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' REPLY BRIEF

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INTRODUCTION

Provisional class members in this case have no greater liberty interest than any other unaccompanied alien child ("UAC") who is taken into Government custody and placed into the custody of the U.S. Department of Health and Human Services, Office of Refugee Resettlement ("ORR"). Plaintiffs recognize this fact, and yet they assert that the district court did not err in providing for entirely different procedures for the arrest and custody of class members than have been provided by Congress for all other UACs. The law is clear that any alien who is in removal proceedings may be arrested by U.S. Immigration and Customs Enforcement ("ICE"). 8 U.S.C. § 1226(a). And the law is further clear that when that occurs, and the alien is determined to be a UAC, then the procedures governing his or her custody and release are those found in the Trafficking Victims Protection and Reauthorization Act ("TVPRA"). 8 U.S.C. § 1232.

Those procedures include a reunification process, which is designed to ensure that no minor is released from Government custody unless the sponsor seeking custody of that minor has been independently evaluated and found to be a suitable custodian to whom the minor may be released. Where release to a parent or legal guardian is denied, existing procedures also offer the opportunity for appeal and subsequent review of that denial. Moreover, the existing procedures for any minor

who is subject to any finding that he or she is considered dangerous also include a *Flores* custody hearing in front of an independent immigration judge who will determine if, in fact, the minor should remain in custody on the basis of dangerousness. If the immigration judge finds that the minor is not dangerous, then the minor will be released as soon as ORR can confirm the suitability of any proposed sponsor to care for that UAC. Through these procedures, Plaintiffs—like all UACs—have notice of the basis for their custody, and the opportunity to challenge their continued custody if it is based on either a finding of dangerousness, or a finding of non-suitability of their proposed custodian. Thus, due process is satisfied.

Nonetheless, Plaintiffs contend that the district court's wholesale rejection of these procedures in favor of applying novel procedures with inapplicable standards that nominally stem from procedures related to custody under the Immigration and Nationality Act ("INA") was correct. In support of their argument, Plaintiffs, like the district court, continue to ignore the reality of the existing framework, and the purposes for which Congress enacted the applicable statutes. By failing to consider the purposes of the existing framework, and instead creating novel procedures that conflict with it and with the purposes for which the governing statutes were enacted, the district court reached a conclusion that is erroneous and subject to reversal.

Plaintiffs, by furthering the same erroneous view of existing procedures as was relied on by the district court, provide no basis to find otherwise.

ARGUMENT

I. Plaintiffs Appear to Recognize That Class Members Have the Same Liberty Interest as Any Other UAC in Government Custody.

The district court based its conclusion that class members—who have previously been released to a sponsor and are re-arrested by ICE—should be subject to different procedures than minors who are arrested for the first time, because they have a heightened liberty interest. Order, ECF 100, at 28, R.E. 28. But Plaintiffs, correctly, adopt no such argument, and instead contend only that class members have the same liberty interest as any other minor in government custody, based on the dual interests of bodily freedom and family integrity. Appellees' Brief at 27-28. In this, Plaintiffs correctly do not assert that there is any greater liberty interest that should be found for class members simply on the basis that those individuals had previously been released to a sponsor.

And nothing in the district court's order supports its conclusion to the contrary. Notably, the district court did not adopt the Government's request to limit the class to minors who had previously been released to a parent, and instead included any previous release to any sponsor as a trigger for class membership. *See* Nov. Hearing Tr. at 47:2-48:25, R.E. 100-101. Yet the district court based its

finding of a heightened liberty interest for class members entirely on language discussing the interests of parents in the case and management of their children. R.E. 29. And the court pointed to no language that would provide any basis to find that the nature of this interest changes simply because ORR previously assessed the suitability of that sponsor and released the minor to his or her care. This is because there is none. Thus, the district court's conclusion on this point was erroneous, and Plaintiffs correctly acknowledge that putative class members in this case share the same liberty interest as any other minor in Government custody.

II. Plaintiffs and the District Court Improperly Ignore the Fact That ICE Lawfully Arrested A.H. on the Ground That He Was Removable, Not on the Basis of Gang Membership.

Plaintiffs' opening brief contends that the district court correctly found that the pre-existing procedures presented an unacceptably high risk of erroneously depriving A.H. and class members of their right to be free from Government custody. However, in support of this argument, Plaintiffs erroneously rely in the first instance on the district court's conclusion that "the Government relied on 'insufficiently substantial allegations of gang affiliation' to justify its initial arrest and custody decisions . . . ." Appellees' Brief at 29 (quoting R.E. 34). This argument is erroneous because it is not an accurate statement of the legal authority for A.H.'s arrest.

