No. 18-15114

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ILSA SARAVIA, et. al.,

Plaintiffs-Appellees,

versus

JEFFERSON B. SESSIONS, III,
Attorney General of the United States, et. al.,

Defendants-Appellants.

On Appeal From the United States District Court
for the Northern District of California
The Honorable Judge Vince Chhabria
District Court Case No. 3:17-cv-03615-VC

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I. INTRODUCTION

Plaintiffs are a provisionally-certified class of noncitizen youths who came to the United States as unaccompanied children ("UCs") and were previously detained in the custody of the United States Office of Refugee Resettlement ("ORR"). ORR released each youth to a parent or other sponsor after concluding that release was in the youth's best interests and that the sponsor was "capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A).

In the spring of 2017, the Government began re-arresting the Class Members based on allegations of gang membership. ORR, disregarding its prior determinations that these youth were eligible for release, and uncritically accepting flawed allegations of gang affiliation, swiftly transferred them to secure juvenile facilities hundreds or thousands of miles away from their families. Before they were jailed, neither the youth, their families, nor their immigration lawyers were given prior notice of the charges against them or any opportunity to challenge their arrests. Their transfers were often effectuated in mere days, with lawyers and parents frantically contacting Government officers for information about their clients and children, only to discover that the youth had been transported across the country. Following

their arrests, Class Members spent months in ORR custody without a hearing to contest the basis for their detention.

The District Court's class-wide preliminary injunction (the "Order") correctly applied *Mathews v. Eldridge* and found that before engaging in such severe deprivations of liberty, the Government must provide re-arrested juveniles with a fair hearing before a neutral decisionmaker to contest the allegations against them. As the District Court found, "in the absence of a prompt adversarial hearing . . . there is a serious risk that minors who were appropriately placed with sponsors . . . will . . . erroneously be placed into ORR custody, and without an opportunity to obtain prompt relief." Order, Record Excerpts ("R.E.") at 34. The District Court's carefully-reasoned Order is supported by detailed factual findings based on an extensive evidentiary record.

Numerous Class Members have now received hearings pursuant to the Order. At these "*Saravia* hearings," an overwhelming majority—including the three Named Plaintiffs—have been released from detention after showing that they did not present a danger or risk of flight that warranted their continued detention. Absent preliminary relief, all these children would remain wrongfully detained.

On appeal, the Government does not dispute that the Class Members would suffer irreparable harm in the absence of an injunction; that the balance of hardships favors the Plaintiffs; or that the public interest supports a preliminary injunction. The Government raises only one question: Did the District Court correctly conclude that the Government violated Class Members' procedural due process rights? Appellants' Opening Br. ("Opening Br."), ECF (9th Cir.) 8, at 2. In support, it raises three arguments, none of which has merit.

First, the Government argues that the District Court failed to consider preexisting procedures available to unaccompanied children. To the contrary, the District Court expressly considered the preexisting system, as well as the substantial evidence documenting that system's numerous flaws, and rightly concluded that it was inadequate.

Second, the Government argues that the Order conflicts with the requirements of the Trafficking Victims Protection Reauthorization Act ("TVPRA"). To the contrary, the Order's safeguards *further* the TVPRA's purpose of ensuring that juveniles are placed "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). The Order is also entirely consistent with the TVPRA's sponsorship provisions because

every Class Member in this case has a sponsor whom ORR had *already* deemed suitable to take custody of and provide care for the Class Member. And nothing in the Order requires the Government to hold Class Members in the custody of United States Immigration and Customs Enforcement ("ICE") for longer than the 72 hours generally authorized by the TVPRA. Even if it did, the Government concedes that it could do so without violating the statute. Order, R.E. at 32; Opening Br. at 28 ("[T]he Government also can avoid violating the TVPRA . . . under the 'exceptional circumstances' exception to [8 U.S.C. § 1232(b)(3)]").

Third, the Government argues that the Order imposes "heavy" and "unnecessary" burdens on the Government. Not only does the Government overstate any burden it would suffer, but, as the District Court found, any minimal burden imposed is "reasonable in light of the government's asserted interests in public safety and welfare, including the welfare of the minor." Order, R.E. at 35.

For these reasons, this Court should affirm the District Court's Order.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The TVPRA was enacted in 2008 to protect unaccompanied immigrant minors from human trafficking and other criminal activity. *See* Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074-82 (2008) (codified at 8 U.S.C. § 1232). Among other things, the TVPRA requires that a UC detained by federal immigration authorities must be transferred to the custody of the Secretary of Health and Human Services ("HHS") within 72 hours, absent "exceptional circumstances." ORR, the agency within HHS that is responsible for the care of UCs, is then tasked with ensuring that the UC is "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

Unaccompanied children are apprehended by DHS officers after coming to the border, or through arrests in the interior of the United States. With certain exceptions not relevant here, the minor is then put in removal proceedings before an immigration judge to determine whether the minor will have the right to remain in the country. Order, R.E. at 4. In the meantime, the TVPRA requires ORR to identify a placement for the child, consistent with its obligation to put the child in "the least restrictive setting that is" in the

child's best interests. *See* 8 U.S.C. § 1232(c)(2)(A), (3)(A). Often, that placement is with a "sponsor"—frequently a parent or other relative—who is already residing in the United States. Order, R.E. at 4. All Class Members in this case were previously released to sponsors after ORR determined both that it was appropriate to release the minor from custody and that the sponsor was "capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A); Order, R.E. at 4-5.

For children in ORR custody, the agency maintains facilities at three levels of security: shelter, "staff-secure" and "secure." Order, R.E. at 4; Opening Br. at 6-7. The secure facility is "akin to a local juvenile hall"; ORR uses local juvenile halls to house children in secure custody. Order, R.E. at 4. A staff secure facility is somewhat less restrictive, but still employs certain security measures, including a secure perimeter and fence. Suppl. Record Excerpts ("S.R.E.") at 74-75 (ORR Guide, § 1.2.4).[1]

The TVPRA provides that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or

[1] The ORR Guide, titled "Children Entering the United States Unaccompanied," is also available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (last visited Mar. 15, 2018).

has been charged with having committed a criminal offense." 8 U.S.C. § 1232(c)(2)(A). The placement decision also requires ORR to consider other factors, such as "risk of flight." *Id.* ORR has interpreted this provision to mean that it may place a UC in a secure facility only if a UC "1. poses a danger to self or others; or 2. has been charged with having committed a criminal offense." S.R.E. at 74-75 (ORR Guide, § 1.2.4). ORR may also determine that the UC in question is not dangerous, and place him in a staff secure facility or shelter care. *Id*. 74-76 (ORR Guide §§ 1.2.4, 1.2.6). The TVPRA contains a clear mandate that ORR must consider the "best interest of the child" in its placement decisions at all times. 8 U.S.C. § 1232(c)(2)(A).

As of the filing of the First Amended Petition, ORR used only two secure facilities in the entire country: one in Woodland, California (the Yolo County facility); and one in Staunton, Virginia (the Shenandoah Valley facility). S.R.E. at 283-84 (Am. Pet. ¶ 40). If a youth is arrested far from one of these places, the decision to place that youth in a secure facility entails significant travel. *See, e.g.*, S.R.E. at 226 (J.G. Decl., ¶ 20) (describing J.G. being placed on a plane by ICE and transported from New York to Woodland, California); S.R.E. at 325-26 (A.H. Decl., ¶¶14-18).

