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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Ms. L.,

*Petitioner-Plaintiff,*

v.

U.S. Immigration and Customs Enforcement (“ICE”); U.S. Department of Homeland Security (“DHS”); U.S. Customs and Border Protection (“CBP”); U.S. Citizenship and Immigration Services (“USCIS”); U.S. Department of Health and Human Services (“HHS”); Office of Refugee Resettlement (“ORR”); Thomas Homan, Acting Director of ICE; Greg Archambeault, San Diego Field Office Director, ICE; Joseph Greene, San Diego Assistant Field Office Director, ICE, Otay Detention Facility; Kirstjen Nielsen, Secretary of DHS; Jefferson Beauregard Sessions III, Attorney General of the United States; Kevin K. McAleenan, Acting Commissioner of CBP; L. Francis Cissna, Director of USCIS; Pete Flores, San Diego Field Director, CBP; Fred Figueroa, Warden, Otay Mesa Detention Center; Alex Azar, Secretary of the Department of Health and Human Services; Scott Lloyd, Director of the Office of Refugee Resettlement,

*Respondents-Defendants.*

Case No. 3:18-cv-00428-DMS-MDD

**BRIEF BY AMICI CURIAE IN SUPPORT OF PLAINTIFF’S HABEAS CORPUS PETITION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Date: May 4, 2018  
Time: 1:30 p.m.  
Dept. 13A  
Judge: Hon. Dana M. Sabraw

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1 **I. INTRODUCTION**

2 The family unit is one of the most fundamental cornerstones of society. Absent  
3 circumstances in which a child is in danger, parents' rights to nurture and care for their  
4 children are sacrosanct. The right to family integrity is codified in policy and law,  
5 federal and state, domestic and international, but it arises from natural law and is  
6 universal to all people. In the case before this Court, Ms. L's seven-year-old daughter  
7 S.S. was taken from her and sent to live with strangers across the country. This  
8 unconscionable family separation<sup>1</sup> of Ms. L and S.S. offends fundamental constitutional  
9 rights, flies in the face of universal federal and state statutory standards, and threatens  
10 one of the most sacred social units: the family.

11 This brief will discuss (i) the trauma imposed by family separation, (ii) the limited  
12 circumstances in which family separation is permitted by child welfare laws and under  
13 the rubric of international law,<sup>2</sup> and (iii) constitutional law limits on the federal  
14 government's rights to separate families.

15 **II. IDENTITY AND INTERESTS OF AMICI**

16 As more fully set forth in *Amici's* Motion for Leave to File Brief as *Amici Curiae*  
17 in Support of Plaintiff's Habeas Corpus Petition and Complaint for Declaratory and  
18 Injunctive Relief, *Amici* are a group of advocacy and nonprofit legal aid organizations  
19 and child welfare professionals dedicated to protecting the legal rights of children. Each  
20 has extensive legal and practical experience in issues regarding family separation and  
21 children living apart from their families. *Amici* are unanimous in their conviction that  
22 the unnecessary separation of children from their families in this context causes serious  
23 and irreparable harm to children.

24  
25 <sup>1</sup> The term "family separation" is used herein to describe circumstances where the  
26 government removes children from their parents in immigration detention when there  
is no allegation of parental abuse or neglect.

27 <sup>2</sup> Though these sources of law do not directly apply here, *Amici* submit that they will  
28 provide helpful background to the Court regarding the fact that family separation is only  
authorized in extreme circumstances.

1 **III. DISCUSSION**

2 **A. Family Separation Within Immigration Detention is Unconscionable,**  
 3 **Needlessly Traumatizes Children and Families and Must Be Avoided.**

4 Family separation is often devastating to vulnerable children. Experts have  
 5 repeatedly identified the “significant psychological and emotional consequences” that  
 6 the separation of families causes in children.<sup>3</sup> These damaging effects are both short  
 7 and long term. For example, the American Academy of Pediatrics urges authorities to  
 8 “exercise caution to ensure that the emotional and physical stress children experience  
 9 as they seek refuge in the United States is not exacerbated by the additional trauma of  
 10 being separated from their siblings, parents or other relatives and caregivers.”<sup>4</sup> Even  
 11 the Department of Homeland Security’s Advisory Committee on Family Residential  
 12 Centers has concluded that “the separation of families for purposes of immigration  
 13 enforcement or management, or detention is *never* in the best interest of children.”<sup>5</sup>

14 Children who are separated from their parents, especially young children,  
 15 experience traumatic stress even if they are eventually reunified with their family.<sup>6</sup>

16 <sup>3</sup> See Declaration of Linh Nguyen in support of Motion for Leave to File Brief of *Amici*  
 17 *Curiae* (“Nguyen Decl.”), Exhibit B (Kids in Need of Defense, *Targeting Families:*  
 18 *How ICE Enforcement Against Parents and Family Members Endangers Children*, at  
 19 p. 13 (citing Exhibit C (Am. Academy of Pediatrics, *AAP Statement Opposing*  
 20 *Continued Federal Efforts to Tear Apart Immigrant Families* (June 30, 2017))); see  
 21 also Exhibit D (Linton JM, Griffin M, Shapiro AJ, AAP Council on Community  
 22 Pediatrics, *Detention of Immigrant Children*. Pediatrics, at pp. 6-7 (April 2017)  
 (discussing research finding “high rates of posttraumatic stress disorder, anxiety,  
 depression, suicidal ideation, and other behavioral problems” among un-accompanied  
 immigrant children who are detained and noting the vulnerability of children who have  
 experienced trauma and violence to additional trauma and fear)).