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). A.H. was lawfully arrested by ICE based on an administrative warrant under 8 U.S.C. § 1226(a). R.E. 425-45. Following arrest, A.H. was transferred to ORR in accordance with the clear mandate of the TVPRA. 8 U.S.C. § 1232(c)(3). Neither the applicable INA authority, nor the TVPRA, make any distinction in this process regarding arrest or custody for UACs who had previously been in ORR custody and were released to a sponsor.

However, without any discussion of this authority, the district court erroneously found that a provisional class member has a heightened liberty interest, and thus "cannot be rearrested solely on the ground that he is subject to removal proceedings." R.E. 30. Nothing in the district court's opinion, however, supports this cursory rejection of ICE's existing arrest authority or, relatedly, its decision to instead erroneously impose inapplicable immigration court authority related to the custody of aliens under the INA, in lieu of the protections provided in the TVPRA. R.E. 31. In arguing that the district court properly analyzed the existing procedures, Plaintiffs also fail to acknowledge ICE's arrest authority, or to show how the district court's analysis of existing procedures could be proper where it erroneously

disregarded this authority. Thus, Plaintiffs' contention that the district court properly considered existing procedures is incorrect.

III. Plaintiffs Erroneously Focus a Significant Portion of Their Argument on Their Contention That ORR's Placement And Step-Down Procedures Are Insufficient, But Those Procedures Are Irrelevant to The Issues Before This Court.

Plaintiffs argue extensively that ORR erroneously considers gang membership in making its placement and step-down decision. Appellees' Brief at 29-37. However this discussion is entirely irrelevant to the issue at hand because the district court's order evaluated only the arrest and release process, and did not address ORR's placement decisions. While the district court did note that an arrest for gang membership was likely to result in a secure placement, R.E. 34, the court's preliminary injunction in this case is entirely concerned with whether a class member has been provided sufficient due process regarding his arrest, and does not evaluate in any way the sufficiency of ORR's placement procedures once a minor is found to be properly in ORR custody. Therefore, to the extent Plaintiffs focus several pages of their brief on the topics of ORR's initial placement decisions and step-down procedures, this Court should disregard this discussion.

IV. Plaintiffs Are Incorrect In Asserting That Existing ORR Reunification Procedures Combined With *Flores* Hearings Do Not Provide Due Process.

Plaintiffs argue that *Flores* custody hearings do not provide provisional class members with sufficient due process protections because such a hearing cannot result in the release of the class member. However, this argument highlights the fundamental problem with the district court's order. Specifically, both Plaintiffs and the district court ignore the protections provided by *Flores* custody hearings to address the issue of gang membership and dangerousness with which Plaintiffs' complaint purports to be concerned, and the district court orders new procedures which undercut the protections of the TVPRA reunification process. Further, the district court appears to do so based on the problematic assumption that despite the passage of time since the prior release of provisional class members to a sponsor there will have been no changes to the suitability of any provisional class member's previous sponsor—an assumption that is entirely contradicted by the record.

First, this approach is erroneous because it fails to acknowledge that the very concern Plaintiffs are raising—what they allege is erroneous custody by the Government based on unfounded allegations of gang membership—can be addressed through the *Flores* custody hearing process. UACs receive notice of their right to such hearings any time the Government is holding them in custody based on

any finding of dangerousness, and at that hearing they have the opportunity to challenge the Government's finding of dangerousness before a neutral immigration judge, and to appeal to the Board of Immigration Appeals if they disagree with the immigration judge's ruling. If the UAC is successful before the immigration judge, then ORR will release that UAC from custody immediately once it has fulfilled the TVPRA's mandate that it assure itself that the UAC is being released to a suitable custodian. 8 U.S.C. § 1232(c)(3)(A).

Contrary to Plaintiffs' assertions, this available procedure is not deficient simply because it does not provide for immediate release. Rather, the fact that it leaves in place the TVPRA's protections related to the suitability of custodians reflects a balancing of the UAC's interest in being released from Government custody, and the Government's interest in assuring itself that the UAC is being released to a custodian who can provide for the safety and well-being of the minor (an interest also shared by the UAC himself). The district court's approach eliminates the Government's interest from this equation solely on the basis that the custodian had, at some prior point in time, been deemed suitable. *See* Order at 31-32. But testimony in this case makes clear that the TVPRA's requirement that ORR review the suitability of a custodian prior to releasing a minor to that custodian is important, and should not be suspended 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, R.E. 238-39. Neither Plaintiffs nor the district court explain why the existing process, which adequately balances and protects these interests, should be replaced with a process that entirely eliminates the Government's consideration of the suitability of proposed custodians, despite the very likely possibility that the suitability analysis may have changed since the previous analysis was made. This failure constitutes error and requires reversal of the district court's opinion.