Minors in ORR facilities are also protected by the terms of the *Flores* Decree, a nationwide consent decree that sets national standards for the detention, release, and treatment of all immigrant children in Government custody. *See Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). The *Flores* Decree provides children in ORR custody with the right to challenge any allegations of danger or flight risk in a hearing before an immigration judge. ORR Guide § 2.9. An immigration judge's finding that a child poses no risk of danger or flight is relevant to ORR's placement decision, but the *Flores* Decree permits ORR to retain the child in custody pending the agency's own determination of whether the child should be released to his sponsor. ORR Guide § 2.9; S.R.E. at 43 (Holguin Decl., Ex. 2 at 1).

B. Factual Background

The following facts are drawn from the District Court's findings, as well as the extensive documentary evidence and testimony presented regarding Plaintiffs' motion for class-wide preliminary relief.

1. The Named Plaintiffs[2]

A.H. On or about April 26, 2015, Named Plaintiff A.H. entered the United States after fleeing abuse and neglect at the hands of his father in Honduras. S.R.E. at 323 (A.H. Decl., ¶ 2). After approximately a month, ORR released A.H. to live with his mother in Long Island, New York. *Id.*; Order, R.E. at 5. A.H. lived with his mother for almost two years. Order, R.E. at 5. During this period, he was in removal proceedings represented by counsel and pursuing a path to lawful immigration status. S.R.E. at 330 (Gibbs Decl., ¶ 2).

On June 12, 2017, A.H. was arrested by plainclothes ICE officers on the street near his house. Order, R.E. at 6. The warrant for A.H.'s arrest listed removability as the sole basis for his arrest. S.R.E. at 320 (Loechner Decl., ¶ 5). The officers told A.H. that they were arresting him because he had admitted to being in a gang, despite A.H.'s protestations to the contrary. S.R.E. at 324, 327 (A.H. Decl., ¶¶ 9, 23).

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[2] Although the District Court dismissed J.G. and F.E.'s individual claims without prejudice, Order, R.E. at 17-22, they remain members of the provisionally-certified Class. For ease of reference, Plaintiffs refer to all three collectively as the "Named Plaintiffs."

The next morning, A.H. was put on a flight to California, where he was taken to the Yolo County facility. Order, R.E. at 6. ICE transferred him without providing any prior notice to his immigration lawyer, or to his family. S.R.E. at 333-34 (Gibbs Decl., ¶¶ 19-27). A.H.'s lawyer only obtained information about his whereabouts after numerous inquiries to ORR officials, who only told her of A.H.'s transfer after he was already in California. *Id.*

ICE told ORR to place A.H. in secure detention "per the new policy." S.R.E. at 210; *see also* R.E. at 333-34 (June 29, 2017 Hr'g Tr.); S.R.E. at 190-208 (Sini Test.). Prior to the transfer, ICE reported to ORR that A.H. was affiliated with a gang, and provided ORR with a criminal history summary. Order, R.E. at 6. That summary incorrectly reported the date of A.H.'s pending juvenile charges, stating that they had occurred only a few weeks prior to his arrest by ICE. *Id.* In fact, the arrests had occurred in 2016, approximately a year prior to his arrest by ICE. *Id.* The summary also failed to acknowledge that all of A.H.'s charges were "adjourned in contemplation of dismissal." *Id.* Those charges have since been dismissed. *Id.* at 6, n.2.

ORR did not question ICE's instructions or conduct any independent inquiry to verify whether ICE's allegations concerning A.H.'s juvenile history were correct. R.E. at 380-82 (June 29, 2017 Hr'g Tr.). A.H. initiated

the instant lawsuit by filing a petition for writ of habeas corpus on June 22, 2017. *See* ECF (N.D. Cal.) 1. Following initial proceedings on this petition, ORR transferred A.H. to a less restrictive facility in Dobbs Ferry, New York. S.R.E. at 248 (Suppl. Saravia Decl., ¶ 7). A.H. then remained in detention for months while ORR reassessed his mother as a sponsor, despite already having approved her upon A.H.'s initial entry into the country. S.R.E. at 248-49 (Suppl. Saravia Decl., ¶¶ 8-12). Subsequent to the District Court's Order, A.H. received a *Saravia* hearing and was released after an immigration judge found that he presented no risk of flight or danger sufficient to justify his secure detention. *See* Appellees' Request for Judicial Notice ("RJN"), Ex. 1 at 2.

F.E. F.E. was born in El Salvador in 2000 and came to the United States in 2014, after local gang members threatened his life. S.R.E. at 237 (F.E. Decl., ¶¶ 1-4). At that time, ORR facilitated F.E.'s reunification with his mother in about three days. S.R.E. at 245 (M.U. Decl., ¶ 14); S.R.E. at 48-52 (F.E.'s ORR reunification documents). He lived with his mother in Brentwood, New York, and attended a local high school. S.R.E. at 237 (F.E. Decl., ¶ 4).

In February 2017, a school resource officer accused F.E. of "loitering" in the hallways. S.R.E. at 237-38 (F.E. Decl., ¶ 6). The officer searched F.E. and found a piece of paper with the number "503" written on it—the area code of his home country. *Id*. F.E. was suspended for several days and, after that, the local police began harassing and stopping him on the streets. S.R.E. at 238 (F.E. Decl., ¶ 7). F.E. requested two meetings with the police to explain that he was not a gang member, but the harassment continued. *Id.* (F.E. Decl., ¶ 9).

On June 9, 2017, F.E. was walking home with his friend from playing soccer when he was stopped by police officers, who told him he was "acting stupid" and arrested him on a juvenile charge of disorderly conduct (a non-criminal violation under New York law). *Id.* (F.E. Decl., ¶ 10); S.R.E. at 252 (Johnson Decl., ¶ 5). Shortly thereafter, ICE agents came to his home and re-arrested him, telling him that "because you aren't legal[,] I need to give you to immigration. You'll probably be deported." S.R.E. at 239 (F.E. Decl., ¶ 13); S.R.E. at 253 (Johnson Decl., ¶ 7).

ICE classified F.E. as a gang member because he had written "503" on his school notebook, and because he had allegedly been seen "associating with known gang members at school and in the community." Order, R.E. at

34; R.E. at 434-36 (Decl. of Joe Pisciotta (F.E.) at 2-5). The ICE officer who explained this classification admitted under oath that he had no personal or indirect knowledge of the facts supporting F.E.'s alleged gang membership; that he had never interviewed or even met F.E. personally; and that display of "503" is an inconclusive indicator of gang affiliation. R.E. at 211-13 (Oct. 27, 2017 Hr'g Tr.).

F.E. was transported to a secure detention facility in Virginia. Order, R.E. at 34. In sending him there, ORR overrode its own placement tool, which indicated that he should not have been placed in secure detention.[3] *See* S.R.E. at 58-60. He was held there until July 6, 2017, when he was transferred to a lower-security detention facility in Fairfield, California. S.R.E. at 240 (F.E. Decl., ¶ 19). Notably, staff at both the Shenandoah and Fairfield facilities acknowledged that they "do not have any evidence confirming that [F.E.] is a gang member." S.R.E. at 254, 260 (Johnson Decl., ¶ 12(a), Ex. 4). Likewise, ORR staff recommended his release from ORR custody and return to his sponsor. S.R.E. at 7-9, 11-13.

[3] ORR's Placement Score is a risk assessment matrix that helps inform ORR of the level of recommended detention for each child. ORR Guide § 1.3.2.

