ORAL ARGUMENT SCHEDULED SEPTEMBER 15, 2026
No. 26-5157

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Diego N., et al.,
Plaintiffs-Appellants,
v.

United States Department of Health and Human Services, et al.,
Defendants-Appellees,

On Appeal from the United States District Court
for the District of Columbia
No. 26-cv-0577
Hon. Carl J. Nichols, U.S. District Judge

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
DHS	United States Department of Homeland Security
ORR	Office of Refugee Resettlement
PRP	Placement Review Panel
TVPRA	Trafficking Victims Protection Reauthorization Act of 2008
UAC	Unaccompanied Alien Child

INTRODUCTION

Plaintiffs were living with their parents or other approved family member sponsors in the United States before being taken into government custody and re-transferred to institutional care. Instead of promptly reuniting Plaintiffs and children like them with their families, Office of Refugee Resettlement ("ORR") policy is to arbitrarily detain these children for many months, apart from their families, schools, and communities. ORR asserts it does this for the children's own safety but it declines to even *consider* whether there is evidence a child was in an unsafe placement before subjecting them to prolonged detention while their previously approved sponsors repeat ORR's arduous application process.

The Government fails to address the extensive precedent recognizing the fundamental right to family integrity and the due process rights of individuals released from government custody against arbitrary re-detention. It instead claims a broad exemption from constitutional constraints because Plaintiffs are noncitizen children. But Plaintiffs, like all individuals living in the United States, are entitled to due process. Moreover, Congress intentionally moved the custody of unaccompanied children outside the immigration enforcement system and instructed ORR to make placements in a child's best interests, with a presumption of prompt release.

Plaintiffs and ORR share an interest in timely and accurate determinations of whether individualized concerns justify keeping a child in custody instead of promptly returning them to their approved sponsor. ORR is capable of making these determinations, but though it requests far-reaching deference to its child welfare expertise, it refuses to *apply* that claimed expertise and authority. ORR instead treats an arrest by the Department of Homeland Security ("DHS") as an automatic revocation of ORR's own sponsorship approval and insists it has no discretion to treat children with approved sponsors differently from new arrivals. ORR also seeks to abdicate its own responsibility for ensuring that children are considered for prompt release in favor of having federal judges determine the legality of custody through habeas, which cannot supply the timely consideration due process demands.

Because ORR adopted its reapplication policy in contravention of its statutory obligation to ensure prompt release and without reasoned consideration of the concrete harms that re-detention causes to children's mental health, educational progress, and family relationships, the policy also violates the Administrative Procedure Act ("APA").

ARGUMENT

I. Plaintiffs Are Likely to Succeed on their Procedural Due Process Claim

A. The Government Disregards Plaintiffs' Uniquely Compelling Interests

1. Legislation Supports Plaintiffs' Liberty Interests

Plaintiffs lawfully released to family in the United States have compelling constitutional interests in family integrity and personal liberty.[1] Opening Br. 25-36. Consistent with these interests, Congress has exercised its "broad power over naturalization and immigration" to remove the custody of unaccompanied children from the immigration enforcement system and create a presumption of prompt release. Opening Br. 32-33 (quoting *Reno v. Flores*, 507 U.S. 292, 305-06 (1993)); 8 U.S.C. § 1232(c)(2)(A). ORR released Plaintiffs only after vetting their

[1] The Government asserts in passing that released Plaintiffs' claims are moot. Plaintiffs' claims remain live because there is a pending motion for class certification and released Plaintiffs could be subjected to ORR's reapplication policy again in the future. *See* Opening Br. 25 n.4 (citing J.A.42); *FBI v. Fikre*, 601 U.S. 234, 241, 243 (2024); *J.D. v. Azar*, 925 F.3d 1291, 1308-11 (D.C. Cir. 2019). Although Mario has since turned eighteen, Diego and Renesme remain minors.

sponsors pursuant to the Trafficking Victims Protection Reauthorization Act ("TVPRA") and "[n]othing in the TVPRA requires the government to conduct this review a second time." *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1143 (9th Cir. 2018); J.A.25, 30.