V. Plaintiffs' Assessment of The Burden Placed on The Government by The District Court's Order Is Erroneous.

Plaintiffs' assertions that the district court's order does not burden the Government or run afoul of TVPRA and the *Flores* Settlement Agreement suffer from the same erroneous assumptions discussed above. Specifically, Plaintiffs ignore the fact that the existing procedures protect UACs by placing very specific restrictions on the manner in which minors may be held in Government custody. The district court's order requires the Government to work around these protections, or to violate specific provisions of the TVPRA and the *Flores* Agreement, neither of which serves the interests of the Government, or of provisional class members.

Inherent in the TVPRA (and to some extent the *Flores* Agreement) is the principle that minors should be transferred as soon as possible to facilities that are

designed for their custody. 8 U.S.C. § 1232(b)(3); *Flores* Settlement Agreement ¶ 12, R.E. 453-54. However, as discussed in the Government's opening brief, in order to read the district court's order not to conflict with the release requirements of the TVPRA the Government is obligated to hold minors in ICE custody until they can have their *Saravia* hearing, meaning that in many cases minors will remain in ICE custody for longer than seventy-two hours. Plaintiffs seek to minimize the Government's concerns on this front first by asserting, without support, that the Government could simply hold provisional class members in ORR custody while awaiting their *Saravia* hearing. Appellees' Brief at 40, 44-47. However, while both Plaintiffs and the district court appear to believe that ORR could simply reinstate a stale suitability determination and release a provisional class member who prevailed on his or her *Saravia* hearing, nothing in the language of the TVPRA itself provides for this type of abrogation of its release requirements. Moreover, nothing in the district court's order provides a basis for ORR to fail to otherwise comply with the TVPRA. Therefore, without more, there is no basis to find that minors could be transferred to ORR custody prior to their *Saravia* hearings without creating the potential that ORR would be required to violate the TVPRA in order to release them to a custodian without a suitability analysis in accordance with the district court's

order.[1]

Plaintiffs also assert that the Government is incorrect that the need to hold provisional class members in ICE custody for a longer time period violates the TVPRA. Plaintiffs are correct on this front to the extent that the district court found that the need to hold a *Saravia* hearing would constitute an "exceptional circumstance" sufficient to waive the requirement for a seventy-two hour transfer. However, Plaintiffs do not explain how the provision to hold a UAC for longer than seventy-two hours gives ICE the authority to release a UAC to a sponsor. The

[1] Plaintiffs contend that the "value of the District Court's safeguards" is exhibited by the fact that a large number of provisional class members were released following their *Saravia* hearings. Appellees' Brief at 43, 47. As an initial matter, evidence of the results of these hearings was not part of the district court's consideration below, and therefore is not properly considered by this Court on appeal in determining whether the district court's order was correct in the first instance. *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994) ("Facts not presented to the district court are not part of the record on appeal."); Fed. R. App. P. 10. Moreover, these results stem from the fact that *Saravia* hearings reflect the district court's misapplication of the law regarding ICE's authority to arrest provisional class members in the first place, and thus erroneously provide for release based on a legal standard of "changed circumstances" that does not apply, rather than the proper standard of present dangerousness that is evaluated at a *Flores* custody hearing. Equally important, these results provide no information about whether any of these provisional class members has been released as the result of prevailing in his *Saravia* hearing to a custodian who is no longer suitable to provide him adequate care. In each of these cases ORR was deprived of the opportunity to complete a suitability assessment for the sponsor before the class member was released as it would have otherwise been required to do under the TVPRA.

TVPRA makes clear that only ORR has the authority to release UACs. *See* 8 U.S.C. § 1232(b)(1) (providing exclusive care and custody of UAC to HHS); 8 U.S.C. § 1232(c)(3) (forbidding placement of UAC with a sponsor unless HHS makes a suitability assessment). Moreover, Plaintiffs do not explain how the waiver of this requirement is preferable to complying with this provision of the TVPRA which is intended to protect UACs and ensure that they are held in facilities designed for their custody. And finally, Plaintiffs do not explain how the need to hold provisional class members in ICE facilities for longer periods of time in order to conduct *Saravia* hearings would not be in violation of the *Flores* Agreement, where the district court's order contains no similar waiver of the Agreement's requirements on that front.[2]

[2] Plaintiffs also scoff at the notion that the Government is seeking to avoid the need to transport provisional class members hundreds of miles in a single day in order to ensure their presence at an immigration court hearing that is located a great distance from any facility that is designed for the custody of minors. Appellees' Brief at 41-42. However, Plaintiffs' comparison of this situation to the need for a single transfer—even if potentially a great distance—to be placed in a facility for the care of minors does nothing to undercut the fact that this difficulty presents a burden for both the Government, and for provisional class members who must experience it.

CONCLUSION

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

DATED: April 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2018, I electronically filed the foregoing REPLY 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

Date: Apr 6, 2018

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