UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V., a minor, and Mr. C., Petitioners, - against - U.S. Immigration and Customs Enforcement, *et al.*, Respondents.	**18 Civ. 9115 (AKH)**

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITIONERS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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Respondents, by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to Petitioners' motion for injunctive relief on an expedited schedule requesting the immediate release of D.J.C.V., a minor in custody of the U.S. Department of Health and Human Services, Office of Refugee Resettlement ("ORR").

BACKGROUND

On December 9, 2010, an immigration judge in Oakdale, Louisiana, previously ordered Mr. C., a native and citizen of Honduras, removed from the United States, and Mr. C. was removed on January 14, 2011. Mr. C. later unlawfully returned to the United States, and immigration officials reinstated his removal order on October 5, 2013. Mr. C. was again removed from the United States on October 9, 2013. *See Ms. L. v. ICE, et al.*, No. 3:18-cv-428-DMS-MDD (S.D. Cal.) ("*Ms. L.*") ECF No. 230-2.[1]

It is undisputed that Mr. C. most recently entered the United States for a third time on April 30, 2018, near Hidalgo, Texas, with D.J.C.V., who at the time was 19 months old. Mr. C. is not D.J.C.V.'s biological father but is the named father on D.J.C.V.'s birth certificate.[2] They were apprehended by U.S. Border Patrol personnel and processed for reinstatement. Because he had a final order of removal on record, Mr. C. was subject to detention. Mr. C.'s criminal history

[1] *Ms. L.* is a class action filed in the Southern District of California on behalf of parents seeking reunification with their children from whom they were separated at the United States' southern border. Judges in the Southern District of New York have transferred similar separation cases to Judge Sabraw as related to *Ms. L.* given the fact that Judge Sabraw was already overseeing the family reunification process for affected individuals. *See N.T.C. v. ICE, et al.*, No. 18 Civ. 6428 (JMF) (S.D.N.Y. July 19, 2018); *E.S.R.B. v. Sessions*, No. 18 Civ. 6654 (GHW) (Rakoff, J.); *R.G.H. v. Sessions*, No. 18 Civ. 6791 (JSR) (S.D.N.Y. July 27, 2018).

[2] Documentary evidence showing Mr. C. as the legal parent was provided and Respondents do not challenge Mr. C.'s legal parental status.

revealed that he had been convicted of aggravated assault for swinging a machete at his wife. Specifically, on October 28, 2010, Mr. C. pleaded guilty to one charge of aggravated assault in LaFourche Parish, Louisiana. He was sentenced to 48 days in jail. Based on his criminal history, the government, in a reasonable exercise of its discretion, determined that Mr. C. could not safely be placed in a family detention center in an open group setting with other parents and children. This determination recently was upheld by the district court in the *Ms. L.* case. *See* Order, *Ms. L.* (ECF No. 236) ("Defendants' determination that . . . Mr. C. ha[s] disqualifying criminal history that precludes reunification with [his] child[] and either release into the community or detention in a family residential center is entitled to deference. The record indicates Defendants have vetted these parents in good faith and made principled decisions in light of their criminal history and overarching concerns regarding safety of their children and the public.").

Accordingly, on May 2, 2018, D.J.C.V. was transferred to ORR and placed with an ORR provider, Lutheran Social Services of New York.[3] Due to his young age, D.J.C.V. was placed in a foster home. He is with his foster parent throughout every day and every night (*i.e.*, he is not in a day care or other facility during the day) and has weekly meetings with the provider's clinician and D.J.C.V.'s case manager. Additionally, the provider has been in contact with D.J.C.V's biological mother in Honduras since D.J.C.V. was admitted to ORR custody, and the provider has been facilitating video conferences and phone calls with his mother since May in order to maintain connection and develop their relationship. Reports show that D.J.C.V. presents euthymic and is in a calm mood while in care. D.J.C.V. is reported to be comfortable in the program and has

[3] Care providers are state-licensed facilities that operate under cooperative agreements or contracts with ORR. ORR Guide § 3.1. The facilities provide children with classroom education, health care, socialization/recreation, vocational training, mental health training, access to legal services, access to child advocates in certain cases, and case management. *Id*.

developed good relationships with his foster parent and staff. In clinical sessions, the clinician has been working to further D.J.C.V.'s development by teaching him social skills, assessing his motor skills, and working on language. D.J.C.V. is friendly with others and has not presented with any mental health or behavioral concerns. *See* Declaration of Kristian Brannon ("Brannon Decl.") ¶¶ 4-8.

