IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

J.E.C.M., a minor, by and through his next friend JOSE JIMENEZ SARAVIA, and JOSE JIMENEZ SARAVIA;

B.G.S.S., a minor, by and through his next friend INGRID SIS SIS;

R.A.I., a minor, by and through her next friend SANDRA ALVARADO, and SANDRA ALVARADO;

K.T.M., a minor, by and through his next friend CINTHIA VELASQUEZ TRAIL; and CINTHIA VELASQUEZ TRAIL

On behalf of themselves and others similarly situated

Plaintiffs/Petitioners,

v.

JONATHAN HAYES, Acting Director, Office of Refugee Resettlement;

JALLYN SUALOG, Deputy Director, Office of Refugee Resettlement;

LYNN JOHNSON, Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services;

ALEX AZAR, Secretary, U.S. Department of Health and Human Services;

NATASHA DAVID, Federal Field Specialist, Office of Refugee Resettlement;

JOHNITHA MCNAIR, Executive Director, Northern Virginia Juvenile Detention Center;

Case No.: 1:18-cv-903-LMB

THIRD AMENDED CLASS ACTION COMPLAINT AND PETITION FOR A WRIT OF HABEAS CORPUS

TIMOTHY SMITH, Executive Director, Shenandoah Valley Juvenile Detention Center; and

GARY L. JONES, Chief Executive Officer, Youth For Tomorrow;

Defendants/Respondents.

INTRODUCTION

1. This class action lawsuit challenges and seeks redress from the government's prolonged detention of immigrant children across the state of Virginia. Petitioners J.E.C.M., B.G.S.S. R.A.I., and K.T.M.[1] (the "child Plaintiffs") are four of many thousands of children who have made the long and perilous journey to the United States surviving trauma and fleeing violence and persecution in their home countries, only to find themselves detained by the federal Office of Refugee Resettlement (ORR) in Virginia.

2. Plaintiffs Jose Jimenez Saravia, Sandra Alvarado, and Cinthia Velasquez Trial (the "sponsor Plaintiffs") are individuals who have agreed to open their homes to the child Plaintiffs so that they need no longer be detained at government institutions, only to find themselves subject to an arbitrary, standardless, seemingly endless vetting process that furthermore unnecessarily placed them at heightened risk for arrest by federal immigration authorities.

3. In recognition of the plight and vulnerability of unaccompanied immigrant children, Congress enacted laws specifically to protect them, establishing a preference for release

[1] In compliance with Local Civil Rule 7(C) and Fed.R.Civ.P. 5.2, J.E.C.M., B.G.S.S., R.A.I., and K.T.M., minors, are identified only by their initials.

over lengthy detention and requiring that ORR promptly reunite these children with loved ones in the United States, while their immigration cases are adjudicated. As Defendant Lynn Johnson, Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, put it: "The children should be home with their parents. The government makes lousy parents."[2]

4. Yet the government's policies and practices regarding the release of immigrant children and the reunification of immigrant families do just the opposite. ORR has implemented the sponsorship process in an opaque and arbitrary manner, lacking sufficient notice and opportunity to be heard, and designed to stymie—rather than facilitate—the release of detained immigrant children. Family members or other sponsors seeking to open their home to a child in ORR custody must submit to an opaque process with shifting goalposts; with no delineated timelines whatsoever; which includes procedural steps designed solely to facilitate immigration enforcement against the sponsor, to the detriment of the child's interest in speedy release from detention and in family unity; where the primary decisionmaker, a case manager, has tremendous subjective discretion and unreviewable power to deny a sponsorship application; and which, unless the sponsor is the child's parent, results in no written decision and no opportunity for appeal. Meanwhile, the children are trapped in highly restrictive facilities, as if they were prisoners serving out criminal sentences without any semblance of due process.

5. To make matters worse, in April 2018, ORR entered into a Memorandum of Agreement (MOA) with the Department of Homeland Security (DHS), whereby ORR agreed to

[2] John Burnett, "Several Thousand Migrant Children In U.S. Custody Could Be Released Before Christmas," Dec. 18, 2018, National Public Radio, *available at* https://www.npr.org/2018/12/18/ 677894942/several-thousand-migrant-children-in-u-s-custody-could-be-released-before-christ.

share with ICE the information it gathered during the family reunification petition process about sponsors and others living in the household. It has become clear that the intended purpose of sharing this information was not to promote the best interests of the children in ORR's care, but rather to facilitate DHS's efforts to arrest and remove undocumented immigrants, and to generally deter illegal immigration from Latin America.[3] The effects of this policy have predictably led to fewer individuals coming forward to sponsor children in ORR detention, thus increasing the time that children are detained. The MOA also directly increased the length of children's detention by adding new procedural hurdles, again designed to facilitate DHS immigration enforcement against sponsors and others in their household.

6. As a result of these policies, ORR has held tens of thousands of children across the country in custody for excessive amounts of time and has illegally and improperly denied them the opportunity to reunite with their families. These children deserve the opportunity to live in a healthy, nurturing, and healing environment that their sponsors are prepared to provide while awaiting adjudication of their immigration claims, and Defendants should not be permitted to delay this reunification any further.

7. Given the continued specter of indefinite detention of immigrant children, and given ORR's continued facilitation of ICE arrests of sponsors to the detriment of the children in its care, Plaintiffs now seek the Court's intervention so that detained immigrant children will no longer be subjected to the grievous harms that children suffer when separated from their families.

[3] *See, e.g.*, Anne Flaherty and Quinn Owen, "Leaked memo shows Trump administration weighed separating families at border, Sen. Merkley wants Nielsen investigated for perjury," Jan. 18, 2019, *available at* https://abcnews.go.com/Politics/leaked-memo-shows-trump-administration-weighed-separating-families/story?id=60459972; Memorandum, "Policy Options to Respond to Border Surge of Illegal Immigration," *available at* https://www.documentcloud.org/documents/5688664-Merkleydocs2.html.

Defendants' actions violate the federal statute that governs the detention and release of immigrant children, the Administrative Procedure Act's (APA) requirements for promulgating rules, the APA's prohibition on unreasonable delays and arbitrary and capricious agency conduct, and the Constitution's Due Process Clause. Defendants' actions are causing serious and irreparable harm to Plaintiffs and the other potential sponsors and caregivers of released unaccompanied children (UACs). Plaintiffs therefore seek declaratory and injunctive relief from this Court to end these violations and harms.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (Declaratory Judgment Act); 28 U.S.C. § 2241 (habeas corpus); and 28 U.S.C. § 1361 (mandamus).

9. Venue is proper in the Eastern District of Virginia under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims occurred and continue to occur in this district. Venue is also proper under 28 U.S.C. § 2241(d) because Plaintiffs J.E.C.M., R.A.I., and K.T.M. were detained within this district at the time the Complaint [Dkt. #1] and First and Second Amended Complaints [Dkts. ##4, 21] were filed; and because Plaintiff B.G.S.S. currently resides within this district.

THE PARTIES

10. Plaintiff J.E.C.M. is a 14-year-old boy from Honduras who was detained by the defendants in Alexandria, Virginia beginning on or about February 27, 2018 until July 26, 2018.

11. Plaintiff Jose Jimenez Saravia is J.E.C.M.'s brother-in-law and ORR sponsor. He lives in New Jersey. Prior to J.E.C.M.'s detention by defendants, Mr. Jimenez Saravia has had a long history of contact and a close relationship with him from an early age.

12. Plaintiff B.G.S.S. is a 17-year-old boy from Guatemala who has been detained by the defendants beginning on or about May 11, 2018 until January 19, 2019. At the time the First and Second Amended Complaints [Dkts. ##4, 21] were filed, he was detained by defendants in Staunton, Virginia. He currently resides in Virginia.

13. Plaintiff R.A.I. is a 15-year-old girl from Honduras who was detained by the Defendants in Prince William County, Virginia beginning on or about April 26, 2018 until some time after September 21, 2018.

14. Plaintiff Sandra Alvarado is R.A.I.'s sister and ORR sponsor, and has been her primary caregiver since she was 5 years old. She lives in Maryland.

15. Plaintiff K.T.M. is a 15-year-old boy from Honduras who was detained by defendants in Prince William County, Virginia beginning on or about March 31, 2018 until some time after September 21, 2018.

16. Plaintiff Cinthia Velasquez Trail is K.T.M.'s sister and ORR sponsor. She lives in Texas. Prior to K.T.M.'s detention by Defendants, Ms. Velasquez Trail had a long history of contact and a close relationship with him from an early age.

17. Defendant Alex Azar is the Secretary of the Department of Health and Human Services, the department of which ORR is part. Mr. Azar is a legal custodian of the child Plaintiffs and is sued in his official capacity.

18. Defendant Lynn Johnson is the Assistant Secretary for the Administration for Children and Families under the U.S. Department of Health and Human Services. The Administration for Children and Families is the office within HHS that has responsibility for ORR. Ms. Johnson is a legal custodian of the child Plaintiffs and is sued in her official capacity.

19. Defendant Jonathan Hayes is the Acting Director of the Office of Refugee Resettlement ("ORR"). ORR is the government entity directly responsible for the detention of the child plaintiffs. Mr. Hayes is a legal custodian of the child Plaintiffs and is sued in his official capacity.

20. Defendant Jallyn Sualog is the Deputy Director of ORR. Ms. Sualog is a legal custodian of the child Plaintiffs and is sued in her official capacity.

21. Defendant Natasha David is a Federal Field Specialist at ORR. Ms. David is a legal custodian of the child plaintiffs and is sued in her official capacity. She is the federal official who oversees the ORR contract with Northern Virginia Juvenile Detention Center, where J.E.C.M. was detained, as well as the ORR contract with Youth For Tomorrow, where K.T.M. and R.A.I. were detained, and Shenandoah Valley Juvenile Detention Center, where B.G.S.S. was detained.

22. Respondent Johnitha McNair is the Executive Director of Northern Virginia Juvenile Detention Center ("NOVA"), and is the warden of that facility. J.E.C.M. was held at NOVA at the time he filed his habeas corpus petition [Dkt. #1] until his release on July 26, approximately one week after the initial filing of this suit. Ms. McNair was a legal custodian of J.E.C.M. and is sued in her official capacity.

23. Respondent Timothy Smith is the Executive Director of Shenandoah Valley Juvenile Detention Center ("SVJC"), and is the warden of that facility, where B.G.S.S. was detained at the time he filed his habeas corpus action [Dkt. #21]. Mr. Smith was a legal custodian of B.G.S.S. and is sued in his official capacity.

24. Respondent Gary L. Jones is the Chief Executive Officer of Youth For Tomorrow ("YFT"), and is the warden of that facility, where R.A.I. and K.T.M were detained at the time

they filed their habeas corpus action [Dkt. #21]. Dr. Jones was a legal custodian of R.A.I. and K.T.M. and is sued in his official capacity.