F.E.'s mother and attorney worked for months to bring F.E. home. S.R.E. at 254 (Johnson Decl., ¶ 11); S.R.E. at 243-45 (M.U. Decl., ¶¶ 4-16). Despite a positive home study by an ORR-contracted case worker and recommendations from both facility and ORR staff that F.E. be released, ORR delayed its decision with constant and repetitive requests for information. S.R.E. at 256-57 (Johnson Decl., ¶ 12(k)); S.R.E. at 7-9. Finally, on October 11, 2017, ORR Director E. Scott Lloyd denied F.E.'s reunification request, citing his alleged gang affiliation. S.R.E. at 36-39 (F.E. Reunification Denial Letter).

The day after the preliminary injunction issued, F.E. won his *Saravia* hearing and was released from custody. RJN, Ex. 2.

J.G. J.G. was born in El Salvador in 2000 and came to the United States in 2015 after gang members threatened him and beat him up, breaking his arm. S.R.E. at 223 (J.G. Decl., ¶¶ 1-3). Upon coming to the United States, he was apprehended by immigration authorities and detained by ORR. S.R.E. at 223-24 (J.G. Decl. ¶ 5); S.R.E. at 66-67 (Nanos Decl., Ex. 1). Within a month, ORR released him to his mother's care in Brentwood, New York. She took good care of him, even changing her work schedule so she

could spend more time with him. S.R.E. at 231 (Gomez Decl., ¶¶ 3-5); S.R.E. at 225 (J.G. Decl., ¶ 11).

On April 19, 2017, J.G. was stopped by local police while walking to a deli with a friend; the officer alleged J.G. was a gang member because he was wearing a Salvadoran soccer jersey. S.R.E. at 225 (J.G. Decl., ¶¶ 12-13). The police insulted him, threatened him with deportation, and ultimately arrested him on the charge of "false personation." S.R.E. at 225-26 (*Id.* ¶¶ 12-16); S.R.E. at 231 (Gomez Decl., ¶ 7).

After his release from local custody, ICE arrested him, put him on a plane, and transported him thousands of miles away to the Yolo facility. *See* S.R.E. at 225-26 (J.G. Decl., ¶¶ 15-20); S.R.E. at 271-72 (Nanos Decl., ¶¶ 14-15). The ORR intake matrix designated J.G. as appropriate for a medium or "staff secure" placement, but ORR officials overrode that recommendation and placed him in secure custody. S.R.E. at 61-63. J.G. remained at the juvenile detention center in Woodland for over one month, during which time Yolo County never received corroboration of J.G.'s alleged gang activity. *See* S.R.E. at 188. On July 26, 2017, he was transferred to a lower-security facility in Washington state. S.R.E. at 227 (J.G. Decl. ¶ 23).

Facility staff described J.G. as "a very positive and respectful individual," who "has not demonstrated any concerning behaviors," and "showed no signs that he is part of the MS-13 gang." S.R.E. at 53-55. In a positive home study report dated August 27, 2017, an ORR contractor recommended that J.G. be released to his mother. S.R.E. at 56-57. But ORR kept J.G. in custody until an immigration judge ordered his release following his *Saravia* hearing on December 11, 2017. *See* RJN, Ex. 1, at 2.

2. Facts Concerning the Government's Policies and Practices with Respect to the Re-Arrest of Juveniles Based on Gang Allegations

The District Court found that the Named Plaintiffs' experiences are typical of other juveniles detained on the basis of unsubstantiated gang allegations. Order, R.E. at 2-3. Many of the Class Members were arrested as part of "Operation Matador," a joint initiative between ICE and local law enforcement in the New York area targeting alleged MS-13 gang members. Order, R.E. at 3. Operation Matador began in June 2017, the same month that ORR amended its detention policies to add "gang involvement" to the list of bases to place juveniles in secure custody. ORR Guide § 1.2.4; *see also* S.R.E. at 32 (ORR policy stating that "all [UCs] identified as having current or past gang affiliation are placed in secure facilities."). Local officials in

New York stated publicly that DHS uses "its immigration enforcement tools" in cases "when [local police are] not able to effectuate a criminal arrest." S.R.E. at 200 (Sini Test.).[4]

ICE's classifications of gang membership were based on various forms of circumstantial evidence, such as being seen with alleged gang members, or wearing certain types of clothing, shoes, or colors. ICE also relied heavily on supposed "self-admissions" by the Class Members that they were gang affiliated. *See* R.E. at 428 (Pisciotta Decl. (A.H.), ¶ 5); R.E. at 443 (Pisciotta Decl. (J.G.), ¶ 4(a)). However, expert testimony in the record showed that such evidence was highly unreliable as a method of identification. S.R.E. at 19, 22-28 (Cruz Decl., ¶¶ 17, 28-49). In addition, law enforcement and school officers had a tendency to "label[] all things rooted in Latin American culture as gang significant," such as phone numbers, wearing certain colors, and social media postings. S.R.E. at 21 (Cruz Decl., ¶ 23).

In making secure placement determinations, ORR accepted ICE's allegations of dangerousness without conducting any independent

[4] The Government has since continued to arrest noncitizens who came to the United States as unaccompanied minors on allegations of gang affiliation. *See* Order, R.E. at 39 & n.18 (citing to news reports and releases on "Operation Raging Bull").

investigation. *See* R.E. at 381 (June 29, 2017 Hr'g Tr.); S.R.E. at 313-17 (ORR Letter re: A.H.). Once a Class Member was placed in secure detention, ORR's only check on the level of detention was a unilateral 30-day review process that might result in a "step-down" to a less secure facility. ORR Guide § 1.4.2. The District Court noted "[It is] not clear . . . that the sponsor with an interest in the minor's release could participate in *any* of the government's existing processes, or that the result of a successful challenge to the basis for the minor's arrest and detention would be an immediate return to the sponsor already deemed suitable." Order, R.E. at 33-34 (emphasis added).

ORR personnel and the staff of the ORR-contracted secure facilities attempted to corroborate the allegations of dangerousness against the Class Members. In response, ICE and local police were frequently unable to provide *any* corroboration of the juveniles' alleged gang affiliation. *See* S.R.E. at 184-85 (Yolo County Chief Probation Officer admitting that Yolo "could not verify gang affiliations for most of the [UCs] sent to Yolo.").

In June 2017, ORR also amended its rules to require approval from the Director of ORR before reunifying any juvenile who is, or previously was, held in a secure or staff secure facility. ORR Guide § 2.7. This process,

combined with the automatic placement of any UC accused of gang membership into secure detention, meant that no alleged gang member could be released without the approval of the ORR Director. Plaintiffs are not aware of the Director ever providing such approval.

C. Proceedings Below

On June 22, 2017, A.H. filed a habeas petition for his release from ORR custody. *See* ECF (N.D. Cal.) 1. A.H. sought a temporary restraining order ("TRO") seeking release, or, alternatively, that he be given an opportunity to contest the allegations that the Government was using to justify his confinement. ECF (N.D. Cal.) 7. After a lengthy hearing, which included testimony from ORR officials, the District Court found that, because ORR had "already . . . made a decision that [A.H.] could be placed with [his] mother," ORR had "an obligation to investigate the information it was receiving from DHS about A.H.," and to ensure that A.H. was placed in "the least restrictive setting that is in the best interests of the child." R.E. at 415-16 (June 29, 2017 Hearing Tr.). Accordingly, the District Court ordered ORR to check the accuracy of the information it received from ICE, provide him a hearing where he could contest the allegations against him, and determine whether his continued detention was proper. *Id.* at 417-18. After the TRO

issued, A.H. was "stepped down" to a staff-secure facility in New York, though still over 50 miles from his mother, whom he was still only able to see every two weeks for two hours at a time. S.R.E. at 248 (Suppl. Saravia Decl., ¶ 7).

