No. 18-15114

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ILSA SARAVIA, et al.
Plaintiffs-Appellees,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
D.C. No. 3:17-cv-03615-VC

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In this case, the district court issued a preliminary injunction dictating new procedures to be applied to a class of minors who had previously been released to a sponsor under the Trafficking Victims Protection and Reauthorization Act of 2008, but were later arrested by U.S. Immigration and Customs Enforcement based on allegations of gang membership. The district court's order creates heavy burdens on the Government and conflicts with existing law and procedure that already provide adequate due process. Thus, the district court's preliminary injunction order should be reversed.

The district court concluded that the government's arrest and custody of A.H. violated his due process rights, and on that basis granted preliminary relief on behalf of a provisionally certified class. That was erroneous. First, existing procedures satisfy due process, and the district court failed to consider those procedures or their adequacy. Second, the district court improperly and without good reason required the Government instead to apply alternate standards and procedures that do not apply to unaccompanied alien children such as A.H., resulting in novel procedures that are inconsistent with, and in some cases in conflict with, existing law. And third, the district court's order creates new administrative procedures that will unnecessarily overburden the Government, while providing no greater protections to class

members. Thus, for all of these reasons, the district court's conclusion that Plaintiff A.H. was likely to succeed on this claim was in error, and as a result this Court should reverse the district court's preliminary injunction order.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291(a)(1), which confers jurisdiction over appeals from interlocutory orders of district courts granting or refusing to dissolve or modify injunctions.

STATEMENT OF THE ISSUES

This appeal raises the following issue:

I. Did the district court err in concluding that the government's arrest and subsequent custody of A.H. violated A.H.'s procedural due process rights?

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Homeland Security Act of 2002

Before 2002, the care and placement of unaccompanied alien children ("UACs") in the United States was the responsibility of the Office of Juvenile Affairs in the former Immigration and Naturalization Service ("INS"). *See F.L. v. Thompson*, 293 F. Supp. 2d 86, 96 (D.D.C. 2003). In 2002, Congress enacted the Homeland Security Act ("HSA"), which created DHS and transferred to DHS and its components most immigration enforcement functions performed by INS. The

HSA also transferred to HHS, Office of Refugee Resettlement ("ORR") the responsibility for the care and placement of UACs "who are in Federal custody by reason of their immigration status." 6 U.S.C. § 279(a), (b)(1)(A), (b)(1)(C). The HSA defines an "unaccompanied alien child" 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.

Id. § 279(g)(2). The HSA transferred to HHS the responsibility for making all placement decisions for UACs, and required HHS to consult with DHS and others in making such decisions. *Id.* § 279(b)(l)(C), (D), (b)(2)(A). The HSA prohibited HHS from releasing UACs on their own recognizance. *Id.* § 279(b)(2)(B).

B. Trafficking Victims Protection Reauthorization Act of 2008

In 2008, the Trafficking Victims Protection Reauthorization Act ("TVPRA") codified further protections related to the processing, custody, and detention of UACs. The TVPRA 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 also provides:

> 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 [a UAC].

Id. § 1232(b)(3). The statute makes no differentiation between a UAC who is in government custody for the first time, and a UAC who has previously been in government custody and been released to a sponsor.

The TVPRA makes clear that HHS is responsible for all placement decisions for UACs in government custody, and provides guidelines for placing UACs with suitable custodians, including requirements for HHS to evaluate the suitability of any placement. 8 U.S.C. § 1232(c)(3). The TVPRA prohibits HHS from releasing to a proposed custodian unless:

> [HHS] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

Id. § 1232(c)(3)(A). In some instances, HHS must conduct a home study before placing a UAC with a proposed custodian. *Id.* § 1232(c)(3)(B). If the proposed custodian is found to be a suitable custodian to whom an unaccompanied child may

be released, the custodian receives a legal orientation presentation addressing his responsibility to ensure the juvenile's appearance at all immigration proceedings, and to protect the child from mistreatment, exploitation, and trafficking. *See id.* § 1232(c)(3)–(4). When reunification is complete, HHS must conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted pursuant to the statute, and is authorized to conduct follow-up services in cases involving children with mental-health or other needs who could benefit from ongoing assistance from a social welfare agency. *Id.* § 1232(c)(3)(B).

