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

[MINOR'S NAME], a minor, by and through his next friend [SPONSOR'S NAME], on his own behalf and on behalf of others similarly situated; and [SPONSOR'S NAME] in his individual capacity and on behalf of others similarly situated, Plaintiffs/Petitioners, v. SCOTT LLOYD, Director, Office of Refugee Resettlement; JONATHAN WHITE, Deputy Director, Office of Refugee Resettlement; STEVEN WAGNER, Acting 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, Defendants/Respondents.	Case No.[] **FIRST AMENDED CLASS ACTION COMPLAINT AND PETITION FOR A WRIT OF HABEAS CORPUS**

INTRODUCTION

1. This class action lawsuit challenges and seeks redress from the government's prolonged detention of immigrant children across the state of Virginia. Petitioner [MINOR'S NAME][1] is one of many thousands of children who have made the long and perilous journey to

[1] In compliance with Local Civil Rule 7(C) and Fed.R.Civ.P. 5.2, [MINOR'S NAME] a minor, is identified only by his initials. His name and other personal identifiers such as date of birth, home address and phone number are also redacted from the exhibits attached hereto. An unredacted copy of all exhibits will be served upon Defendants/Respondents.

the United States surviving trauma and fleeing violence and persecution in their home countries. In recognition of both the plight and vulnerability of this population, Congress enacted a series of laws and Federal policies that have been put in place specifically to offer important protection to these children. These laws and policies establish a preference for release over lengthy detention, and require, *inter alia*, that these children promptly be reunited with loved ones in the United States while their immigration cases are adjudicated.

2. Defendants, representing the very the government agency responsible for safeguarding [MINOR'S NAME]'s well-being and that of other vulnerable children like him by carrying out laws and procedures established by Congress, have committed egregious violations of the law by choosing to ignore them. Defendants' actions reflect the current administration's vilification and targeting of these children. President Trump has said that large numbers of immigrant children are gang members and "animals;"[2] Attorney General Sessions has described them as "wolves in sheep clothing;"[3] and both men have denounced the laws—which they are constitutionally bound to carry out—that protect these children by, for example, denigrating the Federal statute that protects immigrant children as "loopholes."[4] Sadly, the Office of Refugee

[2] Remarks by President Trump to Law Enforcement Officials on MS-13, Issued on July 28, 2017. *See* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-law-enforcement-officials-ms-13/ (last accessed May 2, 2018).

[3] Remarks by Attorney General Sessions to Federal Law Enforcement in Boston, Delivered September 21, 2017. *See* https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about (last accessed May 2, 2018).

[4] President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, Issued October 8, 2017. *See* https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/ (last accessed May 2, 2018); Attorney General Sessions' Remarks on Immigration Enforcement, April 11, 2018. *See* https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement (last accessed May 2, 2018).

Resettlement ("ORR") has adopted this position as well, referring to the release of children in their care to sponsors as a "dangerous loophole[] in U.S. law."[5]

3. As might be expected, when a high-level government official considers a child protection statute passed by Congress to be a "dangerous loophole in U.S. law," that official will take steps to undermine the protections offered by the statute. Indeed, under Defendant Scott Lloyd, whom President Trump appointed to head ORR, the agency responsible for the care of immigrant children like [MINOR'S NAME], the process of reunifying the immigrant children as required by statute has ground to a virtual halt, trapping these children in highly restrictive government-controlled facilities as if they were prisoners serving out criminal sentences without any semblance of due process.[6]

4. That problem could not be more apparent than in the case of [MINOR'S NAME] Recently, the Federal District Court of the Southern District of New York ordered ORR to halt the policy of requiring Mr. Lloyd to personally review and approve release and reunification for any child that was or had ever been in staff secure or secure ORR custody.[7] In the first six months of implementing this new, now overruled procedure (June to December 2017), Defendant Lloyd slowed the release of detained children to a trickle.[8] Defendant Lloyd has and

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[5] Unaccompanied Alien Children State and Community Placement Monthly Report Update, April 2, 2018. *See* https://www.acf.hhs.gov/media/press/2018/unaccompanied-alien-children-state-and-community-placement-monthly-report-update (last accessed May 2, 2018).

[6] *See, e.g., L.V.M. v. Lloyd*, 18 CIV. 1453 (PAC), 2018 WL 3133965 (S.D.N.Y. June 27, 2018).

[7] *Id.;* Statement of Defendant Lloyd before the Senate Judiciary Committee of June 21, 2017. *See* https://www.acf.hhs.gov/olab/resource/testimony-of-scott-lloyd-ms-13 (last accessed July 16, 2018).

[8] *See L.V.M. v. Lloyd, et al.*, 1:18-cv-01453, Complaint (S.D.N.Y.), regarding the effects of these policies on children imprisoned in New York.

continues to implement policy changes under the guise of protecting children and communities, designed to turn ORR into a law enforcement agency rather than a child protective agency.[9]

5. Plaintiff [MINOR'S NAME] is one of the dozens of children in Virginia who have been victimized by the Trump administration and Defendant Lloyd, whose policies have caused him and other children like him to be held in ORR custody for excessive amounts of time, and have been illegally and improperly denied reunification with their families. [MINOR'S NAME] has spent nearly five months in ORR custody, primarily in medium or high security detention. He has been held in these restrictive settings despite having a fit, loving, and capable potential sponsor, his brother-in-law [Sponsor's Name] ready and willing to bring him home, in direct contravention to these laws and policies. This marks a significant and unlawful departure from years past when children like [MINOR'S NAME] typically waited only one to three months for release[10], as intended by statute, barring unforeseen and exceptional circumstances. No such circumstances exist with [MINOR'S NAME]

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[9] For example, Defendant Lloyd testified before the Senate Judiciary Committee a year ago, saying in part,

> "This year we have begun work in the area of community safety, which is one of the Administration's top priorities. . . This prompted the creation of the ORR Community Safety Initiative. . . Local DHS staffs are training ORR post-release services providers on how to identify MS-13 and other gang colors and signs and who to notify if they become aware of MS-13 and other gang activity. Some of our Federal field specialists, who act as local ORR liaisons with care providers and stakeholders, have begun attending local MS-13 task force meetings to strengthen partnerships with local law enforcement and stay informed about MS-13 and other gang activity in their areas. ORR plans to expand this effort."

