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16 **UNITED STATES DISTRICT COURT**
 17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 Ms. L. et al.,

19 *Petitioners-Plaintiffs,*

20 v.

21 U.S. Immigration and Customs Enforcement
 22 (“ICE”); U.S. Department of Homeland Security
 23 (“DHS”); U.S. Customs and Border Protection
 24 (“CBP”); U.S. Citizenship and Immigration
 25 Services (“USCIS”); U.S. Department of Health
 26 and Human Services (“HHS”); Office of
 27 Refugee Resettlement (“ORR”); Thomas
 28 Homan, Acting Director of ICE; Greg
 Archambeault, San Diego Field Office Director,
 ICE; Joseph Greene, San Diego Assistant Field
 Office Director, ICE; Adrian P. Macias, El Paso
 Field Director, ICE; Frances M. Jackson, El Paso
 Assistant Field Office Director, ICE; Kirstjen
 Nielsen, Secretary of DHS; Jefferson Beauregard
 Sessions III, Attorney General of the United
 States; L. Francis Cissna, Director of USCIS;
 Kevin K. McAleenan, Acting Commissioner of

Case No. 18-cv-00428-DMS-MDD

Date Filed: April 20, 2018

**PLAINTIFFS’ OPPOSITION
 TO DEFENDANTS’ MOTION
 TO DISMISS (Doc. #56)**

Hearing Date: May 4, 2018

Time: 1:30 p.m.

Courtroom: 13A

Judge: Dana M. Sabraw

1 CBP; Pete Flores, San Diego Field Director,
2 CBP; Hector A. Mancha Jr., El Paso Field
3 Director, CBP; Alex Azar, Secretary of the
4 Department of Health and Human Services;
5 Scott Lloyd, Director of the Office of Refugee
6 Resettlement,

Respondents-Defendants.

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INTRODUCTION

1
2 The amended complaint alleges that Defendants have a nationwide practice
3 of taking children away from their parents without a legitimate justification, much
4 less a showing that the parent is endangering the child. Defendants offer a kitchen
5 sink of justiciability arguments, but none is correct. On the merits, what is most
6 striking about Defendants' position is the shifting rationales they offer in an effort
7 to retroactively justify their "gratuitously cruel" practice. Washington Post
8 Editorial (March 4, 2018).¹

11 In the initial stages of this case, Defendants focused on the possibility that
12 Ms. L. and others were not actually the parents they claimed to be, and that it was
13 therefore necessary to separate the children for their own sake. In their motion to
14 dismiss, however, Defendants relegate this argument to a footnote, presumably
15 because it is plain that there are multiple, easy ways to verify parentage, including a
16 quick DNA swab (as this Court noted during the first status conference). Now,
17 Defendants seek to pin the blame on *Congress* and argue that the Trafficking
18 Victims Protection Act (TVPRA) *mandates* the separation of families. But nothing
19 in the TVPRA's text supports that argument. Moreover, the purpose of the TVPRA
20 was to *help* children; it would be perverse to read the statute as requiring
21 Defendants to inflict traumatic harm on children by tearing them away from their
22 parents. Most importantly, the TVPRA has been in existence for years and the
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28 ¹ *Gratuitous Cruelty by Homeland Security: Separating a 7-Year-Old from Her Mother*, Wash. Post, Mar. 4, 2018.

1 government has routinely detained parents and children together in family
2 immigration detention centers. Thus, the government itself has never understood
3 the statute to mandate family separation.
4

5 Ultimately, the government falls back on the remarkable argument that
6 Plaintiffs do not have a due process right to the integrity of their families, and that
7 the government therefore need not provide any meaningful justification for its
8 practice. But due process has long been understood to require not just a
9 justification, but a strong justification for separating a parent and child, especially
10 children of a tender age. Here, the government has not offered even a remotely
11 persuasive justification for declining to use the facilities that exist for detaining
12 families together. The government should not be permitted to insulate its practice
13 from judicial scrutiny and from any factual development. The motion to dismiss
14 should be denied.
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18 **BACKGROUND**

19
20 Throughout the last year, DHS officials have publicly stated that they were
21 considering a policy to separate families of asylum seekers at the border. The
22 administration explained that it believed separating families would deter others
23 from coming to the United States. Am. Compl., ECF No. 32, ¶ 34b²; *see infra* n.12
24 (collecting public statements). As it turns out, the government *has* been separating
25 hundreds of parents from their children as a matter of practice, even if it has chosen
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28 ² The amended complaint lists paragraphs 33 and 34 twice. To distinguish them, this filing refers to those four paragraphs as 33a, 34a, 33b, and 34b.

1 not to label it a “policy.” Am. Compl. ¶ 4, 31-32, 68; *see* Caitlin Dickerson,
2 *Hundreds of Immigrant Children Haven Been Taken from Parents at U.S. Border*,
3 N.Y. Times, Apr. 20, 2018 (administration officials confirming 700 family
4 separations since October, “including more than 100 children under the age of 4”).³
5 These separations serve no compelling (or even legitimate) governmental purpose,
6 as there is no allegation that the parents are unfit or otherwise pose a danger to their
7 children. *Id.* ¶ 31-32, 50-52, 61-63, 70. Separating children from their parents
8 causes devastating harm to both the parent and child, and may inflict long-term
9 psychological injuries on the children. *Id.* ¶ 33a. The practice has therefore been
10 widely condemned across the medical community. *Id.* ¶ 34a. It is also
11 unprecedented: No prior administration maintained a widespread practice of
12 forcibly separating migrant children from their fit parents. *Id.* ¶ 33b.