While a child is in ORR's care, ORR makes an ongoing assessment whether there is a suitable sponsor so that the child may be released as quickly as is safe and appropriate. *See* OFFICE OF REFUGEE RESETTLEMENT, ORR Policy Guide: Children Entering the United States Unaccompanied ("ORR Guide") § 2.2 *available at* http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied (last accessed October 12, 2018). Mr. C.'s sister who lives in Austin, Texas was contacted in May as a potential sponsor. She indicated at that time that she was only willing to sponsor D.J.C.V. if Mr. C. remains in the United States. D.J.C.V.'s mother in Honduras expressed desire for her child to be repatriated back to Honduras. In August, D.J.C.V.'s mother submitted a copy of a handwritten letter stating the same. The case manager informed D.J.C.V.'s biological mother to send an original notarized letter documenting her wishes. *See* Brannon Decl. ¶¶ 9-10.

On September 19, 2018, Judge Sabraw specifically denied reunification of Mr. C. and D.J.C.V. under the *Ms. L.* class due to Mr. C.'s criminal history exclusion. *See* Order, *Ms. L.* (ECF No. 236). With reunification under the *Ms. L.* case denied, Petitioners filed their habeas corpus petition in the Southern District of New York on October 4, 2018, seeking the same relief.

On October 5, 2018, a $2,000 bond was set at an immigration bond hearing for Mr. C. Bond was posted on October 10, 2018, and Mr. C. was released from immigration custody on the same day. Also on October 10, 2018, D.J.C.V.'s biological mother had a video meeting visit with

D.J.C.V. and, during a phone call afterward with the case manager, again expressed her desire that she wanted her son to return to Honduras to her. *See* Brannon Decl. ¶ 10.

The following day, October 11, 2018, the ORR provider coordinated a meeting between Mr. C. and D.J.C.V. Mr. C. also submitted sponsor application materials on October 11, 2018. It is Mr. C.'s intent to live with his sister in Austin, Texas, while his limited immigration proceedings remain pending. The sponsor application is currently being processed pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). *See* Brannon Decl. ¶¶ 11-12.

On October 12, 2018, this Court ordered the status quo to remain fixed until a hearing on Monday, October 15, 2018. Order (ECF No. 13). Thereafter, on October 12, 2018, Petitioners filed a motion for order to show cause for temporary restraining order.

LEGAL FRAMEWORK

A. DESIGNATION OF AN UNACCOMPANIED ALIEN CHILD

Congress enacted the Homeland Security Act ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135. The HSA created the Department of Homeland Security ("DHS"), transferring most immigration functions formerly performed by the U.S. Immigration and Nationality Service ("INS") to the newly formed DHS and its components, including U.S. Citizenship and Immigration Services ("USCIS"), U.S. Customs and Border Protection ("CBP"), and U.S. Immigration and Customs Enforcement ("ICE"). *See also* Department of Homeland Security Reorganization Plan Modification of January 30, 2003, H.R. Doc. No. 108-32 (2003) (also set forth as a note to 6 U.S.C. § 542). The HSA also established the definition of an "unaccompanied alien child" ("UAC") as:

> a child who-
> (A) has no lawful immigration status in the United States;
> (B) has not attained 18 years of age; and
> (C) with respect to whom-
> (i) there is no parent or legal guardian in the United States; or

> (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2).

B. TRANSFER OF UAC CUSTODY TO THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT

In 2002, the HSA transferred to ORR the responsibility for making all placement decisions for UACs, and required ORR to coordinate these placement decisions with DHS and to ensure that UACs are not released upon their own recognizance. *See* 6 U.S.C. § 279(b)(l)(C), (D), (b)(2). Subsequently, the TVPRA built on the HSA, and further required that "the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services." 8 U.S.C. § 1232(b)(1). The TVPRA requires that any agency must notify HHS within 48 hours upon "the apprehension or discovery of an unaccompanied alien child[.]" 8 U.S.C. § 1232(b)(2). It also required that except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child. 8 U.S.C. § 1232(b)(3).