Statement of Defendant Lloyd before the Senate Judiciary Committee of June 21, 2017. *See* https://www.acf.hhs.gov/olab/resource/testimony-of-scott-lloyd-ms-13 (last accessed July 16, 2018).

[10] https://www.gao.gov/assets/680/675001.pdf at p.16.

6. Plaintiff [MINOR'S NAME] is typical of many children in the United States, and specifically in Virginia, who are being victimized by Defendant Lloyd's new regime for handling immigrant children. [MINOR'S NAME] deserves the opportunity to live in a healthy, nurturing, and healing environment that his family is prepared to provide while awaiting adjudication of his immigration claims. [MINOR'S NAME] has been close with his brother-in-law and sister since he was young. Placing [MINOR'S NAME] with his brother-in-law is in his best interests, and Defendants should not be permitted to delay this reunification any further.

7. Like many of the children held by ORR in Virginia, [MINOR'S NAME] has been in a "staff secure" or "secure" detention center for months. [MINOR'S NAME] has been held in these settings since []. **Ex. 1**, [] Discharge Notification. Since being placed in these centers, [MINOR'S NAME] has fought episodes of depression, despair, and fear. The conditions of this unnecessary confinement, the high level of security of these facilities, and Defendants' dilatory approach to reunification have combined into a psychological assault that has repeatedly tested an already traumatized child, and which has only further complicated [MINOR'S NAME]'s release. And unfortunately, [MINOR'S NAME]'s experience is not unique.

8. Also like many children in ORR custody, [MINOR'S NAME] has a potential sponsor ready and eager to bring him home. [MINOR'S NAME]'s brother-in-law, [Sponsor's Name], who resides and works in [] seeks to sponsor [MINOR'S NAME] and take custody of him. Mr. [Sponsor's Name] formally applied with ORR to be [MINOR'S NAME]'s sponsor and submitted his biographical and biometric information. On [], ORR prepared a notification to ICE Chief Counsel stating that "ORR has determined that [MINOR'S NAME] should be released to a sponsor" and listing Mr. [Sponsor's Name] as that sponsor. **Ex. 3**, ORR Notification to ICE Chief Counsel.

9. On April 13, 2018, Defendants Wagner and Lloyd signed a Memorandum of Agreement (MOA) with Customs and Border Patrol (CBP) and Immigration and Customs Enformcement (ICE) agreeing to vastly expand the information collected from sponsors *and* household members and to share that information between the agencies. **Ex. 4**, Memorandum of Agreement. Upon information and belief, ORR is now requiring biographical and biometric information from all adults in Mr. [Sponsor's Name]'s household, which will be shared with DHS to be used for enforcement purposes, in order to approve [MINOR'S NAME]'s placement with Mr. [Sponsor's Name]. Because of the new policies and agreements implementing expansive collection of information and information sharing with ICE, the other adults in Mr. [Sponsor's Name]'s house are afraid to submit their biographical and biometric information and have not yet done so.

10. As a result of ORR's overly expansive, intrusive information collection and its new agreement with DHS to transfer all information to ICE for immigration enforcement purposes, [MINOR'S NAME] and dozens of children in Virginia remain in government custody rather than in the home of their capable and loving families.

11. Given the specter of indefinite detention, [MINOR'S NAME] now seeks the Court's intervention on behalf of himself and a class of minors similarly situated to him so that he can be released from secure detention to his brother-in-law's care, and so that immigrant children in custody in Virginia will no longer be subjected to endless unjustified government detention and to the grievous harms that children suffer when separated from their families. The 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 [MINOR'S NAME], the other children in the plaintiff class, and Mr. [Sponsor's Name] 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

12. 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).

13. Venue is proper in the Alexandria Division of 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 [MINOR'S NAME] is detained within this district.

THE PARTIES

14. Plaintiff [MINOR'S NAME] is a []-year-old boy from [] who has been detained by the defendants since [].

15. Plaintiff [Sponsor's Name] is [MINOR'S NAME]'s brother-in-law. He lives in []. Prior to [MINOR'S NAME]'s detention by defendants, Mr. [Sponsor's Name] has had a long history of contact and a close relationship with him from an early age.

16. 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 [MINOR'S NAME] and is sued in his official capacity.

17. Defendant Steven Wagner is the Acting 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. Mr. Wagner is a legal custodian of [MINOR'S NAME] and is sued in his official capacity.

18. Defendant Scott Lloyd is the Director of the Office of Refugee Resettlement ("ORR"). ORR is the government entity directly responsible for the detention of [MINOR'S NAME] Mr. Lloyd is a legal custodian of [MINOR'S NAME] and is sued in his official capacity.

19. Defendant Jonathan White is the Deputy Director of ORR. Mr. White is a legal custodian of [MINOR'S NAME] and is sued in his official capacity.

20. Defendant Natasha David is a Federal Field Specialist at ORR. Ms. David is a legal custodian of [MINOR'S NAME] and is sued in her official capacity. She is the federal official who oversees the ORR contract with [], where [MINOR'S NAME] is currently detained.

BACKGROUND AND LEGAL FRAMEWORK

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

21. 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.[11] 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,

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

especially for children and young adults.[12] In FY2017, 23% of UACs had [] as their country of origin ("COO"), where [MINOR'S NAME] is from. [13] In the same fiscal year, 45% of UACs came from Guatemala and 27% came from El Salvador.[14]

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

23. 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,

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[12] *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).