23 <sup>4</sup> Nguyen Decl., Exhibit E (Am. Academy of Pediatrics, *AAP Statement Opposing*  
 24 *Separation of Mothers and Children at the Border* (March 4, 2017)); see also Exhibit  
 25 D (Linton JM, Griffin M, Shapiro AJ, AAP Council on Community Pediatrics.  
 26 *Detention of Immigrant Children*, Pediatrics (April 2017)).

27 <sup>5</sup> *Id.*, Exhibit F (Department of Homeland Security: Immigration and Customs  
 28 Enforcement, *Report of the ICE Advisory Committee on Family Residential Centers*, at  
 p. 2 (Sept. 20, 2016) (emphasis added)).

<sup>6</sup> See *id.*, Exhibit G (Dube SR, Cook ML, Edwards VJ, *Health-related Outcomes of*  
*Adverse Childhood Experiences in Texas*, 2002, Preventing Chronic Disease., vol. 7 no.  
 3 (May 2010)).

1 Traumatic stress can “disrupt the development of brain architecture and other organ  
2 systems and increase the risk of stress-related diseases and cognitive impairment well  
3 into the adult years.”<sup>7</sup> Thus, the trauma that a child experiences when needlessly  
4 separated from a parent may have life-long consequences.<sup>8</sup>

5 In light of the devastating short and long-term effects of family separation on  
6 children’s emotional, psychological, and physical well-being, it is not surprising that  
7 healthcare professionals and child welfare professionals have all urged the  
8 administration to avoid subjecting children to this unnecessary trauma.<sup>9</sup> Thus,  
9 separation of Ms. L and S.S. needlessly traumatizes them and could have long lasting  
10 negative consequences.

11 **B. Government Action Involuntarily Separating Children from Parents**  
12 **Who Pose No Risk of Harm to Them is Unconscionable and**  
13 **Contradicts Accepted Nationwide Child Welfare Practices and**  
14 **International Law.**

15 In the context of child welfare, the federal and state governments have codified  
16 the legal right to family unity and have enacted procedural protections and programs to  
17 prevent the unnecessary separation of families. Similarly, international law prohibits  
18 unnecessary family separation as a violation of fundamental human rights. Such  
19 enactments demonstrate the universality of the belief that family separation should  
20 occur only where there are compelling reasons why a child may not safely remain in  
21 the custody of her parents.

22 \_\_\_\_\_  
23 <sup>7</sup> *Id.*, Exhibit H (Am. Academy of Pediatrics, *Adverse Childhood Experiences and the*  
*Lifelong Consequences of Trauma*, at p. 2 (2014)).

24 <sup>8</sup> *See id.*, Exhibit G (Dube SR, Cook ML, Edwards VJ, *Health-related Outcomes of*  
*Adverse Childhood Experiences in Texas, 2002*, Preventing Chronic Disease., vol. 7 no.  
25 3 (May 2010)).

26 <sup>9</sup> *See id.*, Exhibit I (*Urgent Appeal from Experts in Child Welfare, Juvenile Justice and*  
*Child De-velopment to Halt Any Plans to Separate Children from Parents at the Border*,  
27 Jan. 23, 2018); Exhibit J (*Letter from Lucille Roybal-Allard, et.al to Sec’y Kirstjen M.*  
*Nielsen*, Feb. 8, 2018); Exhibit K (*Letter from Caryl M. Stern, et. al. to Sec’y Kirstjen*  
28 *M. Nielsen*, Feb. 2, 2018).

1                   **1. State Statutes Allow Families to be Separated Only Under**  
 2                   **Extreme Circumstances and Require States to Maintain the**  
 3                   **Family Unit Whenever Possible.**

4                   Every state in the country has enacted laws that allow children to be removed  
 5 from their parents' care only when circumstances exist that endanger the life and well-  
 6 being of the child. The circumstances under state laws that justify family separation  
 7 include physical or sexual abuse, abandonment, and the debilitating mental illness of  
 8 the parent.<sup>10</sup>

9                   Additionally, children cannot be separated from their parents without court  
 10 approval unless the child is at "imminent" risk of harm.<sup>11</sup> Situations that may justify

11 <sup>10</sup> See ALA. CODE § 12-15-312(c) (West 2008); ALASKA STAT. ANN. § 47.10.086 (West  
 12 2016); ARIZ. REV. STAT. ANN. § 8-822 (West 2016); ARK. CODE ANN. § 9-27-328 (West  
 13 2013); CAL. WELF. & INST. CODE § 361.5 (West 2017); COLO. REV. STAT. § 19-3-401  
 14 (West 2017); CONN. GEN. STAT. ANN § 17a-101g (West 2017); DEL. CODE ANN. tit. 13,  
 15 § 2512 (West 2009); D.C. CODE ANN. § 4-1301.07 (West 2001); FLA. STAT. ANN. §  
 16 39.402 (West 2017); GA. CODE ANN. § 15-11-133 (West 2014); HAW. REV. STAT. ANN.  
 17 § 587A-28 (West 2011); IDAHO CODE ANN. § 16-1608 (West 2005); 705 ILL. COMP.  
 18 STAT. ANN. 405/2-10 (West 2017); IND. CODE ANN. § 31-34-2-3 (West 1997); IOWA  
 19 CODE ANN. § 232.102 (West 2017); KAN. STAT. ANN. § 38-2255 (West 2013); KY. REV.  
 20 STAT. ANN. § 620.020 (West 2010); KY. REV. STAT. ANN. § 610.127 (West 2013); LA.  
 21 CHILD CODE ANN. art 619 (2014); ME. REV. STAT. ANN. tit. 22, § 4036-B (West 2016);  
 22 MD. CODE ANN. CTS. & JUD. PROC. § 3-814 (West 2001); MASS. GEN. LAWS ANN. ch.  
 23 119 § 29C (West 2010); MICH. COMP. LAWS ANN. § 722.628 (West 2017); MINN. STAT  
 24 ANN. § 260.012 (West 2012); MISS. CODE ANN. § 43-15-13 (West 2017); MO. ANN.  
 25 STAT. § 211.183 (West 2014); MONT. CODE ANN. § 41-3-423 (West 2007); NEB. REV.  
 26 STAT. § 43-283.01 (West 2017); NEV. REV. STAT. ANN. § 432B.393 (West 2017); N.H.  
 27 REV. STAT. ANN. § 169-C:6-b (West 2017) N.J. STAT. ANN. § 30:4C-11.2 (West 2012);  
 28 N); N.M. STAT ANN. § 32A-4-22 (West 2016); N.Y. Soc. Serv. LAW § 358-a(3)(b)  
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 STAT. ANN. § 6351 (West 2015); R.I. REV. STAT. ANN. § 40-11-12.2 (West 1998); S.C.  
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 W. VA. CODE ANN. § 49-4-602 (West 2015); WIS. STAT. ANN. § 48.355 (West 2017);  
 WYO. STAT. ANN. § 14-3-440(b)-(c) (West 2009).