The statute further requires that UACs who remain in HHS custody must be "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). It delegates to the Secretary of HHS the authority to (1) make such placement decisions, considering "danger to self, danger to the community, and risk of flight," *id.*, and (2) create review "procedures" to be used when a UAC is placed in a secure facility. When a secure placement is necessary, such placement "shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted." *Id.* § 1232(c)(2)(A).

C. ORR Policy Guide and Practice

ORR has created a comprehensive policy guide for carrying out its statutory mandate. OFFICE OF REFUGEE RESETTLEMENT, ORR Guide: Children Entering the United States Unaccompanied ("ORR Guide"), *available at* http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied. When a UAC is referred to ORR, the agency places the UAC with a care provider. ORR Guide § 3.1.

The ORR Intakes staff makes an initial care provider placement decision for each UAC.[1] ORR Guide § 1.3.2. Most care providers operate one of three types of facilities: shelter-type facilities, staff secure facilities, or secure facilities. *Id.* § 1.1. Shelter care is a residential care facility in which all programs are administered on-site, in the least restrictive setting. *See* ORR Guide: Guide to terms. Staff secure facilities maintain stricter security measures than shelters, such as a higher staff-to-UAC ratio for supervision and a secure perimeter with a "no climb" fence. *Id*. They have a more shelter, home-like setting than secure detention, and do not have locked pods or cell units. *Id.* Secure facilities are the most restrictive level of care. They are

[1] There are two types of placement decisions: (1) the initial placement with an ORR care provider; and (2) transfer between ORR care providers. ORR Guide § 1.2. When DHS refers a UAC to ORR, ORR makes an initial placement decision. Once in care, a UAC may be transferred between facilities.

physically secure structures with staff able to control violent behavior and may be a licensed juvenile detention center or a highly structured therapeutic facility. *Id.*

When deciding placement, ORR places the child in the "least restrictive setting that is in the best interest of the child," subject to considerations of danger to self, danger to others, or risk of flight, in accordance with the TVPRA. 8 U.S.C. § 1232(c)(2)(A). By statute, ORR may place children in a secure facility only if it determines that the child poses a danger to herself or others, or has been charged with a criminal offense. *Id.* § 1232(c)(2)(A); *see also* ORR Guide § 1.2.4. For those cases in which a UAC may be placed in a secure or staff secure facility, such as those UACs with possible gang involvement, ORR uses a standardized "Placement Tool" to input all available information on the UAC's history and condition. ORR Guide § 1.3.2. Based on the score, the placement tool suggests a level of care. *Id*. This score can be overridden in consultation with Supervisory Federal Field Specialists. *Id*.

After a child is placed in an appropriate facility, the care provider conducts ongoing assessments of the UAC's needs. ORR Guide § 1.4. If a care provider determines that a different placement would better meet the child's needs, care providers make a recommendation to ORR, and ORR may transfer the child between ORR care providers. *Id*. ORR assesses each child in secure or staff secure care at least once every 30 days to determine whether the child should remain in such care

and must step-down the child to a less restrictive facility if the child's circumstances warrant the change. *Id.* § 1.4.2. The ORR Federal Field Specialist may allow a review to occur earlier, particularly if new information indicates that another placement is appropriate. *Id.* § 1.4.2. Further, after 30 days in a secure facility, a UAC may ask the ORR Director to reconsider her placement. *Id.* § 1.4.7. In making a step-down decision, ORR reviews the criteria for the secure placement as well as any mitigating factors, such as the UAC's current behavior, previous conduct, self-disclosures, and criminal/delinquent history. *Id.* § 1.4.2.

ORR makes an ongoing assessment of whether there is a suitable sponsor for each child in its care, so that children may be released as quickly as is safe and appropriate. ORR Guide § 2.2. Under the TVPRA, ORR must make "a determination that the proposed custodian is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). The assessment reviews a potential sponsor's strengths, resources, risk factors, and special concerns within the context of the UAC's needs, strengths, risk factors, and relationship to the sponsor. ORR Guide § 2.4. A potential sponsor must fill out an application, provide identification documentation, and (along with any adult living in his or her household) undergo a background check. *Id.* §§ 2.2.3 and 2.5.