C. PLACEMENT OF UNACCOMPANIED ALIEN CHILDREN IN THE CUSTODY OF ORR

Once ORR assumes custody of an unaccompanied alien child, ORR is responsible for determining an appropriate placement for the child, guided by foster care and child welfare best practices. *See* 6 U.S.C. §§ 279(b)(1)(A)-(F); *ORR Guide* §§ 1.1, 1.2. TVPRA directs that ORR place UAC "in the least restrictive setting that is in the best interests of the child," and "may consider danger to self, danger to the community, and risk of flight." 8 U.S.C. § 1232(c)(2); *see also* 6 U.S.C. § 279(b)(2); *ORR Guide* §§ 1.2.1. These placement decisions are animated by a host of factors

concerning individual circumstances, with the safety and well-being of the child being primary . *ORR Guide* § 1.2.3; *see also* 8 U.S.C. § 1232(c).

D. RELEASE OF UNACCOMPANIED ALIEN CHILDREN

ORR also determines whether there is an appropriate person into whose custody the child may safely and timely be released. *ORR Guide* § 2.1. ORR may not simply release a child "upon their own recognizance." 6 U.S.C. § 279(b)(2)(B). Nor may ORR release a child to any person without making "a determination that the proposed custodian is capable of providing for the child's physical and mental well-being," which must include "an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. § 1232(c)(3)(A); *see also ORR Guide* § 2.1. That assessment may include a home study—an assessment of the home into which the child would be released. *See* 8 U.S.C. § 1232(c)(3)(B). In some circumstances not applicable here, such as where the child "has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened," the TVPRA *mandates* a home study. *Id.* The ORR Guide identifies other circumstances in which a home study is required, as well as where a discretionary home study may be conducted to provide additional necessary information. *ORR Guide* § 2.4.2. Discretionary home studies, which require ORR field supervisory staff approval, have been authorized since March 15, 2016. *See* GAO-16-367, Child Advocate Program for Unaccompanied Children, 21 n.30 (*available at* https://www.gao.gov/assets/680/676937.pdf).

The process of appropriately vetting a custodian—also referred to as a "sponsor"—is necessarily a detailed one, and one designed to protect children from smugglers, traffickers, or others who may seek to victimize children; *i.e.*, the very concerns underlying the TVPRA. *See* 8 U.S.C. § 1232(c)(1); *ORR Guide* § 2.1.3. ORR begins the release process by identifying individuals who may be qualified to care for the child, with preference to parents and/or legal

guardians. *ORR Guide* §§ 2.2, 2.2.1. There are three categories of sponsors: (1) Category 1: parents or legal guardians; (2) Category 2: immediate relatives, including biological relatives, relatives through legal marriage, and half-siblings; (3) Category 3: others, including distant relatives and unrelated adults. *Id.* § 2.2.1.

In order to allow ORR to fulfill its statutory obligations and conduct a fulsome and accurate suitability assessment, the sponsor application packet requires extensive information. *Id.* § 2.2.3. Beginning in 2015 and 2016, ORR made a number of policy changes affecting the process of its release determinations. *See* Decl. of Jallyn Sualog, *LVM v. Lloyd*, No. 18-cv-1453, Dkt. No. 63 ¶ 6 (S.D.N.Y. May 15, 2018). These changes followed a 2015 federal indictment of labor traffickers who had obtained custody of UACs and forced them to live in substandard conditions and work dangerous (and illegal) hours. *Id.* ORR has long required a sponsor to provide, as part of his or her application, proof of his or her identity, as well as documentation "verifying the identity of non-sponsor adults of the household." *ORR Guide* § 2.2.4. Part of this identification process includes the provision of fingerprints for background checks. Since 2015, ORR has also required all members of the household into which the child would be released to provide their fingerprints for this purpose in certain circumstances. In 2018, ORR revised its guidelines to require household members to provide fingerprints in all cases.

