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-TJK

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Ms. Q. and her son J, a minor child (collectively, "Plaintiffs") respectfully move this Court for a preliminary injunction enjoining Defendants Immigration and Customs Enforcement ("ICE"), Acting Director and Deputy Direct of ICE Ronald D. Vitiello, Department of Homeland Security ("DHS"), Secretary of Homeland Security Kirstjen Nielsen, and Attorney General Jefferson Beauregard Sessions III (collectively, "Defendants" or the "Government") from continuing to forcibly separate Ms. Q. from her son. Plaintiffs seek an order directing Defendants to immediately reunite Ms. Q. with her son. Such relief is necessary because Defendants' separation of Ms. Q. and her son violates their substantive and procedural due process rights under the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act ("APA"). Both Ms. Q. and her son are suffering ongoing, irreparable harm, and the balance of harms weigh heavily in Plaintiffs' favor. Plaintiffs further respectfully seek a hearing on this application in seven days, or at a date set by the Court no later than within 21 days.

I. INTRODUCTION

Plaintiff Ms. Q. is an asylum-seeker from El Salvador who has now been detained separately from her four-year-old son, J., for seven months. Shortly after crossing the border, DHS officials separated Ms. Q. and J. from one another, leaving Ms. Q. detained in Texas, and sending J. over 1,400 miles away to a shelter in Chicago, IL. That unilateral decision is arbitrary, capricious, and unsupported by evidence, and violates both the Administrative Procedure Act and Due Process Clause of the Fifth Amendment. Ms. Q. and J. move for a preliminary injunction due to the irreparable harm and ongoing damage caused by their prolonged, unnecessary, and illegal separation. Fed. R. Civ. P. 65(a).

First, Ms. Q. and J. are likely to succeed on the merits of their due process and APA claims since the Government's refusal to reunite them is illegal and rooted in pretext. It relies entirely on an outstanding arrest warrant from El Salvador that makes the vague, unsubstantiated, and cursory allegation that Ms. Q. is a member of a gang. The warrant provides no factual basis for the allegation nor does it include any evidence or facts surrounding why the Salvadoran government believes Ms. Q is a member of a gang. Ms. Q. is not a gang member and has never been convicted of a crime. The Salvadoran government frequently falsely accuses its citizens of gang involvement as part of aggressive law enforcement tactics, which is precisely what happened here. Several other individuals who were pulled into the same dragnet operation have already been released because the Salvadoran prosecutor had insufficient evidence, and Ms. Q.'s recently retained attorney is awaiting the same result in her case. Thus, it is arbitrary, capricious, and punitive for the Government to refuse to reunite Ms. Q. and her young son J. on the basis of the warrant, and an injunction is necessary to stop the their forcible, harmful separation that has now lasted seven months.

Second, Ms. Q. and J. are suffering irreparable harm with each passing day they spend apart. Separating families causes well-documented, severe psychological and physical impact on both parents and children, some of which may be irreversible. Ms. Q. recently suffered an anxiety attack, has had trouble sleeping, and cries frequently. Her son is suffering speech and developmental delays, reverted back to wearing diapers after previously being toilet trained, and now caseworkers may have identified that he has an intellectual disability. The drastic harms caused by ongoing separation of parents and children has been well-documented by consensus of the medical community.

Third, the balance of harms tips decidedly in Ms. Q. and J.'s favor and immediate reunification is in the public interest. The Government cannot suffer harm from an injunction that ends an unlawful practice. When balanced against the irreparable, and long-lasting, harm to Plaintiffs, resulting from seven months of separation, the equities weigh heavily in their favor. For these reasons, discussed in detail below, the Court should grant a preliminary injunction and immediately reunify Ms. Q. and her son J.

II. FACTUAL BACKGROUND

A. Ms. Q. and J.'s flight from El Salvador and initial detention in the United States

Ms. Q. is a native of El Salvador and the mother of a four-year-old son, J. Ms. Q. entered the United States with J. on March 22, 2018, intending to seek asylum in the United States. (Ms. Q. Decl. ¶ 2.) Their claims for protection in the United States stem from gender violence and gang-related threats and violence that they experienced in their home country. (*Id.* ¶ 16.)

As a single parent, Ms. Q. has single-handedly raised J. since his birth, providing for all of his physical and emotional needs. (*See id.* ¶¶ 4, 34.) In April 2016, Ms. Q. began renting a room in a house in El Salvador, for herself and her son. (*Id.* ¶ 5.) Ms. Q. did not know the other occupants of the house very well, and tended to keep to herself. (*Id.* ¶ 6.) In July 2016, Ms. Q. was at home with her son when she heard a commotion outside the house. (*Id.* ¶ 8.) It sounded as if people were running near the house and Ms. Q. could hear the cars and voices of police officers outside. (*Id.*) Ms. Q. took J. in her arms and stayed in her room. (*Id.*)

Police officers came into the house with guns drawn, yelled at her to go outside, and began searching the house. (*Id.*) They asked Ms. Q. questions about whether she was involved in a gang, or if she knew where the gang members were, but she explained that she has never been a member

of a gang, and denied any involvement or affiliation with a gang. (*Id.*) The police officers took her state identification card and photographed her. (*Id.* ¶ 9.)

A few days later, a group of MS-13 gang members brutally attacked Ms. Q., causing her to bleed from her nose, mouth, and one of her eyes. (*Id.* ¶ 12.) She had trouble seeing out of that eye for a long time and thought she might be going blind. (*Id.* ¶ 13.) Ms. Q. believes the gang members punished her because they were aware she had talked to the police at the house and also because she refused to work for the MS-13. (*Id.* ¶ 11.)

After the attack, Ms. Q. feared for her life. (*Id.* ¶ 13.) She moved around the country to live with friends for short periods at a time, and eventually moved in with her mother in San Salvador. (*Id.* ¶¶ 14–15.) Finally, Ms. Q. decided that she and her son would not be safe in San Salvador or anywhere else in El Salvador, and fled with J. to the United States in fear of their lives. (*Id.* ¶ 15.)

After a grueling journey from El Salvador, Ms. Q and J. crossed the Texas border on March 22, 2018. (Ex. 3 to Koop Decl. [August 24, 2018 Young Center Best Interests Recommendation] at 1.) U.S. Customs and Border Protection (CBP) officers took them into custody. (Ms. Q. Decl. ¶ 19.) The next day after being taken into custody, J. became ill, vomiting and having diarrhea. (*Id.* ¶ 22.) The officers refused to provide a change of clothes or adequately treat his condition. (*Id.*)

While J. was ill, the officers demanded that Ms. Q. sign some paperwork. (*Id.* ¶ 23.) The paperwork was in English and she did not understand it, so she refused to sign. (*Id.*) The officers became angry with her and told her that her son would be taken away if she did not sign. (*Id.*)

Then on March 25, 2018, the officers separated Ms. Q. and J. (*Id.* ¶ 27.) The officers called Ms. Q. and said to bring J. (*Id.* ¶ 26.) One of the officers told Ms. Q. to give J. to a woman

who appeared to be a Government employee. (*Id.* ¶ 27.) Ms. Q. pleaded with them not to take J. and asked where they would take him. (*Id.*) J. was sleeping in her arms at the time. (*Id.*) Ms. Q. hugged him and they seized him from her arms. (*Id.*) The officers then forced J. to stand up. (*Id.*) He woke up and said "mama." (*Id.*) The officers took J. from her arms and forced her to leave, separating Ms. Q. and J. for the first time in their lives. (*Id.*)

A short time after Ms. Q. was separated from J., she was placed in a row with handcuffed people, in advance of being transported to the Laredo Processing Center. (*Id.* ¶ 28.) On her way out, Ms. Q. saw J. sitting alone in a cell. (*Id.*) He was looking around, as if trying to find her. *Id.* Ms. Q. tried to hide herself so that he would not see the officers taking her away. (*Id.*) This was the last time Ms. Q. saw her son. (*See id.*) The officers did not inform Ms. Q as to what would happen to J. (*Id.* ¶ 30.)