BACKGROUND AND LEGAL FRAMEWORK

A. Legal Framework and Policies Governing Custody and Release of Immigrant Children

25. Each year, thousands of unaccompanied alien children ("UAC") arrive in the United States to escape persecution in foreign countries, some with relatives and some alone.[4] In recent years, the U.S. has seen an influx of children from Mexico and Central America fleeing endemic levels of crime and violence that have made those countries extremely dangerous, especially for children and young adults.[5] In FY2017, 23% of UACs had Honduras as their country of origin, where J.E.C.M., R.A.I. and K.T.M. are from.[6] In the same fiscal year, 45% of UACs came from Guatemala, where B.G.S.S. is from, and 27% came from El Salvador.[7]

26. Government care and custody of UACs is governed by a legal framework consisting primarily of two statutory provisions—§ 279 of Title 6 and § 1232 of Title 8—plus a settlement agreement that is binding on the pertinent federal agencies. In the 1980s and 1990s, immigrant children who arrived to the U.S. were routinely locked up for months in unsafe and unsanitary jail cells in remote facilities across the country. These conditions prompted a federal lawsuit, *Flores v. Reno*, which resulted in a 1997 consent decree (the "*Flores* Agreement"), still

[4] *See* Office of Refugee Resettlement: Facts and Data, https://www.acf.hhs.gov/orr/about/ucs/facts-and-data (last accessed May 2, 2018).

[5] *See* ACF Fact Sheet, https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf (last accessed May 2, 2018).

[6] *See* Office of Refugee Resettlement: Facts and Data, https://www.acf.hhs.gov/orr/about/ucs/facts-and-data (last accessed July 20, 2018).

[7] *Id.*

effective today, and binding on DHS and ORR, that sets national standards for the detention, release, and treatment of immigrant children in government custody.

27. In addition to setting certain minimal detention standards, *Flores* guarantees that children shall be released "without unnecessary delay" while they await their immigration status and requires the Government to undertake "prompt and continuous efforts" towards family reunification. As the Fourth Circuit Court of Appeals explained, "[t]he *Flores* Agreement spells out a general policy favoring less restrictive placements of alien children (rather than more restrictive ones) and their release (rather than detention)." *D.B. v. Cardall*, 826 F.3d 721, 732 (4th Cir. 2016). Under the Agreement, "[U]nless detention is necessary to ensure a child's safety or his appearance in immigration court, he *must* be released without unnecessary delay, preferably to a parent or legal guardian." *Id.* (citing *Flores* Agreement ¶ 14) (emphasis added) (internal citations omitted). The *Flores* consent decree also gives these children the right to a bond hearing before an immigration judge.[8] Moreover "[t]he child may be detained in a secure facility [i.e., the most restrictive] only under specified limited circumstances, and then only when no less restrictive alternative is available and appropriate." *Id.*

28. In 2002, Congress took further action to protect this vulnerable population when it passed the Homeland Security Act ("HSA") and transferred the care and custody of unaccompanied immigrant children from the Immigration and Naturalization Service ("INS") to the Office of Refugee Resettlement, housed within the Department of Health and Human Services. ORR is not a security agency; its mission is to "incorporate[e] child welfare values"

[8] The *Flores* bond hearing does not empower an immigration judge to order a child's release from ORR custody or even to review the reunification process. It merely permits the immigration judge to determine whether a child is a danger to the community, thus substantiating or contradicting ORR's claims that it continues to have authority to detain a child. *See Flores v. Sessions*, 862 F.3d 863, 867-69 (9th Cir. 2017).

into the care and placement of unaccompanied immigrant children. Despite the reorganization mandated by the HSA, the *Flores* Agreement is binding on all successor agencies to the INS,[9] including ORR.[10]

29. Building on *Flores* and the provisions of the HSA regarding immigrant children, Congress further passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), codified at 8 U.S.C. § 1232, which grants legal protections to children in ORR custody and tasks the agency with ensuring they are "promptly placed in the least restrictive setting that is in the best interest of the child." Senator Diane Feinstein, a sponsor of the bill that would become the TVPRA, explained that the legislation was intended to redress situations like one she had personally witnessed, where an unaccompanied child remained in custody for nine months after her initial detention. Congress enacted the TVPRA specifically to facilitate the speedy release and minimally restrictive placement of immigrant children.

30. As the Fourth Circuit observed, the TVPRA contained various provisions that mirror the *Flores* Agreement's focus on the welfare of the child. "[T]he Office shall promptly place a UAC in the *least restrictive* setting that is in the UAC's best interest, subject to the need to ensure the UAC's safety and timely appearance at immigration hearings." *Cardall*, 826 F.3d at 733 (citing 8 U.S.C. § 1232(c)(2)(A)). Equally important, "[t]he Office shall not place a UAC in a secure facility [e.g., NOVA or Shenandoah] absent a determination that the UAC poses a danger to self or others or has been charged with having committed a criminal offense." *Id.*

[9] The HSA transferred functions of INS to several agencies within the newly created Department of Homeland Security.

[10] ORR recognizes its continuing obligations under the *Flores* Agreement. *See* Exh. 1 at § Sec. 3.3 (outlining obligations imposed by *Flores* Agreement on ORR care provider facilities).

B. ORR's Policy-Making Background

31. ORR has promulgated but not yet enacted regulations under the TVPRA.[11] The only public guidance on ORR's detention and release procedures is a guide that has existed for at least a decade but was not published online until 2015. *See* Exh. 1 hereto (ORR Policy Guide). ORR frequently edits and amends this guide without any explanation or announcement of the changes. ORR also regularly advises its staff and service providers of nonpublic changes to this guide by email or phone. The ORR Policy Guide contains the procedures that control more than 10,000 children in ORR custody nationwide.

32. Reviewing ORR's placement practices in 2016, a subcommittee of the Senate Committee on Homeland Security and Governmental Affairs found that ORR had "failed to adopt and maintain a regularized, transparent body of policies and procedures concerning the placement of UACs" and castigated the agency for what it called "[s]etting governmental policy on the fly" in a manner "inconsistent with the accountability and transparency that should be expected of every administrative agency."[12]

33. Although it is crafted without the required public accountability and transparency over ORR's activities, the online guide does provide a set of procedures for the agency to follow when determining the placement and release of children in its care. These procedures are applicable to over 10,000 children in ORR custody nationwide.

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[11] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," 83 Fed. Reg. 45486 (Sept. 7, 2018).

[12] United States Senate Permanent Subcommittee on Investigations, Staff Report, "Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement," January 28, 2016, at p.51, *available at* https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf.

34. Three facilities in Virginia have contracts with HHS to house children in ORR custody. One of these facilities is Youth For Tomorrow (YFT), a "shelter care" facility with the lowest level security, where R.A.I. and K.T.M. were held. One is a "secure" facility housed in a juvenile detention center: Shenandoah Valley Juvenile Center (SVJC), where B.G.S.S. was held. ORR previously had a contract with a second secure facility, the Northern Virginia Juvenile Detention Center (NOVA), where J.E.C.M. was held. Additionally, ORR contracts with a long-term foster care agency for UACs whom ORR considers (whether correctly or incorrectly) to have no sponsor.

35. ORR also has policies and procedures that "require the timely release of children and youth to qualified parents, guardians, relatives or other adults, referred to as 'sponsors.'" ORR prioritizes placement with sponsors as follows: Category 1 sponsors are parents or legal guardians; Category 2 sponsors are immediate relatives, including brothers, sisters, aunts, uncles, grandparents, and first cousins; Category 3 sponsors are all other adults, including relatives or unrelated adults like family friends. *See* Exh. 1 (ORR Policy Guide) at § 2.2.1. ORR allows itself to deny release to a parent or legal guardian where ORR itself determines that "there is substantial evidence that the child would be at risk of harm if released to the parent or legal guardian" without requiring termination of parental rights or even a petition before a juvenile or family court. *Id.* Under current policy, once a "qualifying" custodian or sponsor has been identified, he or she must complete several forms—including a broad authorization for release of information and a family reunification application—and provide documentation of the identity of the child, the sponsor's identity and address, his or her relationship to the child, and "evidence verifying the identity of all adults residing with the sponsor and all adult care givers identified in a sponsor care plan." Notably, ORR requires potential sponsors to identify all adults in the

household *and* an alternative caregiver who is able to provide care in the event the original sponsor is unavailable. *See* Exh. 1. at § 2.2.4.

36. If a sponsor is able to provide all the information required by ORR, including biographical and biometric information for the household adults and alternate care givers identified in the sponsor application, an ORR care provider and a nongovernmental third-party reviewer, called a "case coordinator," may "conclude[] that the release is safe and the sponsor can care for the physical and mental well-being of the child;" the care provider then "makes a recommendation for release" to the ORR Federal Field Specialist (FFS), an individual who acts as the local ORR liaison with the facility. *See* Exh. 1. at § 2.7.

37. Historically, the FFS then either approved or denied release or requested more information. Prior to 2017, children placed in staff-secure custody were typically released to a sponsor within 30 to 90 days.[13] For children in shelter care, the average length of time in custody was 34 days, after which time the vast majority were reunited with a sponsor. But as described below, Defendant ORR Director Lloyd instituted new changes to longstanding ORR reunification policies without explanation, resulting in the reunification process having come to a virtual halt for vast numbers of UACs.

C. ORR's Lack of Due Process in Placement and Release Decisions

38. Despite the admonitions by U.S. District Courts for both the Eastern and Western Districts of Virginia that ORR's reunification process was in violation of the Due Process Clause, ORR has not reformed its policy and in fact has made it worse. *See Beltran v. Cardall*,

[13] Some reports show that in 2012-13, the average days until release was 67 days for male children. *See* Report of the National Technical Assistance Center for the Education of Neglected or Delinquent Children and Youth on the Northern Virginia Detention Center, https://neglected-delinquent.ed.gov/sites/default/files/docs/NDTAC_1-pager-NVJDC_508.pdf (last accessed May 2, 2018).

222 F. Supp. 3d 476 (E.D. Va. 2016) (holding that ORR's family reunification procedures did not provide the child petitioner or his mother due process of law); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017) (holding that ORR's family reunification procedures caused even more egregious violations of the child petitioner's and his mother's due process rights than had occurred in *Beltran*).[14] Notably, in *Santos*, ORR requested additional time in which to provide "a more fulsome process." *Santos*, 260 F. Supp. 3d at 615. Over a year later, ORR still has failed to develop sufficient processes to protect its child wards or their sponsor's interests, and instead has made the reunification process more opaque, cumbersome, and lengthy. Indeed, the constitutionally dubious two-month delay in reunification in *Beltran* soon became the average length of time in ORR custody for children in shelter-level care,[15] with the lengths of detention in staff-secure and secure detention lasting significantly longer.[16] *Santos*, 260 F. Supp. 3d at 613

[14] Although the sponsors in *Beltran* and *Santos* were both the mothers of the petitioners, the liberty interest in family unity is not limited to the nuclear or even biological family. *See Smith v. Org of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977) ("biological relationships are not [the] exclusive determina[nt] of the existence of a family"). Indeed, courts have given great weight to the family unity interests between more distantly related relatives, including siblings, grandparents, and aunts and sisters. *See Moore v. City of East Cleveland*, 431 U.S. at 496-506 (affirming the constitutional conception of family between a grandmother and her grandsons); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (affirming a constitutionally recognized family relationship between an aunt and her niece); *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (upholding the family unity interests of a half-sister).