17 The named Plaintiffs’ experiences demonstrate how this practice plays out on
18 the ground. Ms. L. arrived at the border with her daughter, S.S., and asked to apply
19 for asylum. *Id.* ¶ 40. An asylum officer later determined that she had a credible
20 fear of persecution if she were sent back to the Congo. *Id.* ¶ 41. But Defendants
21 did not place Ms. L. with her daughter in one of its immigration family detention
22 facilities. Instead, Defendants took her then 6 year-old daughter away and shipped
23 her across the country to a separate facility in Chicago, where she celebrated her
24 seventh birthday without her mother. *Id.* ¶ 46. When they took her away, S.S. was
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28 ³ <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

1 frantically begging not to be separated from her mother. *Id.* ¶ 42-43. Defendants
2 did not tell Ms. L. why they were taking her daughter away, but after she filed this
3 lawsuit, they claimed that they were motivated by doubts about parentage (though
4 Defendants never communicated those doubts to Ms. L.). *See* ECF No. 28, at 2.
5 Defendants did not conduct a DNA test prior to separating Ms. L. and S.S., and
6 they did not conduct one during the four months prior to this lawsuit. Only after
7 Ms. L. filed a motion for preliminary injunction did Defendants conduct a DNA
8 test, which proved that S.S. is in fact Ms. L.'s daughter. ECF No. 44; Am. Compl.
9 ¶ 43. While they were separated, Ms. L. and S.S. suffered severe emotional
10 distress. *Id.* ¶ 46-48. Each time they spoke on the phone, S.S. was crying. *Id.* ¶ 43.

14 Ms. C., also an asylum seeker, arrived at the border with her 14 year-old son,
15 J. Am. Compl. ¶ 54. Ms. C subsequently passed a credible fear asylum interview.
16 *Id.* ¶ 55. Despite being an asylum seeker, Ms. C. was prosecuted for the
17 misdemeanor of illegal entry, for which she served 25 days. *Id.* ¶ 55-56; *see* 8
18 U.S.C. § 1325. The government took Ms. C.'s son away from her while she was in
19 jail for illegal entry, but instead of reuniting them once Ms. C. returned to ICE
20 custody, the government has kept her separated from her son for 6 months and
21 counting. Am. Compl. ¶ 58. Ms. C. and J. are suffering severe emotional
22 consequences because of their prolonged separation. *Id.* ¶ 58-60.⁴

27 _____
28 ⁴ After the complaint was filed, the government released Ms. C. on April 9, 2018,
but she has not yet been reunited with her son, who remains detained in Chicago.

ARGUMENT

I. THE CASE IS JUSTICIABLE.

A. Ms. L.'s Claims Are Not Moot.

The government is incorrect that Ms. L.'s claims are moot. MTD 6. Her reunification with S.S. was entirely the result of Defendants' voluntary cessation. Defendants could once again separate her from her child at any moment.⁵

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotation marks omitted). "[T]he party asserting mootness" bears a "heavy burden" to establish that "it [is] absolutely clear that the allegedly wrongful behavior could not" recur. *Id.* (quotation marks omitted). Defendants plainly cannot meet that burden. Ms. L.'s reunification with S.S. was the result of Defendants' own decision to end their separation before this Court could rule. And Defendants have not identified what would prevent them from re-detaining and separating Ms. L. and her daughter if this case were dismissed. In those circumstances, the voluntary-cessation rule ensures that the Court does not "leave

⁵ Even if Ms. L.'s individual claims were moot—which they are not—Plaintiffs' class claims would still remain justiciable. See *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142-43 (9th Cir. 2016) (holding that even if the named plaintiff's claims were moot, the plaintiff "still would be entitled to seek certification" because "certification relates back to the filing of the complaint") (quotation marks omitted). Here, reunification occurred after the filing of both the amended class complaint *and* the class certification motion.

1 the defendant free to return to his old ways.” *Id.* (quotation marks and alterations
2 omitted); *see EEOC v. FedEx Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) (no
3 mootness because defendant could “return to the challenged conduct at any time”).
4

5 Mootness is especially unwarranted where a defendant “continues to defend
6 the legality of” its voluntarily abandoned practice. *Knox v. SEIU, Local 1000*, 567
7 U.S. 298, 307 (2012); *see In re United States*, 791 F.3d 945, 952 (9th Cir. 2015) (no
8 mootness where defendant “continued to defend the practice’s legality”); *Armster v.*
9 *U.S. Dist. Ct.*, 806 F.2d 1347, 1359-60 (9th Cir. 1986) (no mootness where
10 “defendant failed to acknowledge illegality of conduct”). That is the case here,
11 because Defendants have never admitted that Ms. L.’s separation from S.S. was
12 illegal, and they continue to defend their nationwide separation practice, which
13 affects hundreds of other families. *See* MTD 10-21; Brané Decl., ECF No. 42-1,
14 Ex. 14, ¶ 5. Defendants cannot satisfy their “formidable burden” to establish that
15 separation cannot occur in the future. *Friends of the Earth*, 528 U.S. at 190.
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20 **B. Venue Is Proper for Ms. C. in This District.**