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

[14] *Id.*

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.[15] 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.*

24. 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" 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,[16] including ORR.[17]

25. 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

[15] 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).

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

[17] The ORR recognizes its continuing obligations under the *Flores* Agreement. *See* **Ex. 6**, Office of Refugee Resettlement, ORR Guide: Children Entering the United States Unaccompanied ("ORR Guide"), Sec. 3.3 (p. 46) (last accessed July 17, 2017) (outlining obligations imposed by *Flores* Agreement on ORR care provider facilities).

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.

26. Again, 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)). As important, "[t]he Office shall not place a UAC in a secure facility absent a determination that the UAC poses a danger to self or others or has been charged with having committed a criminal offense." *Id.*

27. ORR has never promulgated regulations under the TVPRA. 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. **Ex. 6.** ORR edits and amends this guide as often as once a week and does so 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.

28. 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." And 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.

29. These procedures are applicable to over 11,000 children in ORR custody nationwide. Four facilities in Virginia have contracts with HHS to house children in ORR custody. One of these facilities is a "shelter care" facility, which has the lowest level security. Two are "secure" facilities housed in juvenile detention centers, including the [] facility where [MINOR'S NAME] is currently held. One additional facility is a long-term foster care facility for UACs whom ORR considers (whether correctly or incorrectly) to have no sponsor.

30. Beginning when a child comes into ORR custody, the agency's online guide provides that ORR may place him or her in one of three levels of care based on an assessment of the level of security risk and harm to self or others that the child poses: (i) "shelter care" is the least restrictive custodial setting; (ii) "staff secure" is the intermediate level; and (iii) "secure" care is the most restrictive level.[18] Secure facilities are like juvenile jails; there are only three such facilities in use nationwide, one in California and two facilities in Virginia: Shenandoah Valley Juvenile Center in Staunton and NOVA in Alexandria. Staff-secure facilities, while not using locked pods or cells, are still very restrictive in that children's movement inside the unit is

[18] Children can also be placed in Residential Treatment Centers, given psychiatric or psychological issues, and in long-term or transitional foster care.

controlled; children are not permitted to leave the facility except to attend court; outdoor recreation is limited to one hour a day in a fenced in area; and there is a higher staff-to-child ratio than in shelter units. Shelter-level placements, while less restrictive than staff-secure or secure custody, are nonetheless much more restrictive than a home environment. Children are not permitted to move between rooms or up and down the stairs without staff permission; external doors are locked; children are deprived of human touch and even from hugging a sibling, and time outdoors is limited. For example, children in shelter-level care are typically permitted only two outgoing calls a week for 10 minutes each.

31. ORR places children in secure or staff-secure settings (either initially upon entry into the ORR system or as the result of a "step up" once the child is already in ORR custody) for a variety of reasons, including disruptive behaviors, even those tied to mental health;[19] an expression of a desire to leave ORR custody, which can be construed as making the child an "escape risk"; and other disclosures of behaviors or thoughts deemed to raise safety concerns, including feelings expressed in confidence to mental health professionals or social workers contracted by ORR to care for children.

32. ORR's online guide also contains procedures governing the release of children in its care. The guide provides for ORR to "begin[] the process of finding family members and others who may be qualified to care for an unaccompanied alien child as soon as the child enters ORR's care." For children without a viable sponsor in the U.S., ORR has a long-term foster-care program through which children who have demonstrated "safe behavior in a non-secure setting" can be placed with families in the community, rather than a shelter. ORR also has policies and

[19] ORR's ability to address mental-health linked behavioral issues in more therapeutic Residential Treatment Centers (*see* **Ex. 6**, at § 1.4.6) is limited because there are only two nationwide.

procedures that "require the timely release of children and youth to qualified parents, guardians, relatives or other adults, referred to as 'sponsors.'" Under current policy, once a 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* **Ex. 6** at §2.2.4; *see also, Ms. L. et al., v. U.S. Immigration and Customs Enforcement, et al.,* 302 F.Supp.3d 1149 (S.D. Cal. 2018), White Decl. ¶ 39, July 5, 2018, ECF No. 86.

33. 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. 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.[20] For children in shelter care, the

[20] 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).

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.

B. ORR's Unlawful Promulgation of Agency Rules

34. ORR has never promulgated regulations under the TVPRA. 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. **Ex. 6.** ORR edits and amends this guide as often as once a week and does so 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.

35. 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."

36. These procedures are applicable to some 11,000 children in ORR custody nationwide. Three facilities in Virginia have contracts with HHS to house children in ORR custody.

37. In April of 2018, ORR and DHS executed a Memorandum of Agreement (MOA) that 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. **Ex. 4.** 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.

38. ORR has already incorporated this information collection and sharing policy into its ORR Policy Guide. Section 2.2.4 of the ORR Guide, "Required Documents for Submission with the Application for Release", states that sponsors must sign the Authorization for Release of Information granting permission to ORR to collect and share sensitive biographic and biometric information from sponsors and adults listed in the sponsorship application with DHS or any other government agency for any authorized use, namely, immigration enforcement. *See* **Ex. 5**, Selected of Sponsor Reunification Packet Documents, at 2-3, 15-16.

39. The only rationale for collecting immigration information provided by ORR in the ORR Guide is listed in Sec. 2.6 of that guide. **Ex. 6.** 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." **Ex. 6.** There is 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.

40. DHS and HHS subsequently published notices in the Federal Register. HHS announced in its notice, however, that the agency had already changed their policies, but nonetheless invited public comment. In a noticed published on May 11, 2018, 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 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 indented "the instruments used in this submission to be available for use by mid-May 2018," the date the notice was published. *Id.*

41. 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.

42. 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 children and promptly reunify them with sponsors in order to place them in the least restrictive placement in their best interests.

