UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D.J.C.V, a minor, and Mr. C.

*Petitioners,*

v.

U.S. Immigration and Customs Enforcement ("ICE"), et al.

*Respondents.*

**Case No. 18-cv-09115 (VC) (GG)**

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER**

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Petitioners submit this Memorandum of Law in support of their Motion for Order To Show Cause for Temporary Restraining Order.

## PRELIMINARY STATEMENT

Petitioners are citizens of Honduras, who seek asylum and protection from torture in the United States. Petitioner D.J.C.V. is a two-year old child who has been detained and separated from his father, Petitioner Mr. C., for over five months. On October 4, 2018, they filed a habeas corpus petition, pursuant to 28 U.S.C. §§ 2241 and 2243, and a motion for a preliminary injunction seeking release from detention and family reunification. Petitioners also sought expedited consideration of their preliminary injunction motion in order to prevent further irreparable harm, particularly as to D.J.C.V., who has been traumatized by his detention and separation from his father.

A day after this case was filed, Petitioner Mr. C. was afforded his first hearing before an immigration judge, who concluded that he did not present a threat and ordered him released on $2,000 bond. Bond has been posted and he was released from detention on the evening of October 10, 2018. It is his intention to move to Texas to live with his sister and her family once he and his son, D.J.C.V., are reunited. However, Petitioner D.J.C.V. remains indefinitely detained. He remains in the custody of the Office of Refugee Resettlement ("ORR") not because Respondents object to his release or otherwise seek to continue to detain him, but rather because of newly adopted ORR administrative policies and procedures for processing the release of children from detention. These "vetting" procedures are duplicative of information the agency already has, or are unnecessary given that there is no allegation or evidence that Mr. C. is an unfit parent; such additional, unnecessary delay, which counsel has been told can take up to *two months* to complete, cannot interfere with Mr. C.'s substantive due process right to family

integrity or the court's broad authority to fashion habeas relief. Having stripped this infant from his father for nearly a quarter of his life, any additional delay is unconscionable. The irreparable harm that would be caused by such further months of delay compels immediate judicial intervention.

Petitioners[1] thus move the Court for an order to show cause why Respondents should not be ordered to release Petitioner D.J.C.V. immediately so that he can be reunited with his father, Petitioner Mr. C. This ORR practice of unreasonably delaying reunification has been repeatedly rejected and enjoined by courts, including Judges in this District. *See, e.g., Cruz Paz v. Lloyd et. al.*, No. 18 CV 8993, Dkt. 11 (S.D.N.Y. Oct. 5, 2018) (Crotty, P.); *Paixao v. Sessions*, No. 18 CV 4591, Dkt. 16 (N.D. Ill. July 5, 2018) (Shah, M.); *Souza v. Sessions et al.*, No. 18 CV 4412, Dkt. 23 (N.D. Ill. Jun. 26, 2018) (Shah, M.); *Maldonado v. Lloyd*, 18 Civ. 3089 (S.D.N.Y. May 4, 2018) (Keenan, J.); *Santos v. Smith*, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017); *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016). The Court has plenary habeas authority to grant the requested relief, including D.J.C.V.'s immediate release to his father, or to fashion whatever additional relief may be necessary based on the unique facts and circumstances of this case, including interim relief such as D.J.C.V.'s conditional release from detention, to effectuate the result desired by all parties. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."). The Court should exercise its broad, equitable habeas authority in order to prevent further irreparable harm to Petitioners—particularly D.J.C.V.

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[1] The facts of Petitioners' underlying case and history are set forth more fully in the Petition for Habeas Corpus and Other Declaratory and Injunctive Relief, filed on October 3, 2018. Dkt. No. 1.

Counsel for Respondents have accepted service of the petition and motion, and have been served with copies of the instant motion, but have not yet appeared in this case. We understand that the government will object to the requested relief.

## FACTUAL BACKGROUND

### I. D.J.C.V.'S WRONGFUL, CONTINUED DETENTION APART FROM HIS FATHER

On April 30, 2018, Mr. C. and infant son, D.J.C.V., arrived in the United States. They had fled Honduras to escape threats of imminent death from members of gangs that had kidnapped and held Mr. C. at gun point, threatening his life and the life of his baby, and threats from other gang members that had already killed multiple members of Mr. C.'s extended family. Silane Decl. ¶ 6. Immediately upon encountering United States border officials, Mr. C. communicated his fear of returning to Honduras. *Id.* ¶ 7.