21 The government argues that Ms. C. cannot bring her claims in this district,
22 because at the time the complaint was filed she was detained in Texas. MTD 8-9.
23 But venue is undoubtedly proper as to Ms. L., who was detained and separated
24 from her daughter in this district, and the government has never argued otherwise.
25 And for suits against the government, “venue need be proper for only one plaintiff.”
26 *Railway Labor Execs.’ Ass’n v. ICC*, 958 F.2d 252, 256 (9th Cir. 1991); *Exxon*
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1 *Corp. v. FTC*, 588 F.2d 895, 898-99 (3d Cir. 1978) (“[R]equiring every plaintiff in
2 an action against the federal government or an agent thereof to independently meet
3 section 1391(e)’s standards would result in an unnecessary multiplicity of litigation.
4 The language of the statute itself mandates no such narrow construction.”);
5 *Californians for Renewable Energy v. EPA*, 2018 WL 1586211, at *5 (N.D. Cal.
6 Mar. 30, 2018) (same).
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9 The government suggests that this rule does not apply in class actions, MTD
10 7, but “[v]enue in a class action is governed by the same principles that apply in any
11 comparable action.” 7A Wright & Miller, Fed. Prac. & Proc. § 1757 (3d ed., Apr.
12 2017). The government provides no reason why the Ninth Circuit’s rule that
13 “venue need be proper for only one plaintiff” in suits against the federal
14 government should apply differently in a class action. *Railway Labor Execs.’*
15 *Ass’n*, 958 F.2d at 256 (citing *Exxon* with approval). Thus, in class actions against
16 the government, courts have affirmed venue when *any* named plaintiff satisfies
17 venue. *See, e.g., F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 814-15 (W.D. Wash. 2016)
18 (finding in class action that “venue is proper because at least one plaintiff resides in
19 Washington”); *Matsuo v. United States*, 416 F. Supp. 2d 982, 997 (D. Haw. 2006)
20 (same); *Garcia-Mir v. Civiletti*, 1981 WL 380696, at *4 (D. Kan. May 12, 1981)
21 (finding venue in class action and noting that “[t]here is no requirement . . . that
22 venue be proven to be independently proper for each named plaintiff”); *Holtzman v.*
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1 *Richardson*, 361 F. Supp. 544, 552 (E.D.N.Y. 1973) (same), *rev'd on other*
2 *grounds*, 484 F.2d 1307 (2d Cir. 1973).

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4 At bottom, the government misses that courts have uniformly given a “broad
5 interpretation” to the venue statute for suits against federal officials. *Sidney Coal*
6 *Co., Inc. v. SSA*, 427 F.3d 336, 345 (6th Cir. 2005). That interpretation “is not only
7 the majority view—it is the *only* view adopted by the federal courts” in the last four
8 decades. *Id.* (emphasis added, quotation marks omitted). Even in other contexts,
9 where courts have concluded that *different* venue statutes require each named
10 plaintiff to satisfy venue, courts have expressly distinguished suits against federal
11 officials under § 1391(e). For instance, in *Dukes v. Wal-Mart Stores, Inc.*, the
12 district court analyzed the issue at length and concluded that while every named
13 plaintiff needs venue under Title VII’s venue rules, the *opposite* rule applies under
14 § 1391(e). 2001 WL 1902806, at *6 (N.D. Cal. Dec. 3, 2001) (explaining that in
15 suits against the government, “the proposition that every plaintiff must satisfy
16 venue” has been correctly rejected).⁶

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22 ⁶ The government cites *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1193 (N.D. Cal.
23 2017), to suggest that *all* named plaintiffs independently need to establish venue in
24 a class action against the government. But *Saravia* ultimately concluded that *none*
25 of the named plaintiffs’ injunctive relief claims were properly venued under §
26 1391(e). *Id.* at 1191. *Saravia* therefore did not address this context, where one
27 named plaintiff (Ms. L.) indisputably has venue under § 1391(e). In any event,
28 *Saravia* ultimately rejected the government’s overall challenge to venue, 280 F.
Supp. 3d at 1193, and certified a nationwide class, *id.* at 1205. Here also, because
the Court has uncontested venue over Ms. L., it can certify a class regardless of
whether it concludes it has venue over Ms. C.

1 In any case, even if venue were not proper for Ms. C., the Court can hear her
2 claims under the doctrine of pendent venue. Ms. L.’s and Ms. C.’s legal claims are
3 “closely related”—indeed, almost identical. *McNeary-Calloway v. JP Morgan*
4 *Chase*, 863 F. Supp. 2d 928, 965 (N.D. Cal. 2012) (permitting additional plaintiff to
5 bring claims under pendent venue). And their claims “challenge one course of
6 conduct, carried out by various federal actors.” *Saravia*, 280 F. Supp. 3d at 1193.
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9 **C. The Court Has Habeas Jurisdiction Over Ms. C.’s Claims.**