Later, an asylum officer interviewed Ms. Q. to determine whether she had a "credible fear of persecution" if she was to return to El Salvador, which is the prefatory step to obtain asylum. (*Id.* ¶ 32.) The asylum officer found that Ms. Q. had a credible fear of persecution in El Salvador. *See* 8 U.S.C. § 1225(b)(1)(B)(v). Ms. Q.'s asylum claim was recently denied by an Immigration Judge, but that decision was erroneous and is currently on appeal. (Koop Decl. ¶ 14.)

B. Ms. Q. and J. continue to suffer irreparable harm in detention

Ms. Q. is currently detained in the Webb County Detention Center in Laredo, Texas. (*Id.* ¶ 2.) J. is at a shelter for unaccompanied children in Chicago, Illinois. (Ex. 3 to Koop Decl. at 1.) The effect of the separation on both Ms. Q. and J. is profound. (*See* Ms. Q. Decl. ¶¶ 34–35.) Ms. Q. has suffered from two anxiety attacks, most recently in early September. (*Id.* ¶ 35.) She is now taking medication for depression and anxiety, but the medication makes her nauseous and dizzy. (*Id.* ¶ 37.) She has had trouble sleeping and cannot stop thinking about her son. (*Id.* ¶ 35.)

J. is suffering irreparably as well. He is experiencing developmental delays, including difficulty in speech, such that his speech is unclear and he struggles to produce words. (Ex. 4 to Koop Decl. [Oct. 23, 2018 Young Center Best Interests Recommendation] at 3.) Previously toilet trained, he has reverted to wearing diapers due to bathroom-related accidents. (*Id.*) On recent telephone calls, J. has been confused and angry and has appeared to not recognize his mother's voice. (Ms. Q. Decl. ¶ 34.) The University of Chicago's Young Center for Immigrant Children's Rights ("Young Center") – J.'s federally appointed child advocate – reports that because of J.'s age and delayed speech production, it is difficult for him to communicate with his mother over the phone and that video calls would be more productive, but they are not available at the detention center where Ms. Q. is detained. (Ex. 4 to Koop Decl. at 3–4.) His caseworkers also report that the difficulty with phone calls is resulting in increased hesitancy from J. to participate in weekly phone calls with his mother. (*Id.* at 3.) Recently, J.'s caseworkers have speculated that J. may have a cognitive disorder after almost seven months in government custody (*id.*), a condition that may have developed or worsened while he has been held. As J.'s federally-appointed child advocate, the Young Center has strenuously and repeatedly recommended that it is in J.'s best interest to be reunified with his mother, especially given his J.'s high level of anxiety, speech difficulties and ongoing concerns regarding his health and well-being outside the nurturing presence of his mother. (*Id.* at 3–4; *see also* Ex. 3 to Koop Decl.)

C. Ms. Q.'s Immigration Court Proceedings and the Illegitimacy of the Salvadoran Arrest Warrant

After being forcibly separated from J. for almost four months, Ms. Q. finally learned through an email from an ICE officer to her counsel on July 12, 2018, that she would not be reunified with her son because of her alleged gang affiliation and an outstanding "foreign warrant in El Salvador." (Koop Decl. ¶ 3); *see also Ms. L v. ICE*, No. 18-428 (S.D. Cal. filed Feb. 26,

2018), ECF No. 104 at 3 (same). This was the first time that Ms. Q. and her counsel learned of the reason why the Government had refused to reunite her with J., even though they had known about the warrant since late March 2018. (*Id.*; *see also* Ms. Q. Decl. ¶ 16.) Since then, the Government's position has remained that Ms. Q. cannot reunite with and comfort her four-year-old because of an unsubstantiated warrant from which it believes it can infer that Ms. Q. is a member of a gang.

Ms. Q. has never been convicted of, nor faced trial for any crime, either in El Salvador or the United States. (Koop Decl. ¶ 12.) The Salvadoran arrest warrant that the Government relies on contains nothing more than vague allegations regarding supposed gang affiliation—but importantly, does not reflect any showing of probable cause or evidentiary support for these allegations. (Palacios Decl. ¶ 2.) Instead, it merely alleges the nebulous charge of potentially being affiliated with a "terrorist organization." (Ex. 1 to Koop Decl. [El Salvador Arrest Warrant].)[1] The warrant does not offer specific dates, times, or places of such alleged activity, or cite any evidence to support the charge, and contains numerous inconsistencies and hand-written modifications. (*See id.*)

Consistent with Salvadoran police practices where innocent civilians are ensnared in indiscriminate anti-gang operations, (Rikkers Decl. ¶¶ 6–8), the warrant was issued after a raid relating to suspected gang activity. (Palacios Decl. ¶ 2.) In July 2016, the police conducted a raid near where Ms. Q. was renting a room. (Ms. Q. Decl. ¶ 8.) More than 30 individuals were similarly summoned to appear in court after the raid and several more people were caught up in the operation and already detained. (Palacios Decl. ¶ 2.)

[1] The Government claims that the "warrant is related to [Ms. Q's] involvement in the MS-13 gang," *Ms. L*, ECF No. 223 at 5, which is classified as a "terrorist organization" under Salvadoran law. It has presented no evidence to corroborate this claim.

Ms. Q. did not learn of the warrant against her while in El Salvador and was entirely unaware that this charge had been levied against her until her U.S. counsel received a copy of it in July 2018. (Koop Decl. ¶ 3, Ms. Q. Decl. ¶ 16.) Therefore, she never had an opportunity to resolve it or appear in her own defense at preliminary hearing set for her case in June 2018. (Palacios Decl. ¶ 4.) Upon learning of the charge, Ms. Q. retained Salvadoran counsel to represent her: Sergio Mauricio Palacios Araujo. (*Id.* ¶ 1.) Mr. Palacios examined the Salvadoran record, and determined that ten individuals—including Ms. Q.—were summoned to a preliminary hearing on the charge in June 2018. (*Id.* ¶ 3.) Of the ten, six appeared at the hearing and were represented by counsel they had hired. (*Id.* ¶ 5.) All six that appeared were released immediately after the hearing and had the charges against them suspended, because the prosecution failed to meet its evidentiary burden. (*Id.*) The remaining four that did not appear—including Ms. Q.—had their charges held over until a hearing could be held with their presence. (*Id.*) Given the total lack of evidence against Ms. Q. in the record in El Salvador, Mr. Palacios awaits the scheduling of a hearing in El Salvador where he can similarly have the charge against her dropped due to insufficient evidence. (*Id.* ¶¶ 6–7.)