[15] The average length of time in shelter-care in June 2018 was 57 days. ACF, Fact Sheet, June 15, 2018, *available at*, https://www.acf.hhs.gov/sites/default/files/orr/orr_fact_sheet_on_unaccompanied_alien_childrens_services_0.pdf.

[16] ORR policy changes have resulted in children spending nearly twice as long in ORR custody at the shelter level, and nearly three times as long in ORR custody in secure or staff-secure facilities. *See L.V.M. v. Lloyd*, 2018 WL 3133965, at *3 (S.D.N.Y., June 27, 2018). Prior to 2017, children in staff-secure custody typically remained detained for 30 to 90 days. Yet over the past year, as a direct result of the Defendants' policies, children spend an average of seven to eight months in a staff secure or secure facility in ORR custody; in many cases, children are not released at all and are simply transferred directly to ICE custody on their 18th birthdays. *Id.*

(citing the two-month delay between filing of the reunification request and the denial having "raise[d] due process concerns" in *Beltran*).

39. ORR's family reunification process remains riddled with due process violations. Government contractors are the primary gatekeepers for a sponsor's ability to even complete a reunification application, before a sponsor receives any official ORR decision. These third-party contractors have nearly unfettered power to permit sponsorship applications to go forward, to deny sponsorship as not being viable before the application has been completed (or even begun), to require a time-consuming home study of the sponsor, and to forward the application for final decision to supervisors. *See* Exh. 1 at §§ 2.3.3, 2.3.4. In wielding this power, upon information and belief, they are subjected to pressures from the current administration and directives from ORR administrators that are not necessarily contained in the ORR Policy Guide. At the same time, they are charged with directly assisting sponsors in completing the application in the first place, and describe themselves to the sponsors as their advocates. *See* Exh. 1 at § 2.2.3.

40. In the stages prior to an elusive final decision on a sponsor's application, there is little or no notice as to why a sponsor may be rejected, what steps remain and what requirements will ultimately complete the reunification application, and no recourse to challenge either specific requirements or a case manager's subjective determination that a sponsor is not viable. In fact, ORR grants itself discretion to raise additional barriers to sponsorship, prolonging children's detention by requiring additional documentation and reunification steps prior to calling the application complete. *See* Exh. 1 at § 2.2.4 ("ORR may in its discretion require potential sponsors to submit additional documentation beyond the minimums specified below"). These policies prolong children's time in ORR custody and raise serious due process concerns for those children and for their family members trying to reunify with them.

41. When ORR transfers a minor from one detention center to another—which it does frequently, without prior notice or opportunity to be heard, and in its sole discretion—the reunification process usually has to start over from the beginning, even without any change in sponsor, which adds considerable delays. In addition, even when sponsors have already been previously vetted, they have to go through the entire vetting process all over again from the beginning, which adds considerable delays. If a sponsor temporarily withdraws from the sponsorship process, they often have to start the reunification process over from the beginning, which adds considerable delays. Indeed, sometimes the mere passage of time during the sponsorship process due to ORR's delays causes ORR to tell a sponsor that their fingerprints are "stale" and must be re-taken and re-processed, adding considerable delays.

42. Four of ORR's written policies, taken together, form an opaque, impenetrable process in which sponsors and children have little sense of what will be required of them to achieve reunification, let alone any way to challenge those requirements or early peremptory decisions about sponsor viability. The policies establish a level of discretion with front-line government contractors allowing them to cut the reunification process short or stop it all together before any official grant or denial of reunification with a sponsor. Additionally, the case manager must play the role of the prosecutor and judge for each potential sponsor, even while the sponsors understand them to be their advocates. The established policy lacks any constitutionally sufficient process and enshrines a process nearly identical to (or worse than) the process that the court in *Santos* rejected:

- Section 2.2.3 of the ORR Guide establishes that the "care provider" or case manager helps the sponsor complete the application and outlines what must be sent to the sponsor to complete for a sponsorship application. It establishes the case manager as the gatekeeper of the reunification process.

- Section 2.2.4 of the ORR Guide sets forth the required documentation for potential sponsors and other adults in the household, while simultaneously granting case managers unfettered discretion to require additional information and other steps in the reunification process with no indication as to why or when additional requirements may be added.

- Section 2.4.1. sets out supposed criteria for assessing a sponsor's viability, to be evaluated by the case manager, but does not establish any standards to meet any of the criteria or the weight given to each criterion. It also establishes some highly subjective criteria and improperly places additional burden on would-be sponsors.

- Section 2.4.2 sets out requirements for mandatory home studies, and also grants broad discretion to the government-contracted case manager and case coordinator to recommend "discretionary" home studies. Upon information and belief, this section does not include the internal policy of requiring home studies for all UACs held in a secure detention center. And although this section suggests that the case managers and case coordinators independently recommend additional home studies, upon information and belief, the ORR administrators have begun to require case managers to recommend home studies in far more cases, with little or no justifying concerns about a sponsor's ability to care for a UAC. Home studies significantly slow the release process and force potential sponsors to submit to an invasive procedure in which they must open up their homes and their families, including minor children, to a stranger.

43. Taken together, these policies establish an opaque and overly burdensome reunification process, relying on the discretion of government-contracted case managers and subject to manipulation by the whims and directives of ORR administrators before any "official" reunification decisions are made. This means that for many would-be and current sponsors, ORR does not provide notice as to the reason that their sponsorship was or may be rejected, nor does it require case managers to divulge the basis for demanding that sponsors meet additional requirements. Further, the present framework does not provide sponsors with the ability to challenge a case manager's determination of viability. The current framework deters sponsors from raising concerns regarding any additional requirements or non-viability decisions with the case manager, because the case manager is also charged with helping the sponsor complete the application, and any challenge to the case manager's authority or decision-making power may

result in retaliation during the process of assessing the viability of the sponsor's application. For detained children, this means many more weeks or months in detention, while the case manager works with the sponsor to complete a process with no definitive end and no definitive number of steps or requirements. The process does not accord the children or their sponsors a hearing or other meaningful notice or opportunity to be heard, nor is there any procedure establishing such an opportunity for them. *Contra, e.g.*, 22 Va. Admin. Code §§ 40-201-10 *et seq.* (setting out detailed criteria and strict timelines for foster care placements in Virginia).

44. The Fourth Circuit made clear in *D.B. v. Cardall*, 826 F.3d at 741-43, that the three-part balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), controls this Court's determination of how much process ORR owes to a UAC in the ORR reunification process and in denying a UAC's request to be free from civil detention. Here, all three *Mathews* factors show that ORR's process, as outlined in its Policy Guide and, upon information and belief, as carried out under internal directives to case managers, is unconstitutionally insufficient.

45. In *Beltran* and in *Santos*, ORR detained minors pursuant to "child welfare" custody despite requests by each child's mother for release of her son into her custody, and without affording her any hearing. Both courts found that the detention violated the Fifth Amendment due process rights of the mother and son, granted the petition for habeas corpus, and ordered the release of the minor back to his mother's care and custody. *Id.*

46. As in *Santos*, the private interest implicated here includes both the right to family unification and the child plaintiffs and classmembers' right to liberty. *See Santos*, 260 F.Supp.3d at 611. In *Santos*, this Court found deprivation of a substantial private interest under analogous facts. Here, the Government is using the same and *additional* stall tactics to avoid even reaching a final decision regarding reunification in any timely manner.

47. To remedy these risks, both the *Beltran* and *Santos* courts found the need for an adversarial process, including "a substantial hearing." *Beltran*, 222 F. Supp. 3da at 486; *Santos*, 260 F. Supp. 3d. at 613-14. Both Supreme Court and Fourth Circuit precedent hold that, 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. *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990); *see also Stanley v. Illinois*, 405 U.S. 645, 658 (1972). The *Beltran* and *Santos* courts' conclusions are also reinforced by Fourth Circuit precedent that adversarial hearings are regularly required where "subjective judgments that are peculiarly susceptible to error" are at issue. *Jordan by Jordan v. Jackson*, 15 F.3d 333, 347 (4th Cir. 1994). As in *Beltran* and *Santos*, no hearing or other meaningful notice or opportunity to be heard has been accorded to child plaintiffs or their sponsors, nor is there any procedure establishing such an opportunity for them.

48. In the plaintiffs' cases and under the above-mentioned policies, ORR does not sufficiently make the Petitioners "aware of . . .the evidence or factual findings upon which ORR relied in withholding [the child petitioners] from [their sponsors'] care and custody," which "opaque procedure deprive[s] Petitioner of any opportunity to contest ORR's findings, and thus any meaningful opportunity to alter its conclusions." *Beltran*, 222 F. Supp. 3d at 485.

49. Both the *Beltran* court and the *Santos* courts found that ORR's procedures "created a significant risk that [the mother and son] would be erroneously deprived of their right to family integrity" and that additional procedural safeguards of the nature routinely employed with government interference with fundamental rights could have mitigated the risk. *Beltran*, 222 F. Supp. 3d at 488; *see also Santos*, 260 F. Supp. 3d at 614 ("had better or more process been given especially as to the delay and the burden being on Ms. Santos to initiate and justify

reunification, rather than the default rule being otherwise, the outcome could have been different"). The likely risk of erroneous deprivation of the most fundamental liberty interests is thus significantly higher, and unacceptable, under these circumstances.

50. Further, ORR's actions continue to improperly place the burden onto potential sponsors to change ORR's mind and, if unable, to initiate court proceedings. "At no point [is] the onus on ORR to justify its deprivation of Petitioner's fundamental [familial] rights." *Id. Beltran* and *Santos* both concluded that "having determined that it would deprive [mother] and [child] of their fundamental right to family integrity, ORR could not adopt for itself an attitude of 'if you don't like it, sue.'" *Beltran*, 222 F. Supp. 3d at 485 (*citing Weller*, 901 F.2d at 395); *see also Santos*, 260 F. Supp. 3d at 613; *Stanley v. Illinois*, 405 U.S. at 658 (procedures that "insist[] on presuming rather than proving" are insufficient under the Due Process Clause). But that is precisely what ORR policies and practices require plaintiffs to do.