Once ORR receives a complete application from a potential sponsor, ORR evaluates his/her suitability. ORR's individualized assessment is guided by ten factors in the ORR Guide, which include the sponsor's relationship to the child, his/her motivation, and his/her understanding of the child's particular needs and plan to care for the child. *ORR Guide* § 2.4.1. As part of that assessment, ORR verifies the potential sponsor's identity and relationship to the child, *id.* § 2.2.4; conducts background checks of the sponsor and adult household members with whom the child

would be residing if released to the sponsor, *id.* § 2.5; and conducts a home study when required by law or when the circumstances call for additional information relevant to the determination of whether a sponsor is suitable to care for the child's safety and well-being, *id.* § 2.4.2.[4]

After analyzing all of this information, the case manager and the case coordinator—those individuals most directly involved with the child on a daily basis—make a recommendation to ORR on whether a child may safely be released to the potential sponsor. *Id.* § 2.7. ORR is responsible for making the final release decision, and in so doing, considers this recommendation, as well as the recommendation of any home study provider or other relevant stakeholder. *Id.* §§ 2.7, 2.7.1. ORR must deny a request for release if the potential sponsor "is not willing or able to provide for the child's physical or mental well-being," "the physical environment of the home presents risks to the child's safety and well-being," or "release of the [] child would present a risk of harm to him or herself, the sponsor, household, or the community." *Id.* § 2.7.4. Pursuant to a policy in effect since 2016, ORR also will deny release of a child to a *non*-parent sponsor (and may do so with respect to a parent) if the potential sponsor *or a member of his/her household* has certain criminal convictions or adverse child welfare findings. *Id.* But if ORR decides to release the child to the potential sponsor, "[o]nce [the] child is released . . . ORR's custodial relationship with the child terminates." *Id.* § 2.8.3.

Because of the special constitutional status inherent in the relationship between parent and child, ORR's internal procedures provide parents with the opportunity to appeal the denial of a release request to the Assistant Secretary for Children and Families at HHS. *Id.* § 2.7.8. With his

[4] When ORR requires additional information from a potential sponsor, such as through the performance of a home study, ORR notifies the sponsor of what further information is needed. *See, e.g.*, *ORR Guide* §§ 2.2.4, 2.4.2 ("The care provider must inform the potential sponsor whenever a home study is conducted, explaining the scope and purpose of the study and answering the potential sponsor's questions about the process.").

or her appeal request, a parent can provide any additional documentation or other evidence that he or she believes ought to be considered. *Id.* The parent can also request an oral hearing on the appeal, after which the Assistant Secretary must consider any "testimony and evidence" adduced at that hearing before reaching a final decision. *Id.*

ARGUMENT

As an "extraordinary remedy," a preliminary injunction is "never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In seeking a preliminary injunction, Petitioners "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 21. First, the "irreparable harm" component must be examined before the other requirements are considered, and the moving party must "demonstrate an injury that is neither remote nor speculative, but actual and imminent." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999). When a moving party seeks an injunction "that challenges 'government action taken in the public interest pursuant to a statutory or regulatory scheme' and that would 'alter, rather than maintain, the status quo,' the moving party must demonstrate irreparable harm and a 'clear' or 'substantial' likelihood of success on the merits." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 185-86 (2d Cir. 2010) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 473-74 (2d Cir. 1996)). In evaluating potential harm, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)). In particular, courts should carefully consider "the public consequences in employing the extraordinary remedy of injunction." *Id.* (internal citation omitted); *see also NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013)

("[C]ourts of equity should pay particular regard to the public consequences of any injunction."). Petitioners' motion should be denied because Petitioners cannot meet these four requirements.[5]

A. PETITIONERS CANNOT DEMONSTRATE IRREPARABLE HARM

Although Respondents acknowledge the difficulty that any type of separation of a child from parent entails, Petitioners cannot in this case demonstrate irreparable harm resulting from ORR's performance of its statutorily required review and release process. ORR's priority is always the best interest of the child during custody and release. After being admitted to ORR care on May 2, 2018, D.J.C.V.'s biological mother was immediately contacted and video conferences and calls have been facilitated since May. Due to D.J.C.V.'s young age, D.J.C.V. was promptly