Named Plaintiffs then filed an Amended Petition on behalf of themselves and a putative class of similarly situated UCs who had likewise been re-arrested on allegations of gang affiliation. S.R.E. at 274-311 (Am. Pet.). After expedited discovery, the Plaintiffs filed a Motion for Preliminary Injunction and Provisional Class Certification. *See* Joint Case Management Statement, ECF (N.D. Cal.) 35; *see also* ECF (N.D. Cal.) 38, 61, 67, 73.[5]

On October 27, 2017, the District Court held a hearing on the Plaintiffs' motions. ECF (N.D. Cal.) 84, R.E. at 145-328 (Oct. 27, 2017 Hr'g Tr.). The Court heard testimony from Joseph Pisciotta, an ICE agent, and Jonathan White, an ORR employee, related to the Government's practices at issue in this case. *Id*. The District Court heard additional argument at a

[5] Plaintiffs' Motion sought classwide relief under the Fourth Amendment, the Fifth Amendment, and the TVPRA, challenging both ICE's arrests of the Class Members as well as their subsequent detention without adequate process. *See* ECF (N.D. Cal.) 61-1 at 2. The Motion also sought the three Named Plaintiffs' immediate release from custody. *Id.*

further hearing. ECF (N.D. Cal.) 95; *see also* Nov. 9, 2017 Hearing Tr., R.E. at 54-144.

On November 20, 2017, the District Court issued a class-wide preliminary injunction, and held that the Government violated Plaintiffs' rights to procedural due process. Order, R.E. at 1-44.[6] The District Court concluded that, in order for the Government to justify arresting a Class Member, taking him away from his previously-approved sponsor, and placing him in secure detention, there must be a showing that the "circumstances relevant to" the Government's original placement decision had "changed." *Id.* at 30. The District Court found that "due process requires the government to give the minor a prompt hearing before an immigration judge or other neutral decisionmaker, where the government must set forth the basis for its decision to rearrest the minor, and where the minor and his sponsor may seek to rebut the government's showing." *Id.* at 27.

[6] The class is defined as a class of noncitizen minors who: "(1) [] came to the country as an unaccompanied minor; (2) [were] previously detained in ORR custody and then released by ORR to a sponsor; (3) [were or are] rearrested by DHS on the basis of a removability warrant on or after April 1, 2017 on allegations of gang affiliation." Order, R.E. at 38. The Government has not contested the District Court's class certification decision on appeal.

The Government provided the Class Members with the "*Saravia* hearings" the Order requires. *See* RJN, Ex. 1. Numerous Class Members, finally given a meaningful opportunity to contest this evidence, established that the evidence on which the Government had been relying was insufficient. As of December 22, 2017, 26 of 29 Class Members who had completed *Saravia* hearings were ordered released after immigration judges found insufficient evidence of each Class Member's gang affiliation or other indicia of dangerousness or flight risk. *Id.*; *see also* RJN, Ex. 2 (Order issued by immigration judge ordering Named Plaintiff F.E.'s release).[7]

[7] On December 22, 2017, the Government filed a report with the Court concerning the results of the hearings held to date. *See* RJN, Ex. 1. That report stated that 25 children had received findings from immigration judges that they did not present flight risks or dangers warranting their detention. *Id.* F.E. was omitted from the Government's chart, but he had previously won his hearing the day after the Order issued. RJN, Ex. 2.

Of the three Class Members who had hearings but were not released, the Chart notes one had a prior removal order that the immigration judge stated warranted his re-arrest. However, the Judge noted that this child had a pending motion to reopen that order.

III. COUNTER-STATEMENT OF THE ISSUE PRESENTED

1. Did the District Court abuse its discretion when it issued a preliminary injunction requiring the Government to provide a prompt hearing to unaccompanied children who, having previously been released to the care and custody of an approved sponsor, are re-arrested based on gang allegations?

IV. STANDARD OF REVIEW AND LEGAL STANDARD

The District Court's decision to grant a preliminary injunction is reviewed for abuse of discretion. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). This standard of review is highly deferential. *Id.* "Under this standard, as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id.* (internal quotation and citation omitted). This Court reviews legal conclusions *de novo*, and factual findings for clear error. *Vazsquez v. Rackauckas*, 734 F.3d 1025, 1041-42 (9th Cir. 2013). A district court's factual findings must be affirmed unless they are "illogical, implausible, or without support . . . in the record." *Arc of Cal. v. Douglas*, 757 F.3d 975, 983-84 (9th Cir. 2014) (internal quotations and citation omitted).

To obtain a preliminary injunction, a plaintiff must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of

equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). This Court evaluates these factors on a "sliding scale." *Arc of Cal.*, 757 F.3d at 983 (internal quotation and citation omitted). Thus, a "stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Regardless, "the moving party [must] demonstrate a fair chance of success on the merits or questions serious enough to require litigation." *Arc of Cal.*, 757 F.3d at 993-94 (internal quotation and citation omitted).

V. SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's Order, which crafted a targeted and limited injunction ordering processes necessary to safeguard the due process rights of the Class Members.

First, the Government does not dispute that the familiar balancing framework in *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the governing legal standard; it argues only that the District Court erred in determining that "existing procedures applicable to class members" were insufficient to "satisfy due process." Opening Br. at 20. To the contrary, the

District Court carefully evaluated all of those procedures based on a rich record and concluded that they created a serious risk that Class Members would be unjustifiably detained. This is especially so because assessing whether a juvenile is an active gang member is a "fact-intensive" and nuanced question that "heighten[s] the need for careful factfinding." *Vasquez*, 734 F.3d at 1045-46. As to this determination, the Government has failed to show that the District Court abused its discretion.

Second, the Government asserts that the Order's procedures conflict with the statutory framework governing the treatment of unaccompanied children, but the opposite is true. The Order's safeguards actually *further* the statutory mandate that ORR place unaccompanied children in the "least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). The Order is also entirely consistent with the TVPRA's sponsor reunification provisions because nothing in the statute requires that ORR reassess the suitability of a sponsor it has *already* approved following the child's unjustified arrest. The Government also argues that the Order *might* require Plaintiffs to remain in ICE custody for longer than the 72 hours generally authorized by the TVPRA while they await their hearings. In fact, the Order contains no such requirement. And even if ICE determined that it

needed to hold juveniles for longer than 72 hours pending their hearings, the Government concedes that doing so would not violate the statute. Order, R.E. at 32; Opening Br. at 28 ("[T]he Government also can avoid violating the TVPRA . . . under the 'exceptional circumstances' exception.").

Third, the Government claims that the Order "impose[s] a significant burden" on its resources, Opening Br. at 25, but any burdens the Order places on the Government are minor, and are justified by the Government's responsibility to protect against erroneous deprivations of liberty.

Finally, the Government has waived any argument as to the remaining preliminary injunction factors. The District Court rightly found that those factors favored granting a preliminary injunction here, particularly in light of the grave risk of irreparable harm to the Class Members.

VI. ARGUMENT

A. The District Court Properly Found That the Government's Practices Violated the Due Process Rights of A.H. and the Class.

The District Court correctly concluded that the challenged practices violated A.H.'s right to procedural due process, and fashioned a remedy that appropriately protects his and other Class Members' rights. In doing so, the District Court applied the three-pronged test laid out in *Mathews v. Eldridge*, which the Government agrees provides the applicable legal standard.