51. In sum, the facts and the law applied in *Beltran* and *Santos* compel the same relief here as the court ordered in those cases, a grant of the writ of habeas corpus and requiring ORR to release the child plaintiffs to their sponsors and requiring ORR to revise their policies to bring them into compliance with the Due Process Clause of the constitution.

D. ORR's Fingerprint-Sharing Agreement with ICE.

52. Making matters worse, ORR has agreed to allow one aspect of its reunification process, namely the background vetting of potential sponsors, to be used towards a purpose for which it was never intended: civil immigration enforcement against the very sponsors who are willing to open their homes to enable children to leave government custody.

53. Upon information and belief, ORR has long been aware that the vast majority of children in its care came to the United States intending to unite or reunite with family members

who are also immigrants; that these family members are generally the best sponsors for the children; and that a disproportionately large number of these family members lack any legal status in the United States, like the children themselves.

54. For many years, ORR has routinely collected fingerprint information of non-parent sponsors, in order to run criminal background checks on them.[17] ORR did not routinely fingerprint sponsors who were the parents of the children they hoped to sponsor unless some specific 'red flag' appeared to make it necessary; nor did they routinely fingerprint household members of sponsors unless some specific 'red flag' appeared to make it necessary. Most importantly, any fingerprints that ORR collected were not shared with immigration enforcement agencies.

55. On April 13, 2018, ORR signed a Memorandum of Agreement (MOA) with Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE), agreeing to vastly expand the information collected from sponsors and all of their household members, and to share that information among the agencies. *See* Exh. 2 (Memorandum of Agreement). The MOA addresses the collection and sharing of sponsor, household member, and caregiver information through the sponsorship application process. *Id.* Hiding its true purpose of arresting sponsors and their household members and deterring illegal immigration, and adopting the pretext of protecting child welfare, the MOA outlined vastly expanded information collection not just from potential sponsors, but from every adult household member and a required alternate caregiver. *Id*. at Sec. 5(B) ("ORR will provide ICE with the name, date of birth, address, fingerprints . . . and any available identification documents or biographic information regarding

[17] ORR also conducts a number of other background checks on potential sponsors and their household members using names and other forms of identity verification, that do not require fingerprints to run. *See* Exh. 1 (ORR Guide) at § 2.5.1.

the potential sponsor and all adult members of the potential sponsor's household"). ORR incorporated this information collection and sharing policy into various sections of its ORR Policy Guide.

56. The MOA significantly impacts the rights and legal status of thousands of children in ORR custody and even more potential sponsors, household members, and caregivers of those children. *Id.* Like the ORR Guide, this Memorandum of Agreement (MOA) was entered into and its policies carried out without providing any public notice or opportunity to comment on the new rules.

57. The only rationale for collecting immigration status information provided by ORR in the ORR Guide is listed in Sec. 2.6 of that guide. *See* Exh. 1. That section of the guide states, "ORR does not disqualify potential sponsors on the basis of their immigration status. ORR does seek immigration status information, but this is used to determine if a sponsor care plan will be needed if the sponsor needs to leave the United States; it is not used as a reason to deny a family reunification application." *Id.* There was no rationale provided regarding seeking or sharing information about household members' immigration status, which has no bearing on whether the sponsor would need to leave the United States; nor is there any rationale provided regarding sharing sponsors' address information with ICE or otherwise facilitating ICE immigration enforcement against sponsors.

58. While the publicly stated purpose of this MOA was for ORR to obtain more information about would-be sponsors and their household members and thereby make better-informed placement decisions, the true primary intent and purpose of the MOA was to assist ICE in enforcing immigration laws against sponsors and their household members—a purpose that not only has no relationship to ORR's mission, but actually runs contrary to ORR's statutory

obligation to act in the best interests of the children in its care: when ICE arrests a would-be sponsor of an immigrant child, that immigrant child obviously cannot be released to the sponsor, and the child's release from detention is stalled until another sponsor willing to engage in the process can be identified, if any; and when ICE arrests the sponsor of a recently released immigrant child, that sponsor is prevented from carrying out the terms of his sponsorship agreement with ORR, and the child will be plunged into instability and often poverty.[18]

59. Indeed, in just the first four months of the MOA's operation, ICE used the MOA and the information obtained thereby to carry out civil immigration arrests of 170 sponsors, 109

[18] For example, one 17-year-old Guatemalan child named E.A.X. came to the United States on July 20, 2018 with his two younger brothers and were detained by Defendants at a 300-bed shelter in Arizona. Their father, who lived in Nebraska with his wife and their son, began the sponsorship process for his three older boys. After a disciplinary incident, E.A.X. was separated from his brothers and transferred to a staff-secure facility in northern California.

On or around September 4, 2018, E.A.X.'s father submitted his fingerprints to ORR as part of the reunification process. Just three days later, E.A.X.'s father got in his car to go to work. A few blocks from his home, he was pulled over by ICE agents, arrested, and quickly deported to Guatemala. After E.A.X. found out that his father had been deported as a result of submitting fingerprints to sponsor him, E.A.X. felt guilt-ridden and devastated.

The brothers' stepmother continued the sponsorship process in her husband's place. E.A.X.'s brothers were released to her, but because E.A.X is in a higher security facility than his brothers, he has not been released. As a result of his prolonged detention, the restrictive nature of the staff-secure facility, the separation from his brothers, the release of his brothers, and the deportation of his father, E.A.X.'s behavior became more erratic. The number of minor incidents E.A.X. was involved in increased, further decreasing his chances of release to his step-mother.

Finally, in November of 2018, after E.A.X. had been in detention for four months, he learned that his stepmother was considering withdrawing from the sponsorship process due to the burdensome policies challenged in this lawsuit. E.A.X.'s emotional and psychological condition further deteriorated, and he attempted suicide. When the paramedics arrived, E.A.X. believed they were there to kill him. He was hospitalized for several days.

Instead of working to release E.A.X. to a sponsor as quickly as possible, or alternatively place him in a facility where his mental health needs could be adequately met, ORR transferred E.A.X. to the Yolo County Detention Facility, its most secure and jail-like detention facility in the United States, where his freedoms are even further curtailed, and he is surrounded by other children who have similar difficulties adjusting to prolonged detention.

of whom did not have a criminal record; of the 61 who had a criminal record, most were for charges involving nonviolent and other offenses that would generally be considered to have no bearing on an individual's fitness to sponsor a child.[19]

60. ORR staff and leadership had previously studied and deliberated the pros and cons of putting into place a policy of this nature, but concluded that the marginal increase in useful information would be minimal, and would be vastly outweighed by the predictable negative consequences including a drastic reduction in the number of willing sponsors and a corresponding dramatic increase in the average length of detention of children in ORR custody and number of children detained, and therefore concluded that such a policy would not be in the best interests of the children in ORR's custody. Upon information and belief, when ORR decided to enter into the ICE fingerprint-sharing MOA in April 2018, ORR did not revisit these deliberations and this conclusion, but instead simply ignored them.

61. Consequently, as a predictable (if not known and anticipated) result of this ICE fingerprint-sharing policy, countless would-be sponsors withdrew from the sponsorship process or declined to step forward to sponsor detained immigrant children, rather than participate in a fingerprint-sharing process that was designed to enable ICE to arrest them. Even more sponsors who were willing to come forward were nonetheless stymied when their household members refused to have their fingerprints sent to ICE to be used against them. In addition, the fingerprinting system became overwhelmed with months-long delays added on to each release decision as sponsors waited many weeks for a fingerprinting appointment, and then waited many weeks more for the results to come back. As a result, reunifications ground to a near-halt, and the

[19] Daniella Silva, "ICE arrested 170 immigrants seeking to sponsor migrant children," Dec. 11, 2018, NBC News, *available at* https://www.nbcnews.com/news/latino/ice-arrested-170-immigrants-seeking-sponsor-migrant-children-n946621.

population of children detained by ORR ballooned from less than 3,000 just a year and a half earlier to nearly 15,000 children, a never-before-seen record.[20] More than one-third of those children were detained at mega-facilities with over 1,000 children each, a far cry from the level of individualized attention implied by the concept of "shelter-level care." *Id.*

62. ORR was unable to accommodate all of those children within its existing network of shelters, and was forced to erect temporary facilities with much more restrictive conditions.[21] The most infamous of these facilities was a fenced-in tent city in the middle of the desert, just steps from the Rio Grande river in Tornillo, Texas, in which children were warehoused in conditions reminiscent of the World War II-era Japanese internment camp at Manzanar,[22] with woefully insufficient educational or psychological programming available to them.[23] The situation of these children was so dire that on December 17, 2018, the operator of the Tornillo tent city camp sent a letter to ORR advising that they would no longer accept more detained children at the facility: "We as an organization finally drew the line," Kevin Dinnin, the

[20] Andres Leighton, "Nearly 15,000 migrant children in federal custody jammed into crowded shelters," Dec. 19, 2018, Associated Press, *available at* https://www.cnbc.com/2018/12/19/nearly-15000-migrant-children-in-federal-custody-jammed-into-crowded-shelters.html.

[21] Julián Aguilar, "Operator of migrant facility in Tornillo says it might not stay open past July 13 when contract expires," June 25, 2018, The Texas Tribune, *available at* https://www.texastribune.org/2018/06/25/operator-migrant-facility-tornillo-says-it-might-not-stay-open-past-ju/.

[22] Algernon D'Ammassa, "Tornillo tent city for children could become Trump's Manzanar," Oct. 5, 2018, Las Cruces Sun-News, *available at* https://www.lcsun-news.com/story/opinion/columnists/2018/10/05/tornillo-tent-city-children-could-become-donald-trump-manzanar-family-case-management-immigration/1518678002/.

[23] Nomaan Merchant, "Beto O'Rourke says immigrant minors not receiving education in Tornillo facility," Oct. 3, 2018, Associated Press, *available at* https://kfoxtv.com/news/local/beto-orourke-says-immigrant-minors-not-receiving-education-in-tornillo-facility.

Executive Director of the organization running the Tornillo detention facility, would later explain. "You can't keep taking children in and not releasing them."[24]

63. Just as predictably, the mandatory fingerprinting and information-sharing of sponsors' household members turned out not to be necessary or even helpful: Defendant Johnson would later state that the policy did not "add[] anything to the protection and safety of the children."[25]

64. DHS and HHS subsequently published notices in the Federal Register. HHS announced in its notice, however, that the agency had already adopted and implemented these changes to their policies, but nonetheless invited public comment. In a notice published on May 11, 2018 ("May 11 notice"), ORR "requests the use of emergency processing procedures . . . to expand the scope of . . . information collection" conducted as part of the reunification process. 83 Fed. Reg. 22490. In the May 11 notice, ORR states that "the information collection allows ORR to obtain biometric and biographical information from sponsors, adult members of their household, and adult care givers identified in a sponsor care plan." *Id.* Although comment was not due on this notice until July 10, 2018, ORR had clearly begun implementation of the changes to the information collection process, stating that "the instruments used in this submission [were] available for use by mid-May 2018," the same date that the notice was published. *Id.*

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[24] Emily Green, "Head of controversial tent city says the Trump administration pressured him to detain more young migrants," Jan. 11, 2019, Vice News, *available at* https://news.vice.com/en_us/article/kzvmg3/head-of-controversial-tent-city-says-the-trump-administration-pressured-him-to-detain-more-young-migrants.