Only days later, on or about May 2, 2018, Mr. C. and his young son were forcibly separated by Respondents. *Id.* For over five months now, a baby remains alone and frightened in the custody of the Office of Refugee Resettlement ("ORR"), while his father was shuttled through detention facilities throughout the country, terrified about his son's wellbeing.

As set forth more fully in the Petition for Habeas Corpus and Other Declaratory and Injunctive Relief, filed on October 3, 2018, Respondents have taken a series of inconsistent positions with regard to Petitioners, but made clear that they were willing to reunite Mr. C. with his son if Mr. C. was willing to forego their rights to seek asylum or Convention Against Torture protections under U.S. immigration law. During a call with Petitioners' counsel on August 17, DOJ stated that it was it was "willing to reunify and remove" if Mr. C. elected that option. *Id.* ¶ 4. Five days later, on August 23, 2018, DOJ put it in writing, stating that "DHS will reunify for the purposes of removal." See *id.* at 5, Exh. B.

Also on August 23, 2018, a USCIS Asylum Officer determined that Mr. C. has a "reasonable fear" of returning to Honduras, and Mr. C.'s case for protection under U.S. immigration law is continuing. *Id.* ¶ 8. On October 5, 2018, the day after Petitioners filed this habeas case and motion for a preliminary injunction, citing in part Respondents' failure to afford Mr. C. an immigration hearing, Mr. C. was afforded a hearing and ordered by the Immigration Court to be released on $2,000 bond. *Id.* ¶ 10. The Court specifically found that Mr. C. was not a danger. *Id.* That bond was posted on the morning of October 10, 2018, and Mr. C. was released later that evening. *Id.*

On October 9, 2018, ORR officials informed counsel for Mr. C. and D.J.C.V. that they would not release D.J.C.V. to his father's custody until a formal application was filled out, fingerprints and other documentation obtained from Mr. C. and all members of his household, and Mr. C. and these individuals were "processed" and "vetted"—a process that was not required by ORR in order to reunite children and their parents until six months ago—but in any event a process that ORR could have already begun in order to avoid the very sort of delay that now is solely responsible for preventing D.J.C.V.'s release and reunification with his father.[2] *Id.* ¶ 11. Also during that call, the child's federally appointed Child Advocate, stated that ORR's process currently takes a number of months to complete.[3] *Id.* ORR conceded that the outside agency it uses to process fingerprints is backlogged. *Id.* This delay has been documented in other cases. *See, e.g., Cruz Paz v. Lloyd et. al.*, No. 18 CV 8993, Dkt. 11 (S.D.N.Y. Oct. 5, 2018) (Crotty, P.) (citing "a new ORR policy requiring parents to be fingerprinted as a prelude to a home study

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[2] At the insistence of Petitioners' counsel, Mr. C. was permitted a single, supervised visit with his son on October 11, 2018. Representatives of LSSNY recently stated they will not accommodate more than one visit/contact between father and son per week pending the son's release. Silane Decl. ¶ 14. Although AUSA Michael Byars indicated to counsel that the agencies involved may be attempting to coordinate additional contact, counsel has received no definitive indication of additional visits or contact. *Id.*

[3] On October 12, 2018, the biological mother of D.C.V.J. spoke with Ghita Schwarz, counsel in this action, and told Ms. Schwarz that, on October 11, she was told by a staff member of the agency holding D.J.C.V. that it would be three months before father and son could be reunited if they choose to remain in the United States.

which has to be conducted before detained children may be released to them," and granting TRO to return child immediately to the custody of her parent after fingerprint processing was pending for six weeks). As a consequence, absent judicial intervention, Petitioner D.J.C.V. faces the prospect of additional months in detention, separated from his father, which will indisputably compound the trauma and other irreparable harm that he suffers.

To justify continuing to separate father and son, Respondents have not alleged and certainly have not presented any evidence to show that Mr. C. is an unfit parent or a danger to his child in any way, nor could it. In fact, the Child Advocate, federally appointed to represent D.J.C.V.'s interests, has investigated the case and has not only found that Mr. C. presents no danger to D.J.C.V., but that the young child is severely harmed each day he is not reunited with his father. See Silane Decl. Ex. B. In addition, Respondents themselves have stated more than once that they are willing to reunify Mr. C. with D.J.C.V. should they choose to withdraw their intentions of applying for protections under U.S. law. *Id.* ¶¶ 4-5.