<sup>11</sup> See e.g., FLA. STAT. ANN. § 39.402 (West 2017); MO. ANN. STAT. § 210.125 (West  
 1982); N.H. REV. STAT. ANN. § 169-C:6(I) (West 2016); N.Y. FAM. CT. ACT § 1028(b)

1 immediate removal of the child typically involve endangerment of the health or welfare  
 2 of the child, alleged abuse or neglect of the child, and the subjection of the child to  
 3 sexual exploitation.<sup>12</sup> Even with that finding, state law may require that the court also  
 4 make a finding that the removal is in the best interest of the child before removal is  
 5 appropriate.<sup>13</sup>

6  
 7 (McKinney 2010); S.D. CODIFIED LAWS § 26-7A-12 (1996); TENN. CODE. ANN. § 37-1-  
 404(a) (1987); VA. CODE ANN. § S 16.1-252 (West 2017); WASH. REV. CODE §  
 13.34.050(West 1983); W. VA. CODE. ANN. § 49-4-602 (West 2015).

8 <sup>12</sup> See ALA. CODE § 12-15-312(c) (West 2008); ALASKA STAT. ANN. § 47.10.086 (West  
 9 2016); ARIZ. REV. STAT. ANN. § 8-822 (West 2016); ARK. CODE. ANN. § 9-27-328 (West  
 10 2013); CAL. WELF. & INST. CODE § 361.5 (West 2017); COLO. REV. STAT. § 19-1-115(7)  
 11 (West 2010); CONN. GEN. STAT. ANN § 17a-101g (West 2017); DEL. CODE ANN. tit. 13,  
 12 § 2512 (West 2009); D.C. CODE ANN. § 4-1301.07 (West 2001); FLA. STAT. ANN. §  
 39.402 (West 2017); GA. CODE. ANN. § 15-11-133 (West 2014); HAW. REV. STAT. ANN.  
 13 § 587A-8 (West 2010); IDAHO CODE ANN. § 16-1608 (West 2005); 705 ILL. COMP.  
 14 STAT. ANN. 405/2-5 (West 1988); IND. CODE ANN. § 31-34-2-3 (West 1997); IOWA  
 15 CODE ANN. § 232.79 (West 2001); KAN. STAT. ANN. § 38-2255 (West 2013); KY. REV.  
 16 STAT. ANN. § 620.020 (West 2010); KY. REV. STAT. ANN. § 610.127 (West 2013); LA.  
 17 CHILD CODE ANN. art 621 (2006); ME. REV. STAT. ANN. tit. 22, § 4036-B (West 2016);  
 18 MD. CODE ANN. CTS. & JUD. PROC. § 3-814 (West 2001); MASS. GEN. LAWS. ANN. ch.  
 19 119 § 29C (West 2010); MICH. COMP. LAWS ANN. § 712A.14b (West 2012); MINN.  
 20 STAT ANN. § 260C.175 (West 2010); MISS. CODE ANN. § 43-21-603(7) (West 2016);  
 21 MO. ANN. STAT. § 211.183 (West 2014); MONT. CODE ANN. § 41-3-427 (West 2011);  
 22 NEB. REV. STAT. § 43-283.01 (West 2017); NEV. REV. STAT. ANN. § 432B.393 (West  
 23 2017); N.H. REV. STAT. ANN. § 169-C:6-b (West 2017) N.J. STAT. ANN. § 30:4C-11.2  
 24 (West 2012); N.M. STAT ANN. § 32A-4-22 (West 2016); N.Y. Soc. Serv. LAW § 358-  
 25 a(3)(b) (McKinney 2017); N.C. GEN. STAT. ANN. § 7B-903 (West 2015); N.D. CENT.  
 26 CODE. § 27-20-32.2 (West 2017); OHIO. REV. CODE ANN. § 2151.419 (West 2014);  
 27 OKLA. STAT. tit 10A, § 1-4-809 (West 2012); OR. REV. STAT. ANN. § 419B.340 (West  
 28 2003); tit. 42. PA. STAT. AND CONS. STAT. ANN. § 6332 (West 2002); tit. 42. PA. STAT.  
 AND CONS. STAT. ANN. § 6351 (West 2015); R.I. REV. STAT. ANN. § 40-11-12.2 (West  
 1998); S.C. CODE ANN. § 63-7-1640 (2017); S.D. CODIFIED LAWS § 26-8A-21.1 (2012);  
 TENN. CODE. ANN. § 37-1-166 (2013); TEX. FAM CODE ANN. § 262.102 (West 2017);  
 UTAH CODE ANN. § 78A-6-306(12) (West 2017); VT. STAT. ANN. tit. 33 § 5102 (West  
 2017); VA. CODE ANN. § 16.1-278.2 (West 2017); WASH. REV. CODE § 13.34.050 (West  
 2013); W. VA. CODE. ANN. § 49-4-602 (West 2015); WIS. STAT. ANN. § 48.355 (West  
 2017); WYO. STAT. ANN. § 14-3-440(b)-(c) (West 2009).