10 The government does not dispute that the Court had habeas jurisdiction over
11 Ms. L. given that she was detained in this district. Critically, moreover, the
12 government does not contest that the court has jurisdiction over all the declaratory
13 and injunctive claims brought by Plaintiffs and the putative class under 28 U.S.C. §
14 1331. *See* MTD 8-9 (contesting habeas venue but not § 1331 jurisdiction). Thus,
15 regardless of whether the court additionally has habeas jurisdiction over Ms. C.’s
16 claims, it plainly has jurisdiction to reach all of the claims in this case.
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19 That said, Ms. C.’s habeas claim is properly before this Court under 28
20 U.S.C. § 2241.⁷ The government argues that the Court “does not have venue over”
21 Ms. C.’s habeas claim, because Ms. C. has not sued a respondent who has
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24 ⁷ Suits seeking both habeas and injunctive remedies are common, particularly in the
25 immigration context. *See, e.g., Chehazeh v. Att’y Gen.*, 666 F.3d 118, 125 (3d Cir.
26 2012); *Hernandez v. Lynch*, 2016 WL 7116611, at *1 (C.D. Cal. Nov. 10, 2016);
27 *see also Rasul v. Bush*, 542 U.S. 466, 479-85 (2004) (entertaining claims brought
28 under habeas and federal question statutes in same case); *Selgeka v. Carroll*, 184
F.3d 337, 342 (4th. Cir. 1999) (finding that the Court’s ability to hear the case was
“founded on 28 U.S.C. §§ 2241 and 1331”).

1 “custody” over her. MTD 7-8. But in the immigration context, courts have
2 recognized that supervisory officials are proper custodians for habeas purposes.
3 *See Armentero v. INS*, 340 F.3d 1058, 1069-70 (9th Cir. 2003) (not precedential),
4 *withdrawn on other grounds*, 382 F.3d 1153 (9th Cir. 2004) (“[A]s long as the
5 petitioner names as respondent a person or entity with power to release [the habeas
6 petitioner], a court should not avoid reaching the merits of his petition.”) (citing
7 *Dunn v. U.S. Parole Comm’n*, 818 F.2d 742, 744 (10th Cir. 1987)); *Bogarin-Flores*
8 *v. Napolitano*, 2012 WL 3283287, at *2 (S.D. Cal. Aug. 10, 2012) (holding that
9 “the Attorney General and the Department of Homeland Security” were “proper
10 respondent[s]”).⁸ In this case, Ms. C. has sued custodians who have full authority
11 to order her reunification with J., including the Secretaries of Homeland Security
12 and HHS, the Director of ICE, and the Director of ORR.

17 **D. The INA Does Not Bar Review.**

18 Defendants contend that no court can review their separation practice,
19 because review is precluded by 8 U.S.C. § 1252(a)(2)(B)(ii), which bars challenges
20 to a “decision or action . . . the authority for which is specified under this
21 subchapter to be in the discretion of” the government. MTD 12-14. Defendants
22 claim this jurisdictional provision applies to 8 U.S.C. § 1231(g)(1), which directs
23 that “[t]he Attorney General shall arrange for appropriate places of detention.” But
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26 ⁸ *See also Santos v. Smith*, No. 17-cv-0020, 2017 WL 2389722, at *8 (W.D. Va.
27 June 1, 2017); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 723-25 (D. Md. 2016);
28 *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1148 (D. Colo. 2013).

1 Defendants' own case rejected that very argument. *See* MTD 15 (citing *Aguilar v.*
2 *ICE*, 510 F.3d 1, 20-21 (1st Cir. 2007)) ("We reject the government's sprawling
3 construction [that] section 1252(a)(2)(B)(ii)" applies to § 1231(g)(1)).
4

5 Section 1252(a)(2)(B)(ii) does not apply to a statute "unless the statute
6 *explicitly* refers to the discretion of the Attorney General." *Delgado v. Holder*, 648
7 F.3d 1095, 1100 (9th Cir. 2011) (en banc) (emphasis added). In other words, the
8 statute must "contain[] language indicating that the decision is entrusted to the
9 Attorney General's discretion." *Kucana v. Holder*, 558 U.S. 233, 246 (2010). This
10 means that the statute must refer to the Executive's "sole and unreviewable
11 discretion," or otherwise specify that the decision is entirely discretionary. *Spencer*
12 *Enters., Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003); *see also Kucana*,
13 558 U.S. at 245-46 & nn.13-14 (describing types of statutes that are covered).
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17 Section 1231(g)(1) does not refer to the Attorney General's "discretion" or
18 contain any similar formulation. Just the opposite: It directs that "[t]he Attorney
19 General *shall* arrange for *appropriate* places of detention." 8 U.S.C. § 1231(g)(1)
20 (emphasis added). The statute thus fails to satisfy the clear criteria that are required
21 to invoke § 1252(a)(2)(B)(ii). *See Aguilar*, 510 F.3d at 20 (explaining that "section
22 1231(g) fails to 'specify' that individualized transfer decisions are in the Attorney
23 General's discretion"). In short, § 1252(a)(2)(B)(ii) "applies not to all decisions the
24 Attorney General is entitled to make, but to a narrower category of decisions where
25 Congress has taken the *additional* step to *specify* that the sole authority for the
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1 action is in the Attorney General’s discretion.” *Alaka v. Att’y Gen.*, 456 F.3d 88, 95
2 (3d Cir. 2006) (emphasis added).⁹