43. 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.[21]

[21] *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-

C. Abrupt Unexplained and Arbitrary Changes to ORR's Policies and Procedures Under the Trump Administration

44. The Trump administration has repeatedly engaged in rhetoric and policies that demonize these vulnerable immigrant children and aim to subvert the laws intended to protect them. Recent policy changes enacted by ORR reflect the Trump administration's rhetoric vilifying immigrant children as dangerous criminals or gang members, unsupported generalizations that have been routinely debunked by judicial findings. The administration has deployed this rhetoric despite the fact that ORR's own internal review has found that, even by its own flawed identification process, fewer than two percent of children in its custody have gang ties.[22]

45. The Administration has taken particular aim at laws that protect immigrant children. In his most recent State of the Union Address, President Trump described immigrant children as violent gang members who "took advantage of glaring loopholes in our laws to enter the country as unaccompanied alien minors."[23]

46. In a rally held in Long Island in July 2017, President Trump declared that the "laws are so horrendously stacked against us" and called out "alien minors" as responsible for gang-related killings in the United States, referring to immigrant children accused of being gang

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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.

[22] *See* Testimony from Scott Lloyd of June 21, 2017 to the Senate Judiciary Committee, https://www.hhs.gov/about/agencies/asl/testimony/2017-06/statement-scott-lloyd-ms-13-problem.html (last accessed May 2, 2018).

[23] President Donald J. Trump's State of the Union Address, Issued on January 30, 2018, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ (last accessed May 2, 2018).

members as "animals." "They're going to jails," he yelled, "and then they're going back to their country."[24]

47. Attorney General Sessions has also furthered this narrative, alleging that certain immigrant children who come to this country are "wolves in sheep clothing."[25] In an interview with Fox News broadcast on August 3, 2017, Sessions said: "[W]e need to be able to deport people rapidly who enter the country illegally, and we have to end this policy of taking unaccompanied minors . . . and turning them over to the Department of Health and Human Services [the agency within which ORR is located], and then they take them to their 'destination city' . . . So this is a very bad and dangerous policy and it can be ended and it must be ended." On February 15, 2017, the Department of Homeland Security released a statement describing the *Flores* settlement and the TVPRA as "loopholes" that invite illegal immigration and fuel gangs.

48. Beyond publicly denouncing the existing and binding laws that protect these immigrant children, the Trump administration has called on Congress to amend the TVPRA and to strip children of many of the protections they are afforded under this legislation. Yet, until those laws are amended or repealed, the Constitution requires that the Executive Branch follow the laws, not try to unilaterally rewrite them through unlawful action (or inaction). Though the TVPRA remains fully in place, the Trump Administration has actively worked to subvert its requirements in furtherance of its rhetoric portraying immigrant children as dangerous criminals and gang members. One such new policy ORR instituted under Defendant Lloyd's leadership

[24] Remarks by President Trump to Law Enforcement Officials on MS-13, Issued on July 28, 2017, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-law-enforcement-officials-ms-13/ (last accessed May 2, 2018).

[25] Remarks by Attorney General Sessions to Federal Law Enforcement in Boston, Delivered September 21, 2017, https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about (last accessed May 2, 2018).

was to place all children with gang allegations in "secure"—the most restrictive of detention centers—care, under the guise that they have "gang ties."[26] But the gang allegations upon which the agency relies on in making these placements have been debunked by virtually everyone who has reviewed them, both inside and outside ORR.

49. For example, in late 2017, a federal court in San Francisco ordered that immigrant children previously released from ORR custody as unaccompanied minors, subsequently detained for alleged gang involvement and placed back in ORR custody receive hearings before immigration judges to determine if they truly pose a danger. In nearly every hearing (27 of 29), immigration judges found the government's claim of dangerousness unfounded and ordered the child's release. But children like [MINOR'S NAME], who are not class members in the San Francisco case, still do not have any mechanism available to challenge their detention, even after they are stepped down from secure custody.

50. Yet another example, recently overruled by a federal court in New York, was a spring 2017 policy that indefinitely stalled the reunification of children like [MINOR'S NAME] with qualified sponsors, like [MINOR'S NAME]'s brother-in-law. That policy—reflected in a revision to the online ORR Guide on June 12, 2017—imposed a new and unprecedented requirement for the release of children who are currently or have ever been held in secure or staff-secure facilities within ORR: personal approval by Defendant Lloyd, or his designee, Defendant White. On June 27, 2018, the U.S. District Court for the Southern District of New York granted a preliminary injunction directing ORR to vacate the director review policy

[26] *See* Testimony from Scott Lloyd of June 21, 2017 to the Senate Judiciary Committee, https://www.hhs.gov/about/agencies/asl/testimony/2017-06/statement-scott-lloyd-ms-13-problem.html (last accessed May 2, 2018).

instituted by Mr. Lloyd. *L.V.M. v. Lloyd*, No. 18 CIV. 1453 (PAC), 2018 WL 3133965, at *12 (S.D.N.Y. June 27, 2018).

51. Defendant Lloyd is not a social worker, psychologist, or educator. He has no experience or credentials that render him capable of making determinations for release or for evaluating matters affecting the mental and physical well-being of these children. Before being appointed as ORR director in March 2017—a political appointment that does not require Senate approval or any particular expertise or qualifications—Defendant Lloyd was an attorney for the Knights of Columbus and served on the board of a crisis pregnancy center in Virginia. Yet he continues to develop and implement policies in the name of child protection and child welfare that introduce significant barriers into the reunification process, significantly prolong all children's detention by ORR, and further the administration's policy of mass immigrant detention and deportation rather than the mission he is tasked with upholding as the Director of the Office of Refugee Resettlement to promote child welfare.