<sup>13</sup> See, e.g., N.Y. FAM CT. ACT 1022(C)(iii) (McKinney 2005) (providing that the court  
 must consider “whether continuation in the child’s home would be contrary to the best  
 interests of the child” before issuing a temporary removal order); IDAHO CODE ANN. §  
 16-1619(6) (West 2016) (mandating the court make “detailed written findings” showing  
 “continuation of residence in the home would be contrary to the welfare of the child and  
 that vesting legal custody with the department or other authorized agency would be in

1 Finally, even when these circumstances are present, prior to removal, all states  
 2 require the government to make “reasonable efforts” to preserve the family and prevent  
 3 the removal of the child from the home.<sup>14</sup> Reasonable efforts include, but are not limited  
 4 to, services such as counseling, family therapy, and transportation assistance.<sup>15</sup> Such

5 the best interests of the child”); MISS. CODE ANN. § 43-21-603(7)(b) (West 2016)  
 6 (requiring the court find prior to removal that continued “residence within [a child’s]  
 7 own home would be contrary to the welfare of the child and that the placement of the  
 8 child in foster care is in the best interests of the child”); WYO. STAT. ANN. § 14-3-  
 429(a)(iv) (West 2013) (providing that the court find “clear and convincing evidence

9 <sup>14</sup> ALA. CODE § 12-15-312(b) (West 2008); ALASKA STAT. ANN. § 47.10.086 (West  
 10 2016); ARIZ. REV. STAT. ANN. § 8-846 (West 2017); ARK. CODE ANN. § 9-27-328 (West  
 11 2013); CAL. WELF. & INST. CODE § 361.5 (West 2017); COLO. REV. STAT. § 19-1-115(6)  
 12 (West 2010); CONN. GEN. STAT. ANN § 46b-129 (West 2017); CONN. GEN. STAT. ANN  
 13 § 17a-111b (West 2015); DEL. CODE ANN. tit. 29, § 9003 (West 2015); D.C. CODE ANN.  
 14 § 4-1301.09a (West 2012); FLA. STAT. ANN. § 39.402 (West 2017); GA. CODE ANN. §  
 15 15-11-202 (West 2013); HAW. REV. STAT. ANN. § 587A-26 (West 2010); IDAHO CODE  
 16 ANN. § 16-1615 (West 2016); 20 ILL. COMP. STAT. ANN. 505/5 (West 2017); IND. CODE  
 17 ANN. § 31-34-21-5.5 (West 2012); IOWA CODE ANN. § 232.102 (West 2017); KAN.  
 18 STAT. ANN. § 38-2255 (West 2013); KY. REV. STAT. ANN. § 620.020 (West 2010); KY.  
 19 REV. STAT. ANN. § 620.130 (West 1998); LA. CHILD CODE ANN. art 626 (2014); ME.  
 20 REV. STAT. ANN. tit. 22, § 4036-B (West 2016); MD. CODE ANN. FAM. LAW § 5-525(e)  
 21 (West 2016); MASS. GEN. LAWS. ANN. ch. 119 § 29C (West 2010); MICH. COMP. LAWS  
 22 ANN. § 712A.18f (West 2016); MINN. STAT ANN. § 260.012 (West 2012); MISS. CODE  
 23 ANN. § 43-21-609 (West 2017); MO. ANN. STAT. § 211.183 (West 2014); MONT. CODE  
 24 ANN. § 41-3-423 (West 2007); NEB. REV. STAT. § 43-283.01 (West 2017); NEV. REV.  
 25 STAT. ANN. § 432B.393 (West 2017); N.H. REV. STAT. ANN. § 169-C:6-b (West); N.J.  
 26 STAT. ANN. § 30:4C-11.1 (West 1999); N.M. STAT ANN. § 32A-4-22 (West 2016); N.Y.  
 Soc. Serv. LAW § 358-a(3)(a) (McKinney 2017); N.C. GEN. STAT. ANN. § 7B-507 (West  
 2015); N.D. CENT. CODE. § 27-20-32.2 (West 2017); OHIO. REV. CODE ANN. § 2151.419  
 (West 2014); OKLA. STAT. tit 10A, § 1-1-102 (West 2014); OKLA. STAT. tit 10A, § 1-4-  
 807 (West 2015); OR. REV. STAT. ANN. § 419B.340 (West 2003); tit. 23. PA. STAT. AND  
 CONS. STAT. ANN. § 6373 (West 1994); R.I. REV. STAT. ANN. § 40-11-12.2 (West  
 1998); S.C. CODE ANN. § 63-7-720 (2017); S.C. CODE ANN. § 63-7-1640 (2017); S.D.  
 CODIFIED LAWS § 26-8A-21 (1998); TENN. CODE ANN. § 37-1-166 (2013); TEX. FAM  
 CODE ANN. § 262.101 (West 2017); UTAH CODE ANN. § 62A-4a-203 (West 2008);  
 UTAH CODE ANN. § 78A-6-306(10)(a)(i) (West 2017); VT. STAT. ANN. tit. 33 § 5102  
 (West 2017); VA. CODE ANN. § 16.1-278.4 (West 2017); VA. CODE ANN. § 16.1-278.2  
 (West 2017); WASH. REV. CODE § 13.34.130 (West 2013); W. VA. CODE ANN. § 49-4-  
 604 (West 2016); WIS. STAT. ANN. § 48.355 (West 2017); WYO. STAT. ANN. § 14-3-440  
 (West 2009).