3
4 Moreover, even if § 1252(a)(2)(B)(ii) did generally apply to § 1231(g)(1),
5 Plaintiffs’ particular claims would still be reviewable, because “decisions that
6 violate the Constitution cannot be ‘discretionary’” and § 1252(a)(2)(B)(ii)
7 precludes review only of certain *discretionary* decisions. *Kwai Fun Wong v. United*
8 *States*, 373 F.3d 952, 963 (9th Cir. 2004) (holding that “constitutional or purely
9 legal” claims “are not barred by § 1252(a)(2)(B)”); *see Singh v. Holder*, 638 F.3d
10 1196, 1202 (9th Cir. 2011) (holding that § 1252(a)(2)(B)(ii) does not bar
11 “jurisdiction over questions of law”). Defendants have no discretion to adopt a
12 practice that violates the Due Process Clause or federal statutes.¹⁰

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16 ⁹ The government incorrectly cites pre-*Kucana* decisions stating that the Attorney
17 General generally has discretion to choose where to detain immigrants. MTD 13-
18 14. Plaintiffs do not dispute that the Attorney General has some discretion within
19 legal bounds regarding placement decisions. But as *Kucana* and *Delgado* make
20 clear, even where an official has discretion under a statute, § 1252(a)(2)(B)(ii) still
21 does not apply unless the statute explicitly specifies that discretion. Thus, a
22 “decision can still be discretionary without triggering § 1252(a)(2)(B)(ii)’s
23 discretionary review bar.” *Arbid v. Holder*, 700 F.3d 379, 384 (9th Cir. 2012).
24 Indeed, in *Kucana*, although the Supreme Court acknowledged that the BIA has
“broad discretion” over motions to reopen, the Court nonetheless held that
§ 1252(a)(2)(B)(ii) did not apply to motions to reopen because the statute’s terms
did not *expressly* provide for discretion. 558 U.S. at 838.

25 ¹⁰ For the same reason, contrary to the government’s argument (MTD 11-12), §
26 1252(a)(2)(B)(ii) does not bar legal claims challenging parole decisions. In any
27 event, the amended complaint does not seek an injunction ordering Defendants to
28 grant parole; rather, it seeks an injunction to *reunite* Plaintiffs with their children,
“either” by “detain[ing] them together in the same facility,” *or* by “releas[ing] class
members along with their children.” Am. Compl. at 12.

1 **E. The APA Does Not Bar Review.**

2 The government also asserts that, no matter how arbitrary, its decisions to
3 separate parents from their children are not subject to APA review, because such
4 decisions are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2); MTD
5 18.¹¹ Plaintiffs’ claims are not committed to agency discretion within the meaning
6 of the APA. Section 701(a)(2) is a “narrow exception to the presumption of
7 reviewability of agency actions,” and applies only “in those rare instances” when
8 “there is no meaningful standard against which to judge the agency’s exercise of
9 discretion.” *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003).
10 Meaningful standards can come from “statutes, regulations, established agency
11 policies, or judicial decisions.” *Id.* Here, there is a voluminous body of due
12 process decisions, statutes, and child welfare practices that supply standards for
13 when it is lawful to separate families. *See infra* Part II.A; Amicus Brief of
14 Children’s Rights Groups, ECF No. 17-3 (explaining standards). Moreover,
15 defendants themselves have long had a policy of detaining arriving families
16 together. Am. Compl. ¶ 33b. As the Ninth Circuit has held, even “an irrational
17 departure from established policy” is enough to defeat a § 701(a)(2) defense.
18 *Mendez-Gutierrez*, 340 F.3d at 868.
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¹¹ The government’s conclusory assertion—confined to a single sentence and a single unexplained citation—is insufficient to preserve this argument. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (“[A] bare assertion does not preserve a claim.”).

1 The one case the government cites proves the point. MTD 18. In *Webster v.*
2 *Doe*, 486 U.S. 592, 600 (1988), the Supreme Court held that the CIA Director’s
3 decision to terminate his employee was committed to unreviewable agency
4 discretion because the statute provided that the CIA Director “may, in his
5 discretion,” terminate CIA employees whenever he “shall *deem* such termination
6 necessary or advisable”—“not simply when the dismissal *is* necessary or
7 necessary or advisable”—“not simply when the dismissal *is* necessary or
8 advisable.” 486 U.S. at 600 (emphases in original) (quoting statute). In contrast,
9 § 1231(g)(1) does not allow the Attorney General to take any action he “deems”
10 appropriate; rather, it directs that he *shall* choose “places of detention” that *are*
11 “appropriate,” with no mention of discretion.
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14 **F. The Separation of Plaintiffs’ Families Is Final Agency Action.**

15 The government suggests that its separation practice is not “final agency
16 action” under the APA. MTD 19 (no citations); *see* 5 U.S.C. § 704. But the
17 government’s decision to separate families is not “merely tentative.” It is *already*
18 being carried out against the Plaintiffs and proposed class members. *Bennett v.*
19 *Spear*, 520 U.S. 154, 177-78 (1997). And separation has a “direct and appreciable”
20 impact on Plaintiffs’ “rights”—it takes away their basic right to family unity. *Id.* at
21 178. The government responds that it might one day reunite the Plaintiffs’ families,
22 MTD 19, but it does not deny that it has made a definitive decision to separate the
23 Plaintiffs from their children during their detention—a decision that will have
24 lasting and likely permanent consequences. Am. Compl. ¶¶ 33a, 34a; *see Doe v.*
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1 *Trump*, 2017 WL 6551491, at *13 (W.D. Wash. Dec. 23, 2017) (holding that
2 agency action was final because it “has significant real-world impacts,” regardless
3 of whether action is mere “suspension” or “indefinite”). The “possibility” that the
4 government eventually “may revise” its separation decisions “based on new
5 information” does not defeat finality. *U.S. Army Corps of Eng’rs v. Hawkes Co.,*
6 *Inc.*, 136 S. Ct. 1807, 1814 (2016). Indeed, if Defendants’ position were correct,
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8 parents and their young children could be separated whenever the government
9 chooses and no court could ever review the separation, because Defendants could
10 always say that the separation might eventually end. That extraordinary position is
11
12 not the law.
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14 **II. PLAINTIFFS HAVE STATED A DUE PROCESS CLAIM.**