Moreover, as noted above, ORR has been in possession of all relevant information necessary to conduct any background vetting on Mr. C. for months: it has been in possession of D.J.C.V.'s birth certificate listing Mr. C. as the child's father (which ORR confirmed to counsel had been verified) at least as of July 19, 2018; it has been in possession of information regarding Mr. C.'s criminal history since at least July 27, 2018;[4] and it has had Mr. C.'s birth certificate since August 7, 2018. *Id.* at ¶¶ 2-3. Petitioners' counsel has been in frequent contact with ORR, informing them that Mr. C. intended to continuing caring for D.J.C.V. upon his release from

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[4] Mr. C.'s entire criminal history consists of a single misdemeanor conviction from eight years ago. On October 28, 2010, Mr. C. pled guilty to the charge on which he had been arraigned: misdemeanor aggravated assault in Louisiana. *See* Silane Decl. Exh. A. The incident did not involve any physical contact or harm to another; under Louisiana law, assault is defined as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." LA Rev Stat § 14:36. The maximum penalty for the misdemeanor of which Mr. C. was convicted under Louisiana law is a fine of up to $1,000, a term of imprisonment not more than six months, or both. LA Rev Stat § 14:37. Mr. C. was sentenced to only 48 days. *See* Silane Decl. Exh. A.

custody, and offering numerous times to provide any necessary documentation. *Id.* But also as noted above, to date ORR apparently did not take action to expedite or complete these processes.

## II. ORR'S NEW POLICIES AND PROCEDURES

Within the last few months, ORR changed the requirements for children to be released to the custody of their parents. *See* "Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters" (Apr. 13, 2018). Prior to this policy change, parents, legal guardians, and the members of their households did not have to provide fingerprints to ORR, and home studies did not need to be conducted, in order for the children to be released from ORR custody unless there was a particularized and documented risk of safety to the child.[5] Under the new policy, all parents and their household members are required to be fingerprinted in order for the child to be released. According to ORR, those fingerprints are sent to an outside agency, which has a large backlog of fingerprints to process. Silane Decl. ¶ 11. Even if a home study could be expedited, it could still take weeks or even months for fingerprints to process. In discussions with the

[5] *See* Statement of Kathryn A. Larin, Director Education, Workforce, and Income Security, Testimony Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Sentate, "Unaccompanied Children: DHS and HHS Have Taken Steps To Improve Transfers and Monitoring of Care, but Actions Still Needed" (April 26, 2018) at 8 n. 19, *available at* https://www.gao.gov/assets/700/691526.pdf (noting that, as of the date of the report, the Department of Health and Human Services "must first determine whether a home study is necessary[,]" which occurred pursuant to ORR policy in certain circumstances involving a sponsor who was not the child's relative, and pursuant to law, for "a child who is a victim of a severe form of trafficking; a special needs child with a disability; a child who has been a victim of physical or sexual abuse that has significantly harmed or threatened the child's health or welfare; or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence." (citing 8 U.S.C. § 1232(c)(3)(B)). Table 1 of the GAO report also shows that sponsors who were parents were required at that time only to undergo a "public records check," and not national (FBI) fingerprinting or other checks unless "there is a documented risk to the safety of the unaccompanied child, the child is especially vulnerable, and/or the case is being referred for a mandatory home study."

government regarding this case, they have been unable to provide any sense of timing regarding the fingerprinting process.

In addition, the new policy shares those fingerprints, and other information about all parents and household members with ICE.[6]

## PETITIONERS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER

Petitioners are entitled to emergency relief ordering the immediate release of D.J.C.V. from custody and reunification with Mr. C.

### I. THE APPLICABLE STANDARD

Second Circuit law provides that a party seeking a TRO must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Nat'l Football League Mgmt Council v. Nat'l Football League Players Ass'n*, No. 17-CV-06761-KP, 2017 WL 4685113, at *1 (S.D.N.Y. Oct. 17, 2017) (Crotty, J.) (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010)); *see also Cruz Paz v. Lloyd et. al.*, No. 18 CV 8993, Dkt. 11, at 2 (S.D.N.Y. Oct. 5, 2018).