Once the assessment of the potential sponsor is complete, the care provider

makes a release recommendation. ORR Guide § 2.7. ORR makes the final release decision. *Id*. For children in secure or staff secure facilities, or for children who have been in these facilities previously, the release decision is elevated to the ORR Director or his designee for a final decision. *Id*. ORR will deny release if: (1) the potential sponsor is not willing or able to provide for the child's physical or mental well-being; (2) the physical environment of the home presents a risk to the child's safety or well-being; (3) release of the UAC would present a risk to him or herself, the sponsor, household, or community. ORR Guide § 2.7.4.

Under *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), a UAC in HHS custody may seek a bond hearing before an immigration judge to determine if the child is a flight risk or a danger to the community. ORR Guide § 2.9. ORR will release a child if an immigration judge determines that the child is not a danger to the community and is therefore eligible for bond, but only if the child has a suitable sponsor to whom he or she may be released. *Id*.; *see also* 862 F.3d at 878.

D. U.S. Department of Homeland Security's Immigration Enforcement Authority

DHS's enforcement authority includes the authority to arrest and detain any alien on a warrant "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a); *Preap v. Johnson*, 831 F.3d 1193, 1198 (9th Cir. 2016) ("8 U.S.C. § 1226(a), grants the AG discretion to arrest and detain any

alien upon the initiation of removal proceedings."). The Executive Branch has possessed this authority in some form since Congress enacted the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (June 27, 1952). *See id.* § 242(a) ("Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody.").

Generally, the arrest and detention of aliens, including juveniles, is governed by 8 U.S.C. § 1226(a). However, if a juvenile is found to be a UAC, DHS must follow the TVPRA and "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 [a UAC]." 8 U.S.C. § 1232(b)(3).

II. PROCEEDINGS BELOW

This lawsuit was brought as a habeas petition by Ilsa Saravia as next friend of A.H. and on her own behalf against HHS and Brent Cardall, the chief probation officer of Yolo County, California. ECF No. 1. A.H. was arrested by ICE, and transferred to ORR's care and custody at the Yolo County Juvenile Detention Facility. ECF No. 1, ¶ 33. Plaintiffs raised seven claims and sought a TRO. *Id.* at 14–18; *see also* ECF No. 7. Following a hearing on the TRO application, the district court concluded that ORR had a statutory obligation to "make sure that the child

should be in custody and . . . that being in a secure facility was the least restrictive setting that is in the best interest of the child." June 29, 2017, Hearing Tr., ECF No. 28, at 88:10-13. To effectuate this, the court ordered ORR to respond to the following questions: (1) should ORR have initially taken A.H. into custody on June 13, 2017; (2) should A.H. initially have been placed into secure ORR custody; (3) whether it remains appropriate for A.H. to remain in ORR custody; and (4) if so, whether A.H. should remain in secure care at Yolo. *Id.* at 88:17-89:18. ORR timely responded to these inquiries, ECF No. 27, and A.H. was subsequently transferred to a staff-secure facility in Dobbs Ferry, New York. ECF No. 31, ¶¶ 78–79.

On August 11, 2017, Plaintiffs filed an amended complaint. ECF No. 31. The new pleading added new Plaintiffs, Defendants, claims, and class-action allegations. *Id.* The added Plaintiffs are Lorenza Gomez, her son J.G., and F.E., who is represented by his next friend Wilfredo Velazquez. *Id.* The added Defendants are DHS, ICE, U.S. Citizenship & Immigration Services, and officials from those agencies in their official capacities. *Id.*

Minors A.H., F.E., and J.G. are seventeen years old and lack legal status in the United States. ECF No. 31, ¶¶ 10, 12, 14; *see also id.* ¶¶ 64, 66–67, 83, 94–95, 103–05. ICE officers arrested each of them in Long Island, New York. *Id.* ¶¶ 68, 88, 100. ICE temporarily detained each of them for less than 72 hours, and thereafter

they were transferred to the care and custody of ORR. *Id.* ¶¶ 73, 88, 100. In arresting A.H., F.E. and J.G., and in making placement decisions for them, ICE and ORR have relied on information and evidence showing that each of them is affiliated with, or is a member of, a gang. *Id.* ¶¶ 71, 90, 101. That evidence was gathered by law enforcement agencies in New York, and shared as part of Operation Matador—a law enforcement operation targeting gang operations in Long Island, New York. *See* ECF Nos. 67-2, 67-3, 67-4, Record Excerpts ("R.E.") 425-45; *see also* October 27, 2017 Hearing Tr. at 15-85, R.E. 159-229. When Plaintiffs filed their amended habeas petition and complaint, A.H. was in a staff-secure ORR facility in Dobbs Ferry, New York, *id.* ¶ 12, F.E. was at Lincoln Hall Boys' Haven, an ORR grantee shelter facility in Lincolndale, New York, *id.* ¶ 92, and J.G. was in the Selena Carson Home, a staff secure ORR grantee facility in Tacoma, Washington, *id.* ¶ 102.