[5] Indeed, Petitioners seek an order granting immediate release, thereby expediting the ultimate relief sought in this case—the immediate release of D.J.C.V. from ORR custody. Petitioners' request inverts the fundamental purpose of preliminary injunctive relief, which is "merely to preserve the relative positions of the parties until a trial on the merits can be had." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also, e.g.*, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (TROs "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."); *Unicon Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966) ("It is hornbook law that 'the general purpose of a preliminary injunction is to preserve the status quo *pending final determination* of the action.'" (emphasis added)). Instead, Petitioners improperly ask this Court to completely alter the status quo by granting D.J.C.V. the very relief he hopes to obtain through this action—release from ORR custody. *See, e.g.*, *Powell v. Fannie Mae*, No. 16-cv-1359 (LTS) (KNF), 2017 WL 712915, at *2 (S.D.N.Y. Feb. 2, 2017) (R&R) (the "purpose of a preliminary injunction is to preserve the status quo between the parties pending a full hearing on the merits," and such injunctive relief "is improper where it would give the plaintiff substantially all the ultimate relief [he] seeks"); *Guy v. Tanner*, No. 13-cv-6750, 2014 WL 2818684, *4 (E.D. La. June 23, 2014) ("Guy's motion is no more than a veiled attempt to expedite the resolution of his habeas petition. This is not a proper basis for issuing an injunction."); *Guthrie v. Niak*, No. 12-cv-1761, 2013 WL 5487936, *6 (S.D. Tex. Sep. 27, 2013) ("Moreover, it appears Plaintiff is merely trying to expedite the relief sought in his Complaint."); *Idowu v. Ridge*, No. 03-cv-1293, 2003 WL 21805198, *6 (N.D. Tex. Aug. 4, 2003) ("In this instance, petitioner seeks a TRO not to preserve the status quo, but rather, to obtain expeditious resolution of his habeas petition. The Court need not determine the propriety of seeking a TRO in such instances."). Moreover, a "preliminary injunction is an 'extraordinary remedy' that is 'never awarded as of right.'" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). And where a party seeks an injunction that alters the status quo, such as here, the Second Circuit has placed a heightened burden on the moving party to demonstrate entitlement the relief sought. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

placed with a foster parent full time. D.J.C.V. has weekly visits with his case manager and a clinician to evaluate his progress and to ensure the mental and physical well-being of D.J.C.V. During clinical meetings, the clinician works with D.J.C.V. to further his development in social skills, motor skills, and language. Program reports show that D.J.C.V. presents euthymic and is in a calm mood while in care. D.J.C.V. is reported to be comfortable in the program and has developed good relationships with his foster parent and staff. D.J.C.V. has not presented with any mental health or behavioral concerns. Brannon Decl.¶¶ 4-8.

While D.J.C.V. has been in ORR's care, ORR has been making an ongoing assessment whether there is a suitable sponsor so that the child may be released as quickly as is safe and appropriate. Mr. C.'s sister who lives in Austin, Texas was contacted back in May as a potential sponsor. She indicated at that time that she was only willing to sponsor D.J.C.V. if Mr. C. remains in the United States. Most recently, on October 10, 2018, during a phone call with the case manager, D.J.C.V's biological mother again expressed that she wanted her son to return to Honduras. Brannon Decl. ¶¶ 9-10.

Mr. C. has been detained in adult detention centers until just 5 days ago, October 10, 2018. Mr. C. submitted a sponsor application on October 11, 2018. Brannon Decl. ¶ 11. ORR is required by statute to maintain all UAC in custody pending a release determination, which requires independent findings that the proposed sponsor is suitable. 6 U.S.C. § 279(b)(1)(A). ORR cannot release a minor on his own recognizance. 6 U.S.C. § 279(b)(2)(B). Nor may ORR release a child to any person without making "a determination that the proposed custodian is capable of providing for the child's physical and mental well- being," which must include "an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. § 1232(c)(3)(A).