### II. PETITIONERS WILL CONTINUE TO SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED

Petitioners clearly meet that burden in establishing harm. First, there is no serious dispute that the ultimate relief all parties seek—Petitioner D.J.C.V.'s release from detention and reunification with his father, Petitioner Mr. C.—is delayed solely because of ORR's new policies

[6] Respondents have already begun using this information to deport sponsors or their household members. Tai Kopan, ICE Arrested Undocumented Immigrants Who Came Forward to Take In Undocumented Children, CNN, Sep. 20, 2018, https://www.cnn.com/2018/09/20/politics/iceanested-immigrants-sponsor-children/index.html,; *see also* Testimony of Matthew Albence, Executive Associate Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, Sep. 18, 2018, available at https://www.hsgac.senate.gov/hearings/the-implications-of-the-reinterpretation-of-the-floressettlement-agreement-for-border-security-and-illegal-immigration-incentives.

and procedures. Second, there is also no serious dispute that the injury here is real and obvious – a baby turned two years old in government custody, and has been held by strangers away from the only father he has ever known. Third, to the extent it were not otherwise obvious in this case, which involves a two-year old child who has been detained away from his father for over five months (the sole contact between the two occurring yesterday), it bears emphasis that delay in a habeas case causes the petitioners substantive harm—not merely procedural inconvenience—because each day that D.J.C.V. remains in detention compounds the very indefinite, unlawful detention that he filed this case in order to remedy.

Courts have consistently held that separation of a parent from his child constitutes irreparable harm. *Ms. L. v. U.S. Immigration and Customs Enf't*, 302 F. Supp. 3d 1149, 1146 (S.D. Cal. 2018); *citing Leiva–Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (identifying "separated families" as an irreparable harm); *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1126 (N.D. Ill. 2018) ("common sense would tell anyone that keeping [Plaintiffs] separated from the only family they have in the United States – in a facility where they have limited access to talk to their fathers and where very few people speak their language – is causing irreparable harm"); *Paixao v. Sessions*, No. 18 CV 4591, Dkt. 16, at 2 (N.D. Ill. July 5, 2018) ("Continued separation of [child] and [parent] irreparably harms them both. Money damages cannot repair the harm to familial integrity."); *Souza v. Sessions et al.*, No. 18 CV 4412, Dkt. 23 (N.D. Ill. Jun. 26, 2018) (Shah, M.) (finding that continued separation of parent and child irreparably harms them both). And, the American Academy of Pediatrics has explained the real life harm suffered when a child is ripped away from his parent: "[f]ear and stress, particularly prolonged exposure to serious stress without the buffering protection afforded by stable, responsible relationship . . . can harm the developing

brain and harm short-and long-term health."[7] Specifically in this case, the federally appointed Child Advocate for D.J.V.C. has repeatedly expressed serious concerns about D.J.V.C.'s wellbeing and the irreparable harmed that this prolonged separation is causing. She stated that:

> [C]ontinued separation poses unacceptable risks to [D.J.C.V.'s] health and well-being. [D.J.C.V.'s] separation from his father over the last five months has been traumatic and has taken a significant toll on [D.J.C.V.'s] health. [D.J.C.V.] is very confused about why he is separated from his father, who he has not had contact with in months. He continues to struggle to make sense of life in an ORR shelter without either of his parents. [D.J.C.V.] needs his father's daily attention, care, and love. So long as this separation keeps [D.J.C.V.] from living and developing under his father's care, [D.J.C.V.'s] health, safety, and well-being will continue to suffer and will likely worsen.

Silane Decl. Exh. C. And, as detailed above in the Petition, the psychological harm to a vulnerable two-year old child, could last a lifetime. *See* Pet. ¶¶ 79-80.

In addition to that clear harm being inflicted on this young child, courts will presume that a movant has established irreparable harm in the absence of injunctive relief if the movant's claim involves the alleged deprivation of a constitutional right." *J.S.R. v. Sessions*, No. 3:18-cv-1106, 2018 U.S. Dist. LEXIS 116653, at *14 (D. Conn. July 13, 2018) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citations omitted)); *see also Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) ("[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.") (internal quotations omitted); *Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (It is well established that "the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Respondents' continued detention of D.J.C.V.

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[7] Letter from Colleen A. Kraft, MD, FAAP, President of the American Academy of Pediatrics, to DHS Secretary Nielsen (March 1, 2018), https://downloads.aap.org/DOFA/AAP%20Letter%20to%20DHS%20Secretary%2003-01-18.pdf.

also violates the rights of both Petitioners to family unity, as discussed further below in Sections III(A) and III(B).