Opening Br. at 21, 25. This test requires consideration of: (1) "the private interest that will be affected by the official action"; (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The Government argues that the District Court incorrectly weighed these considerations, but fails to establish that the District Court erred at all, much less abused its discretion.

1. The Private Interests at Stake Are Powerful.

This case implicates two fundamental private interests: the freedom from bodily restraint and the right to family integrity. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" interest the Due Process Clause safeguards. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017) (characterizing freedom from confinement as a "fundamental" liberty interest). Similarly, the right to family integrity is "perhaps the oldest of the fundamental liberty

interests recognized by [the Supreme] Court." *Keates v. Koile*, ---- F.3d ----, No. 16-cv-16568, 2018 WL 1161890, at *5 (9th Cir. Mar. 6, 2018) (internal quotation and citations omitted); *see also Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27-28 (1981) ("[A] parent's desire for and right to the companionship, care, custody and management of his or her children . . . undeniably warrants deference and, absent a powerful countervailing interest, protection.").[8] Consequently, "under the first *Mathews* factor, Plaintiffs' interests are truly weighty." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1045 (9th Cir. 2013).

2. The District Court Correctly Found That the Preexisting Procedures Presented an Unacceptably High Risk of Erroneous Deprivation.

The Government argues that the District Court "did not consider [preexisting ORR] procedures" in issuing its Order and injunction. Opening

[8] The Government does not seriously dispute the gravity of the private interests at stake, and instead suggests that those interests are attenuated here because children are "'always in some form of custody.'" Opening Br. at 22-23 (quoting Order, R.E. at 29). To the contrary, "[c]hildren, too, have a core liberty interest in remaining free." *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring). The Class Members here were detained in secure, jail-like facilities, and were seeking reunification with their parents and family members. Those liberty interests are undeniably powerful. *See D.B. v. Cardall*, 826 F.3d 721, 742 (4th Cir. 2016); *Santos v. Smith*, 260 F. Supp. 3d 598, 611 (W.D. Va. 2017).

Br., at 23. To the contrary, the District Court thoroughly reviewed ORR's procedures, *see, e.g.,* Order, R.E. at 3-8, 27, 34, and found them seriously inadequate. *Id.,* R.E. at 33. Specifically, the District Court determined that the Government's previous procedures suffered from two fatal flaws: first, the Government relied on "insufficiently substantial allegations of gang affiliation" to justify its initial arrest and placement decisions; and second, it provided no way for Class Members to meaningfully challenge those allegations. Order, R.E. at 34 (noting that preexisting procedures lacked "the necessary adversarial factfinding" to minimize the risk of error). The result was a system that lacked even "minimal protections . . . to ensure that a minor is not erroneously taken away from his family, [and] transported across the country to a high-security facility." Order, R.E. at 32.

a. ORR's Process for Making Initial Placement Decisions is Fraught with Error.

The District Court's finding that the preexisting ORR placement process was insufficient to safeguard the liberty interests of the Class Members was supported by ample evidence of the numerous defects in the Government's preexisting processes. First, ORR placed the Class Members in highly restrictive, jail-like settings based entirely on ICE's unsupported and unspecific allegations of gang affiliation. R.E. at 381 (June 29, 2017 Hr'g

Tr.). ORR's own officials repeatedly testified that they conducted no independent evaluation of ICE's allegations, and were unable to even examine the evidence underlying those allegations. *Id.*; *see also* R.E. at 266-67 (Oct. 27, 2017 Hr'g Tr.) As a result, the Class Members were whisked across the country and put in jail-like facilities with no notice of the charges against them and no notice to their lawyers or family members.

The nature of the allegations at issue made the risk of unjustified detention even more likely. Order, R.E. at 34. As this Court has explained, "[d]etermining whether an individual is an active gang member presents a considerable risk of error." *Vasquez*, 734 F.3d at 1046. "The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful factfinding." *Id.* (observing that gangs are "secretive, loosely defined associations" whose membership is "continually changing") (internal quotation and citations omitted).

ICE's methods of determining gang affiliation were rife with defects. Joseph Pisciotta, the ICE officer who testified regarding the Named Plaintiffs' gang allegations, stated that ICE classifies a person as a gang member if they meet "two or more" of certain criteria, including: being seen "displaying

gang signs/symbols;" "frequent[ing] an area" where other gang members are seen; or being seen "wearing gang apparel." R.E. at 427-28. Pisciotta testified that rosary beads; the colors red, blue, and black; wearing Nike shoes; and even F.E.'s written notation of his country's area code could be indicia of gang membership. *Id.*, R.E. at 426-44; *see also* R.E. at 207-09, 211-13 (Oct. 27, 2017 Hr'g Tr.).

Plaintiffs' gang expert found that these methods were gravely flawed. Among other reasons, these methods failed to corroborate evidence of alleged "self-admissions" with specific and reliable details, and mistook the mere emulation of media figures and "pride for one's home country" as evidence of actual gang affiliation. S.R.E. at 18-21 (Cruz Decl., ¶¶ 12, 17-19, 22-23). Plaintiffs' expert also explained that being seen with alleged gang members could simply be the "natural consequence[] of living in a community where gangs are present." S.R.E. at 19 (Cruz Decl., ¶ 17); s*ee also Vasquez*, 734 F.3d at 1047 ("Distinguishing an individual's social association with a gang member on a familial or friendship—i.e. non-gang related—basis, from an association with the gang as an organization is [] a nuanced task."). What is more, Mr. Pisciotta himself acknowledged that his classifications were based on reports produced by unnamed others and conversations with unnamed

officers, without independent evaluation as to those reports' reliability, and no direct interviews with the Plaintiffs or anyone who had even met them. R.E. at 200-30 (Oct. 27, 2017 Hr'g Tr.).

Even the Government's own contractors agreed that the evidence of the Class Members' gang affiliation did not support their placement in secure custody. Brent Cardall, the official who oversees the Yolo secure facility (where A.H. and J.G. were held), attempted to corroborate the evidence of gang membership of numerous Class Members referred to his custody, and concluded that he "did not have just cause to keep most of the undocumented minors . . . in secure custody." Order, R.E. at 15; *see also* S.R.E. at 182-88. Despite the best efforts of his staff, he received *no* information from the Government that corroborated the alleged gang membership of at least seven Class Members within 30 days of sending them to Yolo. S.R.E. at 182-85. Cardall also admitted that, as of August 26, 2017, months after many Class Members had been arrested and sent across the country to his facility, Yolo *still* had not received corroboration of gang affiliation justifying secure detention for most Class Members in its custody. S.R.E. at 185. *See also, e.g.*, S.R.E. at 53-54 (Yolo was not provided "any criminal history records" or "any legal documentation stating that [J.G.] is an MS-13 gang member".);

S.R.E. at 64 (official in charge of facility detaining F.E. noting that "[w]hile in our care . . . [F.E.] does not show evidence of being associated [with] or part of any gang or other similar criminal organization."); S.R.E. at 260 (Johnson Decl., Ex. 4) (F.E. case manager noting that she does not "have any evidence confirming that [F.E.] is a gang member.").

b. The Step Down and Reunification Processes Are Opaque and Unilateral, and Deny Class Members Notice and an Opportunity to be Heard.

The District Court properly found that "on the current record, existing ORR procedures"—including step down hearings and reunification processes—"appear to be inadequate" to "protect against the risk of minors being erroneously taken away from their sponsors . . . ." Order, R.E. at 33. The District Court's finding was amply supported by the record.