After Plaintiffs filed the amended complaint they moved for a preliminary injunction and for provisional class certification. ECF No. 61-1. The government moved to dismiss all claims. ECF No. 54. Among other things, the government contended that the district court lacked habeas jurisdiction because the complaint named the wrong respondent (and the correct respondent was located in a different district), that the Northern District of California was the wrong venue for Plaintiffs'

suit, and that Plaintiffs were not likely to succeed on their procedural-due-process claim.

Following two lengthy hearings, *See* ECF Nos. 98, 107, the district court issued the order at issue here, provisionally certifying a class for the purposes of the preliminary-injunction order, and granting a preliminary injunction on behalf of the provisional class based on one of the claims in the amended complaint. *Saravia, et al. v. Sessions, et al.*, No. 3:17-cv-03615-VC, --- F. Supp. 3d ----, 2017 WL 5569838 (N.D. Cal. Nov. 20, 2017) ("Op."), R.E. 1-44.[2]

First, the district court concluded that it had jurisdiction over A.H.'s habeas claim, because it found that Elicia Smith, an HHS Federal Field Specialist in San Francisco, was the proper respondent to A.H.'s habeas petition. Op. at 11-17, R.E. 11-17. The court relied on the fact that A.H. was in federal custody, but in a facility run by a Yolo County employee. *Id*. at 14-15, R.E. 14-15. When his habeas petition was filed, A.H. was in the Yolo facility, which is located within the Eastern District of California. *Id*. at 11, R.E. 11. But the court rejected application of the proper-respondent rule articulated in *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (in habeas challenges to present physical confinement the proper respondent is the

[2] The order leaves pending the majority of the Government's motion to dismiss, and two claims in Plaintiffs' preliminary-injunction motion which have since been dismissed by Plaintiffs.

warden of the facility where the prisoner is being held), because "[i]t is pursuant to the power and authority of the federal government—not Yolo County—that A.H. is in custody. So, the federal official with most immediate control over the facility holding the petitioner—that is, the federal official tasked with ensuring that Yolo County complies with the requirements of its contract with ORR—is the proper respondent." *Id*. at 15, R.E. 15. Thus, the court ruled that the HHS Federal Field Specialist, Elicia Smith, and not the county employee who was the warden of the Yolo facility, was the proper respondent to A.H.'s habeas petition. Because Elicia Smith is located in San Francisco, the district court held that jurisdiction over A.H.'s habeas petition was properly in the Northern District of California. *Id*. at 17, R.E. 17. The district court also acknowledged that it did not have jurisdiction over the habeas claims for J.G. or F.E. because neither of them was in a facility under Elicia Smith's oversight when the amended complaint was filed. *Id*. at 17-18, R.E. 17-18. The district court therefore dismissed those claims. *Id*.

Second, turning to the issue of venue for the remainder of the claims, the district court acknowledged that the Northern District of California was not the proper venue for the declaratory and injunctive relief claims of any of the three named Plaintiffs because those claims do not meet the requirements for venue under 28 U.S.C. § 1391(e). *Id*. at 18-22, R.E. 18-22. The district court therefore dismissed

those claims with regard to J.G. and F.E. *Id*. at 22, R.E. 22. Notably, in so ruling, the court also found that Elicia Smith was not a proper Defendant for any Plaintiff's claims for declaratory and injunctive relief. *Id*. Nonetheless, the district court concluded that it could take venue over A.H.'s declaratory and injunctive relief claims under the doctrine of pendent venue.[3] *Id*. at 22-26, R.E. 22-26. The district court emphasized that "[t]he same witnesses and evidence are relevant to both sets of claims," and that "[r]esolution of each requires this Court to identify DHS and ORR's policies and practices concerning children released to sponsors who are later rearrested, as well as to evaluate the statutory, constitutional, and contractual limits that circumscribe those policies and practices." *Id*. at 24, R.E. 24. The court added that government lawyers were already required to appear in this district to defend the habeas claims, and that although applying pendent venue here required adding parties that otherwise would not be respondents to the habeas claim, this was