## III. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

This Court should grant Petitioners' request for a temporary restraining order because they are likely to succeed on the merits of their claims under the Court's statutory and equitable powers to grant writs of habeas corpus and also under Fifth Amendment of the Constitution and the enforceable terms of the *Flores* Settlement Agreement. As the Supreme Court has explained in invalidating government procedures that delayed recognition of parental custody rights, while this sort of "[p]rocedure by presumption is always cheap[ ] and eas[y]," where parental rights are concerned, "it needlessly risks running roughshod over the important interests of both parent and child." *Stanley v.* Illinois, 405 U.S. 645, 656–57 (1972).

Accordingly, numerous courts have rejected the government's similar attempts to interfere and delay parental reunification of the child and have granted the relief requested in this case by ordering immediate release of a child in ORR custody to the care of the parent. *See Cruz Paz v. Lloyd et. al.*, No. 18 CV 8993, Dkt. 11 (S.D.N.Y. Oct. 5, 2018) (Crotty, P.); *Paixao v. Sessions*, No. 18 CV 4591, Dkt. 16 (N.D. Ill. July 5, 2018) (Shah, M.) (finding ORR background checks impermissibly interfere with parental rights and ordering release of child to parent on same day); *Souza v. Sessions et al.*, No. 18 CV 4412, Dkt. 23 (N.D. Ill. Jun. 26, 2018) (Shah, M.) (same); *Maldonado v. Lloyd*, 18 Civ. 3089 (S.D.N.Y. May 4, 2018) (Keenan, J.) (granting habeas writ and ordering "immediate release into [mother's] care and custody"); *Santos v. Smith*, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017) (finding ORR reunification procedures violate due process and, pursuant to "broad" habeas power, ordering child's "immediate release to his mother") (W.D. Va. 2017); *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016) (finding ORR

reunification procedures violate due process and granting habeas writ and ordering immediate family reunification).

### A. Petitioners Are Likely to Succeed on the Merits of Their Claim for Habeas Relief

Petitioner D.J.C.V., a two-year old child, and his father, Petitioner Mr. C., have filed this habeas case to remedy what is a continued grave injustice committed by Respondents continuing to separate father and son even upon Mr. C.'s release from immigration custody. Respondents lack any legal authority – in the Constitution, statute or regulation – that could justify D.J.C.V.'s continuing detention away from his father. Indeed, as explained above, all parties appear to seek the same ultimate relief here—D.J.C.V.'s release from detention. As a result, this Court is independently authorized to order release and/reunification pursuant to this Court's statutory and equitable habeas authority. *See* 28 U.S.C. §§ 2241(c)(3); 2243.

In the United States, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception." *Salerno v. United States*, 481 U.S. 739, 755 (1987). Habeas corpus is designed to remediate violations of this foundational presumption by obligating the government to come forward and affirmatively "certify the true cause of detention." 28 U.S.C. § 2243, ¶3. *See also id.* ¶1 (court entertaining a habeas petition "shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted"). At "its historical core," habeas serves as a means of "reviewing the legality of Executive detention," as is at stake in this case, "and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *See also Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (stressing that, unlike judicial review of prior criminal convictions, habeas review of executive or administrative detention in the first instance makes "the need for habeas corpus is more urgent").

Here, there is no affirmative legal basis that would authorize the government to continue to detain D.J.C.V., now that his father has been released from custody. The only legal authority the government could have cited to, while Mr. C was (otherwise unlawfully) detained, would be 6 U.S.C. § 279(g)(2), which authorizes ORR to undertake custody of an "unaccompanied minor" if a parent or guardian is unavailable to provide care and custody to that child. Mr. C. is now unambiguously available to provide care and custody for his son. Accordingly, the continued detention and separation is not lawful and must be remediated by the court.