The Government cites its monthly review process for children held in secure custody as providing sufficient procedural protections, Opening Br. at 22, but fails to note that this process is entirely unilateral. This process offers the juvenile *no* notice of the charges against him, *no* opportunity to answer those charges before a neutral decisionmaker, and *no* chance for the child's counsel or family to participate. *See* ORR Guide § 1.4.2 (describing placement review and step down process); S.R.E. at 327-28 (A.H. Decl., ¶ 23)

(no information provided to A.H. about basis for government's belief that he is in a gang); *see also* Order, R.E. at 33-34 (District Court finding that it was not clear that a sponsor with an interest in a minor's release could participate in ORR processes). Far from facilitating prompt review of ORR's detention decisions akin to that provided in the juvenile delinquency context, this unilateral process takes a month to complete.[9] *Cf. Schall v. Martin*, 467 U.S. 253, 277 (1984).

Even if successful, the "step down" process can only lower the restrictiveness of the facility in which a UC is housed; it will not result in the child's release. ORR engages in a separate process for approving release to a sponsor, which is known as the "reunification" process. ORR Guide § 2.2.6 (referring to "reunification packet" submitted by family member seeking

[9] The Government has pointed to no juvenile custody regime in the entire country that operates as unilaterally or slowly as its previous system. Indeed, the Order's requirements merely bring ORR's custody regime in line with the juvenile justice system, which requires prompt hearings where juveniles can challenge their detention. *See*, *e.g.*, Cal. Welf. & Inst. Code § 632(a)-(b); Colo. Rev. Stat. Ann. § 19-2-508(2)(a); D.C. Code Ann. § 16-2312(a)(2); 705 Ill. Comp. Stat. Ann. § 405/5-415(1): Ga. Code Ann. § 15-11-472(a)-(b); Ga. Code Ann. §§ 15-11-506(b)-(c); Mass. Dist. Ct. Standing Order 2-88, Sec. III, paragraph 1; Mass. R. Crim. P. 7(a)(1); Mo. Ann. Stat. § 211.061(4); N.Y. Fam. Ct. Act § 307.3(4); Ohio R. Juv. P. 7(F); 42 Pa. Stat. Ann. § 6332(a); Tex. Fam. Code Ann. § 54.01(a)-(b); Va. Code Ann. § 16.1-250(A).

custody of UC); *Beltran v. Cardall*, 222 F. Supp. 3d 476, 479 (E.D. Va. 2016) (reviewing challenge to "ORR's family reunification procedures").

Although the Government suggests that the reunification process affords "adequate[]" protection for UCs, Opening Br. at 23, this process suffers from significant flaws. Multiple courts have criticized ORR's procedures as "opaque" and "extremely troubling." *Beltran*, 222 F. Supp. 3d at 485; *Santos v. Smith*, 260 F. Supp. 3d 598, 614 (W.D. Va. 2017). Among other deficiencies, sponsors are not given any notice of the evidence or factual findings ORR relies upon to deny reunification, and there are "very lengthy delays in processing" requests for reunification. *Santos*, 260 F. Supp. 3d at 613-14; *Beltran*, 222 F. Supp. at 486-87 (observing that ORR's then-existing reunification procedures "[v]irtually all . . . consisted of internal evaluation and unilateral investigation"). ORR also denies reunification without providing the sponsor a hearing to contest the agency's evidence or allegations. *Santos*, 260 F. Supp. 3d at 613; *Beltran*, 222 F. Supp. 3d at 486 (stating that "ORR owed Petitioner some form of adversarial process."). And, despite the powerful liberty interests at stake, ORR wrongly puts "the burden of initiation and persuasion" on the sponsor. *Santos*, 260 F. Supp. 3d at 613; *Beltran*, 222 F. Supp. 3d at 485 ("Once the government decides to withhold a

child from a parent's care, the state has the burden to initiate proceedings to justify its action.") (citing, *inter alia*, *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972)).

The Named Plaintiffs' experiences with the reunification process embody all of these flaws. Ilsa Saravia, A.H.'s mother, submitted a reunification packet that required her to duplicate information she had previously submitted. S.R.E. at 248 (Suppl. Saravia Decl., ¶¶ 2-5). She acquiesced to a required home study, which ORR informed her she had failed, without providing any reasons. *See* S.R.E. at 249 (Suppl. Saravia Decl., ¶¶ 9-10). Similarly, ORR required F.E.'s mother to submit and resubmit information in support of her reunification application, as well as respond to repeated requests for new information. S.R.E. at 255 (Johnson Decl., ¶ 12(c)); S.R.E. at 244-45 (M.U. Decl., ¶¶ 7-11). She also consented to a home study that resulted in a positive finding, corroborating multiple recommendations by facility and ORR staff that F.E. be released to his mother's care. S.R.E. at 245 (M.U. Decl., ¶ 12). After months, ORR denied her reunification application, deeming F.E.'s mother an unfit sponsor based on the same faulty gang allegations that led to F.E.'s placement in secure

custody in the first place. S.R.E. at 245 (M.U. Decl., ¶¶ 12, 15-16). *See* S.R.E. at 36-39 (F.E. Reunification Denial Letter).

c. Class Members Cannot Obtain Release through the *Flores* Hearing Process.

The Government also argues that hearings available pursuant to the *Flores* Decree provided a means for Class Members to challenge their detention. *See* Opening Br. at 22-23. But *Flores* hearings cannot afford complete relief to the Class Members because winning such a hearing does not necessarily result in a juvenile's release. Order, R.E. at 33-34 ("[T]he right to challenge a finding of dangerousness in a *Flores* bond hearing" and other ORR procedures do not result in "return to the sponsor already deemed suitable."); *see also Flores*, 862 F.3d at 878 (explaining that "there must still be a separate decision with respect to the implementation of the child's appropriate care and custody"). The Government does not dispute, and in fact *insists*, that it retains the authority to continue to detain a juvenile even if he wins a *Flores* hearing and obtains a finding that he is not dangerous. *See* Opening Br., at 22; ORR Guide, § 2.9; S.R.E. at 43 (e-mail from ORR stating that bond hearings "cannot order a UAC released from ORR. For UAC in shelter care, group homes, and in some cases staff secure facilities, ORR has already determined that the UAC is not a danger, and a bond hearing *would*

have no effect.") (emphasis added).[10] Thus, any Class Member who prevailed in a *Flores* hearing would be still be subject to ORR's reunification process and the ORR Director's approval prior to being released and reunited with his or her sponsor.

The District Court's conclusion that ORR's lengthy, opaque, and unilateral processes did not provide adequate safeguards against erroneous deprivations of liberty was well supported by the evidence in the record. *See* Order, R.E. at 33-34.

3. The Government Overstates the Burden It Faces in Complying with the Order

The protection afforded by the Order's safeguards heavily outweigh any burden placed on the Government. *Mathews*, 424 U.S. at 335. The District Court rightly found that the procedural protections required by the Order will not "impose any significant burden on the federal government;" that the process required by its ruling would be "less cumbersome than" beginning the sponsor approval process anew; and that any "burden is reasonable in light of the government's asserted interests in public safety and

[10] The record also raises doubts as to whether a Class Member could even receive a *Flores* hearing on a reasonable timeline. *See* S.R.E. at 257 (Johnson Decl., ¶ 14).

welfare, including the welfare of the minor." Order, R.E. at 35. Indeed, the District Court ordered a process analogous to that available to adults who are re-arrested after posting bond pending removal proceedings. Order, R.E. at 30-31.[11] The District Court also left the Government significant flexibility in implementing the Order. *See* Order, R.E. at 32-33.