At a her July 31 Immigration Court bond hearing, Ms. Q.'s counsel challenged the warrant that they had only recently been able to evaluate, whereas ICE offered no explanation, context, or evidence to support the arrest warrant. (Koop Decl. ¶ 6.) After hearing argument and reviewing counsel's submissions regarding the arrest warrant, the immigration judge made a detailed finding that the Salvadoran warrant provided no basis whatsoever to find Ms. Q. dangerous:

> The Court finds that Respondent *is not a danger to the community*. While the record reflects that, in 2017, there was a warrant issued for Respondent's arrest in El Salvador charging her with 'terrorist organizations,' *the Court is not convinced there is sufficient evidence to find Respondent is a danger to the community*. [] Aside from the aforementioned arrest warrant, Respondent does not appear to have any other criminal history in El Salvador or the United States. *None of the evidence*

> *in the record indicates that Respondent would pose a threat to national security or a danger to the community at large*.

(Ex. 2 to Koop Decl. [Sept. 14, 2018 Bond Memorandum of the Immigration Judge] at 3 (emphasis added).)[2] Though the immigration judge denied bond based on a perceived flight risk, (*id.*), the Government's only stated justification for detaining Ms. Q. separate from her four-year-old son has been vague insinuations about a danger she would present in family detention. *Ms. L.*, ECF No. 223 at 7. The Government has never articulated the standards, methods, or guidelines used to make this determination.

Department of Justice (DOJ) counsel has consistently refused to reconsider its decision to forcibly separate Ms. Q. and J. in the face of evidence that the unsubstantiated warrant resulted from deficient process and judicial findings that Ms. Q. is not a danger. DOJ counsel has represented in conversations with Ms. Q.'s counsel and in court filings that the arrest warrant was "renewed" in June 2018. (Palacios Decl. ¶ 4.) In fact, as Ms. Q.'s Salvadoran counsel explained, "renewal" of the warrant was purely ministerial and triggered only by Ms. Q.'s absence at her June 2018 preliminary hearing.[3] (*Id.*) Moreover, the Government has made several unsubstantiated claims—including the insinuation that it has had direct communication with Salvadoran government representatives with knowledge of Ms. Q.'s case and supposed interest in her capture—without any citation to sworn testimony or documentary support that Ms. Q.'s counsel could meaningfully evaluate.[4] Should the Government attempt to make such claims here, it should

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[2] Similarly, at Ms. Q.'s immigration merits hearing on October 16, 2018, the immigration judge did not find that she was subject to any of the criminal bars to asylum. (Koop Decl. ¶ 10.)

[3] Ms. Q. did not attend the hearing both because she had no notice of it and because she was being detained in this United States at the time. (Palacios Decl. ¶ 4.)

[4] In the *Ms. L.* litigation, the Government submitted a brief asserting various facts with respect to the Salvadoran warrant, while refusing to provide any citations or evidence in support of these claims: "On August 20, at ICE's request, the government of El Salvador verified the

be required to support them with citations to evidence. Thus far, the Government has provided none.

D. The Ms. L. Class Action

On June 26, 2018, a court in the Southern District of California certified a class of migrant parents who had been separated from their minor children by the Government, and entered a preliminary injunction requiring the government to "reunify all Class Members with their minor children who are under the age of five (5) within fourteen (14) days." *Ms. L v. ICE*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018). In so holding, the court noted that the Government's "use of the children as tools in the parents' . . . immigration proceedings" is a "brutal" and "offensive" practice that is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 1145–46 (internal citations omitted).

In September 2018, class counsel in the *Ms. L.* class action lawsuit in the Southern District of California argued for Ms. Q.'s inclusion among the members of that class. *See Ms. L.*, No. 221 at 1. The Government argued forcefully against Ms. Q.'s inclusion in the class, asserting that her claims should be brought individually rather than part of the *Ms. L.* class, arguing that non-class members like her "may still be reunified with his or her child under existing processes, or if not reunified would need to file an individual action seeking reunification under his or her particular circumstances." *Ms. L.*, ECF No. 223 at 3. The Government emphasized that Ms. Q.'s claims

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warrant and verified that the identity of the person on the warrant matched Ms. Q. The government of El Salvador also gave permission to use both warrants in relation to removal proceedings. On August 30, 2018, INTERPOL issued a Red Notice for Ms. Q. at the request of the government of El Salvador. The government of El Salvador has expressed continued interest in the capture of Ms. Q., and will continue to work with ICE on the matter. Based on this information, the government determined that Ms. Q.'s criminal history excluded her from the class, prevented her from being housed in an FRC, and rendered her ineligible for reunification with her son[.]" *Ms. L*, ECF No. 223 at 5–6. INTERPOL's publicly available database of Red Notices does not include Ms. Q.

"rest on individual circumstances, are beyond the scope of this litigation, and are not well suited to class-wide resolution." *Id.* The Court agreed and excluded Ms. Q. from the class without prejudice to her seeking individual relief, finding that "the class of parents entitled to reunification with their children pursuant to this Court's orders does not include parents with criminal history." *Ms. L.*, ECF No. 236 at 2. Because the *Ms. L.* court found that Ms. Q. was not part of its class, Ms. Q. has not adjudicated her claims before any court with jurisdiction.

III. STANDARD

In evaluating whether to issue a preliminary injunction, courts consider four factors: (1) the movant's likelihood of success on the merits; (2) the likelihood of irreparable harm to the movant in the absence of preliminary relief; (3) whether the balance of equities tips in favor of the movant; and (4) whether an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). In *Winter*, the Supreme Court held that the likelihood of success is the most important factor, but a court must still "balance the strength of a plaintiff's arguments in each of the four elements when deciding whether to grant a preliminary injunction." *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

Before *Winter*, "courts weighed these factors on a 'sliding scale,' allowing 'an unusually strong showing on one of the factors' to overcome a weaker showing on another." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 326 (D.D.C. 2018) (quoting *Davis v. PBGC*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)). Post-*Winter*, this circuit has not squarely decided the ongoing viability of the sliding scale approach, *see Sherley v. Sebelius,* 644 F.3d 388, 393 (D.C. Cir. 2011), but has "hinted" that the standard has been overturned. *See Damus*, 313 F. Supp. 3d at 326. The Court does not need to decide the issue here, as Ms. Q. meets the stricter standard of proving all four preliminary injunction elements independently.

IV. ARGUMENT

A. Ms. Q. and J. are Likely to Succeed on the Merits of their Claims.

Ms. Q. and J. are likely to succeed in establishing that the Government's forcible separation of their family unit violated, and continues to violate, their procedural and substantive Due Process Clause rights. Additionally, they are likely to succeed on their claim that the Government's decision to separate her from J. was "arbitrary and capricious" under the Administrative Procedure Act (APA). The Government has failed to show that Ms. Q. presents a danger to J. or others, or that she is an unfit parent. Thus, the Government's intentional and continual separation of Ms. Q. from her four-year-old son J. violates the Constitution and APA.