27 <sup>15</sup> See, e.g., KY. REV. STAT. ANN. § 620.020 (West 2010) (“‘Reasonable efforts’ means  
 28 the exercise of ordinary diligence and care by the department to utilize all preventive  
 and reunification services available to the community... which are necessary to enable

1 reasonable efforts are required except in the presence of very specific aggravating  
 2 circumstances, such as physical or sexual abuse, abandonment, and the debilitating  
 3 mental illness of the parent.<sup>16</sup>

4 These state statutes reflect the universal belief that a child should remain with her  
 5 parent unless doing so would be severely detrimental to the child’s welfare, and, even  
 6 then, separation should be a last resort.

7  
 8  
 9  
 10 the child to safely live at home.”); NEB. REV. STAT. § 43-283.01 (West 2017)  
 (discussing “reasonable efforts to preserve and reunify the family”); S.C. CODE ANN. §  
 63-7-1640 (2017) (same).

11 <sup>16</sup> ALA. CODE § 12-15-312(c) (West 2008); ALASKA STAT. ANN. § 47.10.086(c) (West  
 12 2016); ARIZ. REV. STAT. ANN. § 8-846 (West 2017); ARK. CODE ANN. § 9-27-303 (West  
 13 2017); CAL. WELF. & INST. CODE § 361.5 (West 2017); COLO. REV. STAT. § 19-1-115(7)  
 14 (West 2010); CONN. GEN. STAT. ANN § 17a-111b (West 2015); DEL. CODE ANN. tit. 13,  
 15 § 1103 (West 2012); D.C. CODE ANN. § 4-1301.09a (West 2012); FLA. STAT. ANN. §  
 39.521 (West 2017); GA. CODE ANN. § 15-11-203 (West 2014); HAW. REV. STAT. ANN.  
 16 § 587A-28 (West 2011); IDAHO CODE ANN. § 16-1619(6)(d) (West 2016); IDAHO CODE  
 17 ANN. § 16-1602(5) (West 2017); 20 ILL. COMP. STAT. ANN. 505/5 (West 2017); IND.  
 18 CODE ANN. § 31-34-21-5.6 (West 2016); IOWA CODE ANN. § 232.102 (West 2017);  
 19 KAN. STAT. ANN. § 38-2255 (West 2013); KY. REV. STAT. ANN. § 620.020 (West 2010);  
 20 KY. REV. STAT. ANN. § 610.127 (West 2013); LA. CHILD CODE ANN. art 672.1 (2012);  
 21 ME. REV. STAT. ANN. tit. 22, § 4036-B (West 2016); MD. CODE ANN. CTS. & JUD. PROC.  
 22 § 3-812(b) (West 2015); MASS. GEN. LAWS ANN. ch. 119 § 29C (West 2010); MICH.  
 23 COMP. LAWS ANN. § 712A.19a (West 2016); MINN. STAT ANN. § 260.012 (West 2012);  
 24 MISS. CODE ANN. § 43-21-603(7) (West 2016); MO. ANN. STAT. § 211.183 (West 2014);  
 25 MONT. CODE ANN. § 41-3-423 (West 2007); NEB. REV. STAT. § 43-283.01 (West 2017);  
 26 NEV. REV. STAT. ANN. § 432B.393 (West 2017); N.H. REV. STAT. ANN. § 169-C:6-b  
 27 (West 2017) N.J. STAT. ANN. § 30:4C-11.2 (West 2012); N); N.M. STAT ANN. § 32A-  
 28 4-22 (West 2016); N.Y. Soc. Serv. LAW § 358-a(3)(b) (McKinney 2017); N.C. GEN.  
 STAT. ANN. § 7B-903 (West 2015); N.D. CENT. CODE. § 27-20-32.2 (West 2017); OHIO.  
 REV. CODE ANN. § 2151.419 (West 2014); OKLA. STAT. tit 10A, § 1-4-809 (West 2012);  
 OR. REV. STAT. ANN. § 419B.340 (West 2003); tit. 42. PA. STAT. AND CONS. STAT. ANN.  
 § 6332 (West 2002); tit. 42. PA. STAT. AND CONS. STAT. ANN. § 6351 (West 2015); R.I.  
 REV. STAT. ANN. § 40-11-12.2 (West 1998); S.C. CODE ANN. § 63-7-1640 (2017); S.D.  
 CODIFIED LAWS § 26-8A-21.1 (2012); TENN. CODE ANN. § 37-1-166 (2013); TEX. FAM  
 CODE ANN. § 262.102 (West 2017); UTAH CODE ANN. § 78A-6-306(12) (West 2017);  
 VT. STAT. ANN. tit. 33 § 5102 (West 2017); VA. CODE ANN. § 16.1-278.2 (West 2017);  
 WASH. REV. CODE § 13.34.130 (West 2013); W. VA. CODE ANN. § 49-4-602 (West  
 2015); WIS. STAT. ANN. § 48.355 (West 2017); WYO. STAT. ANN. § 14-3-440(b)-(c)  
 (West 2009).

1                   **2. Federal Law Allows States to Separate Families Only Under**  
2                   **Certain Extreme Circumstances and Requires States to**  
3                   **Preserve Familial Relationships Whenever Possible.**

4                   Federal statutes are similarly protective of the parent-child relationship. While  
5                   acknowledging that removing a child from the physical and legal custody of her natural  
6                   parents may be in the child’s best interest under certain circumstances, federal law  
7                   requires that states preserve that relationship whenever possible and appropriate.