52. Another particularly pernicious policy and practice is the complete lack of confidentiality between UAC and their caseworkers and clinicians, including but not limited to licensed mental health professionals, who are supposed to be the adults caring for them whom they can trust.[27] In response to prior lawsuits raising issues about using children's purported

[27] *See, e.g.*, Ella Nilsen, "Kids who cross the border meet with therapists and social workers. What they say can be used against them." *Vox*, June 19, 2018, *available at* https://www.vox.com/policy-and-politics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids (last accessed July 20, 2018) ("Immigration lawyers said files containing confidential medical and psychological records and social work case files from ORR [] are increasingly showing up in immigration court as evidence. Often, these files are used by the Trump administration as an argument to push undocumented kids, especially teens with psychiatric conditions, into higher levels of detention in what lawyers described as 'jail-like' settings.").

"admissions" to their clinicians and case managers to step them up into higher security settings and/or denying them release, ORR introduced an instruction to care providers. It states,

> Prior to interviewing the UAC using the Initial Intakes Assessment, the care provider informs the youth that providing honest answers to all assessments is essential. The care provider also informs the UAC that self-disclosure of previously unreported criminal history or violent behavior to any other children, care provider staff, ORR, or others, may result in the child's transfer to another care provider facility and may affect their release.

Ex. 6 at § 3.2.1. Upon information and belief, care providers nonetheless routinely fail to warn children that everything they say will be shared and used against them to place them in jail-like secure facilities and prolong their detention. Even if all care providers followed this directive, the directive itself is misleading and potentially coercive, and it leads children to believe they *must* disclose every experience, thought, and feeling in order to speed their release to their families. Further, this nod at "Mirandizing" children appears to apply only to the initial assessment of the child the day they arrive in ORR custody, and not to any subsequent meetings with therapists, clinicians, or other ORR staff with whom they may subsequently interact. Children's purported "confessions" to case managers, intake workers, and clinicians, even those as seemingly benign as a child missing family and not wanting to remain in ORR custody but instead to be released to family members, can, and often do, form the basis for placing children in secure jail-like settings and prolonging or stalling the reunification process all together.

53. Under the leadership of Defendant Lloyd, ORR has made over 35 such changes to the ORR Guide in a little over a year, including a swath of unexplained, sweeping updates in June 2017 and June 2018. *See* **Ex. 7**, ORR Record of Posting and Revision Dates. Many of these changes have contributed to prolonged detention of the children in ORR custody and to many children's detention at high levels of security.

54. On April 13, 2018, Defendants Lloyd and Wagner signed a Memorandum of Agreement (MOA) with DHS furthering their detention and deportation agenda at the expense of the children they are tasked with protecting, including [MINOR'S NAME] The MOA addresses the collection and sharing of sponsor, household member, and caregiver information through the sponsorship application process. **Ex. 4**. Under the guise 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 the potential sponsor and all adult members of the potential sponsor's household"); *see also,* Women's Refugee Commission and National Immigrant Justice Center, *ORR and DHS Information-Sharing Emphasizes Enforcement Over Child Safety*, *available at* https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-ICE-MOA.pdf.

55. Upon information and belief, based upon internal stakeholder meetings, DHS has no plan or intention of providing information to ORR. The MOA and accompanying procedures are designed purely as an 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.

56. ORR has already incorporated this information collection and sharing policy into the ORR Guide. Section 2.2.4 of the ORR Guide, "Required Documents for Submission with the Application for Release", states that sponsors must sign the Authorization for Release of Information granting permission to ORR to collect and share sensitive biographic and biometric information from sponsors and adults listed in the sponsorship application with DHS or any other

government agency for any authorized use, namely, immigration enforcement. **Ex. 6**, ORR Guide § 2.2.4.

57. 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. at 20846.

58. ORR is unable to show that the MOA and ORR's new policy of expanded information collection and sharing does anything to ensure a child's safety or his appearance in immigration court per the *Flores* agreement. Instead, it serves the Trump administration's goals of denying justice to children who ORR was specifically designed to protect. ORR's approach is rife with imperilments for due process, especially in view of the *Mathews* factors. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). [MINOR'S NAME]'s right to reunification under the enabling statutes that govern ORR is affected by the actions of Defendants Lloyd and White, and the risk of deprivation of this right is inconceivably high given the dilatory tactics employed by ORR and the Trump administration. And the government lacks any competing interest: ORR's mandate under the statute and under the *Flores* agreement is *prompt* family reunification.

59. This new policy of expanded information collection and sharing is only the most recent, most egregious example of ORR policy changes that 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*, No. 18 CIV. 1453 (PAC), 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.*

60. Similarly, the step-down of children from secure care or staff-secure care to the less restrictive shelter care, often an essential precursor to release, has also slowed dramatically. Particularly for children *alleged* to have gang or criminal involvement, transfer to a less restrictive form of care often takes months longer than care providers believe necessary if it happens at all. This is true even if shelter staff or an immigration judge have already rejected the gang allegations against a particular child. On information and belief, this delay in step-down is also the result of politically-motivated policies or practices put in place by ORR's leadership in an effort to undermine the TVPRA statute and *Flores* consent decree requirements.

61. For children, the devastating effect of these delays can include depression, deterioration in mental health, and behavioral problems associated with prolonged detention. Children like [MINOR'S NAME] 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 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.

62. 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.

63. The potential detention and deportation of sponsors, family members, and friends as a direct result of new ORR policies and the MOA also results in arbitrary and capricious government action in direct contrast with the legal obligations of ORR with respect to unaccompanied minors. The new information collecting and sharing procedures prevent children like [MINOR'S NAME] from being released to family members or relatives who may be best suited to care for the child. Caregivers at risk of detention or deportation are forced to choose between getting their child released from ORR custody and their own ability to remain out of detention and in the country to provide care their children.