1. Ms. Q.'s Separation from Her Son Violates Her Fifth Amendment Due Process Rights and Fundamental Right to Family Integrity.

"[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). "The Supreme Court has made clear that 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). Indeed, "the 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." *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality op.) (collecting cases); *see also Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in . . . the rearing of their children is basic in the structure of our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

This Court has already ruled that families fleeing violence and seeking asylum at the southern border have a valid "substantive due process claim that their continued separation, absent a determination that [the mother] is either an unfit parent or presents a danger to her son[], violates their right to family integrity under the Fifth Amendment." *Jacinto-Castanon*, 319 F. Supp. 3d at 499. Ms. Q. herself would be a class member in the *Ms. L.* class action absent the unsubstantiated El Salvador arrest warrant, and the court in that case has already found that parents have substantive due process rights under the Constitution's Due Process Clause and the fundamental right to family integrity. *Ms. L. v. ICE*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)). The Southern District of California already held that the Government's policy of separating families shocks the conscience. *See id.* at 1167 (dismissal order); *Ms. L.*, 310 F. Supp. 3d at 1143 (preliminary injunction order). That holding is crucial for substantive due process purposes, because "substantive due process prevents the government from engaging in conduct that shocks the conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (internal quotation marks and citations omitted).

In recognition of a mother's fundamental liberty interest in parenting her child, courts allow the Government to separate a child from his parent—particularly a child under the age of five like J.—only under extreme circumstances. *See Halet v. Wend Investment Co.*, 672 F.2d 1305, 1310–11 (9th Cir. 1982) (requiring a compelling interest to deprive parents of their "fundamental right" to "live with their children"). The "[s]everance of the relationship between a parent and his child can survive constitutional scrutiny" only if: (i) the government's interest is compelling; (ii) there is a "particularized showing" that terminating the parental relationship promotes the state's interest; (iii) it is "impossible to achieve the goal in question through any means less restrictive";

and (iv) the parties are afforded procedural due process rights. *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983); *see also Goings v. Court Servs. & Offender Supervision Agency*, 786 F. Supp. 2d 48, 70 (D.D.C. 2011) (enjoining a District of Columbia agency determination that barred plaintiff from having "unsupervised contact with children under the age of 18"); *also Jacinto-Castanon*, 319 F. Supp. 3d at 500 ("Substantial governmental burdens on family integrity are subject to strict scrutiny review, and they survive only if the burden is narrowly tailored to serve a compelling state interest.").

Ms. Q.'s likelihood of success on the merits is confirmed because the core facts of Ms. Q.'s case closely track those of the named class plaintiffs in the *Ms. L.* litigation, Ms. L. and Ms. C. As with Ms. Q., both Ms. L. and Ms. C. were also asylum seekers who entered the United States with their minor children. *See Ms. L.*, 302 F. Supp. 3d at 1154–55. Similarly, Defendants forcibly separated Ms. L. and Ms. C. from their minor children upon their arrival in the country, and the *Ms. L.* lead plaintiffs submitted evidence showing that their minor children were experiencing emotional and psychological harm because of the separation. *Id.* And as in this case, there was no suggestion that Ms. L. or Ms. C. abused their children, or were otherwise unfit parents. *Id.*

The only conceivable difference that distinguishes Ms. Q. case from the *Ms. L.* class members is the unsubstantiated El Salvador warrant, which is why Ms. Q. now seeks relief before this court. However, this warrant does not reflect any evidentiary showing that Ms. Q. is a criminal or otherwise involved in gang activity. (Palacios Decl. ¶ 7.) Rather, as explained above, the warrant was only issued because Ms. Q. did not appear for a preliminary hearing to contest charges brought by the Salvadoran prosecutor, and Ms. Q. did not attend that hearing because she had already fled her home out of fear of her life. (*Id.* ¶ 4.)] Indeed, an immigration judge has twice examined the warrant and concluded each time that Ms. Q. is not a danger and that she is not a

gang member or criminal. (Koop Decl. ¶¶ 6, 12.) Thus, Ms. Q. is "on equal footing" with the *Ms. L.* plaintiffs "for purposes of pursuing her due process claim," which is based on the same "government conduct in separating families during removal proceedings." *Ms. L.*, 302 F. Supp. 3d at 1164.

2. Ms. Q's Separation from J. Constitutes Torture, Cruel, Inhuman, and Degrading Treatment, in Violation of the Due Process Clause.

Plaintiffs have a substantive due process right to be free from torture and/or other cruel, inhuman and degrading treatment. Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience.'" *United States v. Shepherd*, 857 F. Supp. 105, 107 n.3 (D.D.C. 1994) (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)). It also precludes government conduct that "interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* (citing *Salerno*, 481 U.S. at 746). In addition, the Supreme Court has specifically classified torture as conscience-shocking conduct enjoined by substantive due process. *See Palko v. Connecticut*, 302 U.S. 319, 326 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental"); *see also Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("[C]onduct that shocks the conscience or afford[s] brutality the cloak of law . . . violates the [Due Process Clause]." (internal quotations omitted)).

Defendants' pretextual separation of Ms. Q. from her son J. was designed to inflict pain under color of law, and therefore meets the definitions of torture under U.S. law governing torture and war crimes, and under well-established international law. "'[T]orture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). This includes "act[s] specifically

intended to inflict severe physical or mental pain or suffering . . . for the purpose of . . . punishment, intimidation, coercion, or any reason based on discrimination of any kind." 18 U.S.C. § 2441(d)(1)(A) (War Crimes Act). The term "severe mental pain or suffering" means "prolonged mental harm caused by or resulting from," among other things, "the intentional infliction or threatened infliction of severe physical pain or suffering," or "threatened" harm to the victims or third persons. 18 U.S.C. § 2340(2) (definitions applicable to 18 U.S.C. § 2340A (Anti-Torture Statute)); 18 U.S.C. § 2441(d)(2)(D) (incorporating definition from 18 U.S.C. § 2340(2)); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, ¶ 1, GA Res. 39/46, (Dec. 10, 1984), reprinted in 23 ILM 1027 (1984), as modified, 24 ILM 535 (1985) (defining torture as including causing "severe pain or suffering, whether physical or mental," without the requirement to show prolonged mental harm).

Defendants' forcible separation of Ms. Q from her son was pursuant to the Trump Administration's "Zero Tolerance" and family separation policies. The Department of Justice's "Zero Tolerance" policy to prosecute all who enter the country unlawfully, which had the intentional result of forcibly separating prosecuted parents from their children, was formally and publicly announced in Spring 2018. *See* Press Release, J. Sessions, Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download. But the family separation policy itself began in earnest as early as October 2017, and Defendants actually separated approximately 700 children from their parents—including J. from Ms. Q.—at the border by the time of the announcement on April 6, 2018. Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html. There is no

question that Defendants' use of this family separation policy is "designed to impose severe mental suffering on . . . families." *USA: Policy of Separating Children From Parents is Nothing Short of Torture*, AMNESTY INT'L (June 18, 2018, 5:53 PM), https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/. Official comments regarding the policy make it clear Defendants are "intentionally inflicting suffering to send a message." *See* Meg Satterthwaite & Rebecca Riddel, *"Zero Tolerance" and the Detention of Children: Torture Under International Law*, JUST SECURITY (June 21, 2018), https://www.justsecurity.org/58269/zero-tolerance-detention-children-torture-international-law/; Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/factchecker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/. Indeed, despite explicit warnings detailing the detrimental harm this policy may have on children, Defendants have continued family separation in hopes that "people will get the message." *See* Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation is Meant as a Deterrent*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?noredirect=on&utm_term=.74f657165e02.