[3] Because pendent venue had not been raised by any party, but was first raised by the district court in an oral tentative ruling just prior to the second oral argument, the government had no opportunity to brief the issue. *See* November 9, 2017 Hearing Tr., ECF No. 107, at 37, R.E. 90. Rather, the government objected at oral argument to applying this doctrine, arguing that application of this judge-made doctrine was not appropriate because there was no precedent applying it in the context of either a habeas claim, or to venue under Section 1391(e). *Id.* at 39:9-19, R.E. 92. The government had also noted that applying the doctrine to allow a court in California to issue a nationwide injunction that primarily affected actions taking place in New York was particularly inappropriate. *Id.* at 45:25-46:25, R.E. 98-99.

permissible because "[c]ourts have allowed such claims to proceed even though a forum that does not otherwise satisfy venue requirements is as likely to be inconvenient for a third-party defendant as for an original defendant." *Id.* at 25, R.E. 25. Ultimately, the court rejected Defendants' contention that applying the doctrine was unfair, and stated that because Defendants were federal actors, applying the doctrine was particularly appropriate in this context. *Id.*[4]

Finally, the court concluded that A.H. was likely to succeed on the merits of his procedural-due-process claim and otherwise met the requirements for a preliminary injunction on that claim. *Id.* at 27-37, R.E. 27-37. The court held that due process required that, for a minor whom ORR had previously found was not dangerous and released to a sponsor, ICE could not simply rearrest him on the basis of removability under Section 1226(a). *Id.* at 30, R.E. 30. The court held that "the liberty deprivation in this case is not the same as when someone is caught coming across the border and detained in the nearest facility. The minors in this case have been taken away from their families, their schools, and their communities, often to

[4] Based on its ruling that it had venue over A.H.'s claims, the court provisionally certified "a class of noncitizen minors meeting the following criteria: (1) the noncitizen came to the country as an unaccompanied minor; (2) the noncitizen was previously detained in ORR custody and then released by ORR to a sponsor; (3) the noncitizen has been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017, on allegations of gang affiliation." Op. at 38, R.E. 38.

be shipped across the country to a high-security institution and held for an indefinite period." *Id.* at 29, R.E. 29. Thus, the court concluded, "a minor previously placed with a sponsor by ORR cannot be rearrested solely on the ground that he is subject to removal proceedings." *Id.* at 29-30, R.E. 29-30. Instead, "to be lawful, the arrest must be based on evidence that the circumstances relevant to that original release decision have changed." *Id.* at 30, R.E. 30.

The court based its holding—that a showing of changed circumstances was necessary to satisfy due process in these circumstances—on its understanding of the process available to an alien who is rearrested under Section 1226(b), and for whom ICE must show "changed circumstances" in order to detain the individual. *See id.* at 31, R.E. 31 (citing 8 U.S.C. § 1226(b) ("The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien."); and *Matter of Sugay*, 17 I. & N. Dec. 637, 640 (BIA 1981) ("[W]here a previous bond determination has been made by an immigration judge, no change should be made by a District Director absent a change of circumstance.")).[5] The court thus held that ICE must provide a "prompt hearing

[5] The court's understanding of the process available to an alien who is rearrested under Section 1226(b) is incorrect in certain respects. DHS generally only re-arrests an alien pursuant to § 1226(b) after a material change in circumstances consistent with *Matter of Sugay*, 17 I. & N. Dec. 637 (BIA 1981); however, the court

in which the government must show that these changed circumstances exist." *Id.* at 31, R.E. 31. The court further held that "[a]t that hearing, the minor must have the opportunity to rebut the government's showing, and, if he does so successfully, the neutral decision maker must have the ability to order a return to the status quo." *Id.* at 31-32, R.E. 31-32. The court stated that the government was in the best position to determine how the hearing should be conducted, but that at a minimum:

> [T]he sponsor, as well as the minor, must receive notice of the basis for the rearrest and an opportunity to be heard. The hearing must, consistent with existing practice for other immigrants rearrested on grounds of changed circumstances, take place within seven days of arrest, absent extraordinary circumstances. The hearing must take place in the jurisdiction where the minor has been arrested or where the minor lives, to provide a meaningful opportunity for the minor, his sponsor, and any existing counsel to rebut the factual basis for the minor's rearrest and detention. This requirement will allow the parties to call necessary witnesses, and the hearing may even occur before the same immigration judge already presiding over any removal proceedings in which the minor is involved.