The Government nonetheless insists that Plaintiffs have no meaningful due process rights against prolonged and arbitrary detention because of Congress's power over immigration. This claim assumes a conflict with Congressional intent that does not exist and depends on wrongly equating Plaintiffs' claim with cases involving admission to the United States or statutory limits on eligibility for government benefits. *Cf. Dep't of State v. Muñoz*, 602 U.S. 899, 910-12 (2024); *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (respondent "has only those rights *regarding admission* that Congress has provided by statute") (emphasis added); *Mathews v. Diaz*, 426 U.S. 67, 70, 79-80 (1976). Congress charged ORR with making placements in children's best interests, not immigration enforcement.

2. <u>ORR's Reapplication Policy Severely Burdens Family Integrity</u>

Children who were living with their families before returning to government custody have a particularly weighty interest in reunification given "the psychic importance to [them] of being raised by a loving, responsive, reliable adult." *Franz v. United States*, 707 F.2d 582, 599 (D.C. Cir. 1982). Beyond its general invocation of Plaintiffs' status as noncitizen children, the Government has no answer to the extensive caselaw recognizing the fundamental right to family integrity. Opening Br. 26-30.[2]

The Government relies heavily on *Reno v. Flores*. But, as Plaintiffs have explained and the Government fails to rebut, *Flores* does not control because Plaintiffs (1) have an "available parent, close relative, or legal guardian"; (2) were living with that caregiver prior to their re-detention; and (3) Congress has subsequently mandated that children be promptly released to the least restrictive setting in their best interests. Opening Br. 29-30, 34-35 (quoting *Flores*, 507 U.S. at 302-06). The *Flores* Court cited favorably to its family integrity precedents, 507 U.S. at 310, and this Court should decline the invitation to expand *Flores* to create an

[2] In preparing this brief, counsel discovered that a citation was inadvertently deleted from page 28 of the Opening Brief, leaving only the accompanying parenthetical. The citation at the top of page 28 should read: *Santosky*, 455 U.S. at 760 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

unnecessary conflict with well-established precedent recognizing the fundamental right to family integrity.

The Government also fails to address the numerous post-*Flores* cases recognizing a right to family integrity even in the context of *initial* ORR sponsorship approval. Opening Br. 29 (collecting cases, including *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016)). The Government instead relies on a different, inapposite Fourth Circuit decision involving a transfer between adult detention facilities. *See Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 211 (4th Cir. 2019). That case did not involve a child's right to live with their family and did not mention, much less call into question, the Fourth Circuit's prior opinion in *D.B. v. Cardall* addressing the right to family integrity in the context of ORR custody. *See D.B.*, 826 F.3d at 740, 742-43; *see also M.A. v. Molina*, No. 26-cv-415, 2026 WL 741623, at *5 (N.D. Ohio March 17, 2026) (finding *Reyna* inapplicable to child's right to release from ORR to non-detained mother); *J.E.C.M. v. Marcos*, 689 F. Supp. 3d 180, 196-97 (E.D. Va. 2023) (similarly distinguishing *Reyna*).

3. <u>Plaintiffs Have a Strong Interest in Continued Liberty and Sponsor Approval Under the TVPRA</u>

The Government's arguments regarding Plaintiffs' liberty interest and legitimate claim of entitlement under the TVPRA likewise ignore the unique interests of previously released children.

Plaintiffs do not assert a general right to "come and go at will," *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999) (quoting *Flores*, 507 U.S. at 302), but instead challenge ORR's decision to revoke their sponsorship approval and upend their lives. The Government fails to address the "grievous loss" experienced by Plaintiffs, including loss of liberty, severe educational disruption, and psychological harm. Opening Br. 12-19; J.A.41, 51-52, 61-62, 68-69; *Santosky v. Kramer*, 455 U.S. 745, 758 (1982); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1196 (N.D. Cal. 2017), *aff'd*, 905 F.3d 1137 (9th Cir. 2018); *see also Goss v. Lopez*, 419 U.S. 565, 574-76 (1975) ("[T]he total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child."). The Government does not contest that ORR custody is more restrictive than placement with a sponsor within the meaning of the TVPRA. 8 U.S.C. § 1232(c)(2)(A).