Separating a mother from her four-year-old child—for seven months—would unquestionably inflict "severe mental pain or suffering" on both mother and child, as well as prolonged mental if not physical harm. Children are likely to experience post-traumatic stress symptoms such as anxiety, terror, and stress, and this damage can be permanent, especially where it occurs on top of trauma from a perilous journey to the United States. The American Academy of Pediatrics (AAP) has described the real life harm suffered when children are ripped away from

their parents: "[H]ighly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short-and long-term health. This type of prolonged exposure to serious stress – known as toxic stress – can carry lifelong consequences for children." Colleen A. Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. PEDIATRICS (May 8, 2018), https://www.aap.org/en-us/about-the-aap/aappress-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx.

J., only four years old, is already suffering from the effects of chronic and ongoing trauma, developing cognitive and emotional impairments that will likely have lifelong consequences. (Ex. 4 to Koop Decl. at 2–3.) Previously toilet trained, J. has reverted to wearing diapers due to toilet accidents. (*Id.* at 3.) J. is constantly crying. He has been angry, confused, and unable to recognize his mother's voice. (Ms. Q. Decl. ¶ 34.) Further, he is suffering from developmental delays, including verbal delays and speech issues, and recently caseworkers may have identified that he has a cognitive disability. (Ex. 4 to Koop Decl. at 3.) Thus, it is undeniable that J.'s physical and mental health has severely deteriorated.

The effects of separation on Ms. Q are also profound. Ms. Q is suffering from extreme anxiety, consumed with thoughts of her son. (Ms. Q. Decl. ¶¶ 35–38.) She struggles to sleep and recently suffered from a severe anxiety attack, which Ms. Q attributes to her separation from J. (Id. ¶ 35.) Defendants are clearly aware of the psychological and physiological trauma and suffering caused by separating a child from a parent – it is an unquestionable reality of everyday life. *See, infra*, Part IV.B.

Moreover, Defendants were explicitly warned by government officials of the barbaric harms this policy would visit on children. *See* Nick Miroff & Karoun Memirjian, *Senate Panel Skewers Trump Officials Over Migrant Family Separations*, WASH. POST (July 31, 2018),

https://www.washingtonpost.com/world/nationalsecurity/lawmakers-to-question-trumpofficials-on-migrant-family-separations-struggle-toreunite-them/2018/07/31/ddb61390-9467-11e8-8ffb-5de6d5e49ada_story.html?utm_term=.27575f06d9ea. Thus, Defendants' decision to continue family separation in the face of this knowledge demonstrates that the cruelty is for the purpose of "punishment, intimidation, coercion, or any reason based on discrimination of any kind." 18 U.S.C. § 2441(d)(1)(A) (War Crimes Act). Indeed, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has observed that ill-treatment may amount to torture if it is intentionally imposed "for the purpose of deterring, intimidating or punishing migrants or their families [or] coercing them into withdrawing their requests for asylum." U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 20, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018), https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf.

Therefore, Ms. Q. and J. are likely to succeed on their claim that the Government has violated their substantive due process rights to be free from torture and/or other cruel, inhuman and degrading treatment. The Government used an intentional, punitive, and unconscionable policy of separation of parents from their children as a means of inflicting pain under color of law on Ms. Q. and J. in order to deter them and others from attempting to immigrate to the United States.

3. The Government has failed to provide Ms. Q. with even basic procedural due process to combat the Government's refusal to reunite her with her child.

Ms. Q. has been denied procedural due process to counter the Government's specious assertion that she cannot be reunited with her son or placed in a family residential center with him because of an unsubstantiated foreign warrant. The Government may not separate a parent from her child absent a clear demonstration that the parent is a threat to the child's safety in some way.

See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("[T]he Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." (internal quotations omitted) (alterations omitted)); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) ("We do not question the assertion that neglectful parents may be separated from their children. But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents."); *United States v. Loy*, 237 F.3d 251, 269–70 (3d Cir. 2001) ("[W]here there is insufficient evidence to support a finding that children are potentially in danger from their parents, the state's interest cannot be said to be 'compelling,' and thus interference in the family relationship is unconstitutional.").

The Government may only take away Ms. Q. and J.'s liberty interests in being together by "due process of law." U.S. Const. amend. V. The process that is "due" turns on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). All three factors point strongly in Ms. Q.'s favor. *First*, her private interest in looking after the wellbeing of her child, a four-year-old whose emotional state is deteriorating by the minute, is beyond doubt. *Second*, the procedures employed by the Government have been inadequate and virtually non-existent. *Third*, whatever purported interest the Government has in unfettered discretion to separate detainees with an alleged "criminal

history" from their children to protect others can be addressed through only negligible "burdens that the additional [] procedural requirement would entail" because Ms. Q. does not pose a threat to her son, others in detention, or the community at large. (*See* Ex. 2 to Koop Decl. at 3 ("The Court finds that [Ms. Q.] is not a danger to the community."); *see also id.* at 3–4 (the immigration court did not find Ms. Q. to be affiliated with a gang, nor did he apply any of the crime or national security-related bars to asylum).)

The Government has offered Ms. Q. no explanation and no supporting evidence as to why it believes that single specious foreign warrant constitutes sufficient "criminal history" to prove Ms. Q is a danger to her child or others, and why the Government has ignored the Immigration Court's finding that Ms. Q. poses no such danger. Moreover, the Government has provided no process for Ms. Q. to challenge these findings or the nature of the warrant upon which it has relied to separate Ms. Q. from her four-year-old.

If given the opportunity to challenge the warrant the Government has used as an unsubstantiated pretextual basis for separating her from her son, Ms. Q. could show the Salvadoran warrant was issued under conditions that fell well short of any U.S. Constitutional standard of due process. U.S. warrants require probable cause. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)) ("'The substance of all definitions of probable cause is a reasonable ground for belief of guilt' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized"); *see also Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 564 (1971) (observing that "[t]he decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant"). A

"mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause" will not support a warrant; rather, the magistrate must have a "substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (citing *Nathanson v. United States*, 290 U.S. 41 (1933)). Here, the record in El Salvador shows that the warrant was not substantiated by sufficient evidence, and every one of the six defendants who were able to appear at the preliminary hearing on Ms. Q.'s charge were able to secure release and dismissal based on the prosecutor's failure to meet the evidentiary burden. (Ex. 1 to Koop Decl.; Palacios Decl. ¶¶ 3–5.) Once Ms. Q. is given the opportunity to challenge the warrant through her counsel, her attorney will finally be able to show the lack of any substantiating evidence for the charge and have it dropped. (See Ex. 1 to Koop Decl.; Palacios Decl. ¶¶ 3–5, 7.)