Based on Mr. C.'s. recent sponsor application submission, ORR is currently engaged in this very important and statutorily required assessment process. Given D.J.C.V.'s young age and complicated facts of this case, it is imperative that ORR follows its release procedures to guarantee that D.J.C.V. is safely released to a sponsor who is able to provide for his physical and mental well-being. ORR was just notified last week of Mr. C.'s intent to live with his sister, in her home located in Austin, Texas. As a potential adult in D.J.C.V.'s future household, she must also be appropriately vetted. ORR has long required a sponsor to provide, as part of his or her application, proof of his or her identity, as well as documentation "verifying the identity of non-sponsor adults of the household." *ORR Guide* § 2.2.4. Part of this identification process includes the provision of fingerprints for background checks. Since 2015, ORR has also required all members of the household into which the child would be released to provide their fingerprints for this purpose in certain circumstances. Currently, ORR requires household members to provide fingerprints in all cases.

Due to D.J.C.V.'s age, the assessment may also include a home study—an assessment of the home into which the child would be released. *See* 8 U.S.C. § 1232(c)(3)(B). In some circumstances, such as where the child "has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened," the TVPRA *mandates* a home study. *Id.* A discretionary home study may be conducted to provide additional necessary information to determine that the sponsor is able to care for the child's health, safety, and well-being. *ORR Guide* § 2.4.2.

Petitioners cannot show a likelihood of irreparable harm. The best interests of D.J.C.V. have been considered throughout his care in ORR. Furthermore, being subject to a lawful process

designed to ensure his safe and suitable release from government custody does not constitute irreparable harm.

B. PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS

Petitioners' likelihood of success on the merits is low because D.J.C.V. was properly designated as a UAC. The UAC designation mandated transfer custody of D.J.C.V. to ORR under the TVPRA. ORR's custody of D.J.C.V. is thus lawful and Petitioners will not succeed in their claim for habeas relief. Moreover, the procedures followed by ORR in evaluation whether D.J.C.V. can be released to a sponsor, including a parent, do not violate due process or the Flores Agreement.

1. The Designation of D.J.C.V. as a UAC Was Not an Abuse of Discretion

The UAC designation of D.J.C.V. under 6 U.S.C. § 279(g)(2) involves the type of factual determination by the agency that should not be reviewed in habeas. *See, e.g.*, *Bravo v. Ashcroft*, 341 F.3d 590, 592 n.4 (5th Cir. 2003); *Bowrin v. U.S. INS*, 194 F.3d 483, 490 (4th Cir. 1999) ("Only questions of pure law will be considered on § 2241 habeas review. Review of factual or discretionary issues is prohibited."); *Auguste v. Ridge*, 395 F.3d 123, 138 (3d Cir. 2005) ("[O]n a habeas petition, our review . . . is limited to constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, but does not include review of administrative fact findings or the exercise of discretion."). To the extent that the designation of D.J.C.V. as a UAC is subject to judicial review, it should be reviewed only for abuse of discretion by the agency. *See* 5 U.S.C. § 706.

In this case, there is no basis to find that the federal government abused its discretion in designating D.J.C.V. as a UAC. First, there is no dispute that D.J.C.V.: (A) had no legal status in the United States; and (B) is under the age of eighteen. Thus, the only question is whether the

federal government properly determined that "no parent or legal guardian in the United States [was] available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

On April 30, 2018, Mr. C. and D.J.C.V. entered the United States near Hidalgo, Texas. They were apprehended by DHS and processed for reinstatement. U.S. Border Patrol agents have the authority to make immigration stops at a checkpoint under 8 U.S.C. § 1357(a)(3). Specifically, when a Border Patrol agent identifies that an individual at a checkpoint does not have legal status to be present in or remain in the United States, Border Patrol has the authority to apprehend that person under 8 U.S.C. § 1357(a)(2). Mr. C. had a final order of removal; therefore, he was subject to detention. Previously, Mr. C. was ordered removed on December 9, 2010, by an immigration judge in Oakdale, Louisiana, and he was removed on January 14, 2011. Mr. C. later returned to the United States, and his removal order was reinstated on October 5, 2013. He was again removed on October 9, 2013. *See Ms. L.* (ECF No. 223-2).