64. No rationale has been provided by ORR regarding the need to collect household member or alternate caregiver information regarding immigration status or the need to share biometric or biographical information for non-sponsors with DHS. Household members or alternative caregivers, who are required to submit to the same background checks as a potential sponsor per ORR policy, may be unwilling to provide the requested information despite a sponsor's willingness and ability to care for a child. The procedures functionally give any member of the household veto power over a sponsor's desire to proceed with reunification and welcome their child into their home. Because of this policy, sponsors will face even steeper barriers when trying to be reunited with their children.[28]

[28] *See* Eli Hager, The Marshall Project, *Trump's Quiet War on Migrant Kids: How the administration is turning child protection into law enforcement* (May 1, 2018), https://www.themarshallproject.org/2018/05/01/trump-s-quiet-war-on-migrant-kids; *see also*, KIND, *Targeting Families* (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017_Final-v.2.pdf.

65. The result of ORR being unable to identify closely related sponsors for the children in its care, and any subsequent enforcement action by DHS against a child's sponsor or the other adults in that sponsor's home, will place children at significantly *greater* risk of being trafficked, smuggled, or otherwise abused.[29]

66. If sponsors or household members are detained or deported after initiating the reunification process, children are likely to interpret their own custody and attempt to be placed in the care of their sponsors as the cause for their sponsor's deportation or prosecution.[30] This feeling of guilt compounded with psychological aftermath of the dangers unaccompanied minors either flee from or encounter on their journey, is overwhelming for children to face alone and is creating dangerous levels of toxic stress among unaccompanied children.[31]

D. Lack of Reasoned Explanation or Justification for Change in Procedures and Resulting Unlawful Delay in Violation of Statute

67. 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 that all household adults and alternate caregivers submit to DHS background checks. Upon information and belief, the additional criminal background checks provided for in the Procedures merely duplicate those that ORR currently performs. **Ex. 4.** According to the MOA, ORR will continue to be responsible for

[29] *See, e.g.*, FBI, *New Fraud Schemes Targeting Families of Unaccompanied Children* (July 19, 2014), https://www.fbi.gov/contact-us/field-offices/sanantonio/news/pres-releases/new-fraud-schemes-targeting-families-of-unaccompanied-children.

[30] *See* KIND, *Targeting Families* (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/Targeting- Families_-December-2017_Final-v.2.pdf.

[31] Steven Davy, NPR, *Discussion: What Trauma are Separated Migrant Children Dealing With?*, (June 28, 2018), http://wesa.fm/post/discussion-what-trauma-are-separated-migrant-children-now-dealing#stream/0.

criminal history checks on the national, state, and local level, some of which would alert ORR about a sponsor's or household member's immigration status. *Id.* Duplicative background checks serve only to waste time and resources of two already over-burdened agencies. As such, by definition, 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 judicial laws governing detention and release of UACs by ORR.

68. In May 2017, likely as a result of litigation ordering ORR to release a child because it had failed to reunify the child with his mother as a result of unreasonable ORR Policies concerning the reunification process, *see Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017), ORR's online policy guide was amended to provide for the possibility of an "appeal" to the Assistant Secretary of ORR if a reunification request is denied. But this process—at which sponsors have no right to call witnesses, includes no requirement of a reasoned decision, and uses a politically-appointed official as an adjudicator—is available only once a final decision is rendered on a reunification request. Setting aside the other fatal procedural flaws, this appeal process also fails because, given current ORR procedures and practices, very few cases will be ripe given the indefinite delays in identifying a potential sponsor willing and able to provide all information required by ORR, including convincing all household members and alternate caregivers to provide their personal information to ORR to be used not just for the reunification process but for DHS's immigration enforcement authority.

FACTS PERTAINING TO [MINOR'S NAME]

A. [MINOR'S NAME]'s Persecution in His Home Country of [], Arrival in the United States, and Subsequent Imprisonment

69. [MINOR'S NAME] is a []-year-old citizen of [] who came to the U.S. in [] accompanied by a friend. He fled [] to escape persecution, including threats to his own life.

70. [MINOR'S NAME] has known and been close with his brother-in-law 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 [], ever week or every other week. They often sent money to support him in [] so that he could attend school.

71. [MINOR'S NAME] has never been arrested for or charged with a crime. Prior to coming to the United States at the age of [], he went to school and mostly stayed in his home with his family out of fear of violence.

B. [MINOR'S NAME]s Prolonged and Unexplained Imprisonment by ORR

72. [MINOR'S NAME] fled [] in at the end of []. [MINOR'S NAME] arrived in the U.S. at the end of [], and was apprehended by Customs and Border Patrol. He was placed in an unaccompanied children's shelter in []. *See* **Ex. 1.**

73. On [], [MINOR'S NAME] was transferred to [], a staff secure facility near []. **Ex. 1.** [MINOR'S NAME] was transferred to the staff secure facility as an escape risk. He was labeled as an escape risk by his clinician and ORR staff at [] 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, combined with a false report that [MINOR'S NAME] had indicated that he wanted to run away and had an escape plan.

74. [MINOR'S NAME]'s case manager [], prepared an ORR Release Notification on [] stating "ORR has determined that the below Juvenile Respondent should be released to a sponsor," and listed [MINOR'S NAME]'s brother-in-law, Mr. [Sponsor's Name], as the custodian. **Ex. 3.** However, [MINOR'S NAME] was not released to Mr. [Sponsor's Name]. Instead, [MINOR'S NAME] remained in ORR Custody at [] in [] until about [], when he was transferred to his current placement at []. *See* **Ex. 2.**

75. [].

76. [].[32]

77. [MINOR'S NAME] was officially transferred to [] on [] and has remained there ever since. **Ex. 2.** For the past three months, he has been detained in this *high* security facility (i.e., most restrictive) in []. Upon information and belief, his detention in staff secure and secure facilities was not the result of any concern that [MINOR'S NAME] was dangerous, or would harm himself or others. Nonetheless, the conditions of the high security [] facility severely limits [MINOR'S NAME]'s movement within the facility, and his time to socially interact, play, and learn with his peers or on his own. And given that [MINOR'S NAME] is placed with other children who have been deemed at-risk, all of these factors would be expected to mentally break down any individual, let alone a []-year-old boy who has already suffered greatly.