Moreover, the Fourth Amendment would also require that a criminal warrant be issued by a "neutral and detached magistrate," supported by probable cause under oath or affirmation, and describe with particularity the areas to be searched or the things or people to be seized. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). By U.S. standards, the Salvadoran warrant lacks any particularity by failing to provide the dates of Ms. Q.'s alleged membership in a "terrorist organization," which terrorist organization she was a member of, and the nature of her alleged activity and contains numerous inconsistencies and handwritten modifications. It makes no reference to other supporting evidence or documentation. While ambiguity or reasonable mistakes do not doom a warrant, this is not a "mere technical mistake or typographical error." *Id.* at 558. Rather, by U.S. standards, "even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 564. Reliance on a warrant that wholly fails

to conform with the particularity requirement violates the Fourth Amendment, *see Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984), and it is clear that the Salvadoran warrant lacks any such particularity.

Ms. Q. has been denied any opportunity or means to procedurally challenge the Government's improper reliance on the unsubstantiated Salvadoran warrant. The speciousness of the Government's effort to tie Ms. Q. to a gang through the warrant and refusal to allow Ms. Q. to challenge its validity demonstrates that the warrant merely serves as useful pretext and is not a legitimate reason to keep Ms. Q. separated from her son.

4. The Government's Continued Separation of Ms. Q. From Her Son Violates the APA Because its Decision is Arbitrary, Capricious, an Abuse of Discretion, and Unsupported by the Record.

Courts must "set aside" an agency decision that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this standard, "[t]o survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 69, 74–75 (D.C. Cir. 2012) (holding that State Department action "was arbitrary and capricious for want of reasoned decisionmaking" because the State Department "failed to provide any coherent explanation for its decision"). A reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30–31 (1983) (government "failed to present an adequate basis and explanation"). And the agency must adequately explain its decision. *Fogo de Chao (Holdings) Inc. v U.S. Dept. of Homeland Sec.*, 769 F.3d 1127, 1142 (D.C. Cir. 2014) (holding that the U.S. Citizenship and Immigration Service's decision to deny a L-1B visa "on the given rationale that cultural knowledge is categorically irrelevant to 'specialized knowledge'" within the meaning of the

Immigration and Nationality Act was arbitrary and capricious "without a more reasoned explanation from the agency").

Ms. Q. is likely to succeed on the merits of her claim that the Government's decision to separate her from her toddler son J., and to continue that separation for seven months, is arbitrary, capricious, an abuse of discretion and unsupported by the record. At base, the Government claims that the unsubstantiated warrant from El Salvador is "criminal history" that disqualifies her from reunification from her four-year-old son. The fact that Ms. Q. "may be subject to some form of immigration detention does not explain why she must be detained separately from her son[]." *Jacinto-Castanon*, 319 F. Supp. 3d at 501. But the Government has refused to even reunite Ms. Q. with J. in detention because of its professed "broad discretion to exclude from [ICE Family Residential Centers] individuals whose criminal history or other factors raise any concern about safety to others housed there." *Ms. L.*, ECF No. 223, at 7. The Government failed provided any policy, or articulated any methods, guidelines, or practices it uses to make the determinations that parents must be separated from their children based on a purported "criminal history" or "any concern about safety." When subjected to even cursory scrutiny, the Government's ongoing separation of Ms. Q. is arbitrary, illegal, and rooted in pretext.

First, the Government has no actual basis to believe Ms. Q. presents a danger sufficient to separate her from her child. Under Texas law—where Ms. Q. and J. were separated and where Ms. Q. is currently detained—an arrest warrant without any evidence of abuse, abandonment, or neglect, would not lead to the temporary removal of a child or the permanent termination of parental rights. *See*, *e.g.*, Tex. Fam. Code, Title 5, §§ 161.001(b), 262.104. Under Illinois law, where J. is currently detained, a parent's rights will only be terminated if the child is abandoned,

subjected to cruelty, abused, neglected or if the parent is convicted of murder, heinous or aggravated battery of a child, or sexual assault of a child. 750 Ill. Comp. Stat. § 50.

Ms. Q. has never been convicted or even tried in any criminal case, either in the United States or El Salvador. The unsubstantiated, procedurally deficient foreign warrant is not "criminal history" and the Government's vague "concern" is completely unsupported. An immigration judge has already concluded in the face of the warrant that Ms. Q. "is not a danger to the community." (Ex. 2 to Koop Decl. at 3.) The Government provides no support for claiming she would be a danger to others in detention – she has been detained for seven months without incident, (Ms. Q. Decl. ¶ 39), and certainly no basis to claim she is an unfit mother.

Second, the facts surrounding the untested and factually dubious foreign warrant highlight the arbitrary and capricious nature of the Government's decision to separate Ms. Q. from J. in sole reliance on that warrant. The warrant contains no facts, dates, times, or places about the alleged criminal activity Ms. Q. allegedly engaged in, nor does not reflect any showing of probable cause or evidentiary support for the allegation. (See Ex. 1 to Koop Decl.) An immigration judge in San Antonio, Texas, evaluated the warrant and determined that it was not a basis to find Ms. Q. a danger to the community and not a basis to apply any of the criminal bars to asylum. (*See* Ex. 2 to Koop Decl. at 3.) He further found credible Ms. Q.'s testimony that she never engaged in criminal activity and has never been affiliated with a gang. (Koop Decl. ¶ 12.)

Now that Ms. Q.'s attorney, Mr. Palacios, has examined the Salvadoran record, he has determined that all six of the nine individuals aside from Ms. Q. that appeared at the joint June 2018 preliminary hearing secured immediate release after the hearing and had the charges against them suspended because the prosecution failed to meet its evidentiary burden. (Palacios Decl. ¶¶ 3–5.) Given the total lack of evidence against Ms. Q. in the record in El Salvador, Ms. Q.'s counsel

is merely awaiting the opportunity to secure the same dismissal after a hearing is scheduled. (Palacios Decl. ¶¶ 7.) But despite the immigration judge's determination and the state of the record in El Salvador, the Government has touted its unfettered discretion to separate Ms. Q. and her son based on the unsubstantiated foreign warrant. *Ms. L.*, ECF No. 221, at 6–7.

The Government has yet to articulate whether or how the unsubstantiated warrant provides sufficient basis for detention or provide any support for other facts it has claimed regarding the Salvadoran government's supposed interest in capturing Ms. Q. Continued reliance by the Government on an obviously dubious and defective warrant is arbitrary. *See also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (finding that government action is arbitrary when "the agency . . . gave almost no reasons at all" for its decision); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 10 (D.C. Cir. 2016) (reversing government action because it failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (quoting *State Farm*, 463 U.S. at 43); *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 613, 618 (S.D.N.Y. 2018) (granting preliminary injunction in challenge to ORR policy regarding release of detained immigrant minors where there was "no indication whatsoever of what facts or factors should be considered in making [the] decision" and where the agency action was "instituted based on 'the personal preferences of the decisionmakers'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 548(2009). Indeed, in addition to finding that Ms. Q. is not a danger to the community, an Immigration Judge also found that she is not a threat to national security. (See Ex. 2 to Koop Decl. at 3 ("None of the evidence in the record indicates that Respondent would pose a threat to national security or a danger to the community at large.").)