[25] John Burnett, "Several Thousand Migrant Children In U.S. Custody Could Be Released Before Christmas," Dec. 18, 2018, National Public Radio, *available at* https://www.npr.org/2018/12/18/ 677894942/several-thousand-migrant-children-in-u-s-custody-could-be-released-before-christ.

65. DHS also published a notice on May 8, 2018, to update its System of Records to implement the MOA, stating that one purpose of the system is "[t]o screen individuals to verify or ascertain citizenship or immigration status and immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children . . . and to identify and arrest those who may be subject to removal." 83 Fed. Reg. 20846.

66. ORR made vast and drastic changes to the information it collects, and more importantly, the manner in which it uses and shares that information. It did so unilaterally, without any public input or any apparent thought or consideration to the way these new rules would impact its own mission: to protect these children's best interest, and promptly reunify them with sponsors in the least restrictive environment possible. Several public groups nonetheless submitted comments to both DHS and HHS denouncing the new "proposed" regulations as contrary to law and to the mission of ORR.[26]

67. Upon information and belief, based upon internal stakeholder meetings, DHS had no plan or intention of providing information to ORR beyond what ORR was already able to obtain on its own. The MOA and accompanying procedures were designed purely as an

[26] *See, e.g.*, Legal Aid Justice Center, Memo Re: HHS ACF Sponsorship Review Procedures, *available at*, https://www.justice4all.org/wp-content/uploads/2018/07/LAJC_Comments-on-OMB-No-0970-0278-Sponsorship-Review-Procedures-002.pdf; National Immigrant Justice Center, Memo Re: HHS ACF Notice of Sponsorship Review Procedures, *available at* http://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-07/NIJC%20Comment%20on%20HHS%20revisions%20to%20UC%20sponsor%20forms.pdf; National Immigrant Justice Center, Memo Re: DHS Notice of Modified System of Records, *available at*, https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-06/NIJC%20Comments%20on%20DHS-2018-0013%20System%20of%20Records%20Notice.pdf; American Civil Liberties Union, Memo Re: DHS Notice of Modified System of Records, *available at* https://www.aclu.org/sites/default/files/field_document/2018.06.07_aclu_comments_dhs_system_of_records_notice_dkt._2018-0013-0001.pdf.

extension of DHS's law enforcement authority in order to use children in ORR custody as bait to vastly expand the reach of ICE enforcement. The result of ORR being unable to identify closely related sponsors for the children in its care, as a result of the sharing of sponsor information with ICE, and any subsequent enforcement action by DHS against a child's sponsor or the other adults in that sponsor's home, places children at significantly *greater* risk of being trafficked, smuggled, or otherwise abused.[27]

68. ORR's online guide provides little to no rationale for any given policy change that has occurred over the past year and a half. ORR's online guide and MOA specifically give only a cursory and empty explanation for the new requirements. Upon information and belief, the additional criminal background checks provided for in the Procedures merely duplicate those that ORR currently performs. *See* Exh. 1 at § 2.5.1. According to the MOA, ORR will continue to be responsible for criminal history checks on the national, state, and local level. *See* Exh. 2. Duplicative background checks serve only to waste time and resources of two already over-burdened agencies. This practice is both arbitrary and capricious, and on information and belief, motivated solely by factors divorced from carrying out the mandate of the statute and case law governing detention and release of UACs by ORR.

69. For children, the devastating effect of the delays caused by the new information collecting and sharing policies can include depression, deterioration in mental health, and behavioral problems associated with prolonged detention. Children like the child Plaintiffs feel a sense of hopelessness stemming from their indefinite detention, particularly once they know that the ORR staff members or field professionals with whom they have had contact continually provide positive recommendations on his performance and progress, and yet they remain

[27] *See generally* Human Trafficking Legal Center, *Amicus Curiae* Brief [Dkt. #45].

detained in a highly restrictive environment. Discouragement becomes despair, and in some cases, children respond by misbehaving in ways that cause them to face progressively more restrictions on their movement in custody, exacerbating their already significant depression and hopelessness. In other cases, children who fear persecution in their home countries nonetheless opt to accept removal and return there, rather than endure further detention which for all intents and purposes resembles imprisonment in their view.

70. Another effect of prolonged detention, and one that is known to ORR, is that when children detained in ORR's custody reach their 18th birthday, ORR no longer considers them subject to its detention and custody. 6 U.S.C. § 279(g)(2)(B). The TVPRA provides that most of these children should generally be released upon turning 18. 8 U.S.C. § 1232(c)(2)(B). In fact, however, most of the children are sent to ICE custody instead. *See Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 30 (D.D.C. 2018). As one immigration attorney described the regular practice at ORR's current largest detention center nationwide, in Homestead, Fla., "When they turn 18, it's basically, 'Happy birthday,' and then they slap on handcuffs and take them off to adult detention centers."[28]

71. The indefinite wait times for release approvals also render release plans and post-release services put in place by shelter staff obsolete, as the availability of those resources is often time-limited.

72. In recognition that the policy had been a failure, on December 18, 2018—just one day after the head of the Tornillo tent city detention facility advised ORR that he would no

[28] Tim Elfrink, "ICE Handcuffs Immigrant Kids on Their 18th Birthdays, Drags Them to Jail," Aug. 23, 2018, Miami New Times, *available at* https://www.miaminewtimes.com/news/ice-handcuffs-immigrants-on-18th-birthday-at-homestead-childrens-center-sends-them-to-jail-10651093.

longer accept any more child detainees—ORR revised its policy: no longer would sponsors' household members be fingerprinted in all cases. However, the new policy requiring fingerprinting of all parent sponsors was not changed; the sharing of sponsors' fingerprints with ICE for the explicit purpose of immigration enforcement against them was not changed; and the fingerprinting of all household members would still be required in various cases, including any case where a home study was ordered for any reason whatsoever (with no meaningful standards limiting when a home study may be required). *See* Exh. 1 at §§ 2.5, 2.5.1. These changes were expected to result in the immediate release of a few thousand children, but would leave the population of detained immigrant children at over 10,000, well more than double what it was when the MOA first went into effect.

73. By means of a memorandum from Defendant Sualog to Defendants Hayes and Johnson, ORR recognized that the MOA and the policies set forth therein had not yielded any additional information about potential sponsors that was not otherwise available under the prior policy. *See* Exh. 3 (Memorandum from Jallyn Sualog, Dec. 18, 2018) at p.1. ORR also recognized that the MOA and the policies set forth therein were responsible for an increase in the median length of custody that presented a risk of harm to children. *Id.* The memorandum recognized that in six months, in *not one single case,* had the ICE fingerprint-sharing policy identified a new child welfare risk, *id.* at p.3; but that it was responsible for the median length of detention increasing to 90 days, *id.* at p.4. ORR considers it best practices to release a child within 30 days, and recognizes that children may suffer negative child welfare consequences after 60 days. *Id.* at pp.3-4.

74. The December 18 Suallog memorandum therefore recommended that the mandatory fingerprinting of sponsors' household members be terminated, a recommendation that Defendant Hayes accepted. *Id.* at p.4.

75. But even though the December 18 Suallog memorandum found that children suffer negative welfare consequences as a result of prolonged detention in ORR's care, and that the ICE fingerprint-sharing MOA was resulting in prolonged detention, the December 18 Suallog memorandum did not recommend the termination of the MOA or an end to fingerprint sharing with ICE. *Id.* To the contrary, the memorandum allowed ORR to continue fingerprinting all categories of sponsors, and continue sharing those fingerprints with ICE, purportedly to verify the identity of the sponsor. *Id.* But the memorandum undercut this reasoning by allowing ORR staff the discretion to release a child to a sponsor *even before the fingerprint results came back,* if ORR was otherwise able to confirm the sponsor's identity. *Id.* In other words, ORR would continue to send all sponsors' fingerprints to ICE, placing them at risk of ICE arrest, even where other records or forms of identification were sufficient to accomplish the only remaining justification for the fingerprint-sharing, namely verifying the identity of the sponsors.

76. The December 18 Suallog memorandum states, "The ORR field staff[] has informed me that biometric ICE background checks of all categories of sponsors are helpful for suitability analyses because they confirm the sponsor's identify." *Id.* at p.3. But the memorandum then proceeds to entirely undercut this justification by allowing ORR to release a child to a Category 1 or 2 sponsor before the biometric ICE background check even comes back, where the sponsor can otherwise confirm their identity. Furthermore, the memorandum makes no effort to balance or weigh the purported benefit of further confirmation of the sponsor's identity against the real and demonstrated harm to children caused by prolonged detention as detailed in

the same memorandum. *See also* Exh. 4 (ORR Frequently Asked Questions guide) (listing only two reasons for the continuation of the ICE fingerprint sharing policy: identity verification of sponsors, and determining the immigration status of sponsors to determine whether a backup care plan might be required should the primary sponsor leave the United States).[29]

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[29] On February 15, 2019, the President signed into law an appropriations bill containing the following language:

> SEC. 224. (a) None of the funds provided by this Act or any other Act, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the components funded by this Act, may be used by the Secretary of Homeland Security to place in detention, remove, refer for a decision whether to initiate removal proceedings, or initiate removal proceedings against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an un accompanied alien child (as defined in section 462 (g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))) based on information shared by the Secretary of Health and Human Services.
>
> (b) Subsection (a) shall not apply if a background check of a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor reveals—
>
> (1) a felony conviction or pending felony charge that relates to—
>
> (A) an aggravated felony (as defined in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)));
>
> (B) child abuse;
>
> (C) sexual violence or abuse; or
>
> (D) child pornography;
>
> (2) an association with any business that employs a minor who—
>
> (A) is unrelated to the sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor; and
>
> (B) is—
>
> (i) not paid a legal wage; or
>
> (ii) unable to attend school due to the employment; or
>
> (3) an association with the organization or implementation of prostitution.

See https://docs.house.gov/billsthisweek/20190211/CRPT-116hrpt9.pdf at p.29. It is unclear what effect if any this provision will have, and in any event the provision is set to expire on September 30, 2019.

FACTS PERTAINING TO PLAINTIFFS

J.E.C.M. and his sponsor Jose Jimenez Saravia

77. J.E.C.M. is a 14-year-old citizen of Honduras who came to the U.S. in February 2018 accompanied by a friend. He fled Honduras to escape persecution, including threats to his own life.