8                   To qualify for federal funding for child welfare and child protection services,  
9                   states must employ “reasonable efforts . . . to preserve and reunify families.” 42 U.S.C.  
10                  § 671(a)(15)(B) (2014). In the absence of evidence that the child is in immediate danger,  
11                  states must attempt “to prevent or eliminate the need for removing the child from the  
12                  child’s home” and “to make it possible for a child to safely return to the child’s home.”  
13                  42 U.S.C. § 671(a)(15)(B)(i)-(ii) (2014). Similarly, federal law allows states to keep a  
14                  child separated from her parents under only two circumstances – first, when the parent  
15                  or legal guardian of the child has voluntarily placed the child in state care, or second,  
16                  upon a judicial determination “that continuation in the home from which removed  
17                  would be contrary to the welfare of the child and that reasonable efforts [to avoid  
18                  separation, as defined above] have been made.” 42 U.S.C. § 672(a)(2)(A)(i)-(ii) (2010).

19                  Additionally, recognizing the importance of maintaining family connections for  
20                  children who are in foster care, federal law encourages states to place children who are  
21                  in foster care with other family members when their parents are unable to care for them  
22                  and requires, as a condition of receiving federal funding, that each state have a state  
23                  plan which “provides that the State shall consider giving preference to an adult relative  
24                  over a non-related caregiver when determining a placement for a child, provided that  
25                  the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. §  
26                  671(a)(19) (2014).

27                  In short, federal law recognizes that removing a child from the care of her parents  
28                  is a last resort and that states must endeavor to avoid subjecting vulnerable children to

1 this extreme trauma whenever possible. And when danger to the child necessitates  
 2 removal, federal law requires that states attempt to minimize the trauma to the child by  
 3 placing the child with other family members.

4 In sum, like state laws, federal law recognizes the significant harm inflicted on  
 5 children who are unnecessarily removed from their parent’s care and requires that states  
 6 separate families only in extreme conditions and after making efforts to preserve the  
 7 family unit.

8 **3. Professional Standards for Child Welfare Workers Emphasize**  
 9 **the Importance of Family Integrity.**

10 Nationally accepted professional child welfare standards reinforce the  
 11 importance of maintaining family unity whenever possible. These standards – created  
 12 by groups of professionals based on their years of experience – are incorporated into  
 13 individual state practices and “form a reliable basis for evaluating the performance of a  
 14 state’s child welfare system.” *Kenny A. ex rel. Winn v. Perdue*, 2004 WL 5503780, at  
 15 \*12 (N.D. Ga. Dec. 13, 2004). For example, the Child Welfare League of America, a  
 16 leading network of public and private child welfare agencies advancing policies and  
 17 best practices in the field emphasizes that children have “the right to live with their  
 18 families of origin” unless it is deemed “harmful” to the child.<sup>17</sup> Similarly, the Council  
 19 on Accreditation (COA), an international human service accrediting organization,  
 20 highlights the “growing emphasis in the field on the importance of maintaining children  
 21 in their home with their families.”<sup>18</sup>

22 Furthermore, even when a child is considered “vulnerable,”<sup>19</sup> COA does not  
 23 recommend automatic removal but prioritizes instead, the stabilization of the family

24 \_\_\_\_\_  
 25 <sup>17</sup> *Id.*, Exhibit L (Child Welfare League of America, *National Blueprint for Excellence*  
 26 *in Child Welfare*, Standards of Excellence, at p. 28 (2013)).

27 <sup>18</sup> *Id.*, Exhibit M (Council on Accreditation, PA-CFS 10: Services for Parents).

28 <sup>19</sup> *Id.* (COA defines a child to be unsafe when children are “vulnerable to a threat and  
 caregivers are unable or unwilling to protect the children.” Children are defined as no  
 longer vulnerable when “no threats of danger exist, or when caregivers are capable of  
 controlling or managing any threats that do exist.”).

1 “with preventive support and in-home services” in order to “mitigate risk and encourage  
2 positive functioning, even under stressful or adverse circumstances.”<sup>20</sup>

3 These professional standards also affirm the rationale behind the state and federal  
4 child welfare laws described above—it is in a child’s best interest to remain with her  
5 parent whenever possible. Thus, the unnecessary and unsanctioned family separation of  
6 Ms. L and S.S. contradicts not only state and federal practices, but also professional  
7 best practices for child welfare.

8 **4. Unnecessarily Separating Children from Their Parents Also**  
9 **Contradicts International Law.**

10 Unnecessary family separation violates long-standing, internationally accepted  
11 human rights: the right to privacy and family life, rights of the child, the right to have  
12 the child’s “best interests” prioritized, parental rights, and the rights of the family.  
13 International law uniformly upholds the precept that the primary consideration in any  
14 custody decision should be the best interests of the child.

15 For instance, the right to family integrity is part of the right to privacy, enshrined  
16 in numerous international conventions.<sup>21</sup> For example, Article 12 of the Universal  
17 Declaration of Human Rights states: “No one shall be subjected to arbitrary interference  
18 with his privacy, family, home or correspondence, nor to attacks upon his honour and  
19 reputation. Everyone has the right to the protection of the law against such interference  
20 or attacks.” This fundamental protection for family relationships appears throughout  
21 international law.