In light of these findings, none of the Government's claims of burden are persuasive. First, the Government asserts that "ORR [] does not have any facilities . . . that are able to hold minors in secure custody . . . in the New York area," where many Class Members' arrests took place. Opening Br. at 26-27. This assumes that the Class Members must be held in secure custody in the first place, contrary to ORR's own initial placement recommendations, which indicated that the Named Plaintiffs could be held in lower-security facilities because they did not present sufficient risks of danger. S.R.E. at 58-

[11] The Government faults the District Court for ordering a prompt "changed circumstances" hearing similar to that available to adults under *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981). Opening Br. at 8, 17-18 & n.5. However, the Order's seven-day timeframe relied on the Government's *own representations* about the timing of those hearings. *See* R.E. at 106 (Nov. 9, 2017 Hr'g Tr.) (counsel for Government stating that such hearings are available in "an average of 10 days"). The Order's "prompt hearing" requirement is also required as a matter of due process. *See Schall*, 467 U.S. at 275 (upholding juvenile custody scheme in part because child was provided prompt initial appearance and robust probable cause hearings).

63. The District Court also considered the Government's stated concerns about where to detain Class Members and concluded "the government can address these concerns consistent with its constitutional, statutory, and contractual responsibilities." Order, R.E. at 32.

Second, the Government now relies on unsupported assertions that were never made to the District Court to argue that it would cost money to hold Class Members in ICE facilities until they can receive *Saravia* hearings. Opening Br. at 27 n.7 (alleging, without evidence, that the cost of contracting with two new juvenile detention facilities may cost certain sums). Once again, this assumes that the Class Members must be held in ICE facilities at all, when many can be held in lower-level ORR facilities.

Regardless, this Court has recognized that there are almost always financial and administrative costs associated with vindicating constitutional rights. *See Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (explaining that "cost or inconvenience of providing adequate facilities is not a defense" to Eighth Amendment claim); *Jordan v. Gardner*, 986 F.2d 1521, 1537 (9th Cir. 1993) ("Almost any accommodation of constitutional rights will result in some 'administrative burden,'" and "most accommodations are not 'cost-free'") (citation omitted) (en banc) (Reinhardt, J., concurring). And "any

additional administrative costs to the government are far outweighed by the considerable harm to Plaintiffs' constitutional rights in the absence of the injunction." *Hernandez*, 872 F.3d at 995-96; *see also Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (finding that, when faced with "a conflict between financial concerns and preventable human suffering," human suffering should be given more weight); Order, R.E. at 37 (finding that any a burden was "justified in light of the hardships endured by minors taken from their sponsors and placed in ORR custody."). Moreover, the cost of a brief period of temporary initial detention before affording the Class Member a prompt hearing is almost certainly less than the cost of holding Class Members in protracted detention in secure facilities, as well as the administrative costs of requiring Class Members and their families to undergo ORR's cumbersome reunification process.

Third, the Government remarkably alleges that the Order will harm Class Members by "subject[ing] [them] to long and difficult transportation between the ICE detention facilities and the immigration court to attend their hearings." Opening Br. at 26. Yet the Government showed no such concern for the Class Members' well-being when it decided to transport them

hundreds or thousands of miles away from their families and communities in order to place them in secure juvenile detention facilities.

Fourth and finally, the Order's due process safeguards serve the Government's own interest in "accurate and just results." *Lassiter*, 452 U.S. at 28.

* * *

The above analysis makes clear that the District Court correctly applied the *Mathews* factors when it concluded that in the absence of a preliminary injunction, there would be no meaningful process for Class Members to challenge the factual assumptions that purportedly justified ORR's ongoing detention of the youth in jail-like facilities. Order, R.E. at 35. And there is nothing remarkable about the processes the Court ordered, which simply compel the Government to provide the Class Members with the core requirements of due process: prompt notice of the charges against them, and a fair hearing before a neutral decisionmaker to contest those charges. *Id*. at 32; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn

on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Vasquez*, 734 F.3d at 1054 (indicating that county should provide "robust, neutral administrative process" to individuals before subjecting them to gang injunction). And, in light of the powerful interests at stake, the District Court rightly found that such a hearing must take place promptly, before the juveniles are taken thousands of miles away from their families. *See Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (explaining that where the state "feasibly can provide a predeprivation hearing . . . it generally must do so").

As to the value of the District Court's safeguards, the results of the *Saravia* hearings speak for themselves. As of December 22, 2017, 26 of the 29 Class Members who had completed their hearings were found by immigration judges not to present indicia of danger or flight risk sufficient to justify their detention. *See* RJN, Exs. 1-2. The *risk* of erroneous deprivation has therefore become a *documented history* of erroneous deprivation.

B. The Preliminary Injunction Does Not Conflict With the TVPRA or the *Flores* Agreement

Having failed to show that its existing procedures comply with basic principles of procedural due process, the Government attempts to conjure conflict between the Order and the TVPRA and the *Flores* Decree. But far

from "eliminat[ing] protections afforded to" unaccompanied children, Opening Br. at 25, the Order in fact *furthers* the purposes of both sources of law by ensuring that children are placed in the least restrictive settings appropriate for their needs. And in any event, it is black-letter law that statutes must be read to avoid violating the Constitution. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1153 (9th Cir. 2004) (reading regulations concerning service of charges on noncitizen children in light of constitutional concerns); *see also Yamataya v. Fisher*, 189 U.S. 86, 99-101 (1903) (construing immigration statutes to require fair hearing before depriving noncitizen of "right to be and remain in the United States"). As set forth below, the TVPRA can easily be construed to avoid any alleged conflict with the Order's safeguards.

First, the Government contends that the Order's procedures conflict with the TVPRA's sponsor suitability provisions, which state that a UC "may not be placed with a person or entity unless [HHS] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). The Government argues that "[n]othing in [this provision] suggests that it is only intended to apply only [sic] to [UCs] who are taken into custody for the first time," Opening Br. at

24, but that misses the point. For each Class Member in this case, ORR has *already* made the requisite "determination" that the proposed sponsor can care for the child when each Class Member was first in ORR custody. Each time, the agency determined both that the Class Member was appropriate for release, and that the sponsor could adequately "provid[e] for [his] . . . well-being." Order, R.E. at 30. In doing so, ORR effectuated its statutory mandate to "promptly" place the child "in the least restrictive setting that is in the [child's] best interest." 8 U.S.C. § 1232(c)(2)(A).

The Government now argues that it can *nullify* ORR's previous determination by re-arresting the child on new allegations of danger, even if those allegations turn out to be unfounded. But if that were permissible, then ICE and ORR could subject the child and his family to a revolving door of custody: the day after ORR releases a child, ICE could simply re-arrest the child and refer him back to ORR to begin the reunification process anew. Order, R.E. at 30. Interpreting the TVPRA in such a manner would frustrate one of its core purposes, which is to ensure that children are "promptly placed in the least restrictive setting" that would serve the child's best interests. 8 U.S.C. § 1232(c)(2)(A); *United States v. Gill*, 264 F.3d 929, 933 (9th Cir.

2001) (declining to adopt construction of statute that would contradict its text and "manifest purposes") (internal quotation and citation omitted).