The Court need not decide whether children have a protected liberty interest in *initial* release under the TVPRA because ORR *already* determined that release to their sponsor is the least restrictive setting in the best interest of each Plaintiff. Once such a determination is made, the TVPRA uses mandatory language to require prompt placement with the approved sponsor. *Id.*; Opening Br. 33. The Government concedes "ORR has disclaimed continued custodial authority after release." Appellee Br. 38. Once release is approved, Plaintiffs thus have a legitimate expectation and claim of entitlement to continued sponsor approval absent material changed circumstances. Opening Br. 32-34. This entitlement is far from "vague." Appellee Br. 37.

Parolees, despite their conditional liberty, have an analogous interest in protection against arbitrary revocation of release. *See* Opening Br. 35, 38; *Young v. Harper*, 520 U.S. 143, 148-50 (1997). The Government fails to engage with this caselaw, noting only that Plaintiffs have not sued DHS. Appellee Br. 36. But the right to challenge revocation of release does not depend on the identity of the initial arresting agency. *See, e.g.*, *Gagnon v. Scarpelli,* 411 U.S. 778, 779-80 (1973) (respondent arrested by Illinois police and probation revoked by Wisconsin). Nor does the Government offer any support for its suggestion that noncitizen children have weaker liberty interests than adults on parole.

Even in the context of an initial release decision, ORR's discretion must be exercised consistent with the TVPRA. "[I]f 'the statute or implementing regulations place substantive limitations on official discretion' to withhold award of the benefit upon satisfaction of the eligibility criteria, there is a legitimate claim of entitlement, as to which the Due Process Clause affords protection." *N.B. ex. rel. Peacock v. District of Columbia*, 794 F.3d 31, 41-42 (D.C. Cir. 2015) (quoting *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997)).

The TVPRA plainly puts substantive limits on ORR's discretion. *See* 8 U.S.C. § 1232(c)(2)(A) ("shall be promptly placed"); *Board of Pardons v. Allen*, 482 U.S. 369, 375-76, 378-79 (1987) ("shall" language created protected liberty interest even though Board had "broad discretion" over prerequisite findings); *Price v. Barry*, 53 F.3d 369, 370 (D.C. Cir. 1995). Although *J.D. v. Azar*, 25 F.3d 1291 (D.C. Cir. 2019), referenced ORR's discretion over a child's release, it did not suggest that ORR has unfettered discretion to withhold release to a suitable sponsor. *Id.* at 1332, 1334. To the contrary, the Court rejected the argument that ORR could speed up or slow down its release process at will. *Id.* at 1334-

35. In any event, that case did not involve the revocation of a previously approved release.

B. ORR's Refusal to Consider Children's Individual Circumstances Creates a Severe Risk of Erroneous Deprivation

The Government admits that "ORR applies the same release requirements to all" children in its custody, regardless of whether they have a previously approved sponsor. Appellee Br. 1. ORR's disregard of children's individual circumstances creates an unacceptable risk of erroneous deprivation of liberty.

The Government seems to downplay this risk because (1) there is a *chance* Plaintiffs could return to their approved sponsors after repeating ORR's lengthy vetting process; (2) Plaintiffs have not sued DHS over their initial arrest; and (3) habeas is potentially available. These arguments are contrary to established caselaw and none address the deprivation at issue here—prolonged detention and family separation during ORR's application process.

First, even a temporary separation of children from their families creates cognizable injury and requires a prompt hearing. *See* Opening Br. 27, 39 (citing *Stanley v. Illinois*, 405 U.S. 645, 647-48 (1972)); *Siefert v. Hamilton Cnty*, 951 F.3d 753, 757 (6th Cir. 2020); *Berman v. Young*, 291 F.3d 976, 984-86 (7th Cir. 2002); *see also Jordan by Jordan v. Jackson*, 15 F.3d 333, 351 (4th Cir. 1994) (a "65-hour delay . . . is near, if not at, the outer limit of permissible delay between a child's removal from his home and judicial review").

The risk of erroneous deprivation is especially high here because Plaintiffs' sponsors are not accused of abuse, neglect, or fraud. ORR instead detains *all* re-referred children based on the possibility that a new application *might* reveal concerns. This cannot justify the risk of erroneous detention, especially given the serious obstacles even previously approved sponsors face in completing ORR's current process. *See* Opening Br. 9-11, 15-19, 37-41; *Stanley*, 405 U.S. at 647-48, 654-55, 657-58; *see also B.S. v. Somerset County*, 704 F.3d 250, 271-72 (3d Cir. 2013) (county cannot deprive mother of custody for 45 days without a hearing "pending the completion of the [abuse] investigation"). The possibility of an appeal *after* a sponsorship application is denied, 45 C.F.R. § 410.1206, does nothing to prevent erroneous detention *during* the application process.