22 <sup>20</sup> *Id.*

23 <sup>21</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)  
24 (hereinafter “Universal Declaration of Human Rights”); *see also* International Covenant  
25 on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter  
26 “ICCPR”); Organization of American States, American Convention on Human Rights  
27 art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (hereinafter “American  
28 Convention”); Convention on the Rights of the Child art. 16, Nov. 20, 1989, 1577  
U.N.T.S. 3, (hereinafter “Convention on the Rights of the Child”); and the African  
Charter on the Rights and Welfare of the Child art. 10, July 11, 1990, OAU Doc.  
CAB/LEG/24.9/49 (1990) (hereinafter the “African Charter on the Rights and Welfare  
of the Child”).

1 **a. The Rights of the Child and the “Best Interests” Test.**

2 Children’s right to remain with their families is enshrined in the 1989 Convention  
3 on the Rights of the Child.<sup>22</sup> The Preamble to the Convention describes the family as  
4 the “natural environment for the growth and well-being of all its members and  
5 particularly children,” and further states that “the child, for the full and harmonious  
6 development of his or her personality, should grow up in a family environment, in an  
7 atmosphere of happiness, love and understanding.”<sup>23</sup> Each child has the right “as far as  
8 possible . . . to know and be cared for by his or her parents,”<sup>24</sup> and “to preserve his or  
9 her identity, including . . . family relations . . . without unlawful interference.”<sup>25</sup> Article  
10 9, ¶ 1 specifically prohibits the separation of children from their parents unless “such  
11 separation is necessary for the best interests of the child,” such as instances in which  
12 either the parents are divorced or separated or the child is in danger from abuse or  
13 neglect.<sup>26</sup>

14 **b. Parental Rights Include the Right of Parents to Be With  
15 and Care For Their Children.**

16 In addition to protecting the rights of children to be with their parents,  
17 international law also protects the rights of parents to be with and care for their children.  
18 Parental rights are, in fact, extensively recognized by the Convention on the Rights of

19 <sup>22</sup> Although the United States has not ratified the Convention on the Rights of the Child,  
20 the language used in the Convention demonstrates the universality of the belief that  
governments should not separate families unnecessarily.

21 <sup>23</sup> Convention on the Rights of the Child, *supra* note 21, Preamble at page 1.

22 <sup>24</sup> Convention on the Rights of the Child, *supra* note 21, at art. 7, ¶ 1.

23 <sup>25</sup> Convention on the Rights of the Child, *supra* note 21, at art. 8, ¶ 1.

24 <sup>26</sup> Convention on the Rights of the Child, *supra* note 21, at art. 9, ¶ 1. Art. 9, ¶ 1 only  
25 allows states to remove children from their families in order to protect them from abuse  
26 or neglect, and when they have complied with a procedural requirement of judicial  
27 review. Art. 9, ¶ 1 is commonly interpreted as imposing the requirement that the judicial  
28 review must take place *before* the child is removed. Art. 9, ¶ 2 further specifies that  
“all interested parties” shall have a right to participate in proceedings pursuant to art. 9,  
¶ 1. This procedural right “has been compared with Article 14(1) of the ICCPR,” a  
provision generally outlining due process protections for any individual whose legally  
protected rights are at stake. Sharon Detrick, A Commentary on the United Nations  
Convention on the Rights of the Child 174 (1999).

1 the Child. For example, Article 18 states: “Parents or, as the case may be, legal  
 2 guardians, have the primary responsibility for the upbringing and development of the  
 3 child. The best interests of the child will be their basic concern.”<sup>27</sup> The Convention on  
 4 the Rights of the Child also details parental rights to guide children in the exercise of  
 5 their own rights, the right to state-provided information in the event of separation  
 6 (which could be used to support reunification), and the right to travel across national  
 7 borders to visit children.<sup>28</sup>

8 The Convention on the Rights of the Child is no outlier in this respect—numerous  
 9 other treaties recognize the sacred and fundamental right of parents to care for their  
 10 children. The Universal Declaration of Human Rights, the ICCPR, the African Charter  
 11 on the Rights and Welfare of the Child, and the European and American Conventions  
 12 all recognize the right of all parents to create families and be responsible for raising  
 13 their children.<sup>29</sup>

14 **c. International Treaties Provide Comprehensive**  
 15 **Protections to Families.**

16 Finally, there are comprehensive protections for preserving the integrity of the  
 17 family unit enshrined in international treaties. Article 16, ¶ 3 of the Universal  
 18 Declaration of Human Rights states: “The family is the natural and fundamental group  
 19 unit of society and is entitled to protection by society and the State.” Article 23, ¶ 1 of  
 20 the ICCPR and Article 17, ¶ 1 of the American Convention contain the same language,  
 21 and the Preamble to the Convention on the Rights of the Child protects the family as  
 22

23 \_\_\_\_\_  
 24 <sup>27</sup> Convention on the Rights of the Child, *supra* note 21, at art. 18.

25 <sup>28</sup> Convention on the Rights of the Child, *supra* note 21, at art. 14, ¶ 2; Convention of  
 26 the Rights of the Child Article, *supra* note 21, at art. 9, ¶ 4; Convention on the Rights  
 27 of the Child, *supra* note 21, at art. 10.

28 <sup>29</sup> Universal Declaration of Human Rights, *supra* note 21, at art. 16, ¶ 1; ICCPR, *supra*  
 note 21, at art. 23, ¶ 2; African Charter on the Rights and Welfare of the Child, *supra*  
 note 21, at art. 10, art. 20; Council of Europe, European Convention for the Protection  
 of Human Rights and Fundamental Freedoms art. 12, Nov. 4, 1950, 213 U.N.T.S. 221;  
 American Convention, *supra* note 21, at art. 17, ¶ 2.

1 the “fundamental group of society.” Article 18 of the African Charter describes the  
2 family as “the natural unit and basis of society” and requires the state to protect it.