Based on Mr. C.'s criminal history which included an aggravated assault conviction for swinging a machete at his wife, it was determined he could not be placed in a family detention center. *Ms. L.* (ECF No. 223 at 8, 9); *see also Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1139 n.5 (S.D. Cal. 2018) (explaining that the class certified in *Ms. L.* did not include, *inter alia*, "parents with criminal history"). TVPRA requires any department or agency of the Federal Government to notify HHS within 48 hours upon the apprehension or discovery of a UAC and further requires that the UAC custody shall be transferred to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child. 8 U.S.C. §§ 1232(b)(3); 1232(b)(2). Due to Mr. C.'s placement in an adult immigration detention center, he was not able to provide care and physical custody of D.J.C.V. Accordingly, the federal government properly exercised its discretion in determining that D.J.C.V. was a UAC.

A minor is also properly designated a UAC when there is simply no parent or legal guardian in the United States. 6 U.S.C. § 279(g)(1). For a period of time, there was a question regarding Mr. C.'s relationship to D.J.C.V. Indeed, Mr. C. is not D.J.C.V.'s biological father. Mr. C.'s attorney, who began representing Mr. C. on July 13, 2018, later provided the government with additional documentary proof which showed Mr. C. as D.J.C.V.'s legal father. *Ms. L.* (Dkt. No. 221, Ex. 64 ¶ 7-8).

In any event, to the extent Petitioners are asking the Court to find that D.J.C.V. is no longer a UAC, this Court should decline to make that re-evaluation. The TVPRA clearly establishes that the UAC may remain subject to the requirements of the TVPRA and in the custody of HHS, even where a parent or guardian seeks to take custody of the minor. Once a child is transferred to ORR, that agency has the independent authority to provide "care and custody of all unaccompanied alien children, including their detention." 8 U.S.C. § 1232(b)(1). The statute clearly delineates the steps ORR must take to determine how, and with whom, to place the UAC. *Id.* § 1232(c). While the minor is in ORR custody, if a parent comes forward, ORR must evaluate the suitability of placing the child with that parent. *Id.* § 1232(c)(3)(A). Thus, after a UAC is transferred to the custody of HHS, the TVPRA contemplates that the minor will be placed with a parent through the procedures provided in the statute and not by withdrawing the minor's designation as UAC.

2. The TVPRA Obligates ORR to Determine Whether Mr. C. is a Suitable Sponsor Before D.J.C.V. Can Be Released

Petitioners also do not establish that the procedures related to D.J.C.V.'s custody and release by ORR are constitutionally inadequate. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process

of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). To determine what procedural due process requires in a given situation, the Supreme Court has articulated the following factors to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Here, ORR's procedures do not create a risk of erroneous deprivation because they are designed to release D.J.C.V. to his sponsor as soon as ORR can be assured that such release is safe and in the best interests of D.J.C.V. By requesting immediate release, Petitioners seek an adjudicated outcome in such a way that there would be no procedures at all to assess issues of safety and the child's best interest. However, this does not comport with the requirements or the purposes of TVPRA. Mr. C. was released from adult detention on the evening of October 10, 2018. Mr. C. did not begin the sponsor application process until October 11, 2018, when he submitted application materials. Yet the very next day, on October 12, 2018, Mr. C. was in Federal court demanding immediate reunification, without allowing any time whatsoever for agency review.

ORR is actively processing the application and gathering all necessary information, including household member information, in order to determine whether the release is in the best interest of D.J.C.V. Additionally, although Respondents no longer contest Mr. C.'s parental status, Respondents must still consider D.J.C.V.'s biological mother's continued request that her child be returned to her. The declaration signed by Mr. C.'s attorney on October 12, 2018, should not be determinative of D.J.C.V.'s mother's wishes, as Mr. C. potentially has conflicting interests in obtaining custody. *See* Schwarz Decl.

The government has a strong interest in protecting the welfare of UACs, as clearly expressed through the provisions of the TVPRA. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) ("[T]he State has an urgent interest in the welfare of the child . . . .") (citation and internal quotation marks omitted). ORR's procedures under TVPRA are established in order to ensure that before any UAC is released from Government custody the custodian and members of the household to whom the UAC is released are evaluated and determined to be safe and suitable for the UAC. Thus, the existence of these procedures serves an important government interest that cannot be circumvented without creating a risk to the safety of UACs whom ORR is seeking to release to safe and suitable custodians in accordance with the TVPRA. For all of the above reasons, ORR's procedures seeking to release D.J.C.V. to a safe and suitable custodian comport with due process, and Petitioners are not likely to succeed on their claims to the contrary.