Id. at 32, R.E. 32. The court noted that the need for such a hearing constituted "exceptional circumstances" that would allow ICE to hold a minor in its custody for

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mistakenly concluded that *Matter of Sugay* requires an Immigration Judge to conduct a "changed circumstances" hearing within seven days of the alien's re-arrest. While an Immigration Judge has authority to conduct a bond hearing for certain aliens in DHS custody, including aliens who have been re-arrested, *Matter of Sugay* does not stand for the proposition that an alien is entitled "to a prompt hearing to ensure that changed circumstances indeed justify the rearrest."

longer than the 72 hours provided in the TVPRA for the purposes of providing such a hearing. *Id.*

Ultimately, then, the district court ordered that the government provide:

> A.H. and all other noncitizen minors previously released to a sponsor who were rearrested and are currently in federal custody based on allegations of gang affiliation with a hearing before an immigration judge by no later than November 29, 2017, to challenge the basis for those allegations, in conformity with the requirements set out in . . . this order. The minor's sponsor must receive notice and be given an opportunity to participate in the hearing. At the hearing, the government must present evidence that the minor is a danger to the community, notwithstanding ORR's prior determination to the contrary. For all sponsored minors who will be arrested on the basis of gang affiliation, the government must provide this hearing within seven days of rearrest, in the jurisdiction where the minor was arrested or lives. A decision by the immigration judge that the government has not made an adequate showing of changed circumstances, or that the minor has successfully rebutted the showing, requires release into the custody of the previous sponsor.

Id. at 43-44, R.E. 43-44.

The government has complied with the district court's order with regard to all class members who were already in government custody at the time of the order by providing all of those class members with *Saravia* hearings before an immigration judge, as well as one additional class member who was arrested immediately following issuance of that order. No new class members have since been arrested.

On January 5, 2018, the district court denied the government's motion to stay the district court's order with regard to future class members. ECF No. 129.

SUMMARY OF THE ARGUMENT

The district court's preliminary injunction order should be reversed. The district court erroneously concluded that the government's arrest and custody of A.H. violated his due process rights, and on that basis granted preliminary relief on behalf of a provisionally certified class. However, the district court's conclusion was improper. The existing procedures applicable to class members satisfy due process, and the district court failed to consider those procedures or their adequacy. Moreover, the district court's order creates new administrative procedures that will unnecessarily overburden the Government, while providing no greater protections to class members. These new procedures also are inconsistent with existing law. For all of these reasons the district court's conclusion that Plaintiff A.H. was likely to succeed on this claim was in error, and as a result this Court should reverse the district court's preliminary injunction order.

ARGUMENT

I. The District Court Erred in Ruling That A.H. Was Denied Due Process With Regard to His Arrest And Custody By The Government.

The district court's entry of a preliminary injunction on behalf of a provisional class was improper and should be reversed. The district court concluded that the

government's arrest and custody of A.H. violated his due process rights. This conclusion was improper because the existing procedures available to UACs satisfy due process, and this ruling will create new administrative procedures for UACs when they are rearrested that will unnecessarily overburden ICE and ORR resources while providing no greater protections to class members.

"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, courts consider: (1) "the private interest that will be affected by the official action"; (2) "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 (3) "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).

As discussed above, unaccompanied minors such as A.H. receive significant due process protections from the extensive regime established by the TVPRA and the *Flores* settlement agreement ("*Flores* Agreement"). Under that regime, any time

a UAC is taken into Government custody, he is "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). This placement decision considers "danger to self, danger to the community, and risk of flight," *id.*, and when a secure placement is necessary, such placement "shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted." *Id.* § 1232(c)(2)(A). Moreover, if held in custody based on a determination of danger, whether upon initial apprehension or after having been returned to custody following a prior release, the UAC may seek a bond hearing before an immigration judge to determine whether he is a danger to the community. *Flores*, 862 F.3d at 863; ORR Guide § 2.9. If he is found not to be a danger, he will be released by ORR, subject only to ORR fulfilling its mandate under the TVPRA to ensure that he is released to a suitable custodian. *See Flores*, 862 F.3d at 878; 8 U.S.C. § 1232(c)(3); ORR Guide § 2.9.