15 **A. Plaintiffs Have Stated a Substantive Due Process Claim.**

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17 The Supreme Court has long recognized family integrity to be a core interest
18 protected by the Constitution. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753
19 (1982) (there is “a fundamental liberty interest of natural parents in the care,
20 custody, and management of their child”); *Troxel v. Granville*, 530 U.S. 57, 65-66
21 (2000) (plurality op.) (“[T]he interest of parents in the care, custody, and control of
22 their children [] is perhaps the oldest of the fundamental liberty interests recognized
23 by this Court.”) (collecting cases). Courts have thus been loath to allow the
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25 government to separate children from their parents (particularly children as young
26 as 7 years old), and have made clear that separation may not occur absent a clear
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1 demonstration that the parent is unfit or is otherwise endangering the child. *See,*
2 *e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“[T]he Due Process Clause
3 would be offended if a State were to attempt to force the breakup of a natural
4 family . . . without some showing of unfitness and for the sole reason that to do so
5 was thought to be in the children’s best interest.”) (quotation marks omitted);
6 *United States v. Loy*, 237 F.3d 251, 269-70 (3d Cir. 2001) (“[W]here there is
7 insufficient evidence to support a finding that children are potentially in danger
8 from their parents, the state’s interest cannot be said to be ‘compelling,’ and thus
9 interference in the family relationship is unconstitutional.”); *cf. Southerland v. City*
10 *of New York*, 680 F.3d 127, 152 (2d Cir. 2012).

14 **B. The Government’s Justifications for Its Separation Practice Are**
15 **Shifting and Unpersuasive.**

16 The government cannot even settle on a reason why it needs to subject
17 hundreds of families to this separation practice. In public statements over the last
18 year, DHS officials have said that they would start separating families as a way “to
19 deter” future asylum seekers and other families from coming to the United States.¹²
20

22 ¹² Rafael Bernal, *DHS Head Confirms He’s Considering Separating Families at*
23 *Border*, The Hill, Mar. 6, 2017, [http://thehill.com/latino/322608-dhs-head-](http://thehill.com/latino/322608-dhs-head-confirms-hes-considering-separating-families-at-border)
24 [confirms-hes-considering-separating-families-at-border](http://thehill.com/latino/322608-dhs-head-confirms-hes-considering-separating-families-at-border); *see also* Caitlin Dickerson
25 *& Ron Nixon, Trump Administration Considers Separating Families to Combat*
26 *Illegal Immigration*, N.Y. Times, Dec. 21, 2017,
27 <https://www.nytimes.com/2017/12/21/us/trump-immigrant-families-separate.html>;
28 *Daniella Diaz, Kelly: DHS Is Considering Separating Undocumented Children*
from Their Parents at the Border, CNN, Mar. 7, 2017,
[https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-](https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html)
[parents-immigration-border/index.html](https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html).

1 But after this lawsuit was filed, the government shifted to new justifications,
2 denying any claim that Plaintiffs' separations were motivated by "ulterior law
3 enforcement purposes," as such motives would be "antithetical to the child welfare
4 values of ORR." Opp. to PI Mot., ECF No. 46, at 3.¹³

6 Defendants have now offered a series of rationales to retroactively justify the
7 legality of their separation practice: (1) doubts about parental relationships; (2)
8 Congress has mandated family separation; and (3) the parents and children have no
9 due process right to be together. None of these rationales has merit.

11 **1. Any supposed doubts about parental relationships do not**
12 **justify the government's separation practice.**

13
14 The initial papers Defendants filed in this case largely sought to justify their
15 practice on the ground that separating parents from their small children was
16 necessary to ensure that children were not housed with adults who are not actually
17 the child's parents. Defendants thus represented that they took S.S. away "due to
18 ICE's suspicions about [Ms. L.'s] claim to be her mother." Opp. Mot. to Expedite,
19 ECF No. 28, at 2. Yet Defendants never told Ms. L. they harbored any doubts
20 about the relationship (assuming they actually did). And Defendants disregarded
21 obvious indications of parentage, including that S.S. was screaming for her mother
22 as she was taken away. Defendants also failed to perform a simple DNA test until
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26 ¹³ The government's shift is not surprising. If the purpose of separating families
27 were to deter legitimate asylum seekers by subjecting young children to this cruel
28 practice, the practice would clearly violate the Due Process Clause, which "at a bare
minimum" prohibits the government from punishing "an individual detained under
civil process." *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

1 more than *four months* after separating them (and only after this lawsuit was filed).
2 Am. Compl. ¶ 42-53.