Similarly, Petitioners will not succeed on their substantive due process claim. It is difficult to overstate the extremely narrow nature of substantive due process analysis under Supreme Court jurisprudence, or the significant burden that Petitioners must carry to demonstrate that ORR's policies run afoul of the same. As the Supreme Court has repeatedly explained, substantive due process only "prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). In cases challenging executive action, the threshold question is whether the challenged conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8. The facts at issue in this case do not even approach this standard; indeed, ORR is engaged in a release process that is meant to protect D.J.C.V.'s well-being, not harm it.

3. Petitioners are Unlikely to Prevail on Their Claims Under the Flores Settlement Agreement

This court has no jurisdiction over Petitioners' claims under the Flores agreement. Paragraph 24B states:

> Any minor who disagrees with the INS's determination to place that minor in a particular type of facility, or who asserts that the licensed program in which he or she has been placed does not comply with the standards set forth in Exhibit 1, may seek judicial review in any United States District Court with jurisdiction and venue over the matter to challenge that placement determination or to allege noncompliance with the standards set forth in Exhibit 1. In such an action, the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action.

Flores Agr. ¶ 24B. Petitioners impermissibly attempt to challenge aspects of the Flores agreement apart from the limited challenge provided in Paragraph 24B, and thus fail to establish a likelihood of prevailing on their claims. Under Paragraph 24B of the Flores agreement, the only types of actions that may be challenged under that paragraph are (1) the determination to place a minor in a particular type of facility, and (2) the failure of the licensed facility to comply with the standards set forth in the Exhibit 1 of the agreement. Other allegations, to the extent they may be brought at all, should be brought as a Flores enforcement action pursuant to Paragraph 37 of the agreement in the Central District of California. *Flores Agr.* ¶ 37.

In any event, despite Petitioners' claims, Respondents have indeed placed D.J.C.V. in the least restrictive setting for his age. D.J.C.V. did not have a parent or legal guardian in the United States available to provide care and physical custody because Mr. C., until just recently, was detained in adult detention centers due to his criminal history. As such, D.J.C.V. was designated a UAC and placed in ORR care. Based on his age, D.J.C.V. was placed with a foster parent with whom he lives during the day and night. Both his physical and mental well-being are monitored closely by his care manager and clinician. Additionally, video conferences and phone calls with his

biological mother have been facilitated since D.J.C.V. has entered ORR care. ORR has also been making prompt and continuous efforts to safely release D.J.C.V. to potential sponsors. In fact, Mr. C.'s sister was contacted; however, the only application submitted was Mr. C.'s application submitted on October 11, 2018. Brannon Decl.¶¶ 4-12.

ORR is currently reviewing the application as it is obligated to do under TVPRA and there has been no "unnecessary delay" in this matter. The Flores agreement, like TVPRA, emphasizes the importance of assessing potential sponsor suitability prior to releasing a child, explicitly providing that then-INS may await a "positive suitability assessment" prior to release that "may include such components as an investigation of the living conditions in which the minor would be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit." *Flores Agr*. ¶ 17.

C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGHS AGAINST GRANTING PETITIONERS' MOTION

An injunction directing D.J.C.V.'s immediate release is not in the public interest. Congress codified ORR's particularized interest in and responsibility for protecting the health and safety of children by prohibiting ORR from releasing any UAC to any sponsor without fully vetting (including a home study, if necessary) the ability of the sponsor to care for both the physical and mental well-being of the child. Moreover, when a child is young, as in this case, the public interest clearly weighs in favor of ensuring that the household to which he may be released can provide appropriate care—an interest that the agency's actions in this case clearly have served. The balance of equities weigh against granting Petitioners' motion because injunctive relief would undermine the important interests of TVPRA in protecting UACs.

CONCLUSION

For the foregoing reasons, Petitioners' motion for injunctive relief should be denied.

Dated: New York, New York
October 15, 2018

Respectfully submitted,

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