Second, that Plaintiffs were initially detained by DHS does not affect the risk of erroneous deprivation related to their continued detention *by ORR*.[3] It is undisputed that DHS lacks legal authority to revoke ORR's sponsor approval determinations under the TVPRA. Opening Br. 1, 4. The two agencies have different missions and detention by DHS does not determine "the least restrictive setting that is in the best interest of the child" under the TVPRA. 8 U.S.C. § 1232(c)(2)(A). Treating DHS detention as an automatic revocation of a child's approved sponsor creates a high risk of error.

Regardless, even if an initial detention and separation of a child is lawful, *continued* detention requires a prompt hearing. *See Duchesne v. Sugarman*, 566 F.2d 817, 826-28 (2d Cir. 1977); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 393, 395-96 (4th Cir. 1990). Similarly, even a probationer lawfully arrested for a separate offense has the right to a revocation hearing. *See Gagnon*, 411 U.S. at 779-80, 791; *Hurd v. District of Columbia*, 864 F.3d 671, 676, 682-84 (D.C. Cir. 2017).

Third, habeas is no answer to the risk of erroneous deprivation. Detained children lack ready access to habeas counsel; even if counsel is obtained, a habeas petition would come only *after* ORR violated their

[3] Notably, the Government argued in *Saravia* that a decision against DHS would not result in release because ORR would *still* require a sponsor reassessment. *Saravia*, 280 F. Supp. 3d at 1198.

constitutional rights. Opening Br. 42. That "[s]ome courthouse somewhere may be open to someone aggressive and knowledgeable enough to initiate legal action . . . does not meet the state's burden of providing an opportunity to be heard at a meaningful time and in a meaningful manner[.]" *B.S.*, 704 F.3d at 272 (internal citation omitted); *Duchesne*, 566 F.2d at 828 ("[T]he state cannot constitutionally 'sit back and wait' for the parent to institute judicial proceedings" through habeas). *Ingraham v. Wright*, 430 U.S. 651 (1976), is inapposite because habeas does not create the same deterrent effect as individual civil or criminal penalties for abuse. *Id.* at 677-78.

Finally, the Government asserts that Plaintiffs' proposed procedures "may not lead to a faster release in many cases." Appellee Br. 43. But Plaintiffs are not required to show that individualized consideration and a hearing would result in immediate release. If that were the standard, there would be no purpose in requiring a hearing at all. *Cf. Gagnon*, 411 U.S. at 780, 791.

Plaintiffs' proposed safeguards are valuable because they would (1) require ORR to consider a child's individual circumstances before subjecting them to lengthy re-detention; (2) provide children and sponsors an opportunity to address any allegations against them; and (3) provide clarity as to what, if any, additional vetting is required. Opening Br. 43-44; Appellee Br. 18-19. This would make a difference in many cases. For example, there are no concerns in the record regarding Renesme or her father. Opening Br. 41.

Procedural protections have value even in more complex cases. Diego, Mario, and Benito never had the opportunity to be heard regarding the reasons they re-entered ORR custody and how, if at all, those circumstances affected their sponsors' suitability.[4] Both Mario and Diego were eventually released back to their parents after ORR once again found them suitable, but only after they endured months of detention. Diego remained in custody for *two and a half additional months* after his father cleared a fingerprint-based background check and received a positive home study. J.A.114-15.

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[4] Although the Government asserts that Diego admitted involvement in smuggling, its declaration does not indicate any foundation for this knowledge and the district court made no relevant findings. J.A.114-15. Diego denied this allegation. *Id.* The Government's other allegations are vague and the Government does not explain why ORR could not have discovered any issues before a hearing.