78. J.E.C.M. has known and been close with his brother-in-law Jose Jimenez Saravia since he was a toddler. He spoke with his sister and brother-in-law by phone on a regular basis when he was living in Honduras, every week or every other week. They often sent money to support him in Honduras so that he could attend school.

79. J.E.C.M. has never been arrested for or charged with a crime. Prior to coming to the United States at the age of 13, he went to school and mostly stayed in his home with his family out of fear of violence.

80. J.E.C.M. fled Honduras in at the end of December 2017. J.E.C.M. arrived in the U.S. at the end of February 2018, and was apprehended by Customs and Border Patrol. He was placed in an unaccompanied children's shelter in San Diego, California operated by Southwest Key Programs.

81. On March 9, 2018, J.E.C.M. was transferred to Selma Carson Home in Fife, Washington, a staff secure facility near Tacoma. He was transferred to the staff secure facility because he had been labeled as an escape risk by his clinician based on his confiding in his clinician that he did not want to be in the shelter and wanted to be with his family instead.

82. J.E.C.M.'s case manager prepared an ORR Release Notification on April 5, 2018 stating "ORR has determined that the below Juvenile Respondent should be released to a sponsor," and listed J.E.C.M.'s brother-in-law, Mr. Jimenez Saravia, as the custodian. However,

J.E.C.M. was not released to Mr. Jimenez Saravia. Instead, J.E.C.M. remained in ORR custody at Selma Carson Home until about April 19, 2018, when he was transferred to secure detention at the Northern Virginia Juvenile Detention Center ("NOVA") in Alexandria, Virginia.

83. J.E.C.M. was officially transferred to NOVA on April 19, 2018 and remained there until July 26, 2018, a week after this action was initially filed with this court. For the last three months of his detention, he was detained in this high security facility (i.e., most restrictive) in Northern Virginia. The conditions of the high security NOVA facility severely limited J.E.C.M.'s movement within the facility, and his time to socially interact, play, and learn with his peers or on his own. And given that J.E.C.M. was placed with other, older children who had been deemed at-risk, all of these factors would be expected to mentally break down any individual, let alone a 13-year-old boy who had already suffered greatly.

84. J.E.C.M.'s mental health deteriorated while at NOVA. He was the youngest resident and was the target of constant bullying. He did not feel that he could trust the other residents, and was afraid to report bullying to staff for fear of retaliation. He had significant difficulty coping with the conditions at NOVA, which he calls a jail. He felt he would never get used to being held in a jail. He wanted only to be with his family, and did not understand why he was still being held by ORR.

85. Upon information and belief, despite ORR staff recommendations that J.E.C.M. be reunified with Mr. Jimenez Saravia, ORR began requiring Mr. Jimenez Saravia's partner, J.E.C.M.'s sister, and other adult members of the household to submit biographical and biometric information as a pre-condition to J.E.C.M.'s release. The adults in Mr. Jimenez Saravia's household feared, correctly, that this information would be used for immigration enforcement purposes. As is common practice, Mr. Jimenez Saravia never received written notice that he had

been denied as a sponsor or that he was not a viable sponsor without his household member's fingerprints. Nonetheless, J.E.C.M. remained locked in a juvenile jail only because of a change in ORR policy and the MOA.

86. J.E.C.M.'s prolonged imprisonment at a very young age, and his inability to be with his family caused him significant anxiety and sadness. He often cried when speaking to family members on the phone and struggled to cope with the daily bullying he experienced at NOVA. J.E.C.M. sought to leave this environment where he felt depressed, sad, and alone, and to be placed with his brother-in-law and family who he knew would provide him the care and attention he needed.

87. J.E.C.M. was released to Mr. Jimenez Saravia on or about July 26, 2018, just days after the filing of the First Amended Complaint [Dkt. #4] and first Motion for Class Certification [Dkt. #5] in this action. He remains living with Mr. Jimenez Saravia subject to ORR's sponsorship agreement and may be re-detained and placed in ORR custody again in the future.

B.G.S.S.

88. B.G.S.S. is a 17-year-old citizen of Guatemala who came to the U.S. in May 2018. He fled Guatemala to escape persecution and because his mother had passed away. B.G.S.S. has never been arrested for or charged with a crime. Prior to coming to the United States, he went to school, worked, and mostly stayed in his home with his family.

89. B.G.S.S. has known and been close with his sister Blanca Jeronimo Sis since he was a toddler. He spoke with her by phone and video on a regular basis when he was living in Guatemala, every week or every other week.

90. B.G.S.S. was initially placed in a small BCFS-operated ORR shelter in Raymondville, Texas housing approximately 50 children. B.G.S.S. did well in the small

program, getting along with the other children and adjusting well as the staff worked on family reunification. After approximately 10 days at BCFS Raymondville, B.G.S.S. was transferred to Casa Padre due to "emergency influx." Unlike BCFS Raymondville, Casa Padre is a warehouse of about 1,500 children, housed in a converted Walmart.[30] Despite the number of children, there are only 313 "door-less rooms" for children to sleep in.[31] The shelter was noisy, and the rooms are merely walls that do not reach all the way to the ceiling, creating a cacophonous echo chamber of 1,500 children day and night.[32] Casa Padre has a poor reputation for care: children are highly monitored and controlled, and have reported that staff have been at best unkind and at worst abusive.[33]

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[30] Dan Barry et al., "Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention," July 14, 2018, The New York Times, *available at* https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html; *see also* Michael Miller, Emma Brown and Aaron C. Davis, "Inside Casa Padre, the converted Walmart where the U.S. is holding nearly 1,500 immigrant children," June 14, 2018, The Washington Post, *available at* https://www.washingtonpost.com/local/inside-casa-padre-the-converted-walmart-where-the-us-is-holding-nearly-1500-immigrant-children/2018/06/14/0cd65ce4-6eba-11e8-bd50-b80389a4e569_story.html?utm_term=.a04e5b7ab55d.

[31] *See* Tara Francis Chan, "There are so many migrant children in one shelter a prison-style headcount is taking hours," Business Insider, June 25, 2018, *available at* https://www.businessinsider.com/headcount-of-migrant-children-in-casa-padre-shelter-takes-hours-2018-6.

[32] Dan Barry et al., "Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention" July 14, 2018, The New York Times, *available at* https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html; *see also*, Michael Miller, Emma Brown and Aaron C. Davis, "Inside Casa Padre, the converted Walmart where the U.S. is holding nearly 1,500 immigrant children;" June 14, 2018, The Washington Post, *available at* https://www.washingtonpost.com/local/inside-casa-padre-the-converted-walmart-where-the-us-is-holding-nearly-1500-immigrant-children/2018/06/14/0cd65ce4-6eba-11e8-bd50-b80389a4e569_story.html?utm_term=.a04e5b7ab55d.

[33] *See* Mary Tuma, "Allegations of Mistreatment at Southwest Key Shelter: The deportation complex," The Austin Chronicle, August 3, 2018, *available at* https://www.austinchronicle.com/news/2018-08-03/allegations-of-mistreatment-at-a-southwest-key-shelter/; *see also* Alan Pyke, "'This is it for you. You're fu**ed.': Inside Trump's abuse of migrant kids at an old Walmart," ThinkProgress, July 19, 2018, *available at* https://thinkprogress.org/inside-the-icebox-hielera-kids-own-words-trump-border-af33e9e0a7fb/;

91. After being transferred to Casa Padre, B.G.S.S. became depressed, irritable, and hopeless. He was overwhelmed by the sheer number of children and people around him all the time. He could not sleep at night because of the noise, and shared a room with four other children. Unlike at BCFS Raymondville, each child only had 8 minutes to shower each day, and staff zealously wrote behavior reports about children for even the smallest transgression. With so many children together, it was inevitable that they would not all get along, so bullying and disagreements with other children were common.

92. Under the constant stress of being in the Casa Padre environment, B.G.S.S.'s mental and behavioral health deteriorated. He received several significant incident reports (SIRs) for things ORR staff alleged he said either to them or to other residents, or for not following program rules, mostly in response to the conditions at Casa Padre. He never received an SIR for any violent behavior.

93. One conversation with ORR staff in which B.G.S.S. made inappropriate but false claims about his age and about past and future violence ultimately resulted in his being transferred on June 26, 2018 to a secure facility, Shenandoah Valley Juvenile Center (SVJC), in Staunton, Virginia.

94. Prior to his arrival at SVJC, B.G.S.S. was never advised that his conversations with staff would be reported to ORR or could be used against him to place him in more restrictive settings. Despite his clinician, case manager, and other staff asking him about his past, his behaviors, and his statements in order to convey that information to ORR for use in making

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Rebekah Entralgo, "Employee at immigrant shelter in Arizona arrested for allegedly sexually abusing teen girl," ThinkProgress, August 1, 2018, *available at* https://thinkprogress.org/employee-at-immigrant-shelter-in-arizona-arrested-for-allegedly-sexually-abusing-teen-girl-7c73f67e2ac3/.

placement decisions, he was not advised of the impact his statements could have on his placement, his reunification, or potentially his immigration case.

95. Following the incident in which ORR alleges that B.G.S.S. made criminal self-disclosures, B.G.S.S. consistently denied being an adult or having committed violence in the past. His birth certificate was verified by the Guatemalan embassy and by his family in Guatemala and in the United States. B.G.S.S. and all of his family not only denied that B.G.S.S. had ever committed violence in his home country but also offered plausible, age-appropriate explanations for his admittedly misguided but certainly not criminal false reports regarding his age and past. B.G.S.S. has also consistently denied having any plan to commit violence in the future. Nonetheless, despite investigating the veracity of B.G.S.S.'s "self-disclosures" pursuant to ORR Policy 1.4.2, and finding no credible support for any of them, ORR staff recommended that B.G.S.S. be placed in a staff secure facility following these uncorroborated "admissions."

96. B.G.S.S.'s case manager recommended that he be transferred to a staff secure, or medium-level security program. Instead, and without explanation, B.G.S.S. was sent directly to the most secure program available at SVJC, which serves both as an ORR facility and as a juvenile jail for minors in Virginia who have been adjudicated delinquent in state court. B.G.S.S. was detained at SVJC in the custody of ORR on August 16, 2018, when he joined this action and filed a habeas corpus petition by means of the Second Amended Complaint [Dkt. #21]. Almost immediately thereafter, ORR transferred him to other secure and staff-secure facilities outside of Virginia.