78. []

79. Upon information and belief, despite ORR staff recommendations that [MINOR'S NAME] be reunified with Mr. [Sponsor's Name], ORR is now requiring Mr. [Sponsor's Name]'s partner, [MINOR'S NAME]'s sister, and other adult members of the household to submit biographical and biometric information as a pre-condition to [MINOR'S NAME]'s release. The adults in Mr. [Sponsor's Name]'s household fear, correctly, that this information will be used for immigration enforcement purposes. As a result, [MINOR'S NAME] remains locked in a juvenile jail only because of a change in ORR policy and the MOA.

80. [MINOR'S NAME]'s prolonged imprisonment at a young age, and his inability to be with his family has caused him significant anxiety and sadness. He often cries when speaking

[32] Notably, the ORR Guide indicates that "ORR only places an unaccompanied alien child in a secure facility if the child 1) poses a danger to self or others; or 2) has been charged with having committed a criminal offense." **Ex. 6** at § 1.2.4.

to family members on the phone and is struggling to cope with the daily bullying he experiences at []. [MINOR'S NAME] seeks to leave this environment where he feels depressed, sad, and alone, and to be placed with his brother-in-law and family who will provide him the care and attention he needs.

CLASS ACTION ALLEGATIONS

81. 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:

> *Detained Children Class*: All children who are or will be in the custody of ORR in the state of Virginia, at any date on or after July 20, 2017.
>
> *Sponsor Class*: All individuals, anywhere in the United States, who have applied to ORR to sponsor a member of the Detained Children Class, and to whom the Detained Children classmember has not been released, at least in part because the sponsor applicant has not provided full biographical information and fingerprints of all other adults living in her or his household.

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

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

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

85. Numerosity: The proposed classes are sufficiently numerous so as to render joinder impracticable. Upon information and belief, the Detained Children Class consists of at least 50 children of whom approximately 25 are in secure ORR detention. Moreover, additional children will continue to enter the class in the future on a regular basis, as ORR's population of detained immigrant children continues to increase.

86. 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.

87. 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 policies, which impact all children in ORR custody, were unlawfully promulgated through an online Policy Guide and MOA between ORR and DHS in a manner not in accordance with the APA; (c) whether the government's policies, which impact all children in ORR custody and have effected substantially more restrictive and lengthier detention for many children, are arbitrary, capricious, or otherwise contrary to law under the APA; (d) whether the specific policy of blanket collection of biometric and biographic information from all sponsors, household members, and alternate caregivers combined with the policy to share all of this information with DHS for immigration enforcement purposes is arbitrary, capricious, or otherwise contrary to law under the APA; and (e) whether the Government's practice of subjecting children to prolonged detention and separation from their families or guardians in overly restrictive placements in violation of its own policies and without adequate procedures violates the plaintiffs' right to due process.

88. 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 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 as set forth herein.

89. 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.

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

91. 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.

92. 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.

93. 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
(All Child Plaintiffs Against All Defendants)

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

95. 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.

96. Petitioner [MINOR'S NAME] 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.

97. Defendants' actions as set forth above 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.

COUNT II
VIOLATION OF SUBSTANTIVE DUE PROCESS
(All Child Plaintiffs Against All Defendants)

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

99. The Due Process Clause of the Fifth Amendment applies to all "persons" on United States soil and thus applies to Petitioners and the Detained Children Classmembers.

100. Petitioner [MINOR'S NAME] and the Detained Children Class have a liberty interest in remaining free of government custody, and in being unified with their families or adult caregivers.

101. The prolonged, unexplained detention of [MINOR'S NAME] and the Detained Children Class, and their separation from their sponsors and families violates substantive due process because it furthers no legitimate purpose and no compelling government interest.

COUNT III
VIOLATION OF PROCEDURAL DUE PROCESS
(All Plaintiffs Against All Defendants)

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

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

104. Petitioner [MINOR'S NAME] and the Detained Children Classmembers have a liberty interest in remaining free of government custody, and in being unified with their families.

105. The prolonged, unexplained detention of [MINOR'S NAME] and the Detained Children Classmembers, and their separation from their sponsors and families, violates procedural due process because it deprives these children of their liberty from government custody without notice or any opportunity to be heard, to the injury of the children in the form of prolonged detention.

106. Likewise, the prolonged, unexplained detention of [MINOR'S NAME] and the Detained Children Classmembers, and their separation from their sponsors and families, violates procedural due process because it deprives the Sponsor Classmembers of their right to provide

care and upbringing to their loved ones, to the injury of the sponsors in the form of prolonged denial of the right to family unity.

COUNT IV
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT PROCEDURES FOR PROMULGATING AGENCY POLICIES
(All Plaintiffs Against All Defendants)

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

108. Petitioners and the classmembers have been aggrieved by Defendants' action in detaining [MINOR'S NAME] and the Detained Children Class in government custody and demanding that the adult household members of each child's sponsor submit biometric and biographical information to be shared with DHS before Defendants release any child Plaintiff to his or her sponsor. Defendants' detainment of and failure to release [MINOR'S NAME] and the Detained Children Class constitutes final agency action. ORR's Policy Guide and MOA establish final agency action resulting in the prolonged detention and refusal to release [MINOR'S NAME] and the class of children similarly situated. 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 Petitioners and has the legal consequence of maintaining this class of children in ORR custody, and depriving their sponsors of their right to family unity.. Accordingly, Petitioners are entitled to judicial review of ORR's actions under 5 U.S.C. § 704.

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

110. 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).