This regime created by the TVPRA and *Flores* takes into account a UAC's interest in being free from custody, an interest that is necessarily limited by the fact that UACs are "always in some form of custody." Op. at 29, R.E. 29. At the same time, the risk of erroneous deprivation under this structure is minimal, because a UAC is accorded a bond hearing in front of an immigration judge—a neutral

decision-maker—who must determine that a UAC is a danger to the community before permitting his continued custody where a suitable custodian is available to take custody. *See Flores*, 862 F.3d at 881.

In addition, the government's interest in preserving public welfare, including A.H.'s own welfare, is significant. This interest is reflected in the TVPRA's clear delegation to HHS of the duty to ensure that every UAC released from Government custody is released to a sponsor who has been fully vetted and determined to be suitable by ORR. 8 U.S.C. § 1232(c)(3); *see also Flores* Agreement ¶ 17, R.E. 11 ("A positive suitability assessment may be required prior to release to any individual or program . . . ."). The TVPRA and *Flores* Agreement thus adequately protect the limited liberty interests of UACs, and provide a constitutionally appropriate procedure to minimize the risk of erroneous deprivation, while also protecting the public interest in ensuring the safety of UACs who are being released from the custody of the Government into the custody of another.

The district court did not consider these procedures, nor did it acknowledge that these are the procedures that apply. The district court therefore reached no conclusion as to whether the procedures provided under the TVPRA and *Flores* Agreement are constitutionally adequate. Rather, the district court's ruling is premised in its finding that class members, who were "previously detained in ORR

custody and then released by ORR to a sponsor," and later rearrested by ICE on the basis of gang membership, should be entitled to different procedures from UACs taken into government custody for the first time. Op. at 38, R.E. 38. It is on the basis of this distinction that the district court rejected the procedures that apply to all UACs under the TVPRA and *Flores* Agreement, and instead looked to apply what it misunderstood to be the procedures that apply to adult aliens who are re-arrested by ICE after having been released on bond, in accordance with 8 U.S.C. § 1226(b). Op. at 30-32, R.E. 30-32. As a result, the district court's preliminary injunction requires the Government to undertake procedures that are inconsistent with, and in some instances in violation of, the existing regime that applies to UACs.

As an initial matter, the district court was incorrect because there is no basis for the distinction applied by the district court to reject the existing procedures. Nothing in the TVPRA suggests that it is only intended to apply only to UACs who are taken into custody for the first time, and the district court's order provides no explanation for why class members should be removed from the custody framework provided by the TVPRA and *Flores* Agreement, which clearly are intended to provide protections to UACs, and instead subject to arrest and custody provisions from the Immigration and Nationality Act, 8 U.S.C. § 1226, that apply to all other aliens. Despite the district court's best intentions, this result plainly, and without

good reason, goes against Congressional intent in enacting the TVPRA and the many protections it provides for UACs.

This analysis also is erroneous because the newly created procedures provide only minimally different protections and, in some instances eliminate protections afforded to UACs, while imposing a significant fiscal and administrative burden on the government. *See Mathews*, 424 U.S. at 335 (due process requires consideration of "fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). For example, the seven-day time frame and requirement that the hearing be in the district where the minor's arrest occurred impose a significant burden on ICE and ORR resources because of the difficulty of holding unaccompanied minors in facilities in close proximity to where the newly-created *Saravia* hearing must take place. Under the TVPRA and *Flores* Agreement, ICE may only hold UACs in facilities not designated for their detention for up to 72 hours. 8 U.S.C. § 1232(c)(3); *Flores* Agreement ¶ 12.A, R.E. 452-53 (requiring transfer within three days after arrest). And when in ICE custody, minors must be placed in facilities that are compliant with the *Flores* Agreement. *See Flores* Agreement ¶¶ 6, 8, 12.A, 14, 19, and Exhibit 1, R.E. 449-71. The *Flores* Agreement requires, *inter alia*, that the facilities separate UACs from unrelated adults. *Id.* ¶ 12.A, R.E. 452-53. While the district court's order does avoid the 72-hour

limitation of the TVPRA for transferring UACs to ORR, Op. at 32, R.E. 32, nothing in the order releases ICE from the requirements of the *Flores* Agreement concerning the conditions that must be maintained for minors in ICE custody. Thus, ICE is limited by these requirements as to the facilities where it can hold minors while complying with the preliminary injunction order.