3
4 Given that there are so many quick and effective tools to verify a parental
5 relationship, the government has, unsurprisingly, largely abandoned its parental
6 relationship argument, relegating it to a footnote. MTD 14 n.3. Indeed, the
7 government has never questioned that Ms. C. is the mother of her 14 year-old son.
8

9 **2. Family separation is not required by statute.**

10 Defendants now assert that federal statutes require them to separate parents
11 from their children, and that it is therefore *Congress*, not DHS, who bears
12 responsibility. MTD 4, 6, 10. Defendants' attempt to shift responsibility to
13 Congress is unpersuasive. For starters, Defendants' new justification contradicts
14 their own actions over the last decade, as well as their representations in this very
15 case. Defendants claim that, under the relevant statutes, they must separate every
16 detained parent and child. *See* MTD 10. But if that were true, no parent and child
17 could *ever* be detained together in family detention. Yet the government has been
18 detaining thousands of parents and children together in family detention for over a
19 decade. *See* Am. Compl. ¶ 35; MTD 14 n.3 (acknowledging that Defendants
20 maintain "family residential centers"). In fact, the government's own declarant
21 confirmed that parents and children "may be detained at a family residential center"
22 together. Ortiz Decl., ECF No. 46-1, ¶ 3.
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1 Not surprisingly, then, there is nothing in the relevant statutes that remotely
2 requires Defendants to separate young children from their parents. Defendants rely
3 on the TVPRA. 6 U.S.C. § 279; 8 U.S.C. § 1232. But the TVPRA seeks to *protect*
4 children. *See* H.R. REP. 110-430(I), 57 (TVPRA enacted to ensure “better care and
5 custody of unaccompanied alien children”). The same statute cannot be a
6 justification for *harming* children by subjecting them to the trauma of separation
7 from their parents. *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (“We cannot
8 interpret federal statutes to negate their own stated purposes.”).

11 The government points to 6 U.S.C. § 279(g)(2)(ii), which defines certain
12 children as “unaccompanied,” who must then be placed in ORR custody. MTD 10,
13 11; *see* 8 U.S.C. § 1232(b)(3). But “children who are apprehended by DHS while
14 in the company of their parents are not in fact ‘unaccompanied’ and if their welfare
15 is not at issue, they should not be placed in ORR custody.” *Bunikyte ex rel.*
16 *Bunikiene v. Chertoff*, 2007 WL 1074070, at *2 (W.D. Tex. Apr. 9, 2007) (quoting
17 House Approp. Comm., *Dep’t of Homeland Sec. Approp. Bill of 2006*, 109th Cong.,
18 1st Sess.); *id.* (“When detention of family units is necessary, the Committee directs
19 DHS to use appropriate detention space to house them together.”); *accord* H.R.
20 Rep. No. 110-430, § 236(h)(2), at 27 (Nov. 6, 2007) (a child need not be treated as
21 unaccompanied when her “parent is in [her] physical presence . . . at the time of
22 such child’s apprehension and during the child’s detention”).
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1 In short, Congress has not directed Defendants to separate parents and
2 children like Ms. L. and her 7 year-old daughter. Nor does the statute remotely
3 prevent Defendants from reuniting families like Ms. C. and her son J., who also
4 came to the United States together. Even if J. was validly sent to an ORR facility
5 while his mother spent 25 days in criminal custody for the misdemeanor of illegal
6 entry—which Plaintiffs do not challenge in this lawsuit—the government should
7 have reunited them once Ms. C. returned to ICE custody. No statute would have
8 prohibited that reunification. Indeed, in that situation, ORR’s “child welfare
9 values” undoubtedly allow it to do what due process and universal child welfare
10 practice require: reunite parents and children as soon as possible. *Opp. to PI Mot.*,
11 ECF No. 46, at 3.
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15 Moreover, even if a statute told them otherwise, Defendants would still be
16 required to follow the dictates of due process, because “no Act of Congress can
17 authorize a violation of the Constitution.” *Almeida-Sanchez v. United States*, 413
18 U.S. 266, 272 (1973). But nothing Congress has done remotely required DHS to
19 cause harm to children by separating them from their parents. Defendants’
20 retroactive attempt to find some explanation only underscores how arbitrary their
21 separation practice really is.
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25 **3. Plaintiffs have a due process right to remain together.**

26 The government adopts the fallback position that it need not offer a
27 legitimate justification for its separation practice because (in its view) Plaintiffs
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1 lack a due process right to be with their children. The cases on which the
2 government relies are inapposite. MTD 14-16. First, the government cites cases
3 involving challenges to a parent’s detention and transfer away from children who
4 were *not* themselves arrested and detained. *See, e.g., Milan-Rodriguez v. Sessions*,
5 2018 WL 400317, at *10 (E.D. Cal. Jan. 12, 2018) (stating that separation in such
6 circumstances is the “ordinary incident of immigration detention”); *Aguilar*, 510
7 F.3d at 22 (same). But even if those cases were rightly decided, the practice here is
8 not a necessary incident of detention; it is the result of an *unnecessary*
9 governmental action intended to separate family units who were arrested *together*,
10 and who are being detained far apart despite the availability of family detention
11 facilities that were specifically established to house families together. Similarly,
12 the government cites cases subordinating the right of family integrity to Congress’s
13 power to deport noncitizens, where courts have rejected a claim that the deportation
14 of a parent violates the constitutional rights of citizen children. *See, e.g., Gallanosa*
15 *by Gallanosa v. United States*, 785 F.2d 116, 120 (4th Cir. 1986). But Plaintiffs are
16 not contesting the grounds for their removal—only their treatment by the
17 government while they contest their removal.
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24 Defendants also cite cases where interference with family integrity was
25 justified by safety interests, and where the plaintiffs could identify no “obvious
26 regulatory alternative that fully accommodates the asserted right while not
27 imposing more than a *de minimis* cost to the valid penological goal.” *Overton v.*
28