111. The 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." **Ex. 6**. The biometric information requirement is contained in Section 2.6 of the Guide. *Id.*

112. The entire ORR Guide was promulgated in violation of the APA. 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. **Ex. 7**. 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).

113. Accordingly, under 5 U.S.C. §§ 706(1), (2)(A), (2)(C), and (2)(D), this court should set aside various ORR policies enacted through the ORR Guide as being arbitrary and capricious, in excess of statutory jurisdiction and for failure to observe the procedures required

by the APA, and compel the release of [MINOR'S NAME] to the custody of [Sponsor's Name]; and compel the release to their sponsor of any other member of the Detained Children Class whose detention has been prolonged based solely on one or more of the enjoined provisions.

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

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

COUNT V
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT PROHIBITION ON ARBITRARY, CAPRICIOUS, AND UNLAWFUL GOVERNMENT ACTION
(All Plaintiffs Against All Defendants)

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

117. Petitioners have been aggrieved 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 enacting revised policies in furtherance of the MOA is final agency action that is arbitrary, capricious, and otherwise not in accordance with law. Second, this unlawful agency action leads to ORR's final decisions not to release [MINOR'S NAME] and the class of children similarly situated pending additional fingerprinting and information sharing for all members of the sponsors' households, despite ORR staff routinely recommending to release these children to their sponsors. This second agency action is likewise arbitrary, capricious, and not in accordance with law.

118. In addition, Defendants' detention of [MINOR'S NAME] and the class of children similarly situated and their failure to release these children 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.

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

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

COUNT VI
HABEAS CORPUS
(All Child Plaintiffs Against All Defendants)

121. As set forth above, Defendants are holding Petitioner [MINOR'S NAME] and the Detained Children Classmembers in federal custody, in violation of federal statutes and the U.S. Constitution, and Petitioner [MINOR'S NAME] and the class of children similarly situated accordingly seek a writ of habeas corpus.

PRAYER FOR RELIEF

WHEREFORE, [MINOR'S NAME] and [Sponsor's Name], on behalf of themselves and others similarly situated, respectfully request that the Court:

A. Assume jurisdiction over this matter;

B. Certify the Detained Children's Class and the Sponsor Class, as set forth above, and appoint Legal Aid Justice 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;

D. Declare that Defendants' actions, including the prolonged detention of child plaintiff class members, violate the TVPRA, the Administrative Procedure Act, and the Due Process Clause;

E. Declare various provisions of Defendant's ORR Guide to have been unlawfully promulgated and enjoin Defendants from further enforcing those requirements of the ORR Guide.

F. Declare that Defendants' new policy requiring all sponsors, household members, and alternate caregivers to provide complete biometric and biographical information to ORR to be shared with DHS and used for immigration enforcement to violate the TVPRA, the Administrative Procedure Act, and the Due Process Clause;

G. Issue a writ of habeas corpus to Petitioner [MINOR'S NAME], and to any member of the Detained Children Class whose continued detention by ORR is based solely on any enjoined provision;

H. Order Defendants to immediately release [MINOR'S NAME] to the custody of his brother-in-law [Sponsor's Name], and release to their sponsor 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: July 20, 2018

Respectfully submitted,

/s/ ***Rebecca Ruth Wolozin***

Rebecca Ruth Wolozin (VSB No.: 89690)
becky@justice4all.org
Simon Sandoval-Moshenberg (VSB No.: 77110)
simon@justice4all.org
LEGAL AID JUSTICE CENTER
6066 Leesburg Pike, Suite 520
Falls Church, VA 22041
(703) 778-3450 / fax (703) 778-3454

Attorneys for Plaintiffs/Petitioners
[MINOR'S NAME] and [SPONSOR'S NAME], and all others similarly situated

John Christopher Rozendaal (VSB No. 41857)
jcrozendaal@sternekessler.com
Salvador M. Bezos (VSB No. 75942)
sbezos@sternekessler.com
Jorge A. Goldstein (*pro hac vice* motion forthcoming)
jgold@sternekessler.com

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.
1100 New York Avenue, N.W.
Washington, D.C. 20005-3934
(202) 772-8805 / fax (202) 371-2540

Attorneys for Plaintiffs/Petitioners
[MINOR'S NAME] and [SPONSOR'S NAME]

Certificate of Service

I, the undersigned, hereby certify that on this date, a true and correct copy of the foregoing, as well as all attachments thereto, was sent by certified US mail, return receipt requested, to the following:

SCOTT LLOYD, Director, HHS/ACF/ORR
Office of Refugee Resettlement
Mary E. Switzer Building
330 C St. SW
Washington, DC 20201

JONATHAN WHITE, Deputy Director, HHS/ACF/ORR
Office of Refugee Resettlement
Mary E. Switzer Building
330 C St. SW
Washington, DC 20201

STEVEN WAGNER, Acting Assistant Secretary, HHS/ACF
Administration for Children and Families
Mary E. Switzer Building
330 C St. SW
Washington, D.C. 20201

ALEX M. AZAR II, Secretary
Department of Health and Human Services
200 Independence Ave. S.W.
Washington, D.C. 20201

NATASHA DAVID, Federal Field Specialist
Office of Refugee Resettlement
Mary E. Switzer Building
330 C St. SW
Washington, DC 20201

JOHNITHA MCNAIR, Executive Director
Northern Virginia Juvenile Detention Center
200 South Whiting St.
Alexandria, VA 22304

JEFFERSON B. SESSIONS III, Attorney General of the United States
Department of Justice
ATTN CIVIL PROCESS CLERK
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

TRACY DOHERTY-MCCORMICK, Acting United States Attorney
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314

Respectfully submitted,

_____//s//_____ Date: _07/20/2018
Rebecca R. Wolozin
LEGAL AID JUSTICE CENTER
6066 Leesburg Pike, Suite 520
Falls Church, VA 22041