97. B.G.S.S.'s sister, Blanca Jeronimo Sis, who resides and works in Virginia, sought to sponsor B.G.S.S. and take custody of him. Ms. Jeronimo Sis formally applied with ORR to be B.G.S.S.'s sponsor and submitted his biographical and biometric information. On June 20, 2018,

while at Casa Padre, ORR staff completed a release request for B.G.S.S.'s release to Ms. Jeronimo Sis. But after B.G.S.S. was transferred to SVJC, ORR staff added onerous steps to his reunification process, such as requiring that B.G.S.S. complete a psychological evaluation and that his sponsor submit to a discretionary home study. ORR also required fingerprints from all adults in Ms. Jeronimo Sis's household, including her adult daughter and her partner, in order to approve B.G.S.S.'s placement with Ms. Jeronimo Sis. Ms. Jeronimo Sis's partner was fearful of providing his information to ORR to be shared with ICE and used for immigration enforcement, and Ms. Jeronimo Sis was told her only option to sponsor her brother was to convince him to provide the information or for the two of them not to live together anymore. These extra steps resulted in further delay to the reunification process as Ms. Jeronimo Sis' daughter awaited action by the case manager working on B.G.S.S.'s case to make her appointment to provide fingerprints to ORR.

98. As is common practice, Ms. Jeronimo Sis never received written notice that she had been denied as a sponsor or that she was not a viable sponsor without her household member's fingerprints. Ms. Jeronimo Sis was repeatedly told over the telephone that her sponsorship of B.G.S.S. would likely not be approved, or if it was approved would take a long time. Eventually, in December 2018, Ms. Jeronimo Sis succumbed to a sense of hopelessness that Defendants would never release B.G.S.S. to her care, and she withdrew her sponsorship application.

99. On or about January 3, 2019, B.G.S.S.'s 27-year-old niece Ingrid Sis Sis, also a resident of Virginia, was given a sponsorship package, which she submitted to the caseworker just one day later in an effort to sponsor B.G.S.S. and finally bring him home to live with family, instead of in an institution. Some days thereafter, she was given another five pages to fill out,

which she submitted within about a week. She submitted her fingerprints on January 15, 2019. B.G.S.S. was released to her care on January 19, 2019.

R.A.I. and her sponsor Sandra Alvarado

100. R.A.I. is a 15-year-old girl from Honduras. At the age of five, she left her parents' house and went to live with her sister, Sandra Alvarado, because her parents could no longer care for her or support her.

101. R.A.I. came with her sister to the United States in April 2018. They came because there was significant violence in their community and to enable R.A.I. to study. Ms. Alvarado wanted a better future for her young sister.

102. Despite Ms. Alvarado being R.A.I.'s primary caretaker, the two were separated at the border by U.S. immigration officials. R.A.I. was placed in ORR custody in Virginia at Youth for Tomorrow ("YFT"). Ms. Alvarado was paroled to Maryland where she lived in an apartment with a friend.

103. Ms. Alvarado was initially told that she could not sponsor her younger sister R.A.I., whom she had raised, because the adult roommates living in her apartment refused to send any biographical or biometric information to ORR. As is common practice, Ms. Alvarado never received written notice that she had been denied as a sponsor or that she was not a viable sponsor without her household member's fingerprints. Ms. Alvarado had to move out of her apartment and into a different home with her siblings, who were willing to provide their biographical and biometric information for the sponsorship application. Only after moving in with her siblings and communicating their willingness to participate in the reunification process was she able to officially begin the sponsorship process.

104. R.A.I. was detained at YFT in the custody of ORR on August 16, 2018, when she joined this action and filed a habeas corpus petition by means of the Second Amended Complaint [Dkt. #21]. ORR released R.A.I. into the custody of her sister Ms. Alvarado only after the filing of the Second Amended Complaint [Dkt. #21] and Supplemental Motion for Class Certification [Dkt. #28] identifying her as a Plaintiff and putative class representative in this action. She remains living with Ms. Alvarado subject to ORR's sponsorship agreement and may be re-detained and placed in ORR custody again in the future.

K.T.M. and his sponsor Cinthia Velasquez Trail

105. K.T.M. is a 15-year-old boy from Honduras. He fled Honduras with his older sister, Wendy, to escape violent and credible threats on his life after his father was murdered in front of him. He has experienced severe trauma and has relied on his older siblings to care for him and help him cope with the violence to which he has been exposed. He and his other sister Cinthia Velasquez Trail have always had an especially close relationship: after Ms. Velasquez Trail moved to the United States a few years ago, K.T.M. spoke with her every day by phone. He also spoke to her husband several times a week by phone. He has a close and loving relationship with both his older sisters and with his brother-in-law.

106. K.T.M. and his sister Wendy arrived in the U.S. in March 2018. Although Wendy was caring for K.T.M., they were separated at the border by U.S. immigration officers, despite K.T.M.'s desire to remain with his sister. K.T.M. was placed in ORR custody in Virginia at YFT. His sister Wendy was paroled to Texas where she is living with their sister, Cynthia Velasquez Trail.

107. K.T.M.'s sister, Ms. Velasquez Trail, submitted all the requisite paperwork to be K.T.M.'s sponsor. She lives with her partner and with K.T.M.'s other sister, Wendy, with whom

K.T.M. traveled to the U.S. Although K.T.M.'s sister and brother-in-law both submitted all the required documentation and passed their background checks, upon information and belief, Wendy was unable to be scheduled for her background check and fingerprint appointment because ICE had confiscated her identification upon apprehension and she did not have another form of valid photo ID. As is common practice, Ms. Velasquez Trail never received written notice that she had been denied as a sponsor or that she was not a viable sponsor without her household member's fingerprints.

108. K.T.M. was detained at YFT in the custody of ORR on August 16, 2018, when he joined this action and filed a habeas corpus petition by means of the Second Amended Complaint [Dkt. #21]. ORR released K.T.M. into the custody of his sister Ms. Velasquez Trail only after the filing of the Second Amended Complaint [Dkt. #21] and Supplemental Motion for Class Certification [Dkt. #28] identifying him as a Plaintiff and putative class representative in this action. He remains living with Ms. Velasquez Trail subject to ORR's sponsorship agreement and may be re-detained and placed in ORR custody again in the future.

CLASS ACTION ALLEGATIONS

109. This case is brought as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), or in the alternative, as a representative habeas action on behalf of the following classes:

(1) *Detained Children Class*: All children who:

a. are or will be in the custody of ORR in the state of Virginia;

b. at any date on or after July 20, 2018; and

c. who have been in ORR custody for 60 days or more; and

(2) *Sponsor Class*: All individuals, anywhere in the United States, who:

a. have initiated the sponsorship process to sponsor a member of the Detained Children Class;

b. as a Category 1 or Category 2 sponsor;

c. by either

i. returning a family reunification packet to ORR or to an ORR-contracted caseworker, or

ii. otherwise formally advising ORR or an ORR-contracted caseworker of their desire or willingness to sponsor a child; and

d. to whom the Detained Children classmember has not been released, at least in part because

i. the sponsor applicant has not provided her or his full biographical information and fingerprints, or if required, those of all other adults living in her or his household, or

ii. who has been informed by ORR or an ORR-contracted caseworker that their sponsorship application is rejected or not viable, but who has not been given a formal letter of denial.

110. Plaintiffs reserve the right to amend the class definitions if discovery or further investigation reveals that the classes should be expanded or otherwise modified.

111. Plaintiffs reserve the right to establish sub-classes as appropriate.

112. This action is brought and properly may be maintained as a class action under Fed. R. Civ. P. 23(a)(1)-(4).

113. Numerosity: The proposed classes are sufficiently numerous so as to render joinder impracticable. Upon information and belief, ORR has bedspace for over 130 children in Virginia, and those beds are usually full or close to full. Additional children are joining the class on a near-constant basis as ORR's population of detained immigrant children continues to increase and new sponsors are universally subject to the MOA policies.

114. Joinder is also impractical because the proposed Detained Children Class consists of children who are separated from their families and other adult caretakers, many of whom are

indigent, have limited English proficiency, and/or have a limited understanding of the U.S. judicial system. The proposed Sponsor Class consists of adults across the country who are attempting to sponsor UACs in ORR custody in Virginia, many of whom are indigent, have limited English proficiency, and/or have a limited understanding of the U.S. judicial system. The guarantee of future unidentified class members renders joinder impractical.

115. Commonality: Common questions of law and fact affect class members, including:

(a) whether the Government is in compliance with its obligations under the TVPRA to promptly place children in the least restrictive setting possible;

(b) whether the government's reunification policies, establishing the discretionary and opaque decision-making system described in §§ 2.2.3, 2.2.4, 2.4.1, and 2.4.2, which impact all children in ORR custody and all potential sponsors, violate UACs and their sponsors' due process rights by creating a system in which case managers make the majority of reunification decisions without any notice or opportunity for UACs or sponsors to be heard regarding either additional discretionary requirements imposed by case managers or non-viability decisions made by case managers;

(c) whether the blanket sharing of sponsors' biometric and biographic information with DHS for immigration enforcement purposes is in compliance with ORR's obligations under the TVPRA to promptly place children in the least restrictive setting possible;

(d) whether the blanket sharing of sponsors' biometric and biographic information with DHS for immigration enforcement purposes were unlawfully promulgated through an online Policy Guide and MOA between ORR and DHS in a manner not in accordance with the APA; and

(e) whether the blanket sharing of sponsors' biometric and biographic information with DHS for immigration enforcement purposes are arbitrary, capricious, or otherwise contrary to law under the APA.

116. Both the Detained Children Class and the Sponsor Class are negatively impacted by the same ORR policies, either now or in the imminent future. A finding that these policies were promulgated in violation of the APA, the TVPRA, or operate in violation of the Due Process Clause would remove the same barriers from all members of both classes in a single stroke.

117. Typicality: Plaintiffs' claims are typical of the claims of the proposed class, as all members of the Detained Children Class are subject to prolonged detention because of ORR's unlawful policies, violating the TVPRA and their due process rights, and issued in violation of the APA as set forth herein; and all members of the Sponsor Class are denied their ability to sponsor their loved ones because of ORR's unlawful policies violating their due process rights and issued in violation of the APA as set forth herein.

118. Plaintiffs recognize that not all UACs will be immediately released if the Plaintiff classes win this case. However, this does not defeat typicality because if Plaintiff classes are successful, every class member will significantly benefit from a judgment in their favor. Requiring ORR to come into compliance with the TVPRA obligations to place children *promptly* in the least restrictive environment, including with their families, that is in the best interest of the child will reduce the institutionalization of immigrant children and promote their best interests, as intended by the statute. Requiring ORR to revise its policies to come into compliance with due process requirements will serve to protect the due process rights of members of both classes. Enjoining ORR and ICE's MOA, including enjoining ORR from implementing expanded

information collection and from transferring information to DHS unless specifically warranted by an individual case will significantly speed up the reunification process for all class members and will allow the most appropriate caregivers to proceed with the reunification process.

119. Adequacy: Plaintiffs will fairly and adequately protect the interests of the proposed classes. Plaintiffs' claims are identical to the members of the proposed classes, they have no relevant conflicts of interest with other members of the proposed classes, and they have retained competent counsel experienced in class-action and immigration law.