1 *Bazetta*, 539 U.S. 126, 136 (2003); *see id.* at 126-27 (upholding restrictions on the
2 family visitation rights of sentenced prisoners because of “valid interests in
3 maintaining internal security and protecting child visitors from exposure to sexual
4 or other misconduct or from accidental injury”). Here, the government has claimed
5 no security rationale, and family detention centers provide a clear alternative to
6 separation.¹⁴
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9 Finally, Defendants assert that their practice of separating young children
10 from their parents does not “shock the conscience” and thus does not violate
11 substantive due process. MTD 17. That is not the test governing a challenge to a
12 practice of separating children. In any event, Plaintiffs easily meet this test. The
13 government’s decision to forcibly separate parents and children, in service of no
14 compelling or even legitimate purpose, clearly shocks the conscience. That is
15 abundantly illustrated by cases like Ms. L.’s. Not only was she separated from her
16 7 year-old daughter for months, but she had to listen to her daughter frantically
17 begging not to be taken away.
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21 **4. The government’s separation practice also violates Plaintiffs’**
22 **procedural due process rights.**

23 The government argues that Plaintiffs cannot state a procedural due process
24 violation because its separation practice violates no protected liberty interest. MTD
25 18. But, as set out above, the practice *does* implicate a substantive due process
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27 ¹⁴ Moreover, insofar as the government relies on criminal cases, that reliance is
28 misplaced for the additional reason that civil detainees have more rights than
criminal detainees. *See Jones*, 393 F.3d at 931-32.

1 interest. And it is uncontested that the government is separating families without
2 any process to determine whether the separation is justified by parental abuse,
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interest. And it is uncontested that the government is separating families without any process to determine whether the separation is justified by parental abuse, unfitness, or any other reason. Nor is there any question that process is critical. For example, had Defendants told Ms. L. that they had doubts about her parental relationship (assuming they genuinely did), an expeditious process was critical to inform Ms. L. of the doubts and allow her to request a DNA test.

III. PLAINTIFFS HAVE STATED AN APA CLAIM.

An agency action is arbitrary and capricious under the APA (1) if the agency has failed to provide a reasoned explanation, *Ctr. for Bio. Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008); (2) if its explanation is based on an erroneous legal premise, *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007); or (3) if the government fails to account for reasonable “alternative[s],” *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 48 (1983). The government argues its actions are not arbitrary and capricious because separation is required by statute. MTD 18-19. But, as explained above, Congress has not remotely required that families be separated. *See supra* Part II.A.2. Thus, because the legal premise underlying its actions is incorrect, its separation practice is necessarily arbitrary. *See Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018).

As importantly, the government has not even acknowledged or explained its change in policy from previous years, when there was no widespread separation of

1 families. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 51 (2009) (“An
2 agency may not . . . depart from a prior policy *sub silentio*” and “must show that
3 there are good reasons for the new policy.”). In addition to this failure to explain
4 its policy change, the government has failed to explain why it is not using the
5 available alternative of family detention. *State Farm*, 463 U.S. at 48. The
6 government’s shifting rationale is a classic example of arbitrary action.
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9 **IV. PLAINTIFFS STATE A CLAIM UNDER THE ASYLUM STATUTE.**

10 Noncitizens have “a statutory right to apply for asylum.” *Campos v. Nail*, 43
11 F.3d 1285, 1288 (9th Cir. 1994) (citing 8 U.S.C. § 1158(a)(1)). “That right may be
12 violated by a pattern or practice that forecloses the opportunity to apply,” *id.*, or that
13 “interfere[s] with plaintiff class members’ exercise of their right to apply.”
14 *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990) (upholding
15 permanent injunction against unlawful interference with opportunity to
16 meaningfully apply for asylum); *Orantes-Hernandez v. Holder*, 321 Fed. App’x
17 625, 626-27 (9th Cir. 2009) (refusing to dissolve the injunction); *Campos*, 43 F.3d
18 at 1287 (affirming an injunction against a practice that interfered with the statutory
19 right to apply for asylum: an immigration judge’s practice of denying transfer
20 motions to asylum seekers who had moved across the country).¹⁵
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27 ¹⁵ Because this claim is statutory, the government’s due process cases are beside the
28 point. MTD 20-21 (citing only due process cases); *see Campos*, 43 F.3d at 1288-89
(resolving impediment claim based on asylum statute, without due process).

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**Admitted Pro Hac Vice*

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed the foregoing with the Clerk for the United States District Court for the Southern District of California by using the CM/ECF system. A true and correct copy of this brief has been served via the Court’s CM/ECF system on all counsel of record.

/s/ Lee Gelernt
Lee Gelernt, Esq.