeit both their rights to seek asylum and other immigration relief by acceding to Defendants' demand that they accept removal to a country where they face the risk of violence and death. Due process cannot be conditioned or coerced in this way.[10]

[10] Indeed, Defendants' effort to condition the alleviation of the severe physical and mental pain and suffering they are intentionally inflicting upon Ms. Q. and her son meets the threshold for torture under U.S. and international law, and thus "shocks the conscience." (*See* Dkt. 7 at 15–19.)

C. Defendants Have Failed to Show That Reunification Would Disturb Its Interest in "Maintaining Safe Detention Facilities," and the Balance of Equities and Public Interest Weigh Heavily in Favor of Reunification.

Defendants' brief also misses the mark when attempting to balance the ongoing harm to Ms. Q. and J., with the public interest in this matter. Defendants nakedly assert that their interest in "maintaining safe family detention facilities" should prevail over the heart-wrenching ongoing harm that Ms. Q. and J. are experiencing apart. (Dkt. 23 at 10.) But as discussed above, *supra*, II.A, Defendants can point to no credible evidence showing that Ms. Q. would be a danger in those facilities or that they could not mitigate any perceived flight risk, nor do they address that J.'s federally appointed child advocate has consistently found that reunification is unequivocally in J.'s best interest. (Dkt. 7 at 6, 30.) Defendants conversely have no legitimate interest in acting *against* the best interests of children, like J., who are in their custody.

At bottom, reunification would impose no hardship on Defendants, who "cannot suffer harm from an injunction that merely ends an unlawful practice." (Dkt. 7 at 33.) The balance of equities therefore weighs decisively in Plaintiffs' favor.

D. All of Defendants' Procedural Arguments Fail.

Finally, Defendants' attempts to raise procedural challenges to skirt this Court's review are wholly unavailing: (1) an injunction is an appropriate remedy here; (2) jurisdiction is proper because Plaintiffs do not seek habeas relief; and (3) the Ms. L. Order concerning Ms. Q.'s membership in the Ms. L. class is not preclusive.

1. An Injunction Is an Appropriate Remedy Here.

Plaintiffs dispute Defendants' argument that the requested preliminary injunction would alter the status quo. (*See* Dkt. 23 at 6–7.) It is well established that the status quo to be preserved "is the *last peaceable, uncontested status* between the parties which preceded the controversy about which suit is brought." *Douglas T. v. Hi-Fi Stereo Ctr.*, No. 312-74, 1974 WL 860, at *2

(D.D.C. Mar. 26, 1974) (emphasis added). Here, "the last peaceable, uncontested status between the parties" is the status that existed *before* Defendants forcibly separated Ms. Q. and J. in March 2018. In two nearly identical family separation cases, this Court held that since each mother "contested her separation from the moment that she was separated from her son, the last uncontested status occurred when she and her son approached immigration officials together near the United States-Mexico border." *M.G.U.*, 325 F. Supp. 3d at 118; *Jacinto*, 319 F. Supp. 3d at 498. Similarly, Ms. Q. disputes the legality of the separation and seeks to return her and J.'s status to the status quo—the point in time before the government separated them.

Even if the Court finds that a preliminary injunction would alter the status quo, Plaintiffs meet the higher standard for a mandatory injunction. *See M.G.U.*, 325 F. Supp. 3d at 118 (finding "even if a heightened standard were appropriate, [the mother] satisfies the higher standard"). For such an injunction, the moving party must show that she is "clearly . . . entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Human Touch DC, Inc. v. Merriweather*, No. 15-741-APM, 2015 WL 12564166, *3 (D.D.C. May 26, 2015). For the reasons discussed above, Ms. Q. and J. are clearly entitled to relief, and the irreparable psychological and physical harm to both Ms. Q. and her son are extreme and very serious. Indeed, when weighing these interests, courts have granted preliminary injunctions in the context of the government's separation of immigrant families. *See, e.g.*, *Ms. L.*, 310 F. Supp. 3d at 1149; *M.G.U.*, 325 F. Supp. 3d at 124; *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1134 (N.D. Ill. 2018). More broadly, courts in this district have granted mandatory preliminary injunctions in the immigration detention context, altering the status quo. "Continued detention, where Plaintiffs might otherwise be eligible for less restrictive placements, constitutes very serious damage that merits a mandatory injunction." *Ramirez v. ICE*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018); *see also R.I.L.-R v. Johnson*,