120. This action is brought and properly may be maintained as a class action under Federal Rule 23(b)(1), (b)(2), or (b)(3).

121. Separate actions by or against individual class members would create a risk of inconsistent or varying adjudications regarding the legality of ORR's policies as set forth herein.

122. The U.S. government presently takes the position that its policies as set forth herein are lawfully promulgated, and to the extent that this causes the prolonged detention of immigrant children, such detention is a regrettable necessity. Thus, Respondents have acted or refused to act on grounds that apply generally to the proposed class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the proposed class as a whole.

123. Common questions of law or fact predominate over questions affecting only individual members, and a class action is thus superior to other available methods for fairly and efficiently adjudicating the controversy. Even if individual class members had the resources to bring individual lawsuits (which most do not), it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties, and to the court. Respondents have engaged in a common course of conduct, and the class action device allows a single court to provide the benefits of unitary

adjudication, judicial economy, and the fair and equitable handling of all class members' common claims in a single forum.

CAUSES OF ACTION

COUNT I
VIOLATION OF TVPRA

124. Petitioners allege and incorporate by reference all of the foregoing allegations as though fully set forth herein.

125. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 requires Defendants to promptly place unaccompanied minors in its custody in the least restrictive setting that is in the best interest of the child.

126. Petitioners J.E.C.M., B.G.S.S., R.A.I., K.T.M., and the Detained Children Classmembers are unaccompanied minors, and their sponsors are the individuals who offer the least restrictive setting to the UACs they are attempting to sponsor in the children's best interests.

127. Defendants' actions in establishing and carrying out opaque reunification policies with little to no due process protections, instituting the MOA and the associated ORR policies, and continuing the ICE fingerprint sharing policy by means of the December 18 Suallog Memorandum, all prevent the prompt placement of minors in the least restrictive setting and in the best interests of the child, in violation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[34]

[34] Count II of the Second Amended Complaint and previously submitted proposed Third Amended Complaint, Violation of Substantive Due Process, was dismissed by the Court, *see* Dkt. ##60, 91, and therefore has been removed from this Third Amended Complaint. Its omission herein is not intended as a waiver of this claim.

COUNT II
VIOLATION OF PROCEDURAL DUE PROCESS

128. Plaintiffs allege and incorporate by reference all of the foregoing allegations as though fully set forth herein.

129. The Due Process Clause of the Fifth Amendment applies to all "persons" on United States soil and thus applies to Petitioners and all classmembers.

130. The child Plaintiffs and the Detained Children Classmembers have a liberty interest in remaining free of government custody, and in being unified with their families.

131. As set forth above, ORR policies creating an opaque, highly discretionary reunification process, ORR's recent MOA and associated ORR polices, and the decision in the December 18 Suallog Memorandum to continue the ICE fingerprint sharing policy, all contribute to the prolonged, unexplained detention of the child Plaintiffs and the Detained Children Classmembers, and their separation from their sponsors and families. This violates procedural due process because they deprive these children of their liberty from government custody without notice or any opportunity to be heard, and cause injury of the children in the form of prolonged detention.

132. Likewise, these policies violate procedural due process because they deprive the Sponsor Classmembers of their right to provide care and upbringing to their loved ones, causing injury to the sponsors in the form of prolonged denial of the right to family unity.

133. In addition, the lack of due process protections, including the lack of written notice of denial or non-viability of sponsorship in the early stages of the reunification process (prior to an official denial by ORR), violates all Classmembers' due process rights because it deprives both child and sponsor of meaningful notice of denial, the reasons for denial, and an opportunity to be heard challenging the denial and/or the reasons on which it was based.

COUNT III
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT PROCEDURES FOR PROMULGATING AGENCY POLICIES

134. Petitioners allege and incorporate by reference all of the foregoing allegations as though fully set forth herein.

135. Plaintiffs and the classmembers have been aggrieved by Defendants' action in requiring that all sponsors, and in many cases all adult household members of all sponsors, submit biometric and biographical information to be shared with DHS for the purpose of immigration enforcement before Defendants will release any child Plaintiff to his or her sponsor. This constitutes final agency action. Yet ORR has not promulgated rules that provide procedures for challenging ORR's Policy Guide or the policies unlawfully promulgated through the MOA. The agency's action determined the rights of Plaintiffs and has the legal consequence of keeping this class of children in ORR custody, and depriving their sponsors of their right to family unity. Accordingly, Plaintiffs are entitled to judicial review of ORR's actions under 5 U.S.C. § 704.

136. The Administrative Procedure Act ("APA") requires agency rules to be promulgated through the notice and comment process.

137. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. §551(4).

138. ORR describes its Guide for Children Entering the United States Unaccompanied ("ORR Guide") as detailing "ORR policies for the placement, release and care of unaccompanied alien children in ORR custody." Exh. 1 at Intro. The biometric information requirement is contained in Section 2.6 of the Guide. *Id.*

139. The APA requires that an agency first publish in the Federal Register the agency's proposed rules and its claim of statutory authority for those rules to provide notice to the public, then give the public an opportunity to comment on the proposed rules, and then publish the final rules in the Federal Register at least 30 days before the effective date. 5 U.S.C. §§ 552(a)(1)(C)-(D), 553(b)-(d). ORR ignored all of these APA requirements and instead posted the ORR Guide on its website and began immediate enforcement of the requirements. *See* Exh. 1. Moreover, the ORR failed to articulate any explanation—much less a rational one—as to why it requires that "All individuals seeking to sponsor a UAC and adults in their household are subject to fingerprinting requirements" and that that "biometric and biographical information, including fingerprints, is shared with . . . DHS to determine immigration status." ORR Guide Sections 2.6 and 2.6.2. The reviewing court judges the agency's action by the grounds invoked by the agency, and where, as here, those grounds are inadequate or improper then the court is powerless to affirm the administrative action. *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

140. Accordingly, under 5 U.S.C. §§ 706(1), (2)(A), (2)(C), and (2)(D), this court should set aside the MOA and the various 2018 amendments to Section 2.5 and 2.6 and the various subsections thereof relating to fingerprinting and fingerprint sharing with DHS, and the decision in the December 18 Suallog Memorandum to continue the ICE fingerprint sharing policy, as being arbitrary and capricious, in excess of statutory jurisdiction and for failure to observe the procedures required by the APA.

141. Petitioners have exhausted all administrative remedies available to them as of right.

142. Petitioners have no recourse to judicial review other than by this action.

COUNT IV
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT PROHIBITION ON ARBITRARY, CAPRICIOUS, AND UNLAWFUL GOVERNMENT ACTION

143. Petitioners allege and incorporate by reference all of the foregoing allegations as though fully set forth herein.

144. Plaintiffs have been aggrieved by agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. First, the agency's action entering into the MOA and the various 2018 amendments to Section 2.5 and 2.6 and the various subsections thereof relating to fingerprinting and fingerprint sharing with DHS, and the decision in the December 18 Suallog Memorandum to continue the ICE fingerprint sharing policy, is final agency action that is arbitrary, capricious, and otherwise not in accordance with law. Second, this unlawful agency action led to ORR's final decisions not to release the child Plaintiffs and the Detained Children Class pending additional fingerprinting and information sharing with DHS, despite ORR staff routinely recommending that these children be released to their sponsors. This second agency action is likewise arbitrary, capricious, and not in accordance with law. Further, the MOA and associated ORR policies are arbitrary, capricious, and otherwise not in accordance with law because the primary intent and purpose of these policies was to assist ICE in enforcing civil immigration laws against sponsors and their household members—a purpose that not only has no relationship to ORR's mission, but actually runs contrary to ORR's statutory obligation to act in the best interests of the children in its care.

145. In addition, Defendants' detention of J.E.C.M., B.G.S.S., R.A.I., K.T.M., and the class of children similarly situated and their failure to release these children promptly into the custody of their capable and appropriate sponsors is arbitrary and capricious and otherwise not in accordance with law by, *inter alia*, either ignoring applicable provisions of the *Flores* Agreement

and the TVPRA or interpreting those provisions in a manner that frustrates their underlying purpose, and by imposing unreasonable and unnecessary conditions precedent to releasing UACs to a suitable sponsor.

146. Petitioners have exhausted all administrative remedies available to them as of right.

147. Petitioners have no recourse to judicial review other than by this action.

COUNT VI
HABEAS CORPUS

148. As set forth above, Defendants are holding the Detained Children Classmembers in federal custody, in violation of federal statutes and the U.S. Constitution, and Petitioners J.E.C.M., B.G.S.S., R.A.I., K.T.M., as class representatives for the class of children similarly situated accordingly seek a writ of habeas corpus.

PRAYER FOR RELIEF

WHEREFORE, J.E.C.M., B.G.S.S., R.A.I., and K.T.M.; and Jose Jimenez Saravia, Sandra Alvarado, and Cinthia Velasquez Trail; on behalf of themselves and others similarly situated, respectfully request that the Court:

A. Assume jurisdiction over this matter;

B. Certify the Detained Children Class and the Sponsor Class, as set forth above, and appoint Legal Aid Justice Center and the Southern Poverty Law Center as class counsel for both classes;

C. Order the Respondents to promptly identify all classmembers to class counsel, and to notify all classmembers (and their attorneys of record, if any) of their status as classmembers in this action;

E. Declare that Sections 2.2.3, 2.2.4, 2.4.1, and 2.4.2 of Defendant's ORR Guide create a reunification process that violates Plaintiffs' due process rights and require Defendants to promptly bring their reunification process, as described in Sections 2.2.3, 2.2.4, 2.4.1, and 2.4.2 of the ORR Guide, into compliance with the Due Process Clause of the Constitution providing for adequate due process protections at each stage of the reunification process;

F. Declare that the MOA and the various 2018 amendments to Section 2.5 and 2.6 and the various subsections thereof relating to fingerprinting and fingerprint sharing with DHS, and the decision in the December 18 Suallog Memorandum to continue the ICE fingerprint sharing policy, violate the TVPRA, the Administrative Procedure Act, and the Due Process Clause;

G. Issue a writ of habeas corpus to, and order the release of, any member of the Detained Children Class whose continued detention by ORR is based solely on any enjoined provision;

I. Award the named plaintiffs and other members of the proposed classes reasonable attorney's fees and costs for this action, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412; and

J. Grant any further relief that the Court deems just and proper.

Dated: Feb. 22, 2019

Respectfully submitted,

/s/ ***Simon Sandoval-Moshenberg***
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Certificate of Service

I, the undersigned, hereby certify that on this date, I electronically filed the foregoing Third Amended Class Action Complaint and Petition for Writ of Habeas Corpus with the Clerk of Court using the CM/ECF System, which will send a Notice of Electronic Filing (NEF) to all counsel of record:

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Respectfully submitted,

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