3 Thus, the separation of S.S. and Ms. L contradicts comprehensive international  
4 legal protections protecting the right to privacy and family life, rights of the child, the  
5 right to have the child’s “best interests” prioritized, parental rights, and the rights of the  
6 family.

7 **C. Government Action Involuntarily Separating Children from Their**  
8 **Parents Who Pose No Risk of Harm to Them is Unconscionable and**  
9 **Unconstitutional.**

10 Finally, the right to family unity is a fundamental human right recognized by both  
11 the U.S. Constitution and various state constitutions.<sup>30</sup> Federal courts have repeatedly  
12 interpreted the Bill of Rights and the due process clauses of the U.S. Constitution to  
13 protect this right. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 618-20  
14 (1984) (“[B]ecause the Bill of Rights is designed to secure individual liberty, it must  
15 afford the formation and preservation of [the family] a substantial measure of sanctuary  
16 from unjustified interference by the State.”); *Griswold v. Connecticut*, 381 U.S. 479,  
17 496 (1965) (The Ninth Amendment protects “fundamental personal rights” such as the  
18 right to raise a family, even “though [it is] not specifically mentioned in the  
19 Constitution”).

20 A basic tenet of the right to family unity is that it “encompasses the reciprocal  
21 rights of both parent and children.” *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir.  
22 1977). As such, both parents and children are entitled to freedom from unwarranted  
23 interference in the parent-child relationship. *Hodgson v. Minnesota*, 497 U.S. 417, 484  
24 (1990) (“[P]arents have a liberty interest, protected by the Constitution, in having a  
25 reasonable opportunity to develop close relations with their children.”); *Smith v. City of*  
26

27 <sup>30</sup> For example, California’s constitution recognizes the right to privacy as an  
28 “inalienable right[]” that protects, among other things, the rights of families. *White v.*  
*Davis*, 13 Cal. 3d 757, 773-74 (1975).

1 *Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-*  
2 *Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

3 The U.S. Supreme Court has consistently recognized that a parent’s desire to care  
4 for her child is an “important interest” that “undeniably warrants deference and, absent  
5 a powerful countervailing interest, protection.” *See, e.g., Lassiter v. Dep’t of Soc. Servs.*,  
6 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 650-52 (1972). Thus, for  
7 instance, when a state seeks to sever permanently the legal relationship between a parent  
8 and child, it must follow “procedures meeting the requisites of the Due Process Clause.”  
9 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). These procedures must be  
10 “fundamentally fair.” *Lassiter*, 452 U.S. at 33; *see also Santosky*, 455 U.S. at 753-54.

11 The U.S. Supreme Court has unequivocally recognized that “[f]amily  
12 relationships, by their nature, involve deep attachments and commitments,” provide  
13 necessary “emotional enrichment,” and are “central to any concept of liberty.” *See*  
14 *Roberts*, 468 U.S. at 619. As such, the federal government has a duty under the First,  
15 Fifth, and Ninth Amendment to protect vulnerable children and their parents from being  
16 needlessly separated by the government.

17 These constitutional standards apply to children in government custody, such as  
18 foster children. Federal courts have recognized that children in foster care have a  
19 constitutional right to family integrity and association. *See, e.g., Kenny A. v. Perdue*,  
20 218 F.R.D. 277, 296 (N.D. Ga. 2003) (“The constitutional right to family integrity  
21 encompasses the right of children in foster care to have meaningful contact with their  
22 siblings and parents...”). Placing siblings in separate placements, and then failing to  
23 provide them with visits on a reasonable basis would “violate[] their right to freedom  
24 of association under the First Amendment . . . .” *See Aristotle P. v. Johnson*, 721 F.  
25 Supp. 1002, 1005 (N.D. Ill. 1989); *Connor B. v. Patrick*, 771 F. Supp. 2d 142, 163-64  
26 (D. Mass. 2011) (First and Ninth Amendment violation where “[foster] children are  
27 denied *any meaningful contact* with family members”) (emphasis in original). The state  
28 may only deprive foster children of their family relationships for “compelling reasons.”

1 *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 956 (M.D. Tenn. 2000); *Eric L. v. Bird*, 848  
2 F. Supp. 303, 307 (D.N.H. 1994) (the state “may intervene in the relationship between  
3 parent[s] and child” only if “constitutionally adequate procedures are followed”).  
4 Additionally, the state must establish that the interest cannot be achieved using less  
5 restrictive means. *Aristotle P.*, 721 F. Supp. at 1006.

6 These fundamental rights and their interpretation in the foster care setting provide  
7 helpful context to aid the Court in its Due Process analysis in the instant case.

#### 8 **IV. CONCLUSION**

9 For these reasons, the separation of Ms. L and S.S. is an unconscionable  
10 overreach of government power violating fundamental principles of fairness, including  
11 substantive due process rights under U.S. constitutional law, and threatens one of our  
12 most fundamental social constructs, the family. It also needlessly traumatizes Ms. L.  
13 and S.S. and violates nation-wide child welfare practice and international law. As such,  
14 *Amici* urge the Court to find for the Plaintiff.

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Dated: March 2, 2018

COOLEY LLP

*/s/ Summer Wynn*

SUMMER J. WYNN

Attorney for *Amici Curiae*

Children’s Rights; Children’s Defense Fund; Children’s Law Center of Minnesota; Dr. Luis Zayas; First Star, Inc.; Foster Children’s Project of the Legal Aid Society of Palm Beach County; Juvenile Law Center; Lawyers for Children; Legal Counsel for Youth and Children; Pegasus Legal Service for Children; Prof. Michael J. Dale; The American Academy of Social Work and Social Welfare; The Center for Children & Youth Justice; The Children’s Advocacy Institute; Women’s Refugee Commission

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