80 F. Supp. 3d 164 (D.D.C. 2015) (requiring ICE to release plaintiffs from detention pending a hearing on the merits). In sum, Plaintiffs have carried their burden of showing they are clearly entitled to the relief they seek, and the gravity of the harm is profound for both Ms. Q. and her four-year-old son.[11]

2. Jurisdiction Is Appropriate as Plaintiffs Do Not Bring a Habeas Claim.

The Defendants claim that this Court lacks jurisdiction over the claims since core habeas challenges "must be directed at the person with custody and control over Plaintiffs." (Dkt. 23 at 7.) Plaintiffs have not brought a habeas claim—as a core challenge or otherwise—under 28 U.S.C. § 2241, so this argument is irrelevant and meritless. *See M.G.U.*, 325 F. Supp. 3d at 117.

3. The *Ms. L.* Order Concerning Ms. Q.'s Class Membership Is Not Preclusive.

Defendants also argue that this Court should "decline to offer any further consideration of [Ms. Q.'s] claims" because of "Judge Sabraw's order denying her request to be reunified with her minor son" pursuant to the *Ms. L.* class order. (Dkt. 23 at 9.) But the order in *Ms. L.* is not binding and does not preclude judicial review of Ms. Q.s' claims, nor entitle Defendants to any deference. *See Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (resolution of a class action "leave[s] intact the legal claims" of "[t]hose who are not class members," such as those who are "outside

[11] Defendants also argue that a preliminary injunction is not proper because Ms. Q. seeks the ultimate relief in this case: reunification with her four-year-old son. But it is not unusual for a court to issue a preliminary injunction that awards some or all of the ultimate requested relief, as occurred in other family separation preliminary injunctions. *See Ms. L.*, 310 F. Supp. 3d at 1149; *M.G.U.*, 325 F. Supp. 3d at 124; *Jacinto*, 319 F. Supp. 3d at 505; W.*S.R.*, 318 F. Supp. 3d at 1134. In *Ramirez v. ICE*, a case involving the detention of immigrant teenagers, another court in this district rejected Defendants' argument that the preliminary injunction would improperly overlap with the merits of the overall case. 310 F. Supp. 3d at 33. "[T]he Court finds that the consequences of delaying relief justifies swift action even in the face of such overlap." *Id.* Similarly, the consequences of delaying relief here—the psychological and emotional toll on Ms. Q. and her four-year-old son—justify swift action reunifying this family.

the definition of the class"); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (class action is only "bind[ing] [on] members of the class"). Judge Sabraw's order simply relates to the exclusion of Ms. Q. from the *Ms. L.* class, which says nothing about the causes of action underlying this action. Furthermore, the Government's counsel even argued to the Court in *Ms. L.* that Ms. Q. could "seek relief other ways," including "individual" relief, since she is "just not in the class." Tr. of Sept. 14, 2018 Hr'g at 26:19–21, *Ms. L.*, No. 18-428 (Sept. 14, 2018), ECF No. 234. Having argued that Ms. Q. is not a part of the *Ms. L.* class, Defendants are judicially estopped from making a different argument before this Court. *Encyclopaedia Britannica, Inc. v. Dickstein Shapiro, LLP*, 905 F. Supp. 2d 150, 154 (D.D.C. 2012) ("Judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court preliminarily enjoin Defendants from continuing to separate Ms. Q. from J., and order Defendants to immediately reunify Ms. Q. with J. in the same location.

DATE: November 13, 2018

Respectfully submitted,

/s/ Michael J. Galas

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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.3, I hereby certify that on November 13, 2018, I electronically filed a copy of the foregoing document and attachments thereto, which will be served on all counsel of record through the Court's CM/ECF system.

/s/ Michael J. Galas