Moreover, the purpose of the *Saravia* hearing is to allow the Government to present evidence of changed circumstances that would warrant a departure from its previous release decision—namely changed circumstances relevant to flight risk or danger. Order, R.E. at 31-32.[12] If the allegations are found to be unsubstantiated at the hearing, then ORR has no basis to revisit its prior determination that the Class Member's sponsor is suitable to provide care and custody. As the District Court pointed out, 8 U.S.C. § 1232(c)(3)(A) "was designed for a different situation (namely, the situation where a minor is first picked up by the federal government after

[12] The Government argues that the District Court's preliminary injunction removes Class Members from the "custody framework provided by the TVPRA . . . and instead subject to arrest and custody provisions from the Immigration and Nationality Act, 8 U.S.C. § 1226." Opening Br. at 24. But the District Court did not base its finding on *applying* § 1226(b), which all parties agreed was not directly applicable to the Class Members. *See* R.E. at 294 (Oct. 27, 2017 Hr'g Tr.) (District Court acknowledging that 1226(b) is part of a different "statutory scheme," and explaining that "I understand. I was just trying to understand how it works with adults."). Instead, the Court reasoned by analogy to conclude that "there is no reason to deny these minors protections that [adult] noncitizens typically get after having been released on bond or parole." *See* Order, R.E. at 1-2; *see also* Order, R.E. at 30-31 (noting that the § 1226(b) context is "closely analogous").

coming across the border and before a suitable caretaker has been identified)." Order, R.E., at 35.

This conclusion finds support in the experiences of the Plaintiffs. For example, when F.E. was re-arrested by ICE and referred to ORR secure custody on the basis of faulty gang allegations, ORR required his mother to undergo the reunification process even though ORR had previously approved her as F.E.'s sponsor. S.R.E. at 244-45 (M.U. Decl., ¶¶ 7-11). After positive release recommendations from a home study caseworker and staff at the facilities where F.E. was detained, the ORR Director refused release based on the same unfounded gang allegations that led to F.E.'s re-arrest in the first place; the only difference was that those gang allegations were reframed as evidence of F.E.'s mother's inability to ensure that he would stay out of trouble. S.R.E. at 36-39. F.E. later demonstrated to the satisfaction of an immigration judge that the only legitimate basis for holding him in ORR custody—flight risk or danger—did not exist. RJN, Ex. 2. Once he did so, he necessarily demonstrated that there is no reason to revisit ORR's previous sponsorship determination.

Second, the Government argues that providing Class Members a prompt *Saravia* hearing may require ICE to hold them in custody for longer

than 72 hours, which would supposedly violate the TVPRA. *See* 8 U.S.C. § 1232(b)(3) (requiring any federal agency that has care of UC to transfer UC to ORR within 72 hours, "[e]xcept in the case of exceptional circumstances"). Not so. As stated above, nothing in the Order requires the Government to maintain class members in *ICE* custody at all; Class Members can be held in available ORR facilities upon their arrest. *See* S.R.E. at 58-63 (placement tools noting that J.G. and F.E. do not require secure placement).[13] And, of course, the hearing may take place within 72 hours, after which the child would either be released or transferred to ORR custody.

Even assuming that children would be held in ICE custody for longer than 72 hours pending their *Saravia* hearings, this provision of the TVPRA contains an express exception for "exceptional circumstances." 8 U.S.C. § 1232(b)(3). As the District Court explained, "the rearrest of a previously released minor, and the need for a prompt hearing on the propriety of that rearrest," is easily such an "exceptional circumstance." Order, R.E. at 32-33.

[13] To the extent the Government complains that it does not have enough ORR facilities to hold newly arrested juveniles, *see* S.R.E. at 4 (White Decl. ¶¶ 8-9), it cannot defend its practices by claiming that it lacks resources to detain children in a manner consistent with the requirements of the Constitution and the statute. *See supra* Section VI(A)(3).

Indeed, the Government *concedes* that it "can avoid violating the TVPRA" by applying this exception to the Class Members, and offers no reason why it should not, beyond a conclusory assertion that Class Members would lose unspecified "protections." Opening Br. at 28.

Third, the Government suggests that the Order conflicts with the *Flores* Decree, which it reads to forbid ICE from holding UCs for longer than 72 hours in facilities not designated for juvenile detention. Opening Br. at 25. But, as stated above, nothing in the Order requires the Government to hold children in ICE custody pending their hearings. Moreover, this is a remarkable reversal of the Government's position in proceedings to enforce the *Flores* Decree itself, where it argued vigorously that it should retain authority to hold children in ICE facilities for longer than three to five days. *See* Defendants' Response to the Court's Order Show Cause, *Flores v. Lynch*, No. 85-cv-04544-DMG-AGRx (C.D. Cal. Aug. 6, 2015), at 4, 6 n.7, 26, 51.

In sum, the TVPRA's purposes are served, not undermined, by the Order's procedural safeguards.

C. There is No Dispute that the Remaining Preliminary Injunction Factors Favor the Plaintiffs.

In its Opening Brief, the Government fails to argue any prong of the preliminary injunction standard other than the likelihood of success on the

merits. Arguments not raised in an appellant's Opening Brief are deemed waived. *See Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (noting that this Court "will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief."); *accord Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 n.11 (9th Cir. 2000) ("An appellant ordinarily must raise an argument in its opening brief on appeal in order to preserve it for our review.") (citation omitted).

Regardless, the Government cannot plausibly contest the District Court's findings concerning the remaining preliminary injunction factors. Order, R.E. at 36-37. First and foremost, there is no disputing the District Court's finding that the Class Members would suffer irreparable harm in the absence of preliminary relief. Order, R.E. at 36. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (indicating that even "colorable claim" of constitutional violation can establish irreparable harm). This is to say nothing of the "negative mental health repercussions" endured by Class Members

during their months of unjust detention, the consequences of which grow more likely to become lasting "the longer children remain in confinement." Order, R.E. at 36; S.R.E. at 214-19 (Decl. of Dr. Lisa Fortuna, ¶¶ 10-31).[14]

Similarly, the District Court rightly found that "the public interest in ensuring the protection of constitutional rights, together with the [Class Members' interests] . . . in being free from unnecessary detention" supported preliminary relief here. Order, R.E. at 36 (citing *Hernandez*, 872 F.3d at 994-95). The public interest is also measured in "the indirect hardship to [the Class Members'] friends and family members," *Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008); the record reflects the numerous harms that the Class Members' families have suffered as a result of their unlawful detention. *See, e.g.*, S.R.E. at 231-35 (Gomez Decl., ¶¶ 5-6, 11-12, 17-20); S.R.E. at 244-45 (M.U. Decl., ¶¶ 8-9, 11, 14, 16); S.R.E. at 248-49 (Suppl. Saravia Decl., ¶¶ 4, 8, 10-12). Any harm to the Government is also mitigated by the form of relief Plaintiffs seek here—they ask only for procedural protections before the Government deprives them of

[14] The Government's claim that indefinite ORR detention without a hearing is in the "best interests" of Class Members, *see* Opening Br. at 21-22, defies both common sense and the evidentiary record. *See* S.R.E. at 215-19 (Fortuna Decl. ¶¶ 12, 14-22, 28-31) (detailing psychological harm to class members resulting from detention and separation from family).

fundamental liberty interests, and their requested relief would not result in the automatic release of any class member without a finding that his detention is not justified.

VII. CONCLUSION

The District Court's grant of the Preliminary Injunction should be affirmed.

Dated: March 16, 2018

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Dated: March 16, 2018

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VIII. STATEMENT OF RELATED CASES

There are no related cases pending before this court.

Dated: March 16, 2018 COOLEY LLP

By: */s/ Martin S. Schenker*
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Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I electronically filed the foregoing APPELLEES' ANSWERING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 16, 2018

COOLEY LLP

By: */s/ Martin S. Schenker*
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Signature of Attorney or Unrepresented Litigant: /s/ Martin S. Schenker

Date: Mar 16, 2018

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