Further, the Salvadoran government is notoriously indiscriminate in its effort to crack down on gang activity, causing many innocent citizens to be caught in the dragnet of the government's

anti-gang operations. (*See* Rikkers Decl. ¶ 8.)[5] The government's "iron fist" efforts have resulted in many Salvadorans being mislabeled as gang members, or worse. *See* Nina Lakhai, *'We fear soldiers more than gangsters': El Salvador's 'iron fist' policy turns deadly*,' GUARDIAN (Feb. 6, 2017, 6:00 EST), https://www.theguardian.com/world/2017/feb/06/el-salvador-gangs-police-violence-distrito-italia ("The government's promise to apply a mano dura ('iron fist') policy against gangs seems to have become a shoot-to-kill policy under which anyone living in a gang-controlled neighbourhood risks falling victim to extrajudicial violence.").[6] The Salvadoran government has designated MS-13 and Barrio 18 as terrorist organizations, such that anyone the government accuses of association or membership in a gang—like they have done to Ms. Q.—is accused of terroristic activities. *See INL Work by Country, El Salvador*, U.S. DEP'T STATE (Sept. 4, 2018), https://www.state.gov/j/inl/regions/westernhemisphere/219166.htm.[7] But, as described in detail above, Ms. Q. is not and never has been involved with gangs in any capacity. To the extent the vague and unsupported warrant has any probative value at all, it is evidence of why Ms. Q. has a strong claim for asylum, not of any history of criminality.

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[5] Jeanne Rikkers was qualified as a country conditions expert in El Salvador in Ms. Q.'s asylum merits hearing; DHS did not object. (Koop Decl. ¶ 8.)

[6] *See also* Azam Ahmed, *'They Will Have to Answer to Us*', N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/magazine/el-salvador-police-battle-gangs.html (detailing police going into homes and harassing people and "registering" them through photographing and taking their information); Sarah Esther Maslin, Fred Ramos, & Gabriela Martinez *'What we have now is a civil war'*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/sf/world/2016/10/28/el-salvadors-conflict-with-gangs-is-beginning-to-look-like-a-war/?utm_term=.5b088f804edf ("El Salvador's hostilities appear to be taking on a dangerous new dimension. . . . Soldiers and police are being linked to human rights abuses and assassinations . . . .").

[7] *See also* U.N. High Commissioner on Refugees, Reflaw, *El Salvador: Anti-gang law enforcement efforts, including anti-gang legislation (2011-2015)* (Sept. 2, 2015), http://www.refworld.org/docid/560b855e4.html (discussing the Attorney General's aim to prosecute gang crime as terroristic acts); Ahmed, *supra.*

The Government has facilities designed specifically to house families together, not to mention non-governmental shelters that exist for this purpose, as well as alternative to detention programs like ankle monitoring and check-ins to mitigate any flight risk. There is no suggestion that Ms. Q. is an unfit caretaker or that she is a danger to the community around her—quite the opposite in fact, based on the immigration judge's finding—so the Government's continued refusal to reunite Ms. Q. with her son is arbitrary, capricious, an abuse of discretion, and unsupported by the record.

B. Ms. Q. and J. Have Experienced, and Continue to Experience, Irreparable Harm, Which Reunification Will Mitigate.

To establish the existence of irreparable harm, a party must demonstrate that the injury "is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (emphasis omitted) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury must also be "both certain and great; it must be actual and not theoretical." *Id.* (quoting *Wisconsin Gas*, 758 F.2d at 674). Finally, the injury must be "beyond remediation." *Id.*

Courts have recognized "the 'major hardship posed by needless prolonged detention'" which is "particularly harmful to minor children." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). In fact, this Court recently determined that a similar set of circumstances easily satisfies the standard for pleading irreparable harm. *See Jacinto-Castanon*, 319 F. Supp. 3d at 502–03. Ms. Q. and J.'s separation and ongoing detention for seven months has caused irreparable and profound harm.

In this Circuit, the deprivation of a constitutional right constitutes irreparable harm. *See Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("[L]oss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

(internal quotations omitted)). Here, the government's interference with Ms. Q. and J.'s constitutional right to family integrity, coupled with their loss of liberty in detention, amounts to ongoing, irreparable harm.

The irreparable harm began when government officers forcibly and traumatically separated Ms. Q. and J. When they entered the United States, Ms. Q. and J. were held in a CBP holding cell akin to a cage. (*See* Ms. Q. Decl. ¶ 21.) J. became sick and was vomiting. (*Id.* ¶ 27.) Nonetheless, officers took J., who was sleeping, from Ms. Q.'s arms. *Id.* ¶ 72. He awoke and said "mama," but Ms. Q. was quickly ushered away. (*Id.*) Soon after, Ms. Q. was lined up with other immigrants to be transported to the Laredo Processing Center. (*See id.* ¶ 28.) On her way out, Ms. Q. saw J. sitting alone in a cage. (*Id.*) He was looking around, as if trying to find her. (*Id.*) Ms. Q. tried to hide herself so that J. would not be frightened by seeing the officers take her away. (*Id.*) This was the last time Ms. Q. saw her son.

Following that traumatic separation, the irreparable harm has continued through their seven months of separation and detention. Unlawful detention alone constitutes irreparable harm as a matter of law. *See, e.g.*, *R.I.L.-R*, 80 F. Supp. 3d at 191 (holding that class action plaintiffs in immigration detention were suffering irreparable harm because the harm from detention "cannot be remediated after the fact"); *Ramirez v. ICE*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (finding in a class action involving the detention of immigrant teens, "deprivations of physical liberty are the sort of actual and imminent injuries that constitute irreparable harm").[8] But here, the equities at

[8] Further, in cases involving adult immigrant detainees, courts have regularly recognized as an irreparable harm "the negative physical and mental effects" of ICE detention, the "subpar medical and psychiatric care" detainees receive in ICE detention facilities, and the "economic burdens imposed on detainees and their families as a result of detention," separately constitute irreparable harm. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 955 (9th Cir. 2017) (finding irreparable harm where plaintiffs were detained and highlighting the "irreparable harms imposed on anyone subject to immigration detention," including "subpar medical and

stake—the separation and detention of a mother and her four-year-old child, the interference with the parent-child relationship, and its effects on both Ms. Q. and J.'s physical and mental health—makes the irreparable harm all the more profound. Indeed, the AAP has warned that the longer a child is separated from a parent, the more likely the child will experience depression and anxiety. *See* APA Letter to John F. Kelly, Former Sec'y, U.S. Dep't of Homeland Sec. (Apr. 5, 2017), http://www.apa.org/advocacy/immigration/separating-families.pdf; Kraft, *supra*.