ORR appears to assume it has some kind of corollary "wind down" authority, to take its time to ensure an appropriate transition. It does not under the law. Indeed, at this point the true cause of Petitioner D.J.C.V.'s detention is solely the bureaucratic delay caused by ORR's newly adopted administrative policies and procedures, which inexplicably could take weeks if not months to clear. This Court has broad, equitable habeas authority to fashion necessary and appropriate relief, including by setting aside the ORR policies and procedures in this case, or, for example, by imposing a deadline of 48-hours for ORR to complete its process, in order to remedy the harm to D.J.C.V. and speed his release. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."). The Court may likewise exercise its habeas authority to grant interim relief such as D.J.C.V.'s conditional release to his father or to a licensed foster care provider with an order affording Mr. C. broad access or visitation to his son pending expedited completion of the ORR process. *See* *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987) (federal courts retain "broad discretion in conditioning a judgment granting habeas relief."); *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release.") *Boumediene v. Bush*, 553 U.S. 723, 780

(2008); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.") ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.").

In this case, the government has no ability to identify a lawful basis of detention. "The Office of Refugee Resettlement has no statutory basis to keep [a child] in custody if he is not an unaccompanied alien child." *Paixao v. Sessions, et al.*, No. 18 CV 4591, Docket No. 16 (N.D. Ill. July 5, 2018) (granting preliminary injunction and finding that, upon parent's release from immigration custody, separated child "likely….no longer qualifies as an unaccompanied alien child—the statutory definition requires the absence of any parent or guardian in the United States or the unavailability of any parent or guardian to provide care and custody") (citing 6 U.S.C. § 279(g)(2)). ORR only has authority to detain "unaccompanied" children -- children without a parent available to care for them. 6 U.S.C. § 279(a). "Unaccompanied" is defined to mean a child who "(A) has no lawful states 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). That is simply not the case here: Mr. C. is ready, able, and very much looking forward to caring for D.J.C.V.

### B. Petitioners Are Likely To Succeed on Their Substantive and Procedural Due Process Claims

Continuing to separate father and son is a clear violation of Petitioners' rights under the Due Process Clause of the Fifth Amendment.[8] The liberty interest at stake here, the right of father and son to be together, "has long been recognized as a fundamental right." *W.S.R. v. Sessions*, 318 F. Supp. 3d at 1124 (holding that there is "no doubt" that by forcibly separating fathers from their sons and keeping them apart, the government substantially interfered in their fundamental rights, and that such separation can only be "deemed arbitrary and conscious shocking"); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (describing parents' rights "in the care, custody, and control of their children" to be "perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Ms. L.*, 302 F. Supp. 3d at 1161 ("there is no dispute the constitutional right to family integrity applies to aliens…"). Indeed, as part of the *Ms. L* litigation ORR waived its policies and procedures in reuniting parents and children who were *Ms. L.* class members—something it has inexplicable refused to do in this case.[9]

Respondents are clearly, and intentionally, interfering with that fundamental right for no legitimate, let alone compelling, reason. There has been no allegation, and indeed no hearing or evidentiary showing, that Mr. C. is unfit to care for D.J.C.V. that could justify a delayed reunification. *Stanley v. Illinois*, 405 U.S. 645 (1972) (explaining that delay in parental custody

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[8] The Due Process Clause of the Fifth Amendment applies to all "persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," and thus applies to the Petitioners. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

[9] As part of the *Ms. L* litigation, a federal district court in the Southern District of California certified a class of adults who had been separated from their children at the border, and ordered DHS to reunify families, absent a finding that the parent was unfit or a danger to the child, by July. The class does not include any families where the parent has any kind of "criminal" history. *Id.* at 1139 n.5. The government argued in that case that "[a]ny parent separated from his or her child, but who is not a *Ms. L.* class member, may still be reunified with his or her child under existing processes, or if not reunified would need to file an individual action seeking reunification under his or her particular circumstances." Supplemental Briefing, *Ms. L. v. U.S. Immigration and Customs Enf't, et al.*, No. 3:18-cv-00428 (S.D. Cal Sept. 13, 2018) (Dkt. No. 223). Mr. C. does so here. ORR has stated that it "waived" its policies and procedures in reuniting parents and children who were *Ms. L.* class members. See Silane Decl. ¶ 12.