At the same time, the reality of the procedures provided by the preliminary injunction order is that even if a class member receives his hearing within seven days of arrest, there is a strong possibility he will remain in ICE custody longer than the 72 hours that Congress believed was appropriate before transfer to ORR.[6] ICE has only a limited number of facilities that are designated to hold juveniles, none of which is located in New York. *See* Nov. Hearing Tr. 62:7-15, R.E. 115. Holding minors in the existing ICE facilities thus likely would require that they be subjected to long and difficult transportation between the ICE detention facilities and the immigration court to attend their hearings. ORR also does not have any facilities (nor do they contract with any) that are able to hold minors in secure custody—the

[6] Moreover, if the class member wishes to request that his hearing be delayed so that he can obtain counsel, or locate additional evidence, then he will be forced to choose between these interests and his right to be transferred to the custody of ORR and to a facility compliant with the *Flores* Agreement, along with his right to seek release to a suitable custodian in accordance with the TVPRA.

level necessary if the minor is believed to be a danger to himself or others—in the New York area. *Id.*[7]

The district court's due process analysis also fails to acknowledge that there are many instances where the procedures provided by the preliminary injunction order necessarily conflict with the procedures that would exist under the TVPRA and *Flores* Agreement, and in doing so eliminate protections that Congress intended should be provided to class members. For example, if a class member prevails at a *Saravia* hearing he must be immediately released to his previous custodian. Thus, if the Government were to provide a *Saravia* hearing to a UAC in HHS custody, if that UAC prevailed at his hearing HHS would be required to violate the TVPRA's requirement that it assess the suitability of a potential custodian before a UAC is released from its custody. 8 U.S.C. 1232(c)(3). This requirement exists to ensure the safety of UACs who are being released from Government custody, and HHS has

[7] To lessen the travel burden imposed by the required in-person hearing, ICE is exploring the option of establishing new contracts with two juvenile detention facilities, one located in Essex County, New Jersey, and the other located in Richmond, Virginia. ICE is also attempting to modify its contract with the Northern Virginia Juvenile Detention Center so that it can hold minors for longer than 72 hours. The cost of these contracting efforts is expected to be $162,000 per year. To date, these contracts have not been finalized. Moreover, while this order presently affects New York primarily, it would apply to ICE arrests in any location, and ICE has only nine facilities designed to hold minors throughout the United States, only three of which can hold vulnerable minors for more than 72 hours. *See* Declaration of Melissa B. Harper, ECF No. 120-2, ¶¶ 7-8, R.E. 51-52.

reasonably interpreted this requirement to apply even when a UAC is being released to a custodian that was previously approved, because there are many reasons why circumstances related to suitability may change. *See* Oct. Hearing Tr. at 94:2-95:23, E.R. 238-39. Thus, requiring HHS to release UACs in violation of the TVPRA necessarily deprives class members of this Congressionally-provided protection.

Of course, the Government also can avoid violating the TVPRA by instead applying the provision of the preliminary injunction order allowing it to hold minors in ICE custody for longer than 72 hours under the "exceptional circumstances" exception to the TVPRA. Op. at 32, R.E. 32. And in fact, in many instances the Government will need to do so because of the seven-day time frame of the order, and the requirement that the hearing be in the district where the arrest occurred. Op. at 44, R.E. 44. However, proceeding in this manner not only eliminates protections for UACs that would be provided by compliance with the TVPRA, but also imposes a significant burden on ICE resources because of the difficulty of holding unaccompanied minors in facilities in close proximity to where the *Saravia* hearing must occur.

Thus, as described above, the procedures required by the preliminary injunction order deprive class members of protections to which they are entitled under the TVPRA and *Flores* Agreement, while also burdening government

resources. At the same time, the district court provides no basis on which to conclude that the existing procedures under the TVPRA and the *Flores* Agreement would not provide adequate due process to class members. Therefore, there is good reason for this Court to find that the district court erred in issuing its preliminary injunction order, and that the order should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court.

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STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018, I electronically filed the foregoing BRIEF FOR APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Signature of Attorney or Unrepresented Litigant /s/ Sarah B. Fabian

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