Sadly, this has been the case for J. Once toilet-trained, he has reverted to having to wear diapers after repeatedly having accidents. (Ex. 4 to Koop Decl. at 3; *see also* Ms. Q. Decl. ¶ 34.) He is also suffering from developmental delays, and a psychiatrist has diagnosed him with a mild expressive and receptive language disorder. (Ex. 4 to Koop Decl. at 3.) A federally appointed child advocate from the University of Chicago's Young Center for Immigrant Children's Rights has recommended that J.'s best interest is to be reunified with his mother, especially given his J.'s high level of anxiety, speech difficulties and ongoing concerns regarding his health and well-being outside the nurturing presence of his mother. (Ex. 3 to Koop Decl. at 2–3.)

J.'s symptoms are consistent with the medical literature, which warns of lasting physical and psychological effects of separation form a parent. A report from the AAP found:

> Studies of detained immigrants, primarily from abroad, have found negative physical and emotional symptoms among detained children, and posttraumatic symptoms do not always disappear at the time of release. Young detainees may experience developmental delays and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.

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psychiatric care in ICE detention facilities" and the "economic burdens imposed on detainees and their families as a result of detention."); *Abdi v. Duke*, No. 17-0721, 2017 WL 5599521, at *22 (W.D.N.Y. Nov. 17, 2017) (finding that petitioners had established irreparable harm "through the negative physical and mental health effects of prolonged detention").

> Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.

Julie M. Linton, Marsha Griffin, Alan J. Shapiro & Council on Community Pediatrics, *Detention of Immigrant Children*, AAP NEWS & J. GATEWAY (March 2017), http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.[9]

The separation has also caused significant harm to Ms. Q. She has had trouble sleeping and cannot stop thinking about her son. (Ms. Q. Decl. at ¶ 35.) In the past few weeks, the stress and anxiety of the separation have manifested more severely in physical symptoms. On September 3, 2018, Ms. Q. had an anxiety attack. (*See id.*) Her blood pressure rose, her lips got swollen, and

[9] In *Ms. L.*, plaintiffs submitted declarations from nine medical and mental health professionals—including pediatricians, psychiatrists, psychologists, and social workers—which detail the significant psychological and physical harms that a child faces when forcibly separated from a parent. *See* Pls.'s Am. Mot. for Prelim. Inj., *Ms. L.*, ECF No. 21-1 at Ex. 1 [Oo and Schmidt Decl.] (stating that "[s]eparation from a parent can lead to a significant deterioration in mental and physical health," where "children remain in a constant state of fear and worry regarding the well-being of their parent, which can affect their concentration, sleep, social engagement, and overall functioning," and can "often lead to decreased academic performance and social difficulties"); *id.* at Ex. 2 [Pena Decl.] (explaining that "[s]eparation from the primary caregiver causes damaging ruptures in the attachment trajectory of [separated] children"); *id.* at Ex. 3 [Griffin Decl.] (attesting that "the separation of a child from a loving parent places a child at risk for the long-term serious impacts of toxic stress," which can "damage the developing brain and is associated with subsequent development of physical health problems such as diabetes and heart disease, mental health problems, behavioral problems and school failure"); *id.* at Ex. 4 [Carter Decl.] (stating that "[f]orcibly separating a child from their parent is nothing short of overwhelming and deleterious to their well-being—emotionally, physically, and spiritually," which can "create permanent harm that influences them for the remainder of their lifespan"); *id.* at Ex. 5 [Linton Decl.] (stating that "[s]eparation of children from parents . . . is indisputably harmful to children"); *id.* at Ex. 6 [Shapiro Decl.] (noting that "[f]amily separation is not only ineffective as a proposed deterrent strategy but also egregiously harmful to the welfare of children and their parents"); *id.* at Ex. 7 [Fortuna Decl.] (concluding that "separating children from their parents has a real and substantial risk of leading to long-term (and irreversible) physiological, developmental and psychological problems"); *id.* at Ex. 8 [Melikian Decl.] (stating that "[s]eparating asylum-seeking parents and their children . . . perpetuates extreme emotional destabilization and purposeful neglect of th[e] child's basic needs").

she was trembling. (*Id.*) On October 4, 2018, she experienced numbness in her arm and heart palpitations. (*See id.* ¶¶ 35–36.)[10]

"Unlike economic harm, the harm from detention pursuant to an unlawful policy cannot be remediated after the fact." *R.I.L-R*, 80 F. Supp. 3d at 191. To this day, Ms. Q. remains detained in Laredo, Texas, and J. remains at an Office of Refugee Resettlement shelter for unaccompanied children in Chicago, Illinois. Ms. Q. has several independent and proper grounds for appeal of her asylum claim, which could take several months or more. In the interim, she and her son should be reunited to mitigate the ongoing irreparable harm they are suffering. The harm of their separation is real, imminent, and irreparable, and will continue until they are reunited.

C. The Balance of Equities and the Public Interest Supports Immediate Reunification of Mother and Son.

When ruling on a preliminary injunction motion, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation omitted). And it must "pay particular regard for the public consequences in employing" injunctive relief. *Id.* (internal quotation omitted). Where the government is the defendant, the analysis of these two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, the constitutional liberty interest of "parents in the care, custody, and control of their children[,] is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel*, 530 U.S. at 65. Ms. Q. requests the Court grant the requested injunction to uphold

[10] The government has done little to mitigate the irreparable harm, including failing to facilitate regular communication between Ms. Q. and J. In total, Ms. Q. and J. have only spoken on the phone around 10 times in seven months, and have not had any video calls. (*See* Ms. Q. Decl. ¶ 33.) On recent calls, J. has been confused and angry and has not recognized his mother's voice. (*Id.* ¶ 34.)

her right to family integrity and association while her immigration proceedings are underway. This right, specifically, the relationship between parent and child, is "constitutionally protected" and well established. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (collecting cases). Indeed, "'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)*; see also Franz*, 707 F.2d at 595 ("Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship.").

The relief requested here would cause no injury to Defendants, since a government agency "cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R*, 80 F. Supp. 3d at 191 (quoting *Rodriguez*, 715 F.3d at 1145. And courts in this District have recognized that "[t]he public interest is served when administrative agencies comply with their [statutory] obligations," *id.*, and there is no reason to find otherwise with respect to constitutional obligations. *See also Ramirez*, 310 F. Supp. 3d at 33 (holding while the government has "substantial discretion in the area of immigration," it cannot exercise that discretion in violation of law). Moreover, the Government would be unaffected by issuance of the requested injunction, since it would continue to be free to prosecute border crossers and institute immigration proceedings against non-citizens if an injunction is issued. *See Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (declaring that a state "registers no gain towards its goals when it separates children from the custody of fit parents" (internal quotation omitted)).

Given the ongoing, and irreparable harm that continues to grow daily, the balance of harms and public interest militate strongly in favor of immediately reuniting Ms. Q. and her toddler son.

V. CONCLUSION

Because all relevant considerations weigh heavily in Plaintiffs' favor, a preliminary injunction is warranted. Plaintiffs therefore request that the 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. Plaintiffs further respectfully seek a hearing on this application in seven days, or at a date set by the Court no later than within 21 days.

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Respectfully submitted,

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** Indigent client certification per Local Rule 83.2(g)* forthcoming