causes intangible deprivation, uncertainty, and dislocation). In fact, the government has stated it would reunite Petitioners for the purpose of deportation, so it clearly does not perceive Mr. C. to present any danger to caring for a very young child. Silane Decl. ¶¶ 4-5. The Child Advocate came to a similar conclusion: Mr. C. presents no danger to a young and very vulnerable child, and in fact, the child is continuing to be harmed by failing to reunite him with his father. *Id.* ¶ 9, Exh. C. *Paxiao v. Sessions*, No. 18 CV 4591, Dkt. 16, at 2 (N.D. Ill. July 5, 2018) (granting preliminary injunction to immediately reunify parent and child, and finding that, although ORR background checks may be reasonable in some cases, "there is also a reasonable likelihood that since the process to date has established that [the child's mother] is fit and available, additional process only serves to interfere in the family's integrity with little to no benefit to the government's interest."); *Souza v. Sessions et al.*, No. 18 CV 4412, Dkt. 23, at 3 (N.D. Ill. Jun. 26, 2018) (granting preliminary injunction to immediately reunify parent and child where ORR did not contest parent's fitness, but would not release child until it completed "additional background checks related to the adults living in the home where [the parent] intends to stay with [the child]"); *see also Santos v. Smith*, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017) (finding ORR procedures impermissibly interfered with parental interest in care and custody of child); *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va 2016) (same).

### C. Petitioners Are Likely To Succeed on Their Claims Regarding Violations of the Flores Settlement

The Flores Agreement ("FSA") applies to "[a]ll minors who are detained in the legal custody of the INS." *See* FSA ¶ 10. It "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS[.]" *Id.* ¶ 9. Pursuant to the FSA, Respondents must work to release a minor at all times, with absolute priority being given to releasing the child to a parent. *Id.* ¶ 14. The agreement requires that children be released to adult sponsors "without

unnecessary delay" and that Respondents take "prompt and continuous efforts" to release children. *Id.* ¶¶ 14, 18. The agreement also requires that Respondents "shall place each detained minor in the *least restrictive setting* appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others." *Id.* ¶ 11. Per the FSA, the government agreed "that the [government] must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together…" *Reno v.* Flores, 507 U.S. 292, 295 (1993). The intention and requirements of the FSA are very clear: D.J.C.V. should be immediately released to the care of his father.

## IV. THE BALANCE OF EQUITIES FAVORS GRANTING THE PRELIMINARY INJUNCTION

Furthermore, the balance of equities also favors granting Petitioners' request for a temporary restraining order as, contrary to the real and severe harm inflicted on an infant and his father due to their separation, Respondents have not articulated any harm in immediately reuniting Mr. C. and his son. In fact, the only reason ORR presents is that it has a "policy" it needs to follow. Silane Decl. ¶ 11. At the outset, ORR does not have a legal right to detain a minor who is not "unaccompanied" (6 U.S.C. § 279(a)) so its policies are inapplicable to D.J.C.V. In addition, its time-intensive "policy" of vetting parents serves no legitimate, let alone compelling, reason to separate father and son since it has been in possession of all information necessary to vet Mr. C. for months, knows his full criminal history, and has not articulated any concern that Mr. C. is an unfit parent. *See Paixaio v. Sessions*, No. 18 CV 4591, Dkt. 16 (N.D. Ill. July 5, 2018) ("the harm to the [government] in immediately placing [child] with [parent] is negligible. There is no dispute that she is [the child]'s parent and she is fit. The government's

interests in completing certain procedures to be sure that [the child] is placed in a safe environment and in managing the response to ongoing class litigation do not outweigh the family's interest in reuniting.").

Given D.J.C.V.'s tender age, the amount of time he has already spent detained and separated from his father, and the complete failure by the Respondents to articulate a legitimate reason for the continued separation, the balance of equities "favors accelerated reunification." *W.S.R.*, 318 F. Supp. 3d at 1127 (finding "balance of equities favors accelerated reunification" where separation of nine and sixteen-year-old boys from their fathers was shown to be causing harm to their mental health, absent allegations of parental unfitness or danger posed by father to a child, the government must reunite father and son within 72 hours of the order").

## V. THE PUBLIC INTEREST FAVORS GRANTING THE PRELIMINARY INJUNCTION

The public has an interest in protecting the rights of families to be together, and statutory and constitutional rights. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Innovation Law Lab*, 310 F. Supp. 3d at 1163; *Hernandez*, 872 F.3d at 996 (finding that "[t]he public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention" due to unconstitutional processes). "[W]hen a plaintiff establishes 'a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction.'" *Ms. L.*, 310 F. Supp. 3d at 1147, citing *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). It is in the interest of the public to uphold these protected rights, "especially when there are no adequate remedies available." *Id.* at 1149 (internal citation omitted).

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to enter an order to show cause why Respondents should not be ordered to release D.J.C.V. from custody and reunifying him with Mr. C. immediately.

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