C. Procedural Protections Further the Parties' Shared Interest in Safety and Prompt Release

As the Government acknowledges, "ORR must balance its obligation to protect [unaccompanied children] from human trafficking and exploitation, with promptly reunifying [them], where possible, with their parents or other suitable sponsors." Appellee Br. 1. A timely hearing would allow ORR to meet its statutory objectives by examining whether an individual child's circumstances warrant revocation of their sponsor's approval and, if not, promptly returning the child to that sponsor. *See Stanley*, 405 U.S. at 652-53; *Gagnon*, 411 U.S. at 785-86.

The Government argues that "Congress did not exempt second-time referrals from the required vetting process," Appellee Br. 41, but the TVPRA did not mention second-time referrals at all. As the district court properly concluded, the TVPRA does not *require* the Government to repeat the application process for previously approved sponsors. J.A.22 (citing *Saravia*, 905 F.3d at 1143).

The most logical and consistent reading of the TVPRA is that once a child is placed in the least restrictive setting, they should remain in that setting absent a material change in circumstances. *See, e.g.*, *Garcia Ramirez v. ICE*, 812 F. Supp. 3d 86, 108 (D.D.C. 2025). Indeed, the

Government recognizes that before 2025 re-referrals were "extremely rare." Appellee Br. 15. And despite expressing concerns about its prior vetting process, ORR is not repeating all prior sponsorship applications, and such a policy "would be the definition of absurd." *A.N.P.S. v. Salazar*, No. 25-cv-14778, 2025 WL 3707333, at *6 & n.6 (N.D. Ill. Dec. 22, 2025). There is thus no general government interest in repeating the sponsorship process absent evidence that placement is no longer in the child's best interests.[5]

Even if the TVPRA imposed a duty on ORR to assess the suitability of a sponsor again when a child re-enters its custody, *but see infra*, § II.A, Plaintiffs seek relief consistent with such a duty. Because ORR has previously verified "the custodian's identity and relationship to the child" and made a finding "that the individual has not engaged in any activity that would indicate a potential risk to the child," 8 U.S.C. § 1232(c)(3)(A),

[5] Notably, even the Government's statistics show that identified sponsorship fraud represents a tiny percentage of the total number of children released to sponsors by ORR. *Compare, e.g.*, Appellee Br. 14 (ORR "identified 10 UAC who were released to sponsors who committed intentional document fraud in October 2024"), *with* Office of Refugee Resettlement, *Data: Released to Sponsors* (last updated Sept. 11, 2025), https://perma.cc/2X2G-YT3X (ORR released 5,111 children to sponsors in October 2024).

it need only verify that the sponsor is the same person and that the circumstances of the re-referral do not indicate a risk to the child from the sponsor. If there is evidence the child is at risk, ORR can conduct further vetting. *See* 45 C.F.R. § 410.1203(e) (ORR reserves right not to release a child "to any person or agency *it has reason to believe* may harm or neglect the unaccompanied child or fail to present the unaccompanied child before DHS or the immigration courts when requested to do so") (emphasis added).

Finally, Plaintiffs' proposed procedures would not impose an undue administrative burden on ORR. The Government notes that "ORR must conduct a dangerousness assessment at the initial intake stage and *prior to placement,* based on the circumstances of the child's apprehension and re-referral." Appellee Br. 48-49 (emphasis added). The Government does not explain why ORR cannot simultaneously consider whether those same circumstances indicate a need to reconsider sponsor approval.

Moreover, it is entirely feasible for ORR to set up administrative hearings in line with its existing procedures, a point the Government fails to address in its briefing. Opening Br. 63-64; *see also* 45 C.F.R. § 410.1902(c) (requiring ORR to convene a Placement Review Panel

("PRP") within seven days of a child's request).[6] Administrative convenience alone, in any event, cannot justify denying due process. *Stanley*, 405 U.S. at 657-58. It is uncontested that Plaintiffs' proposed procedures would likely save ORR significant resources it would otherwise spend paying for a child's detention and repeating the sponsorship process. Opening Br. 25.

II. Plaintiffs Are Likely to Succeed on their APA Claims

The reapplication policy also is contrary to law and arbitrary and capricious in violation of the APA.

The Government devotes much of its response to threshold arguments that fail on their own terms and conflict with the Government's merits arguments. The Government opens by insisting that no final and reviewable reapplication policy exists; it closes by insisting the TVPRA *mandates* that every previously approved sponsor reapply. The Government cannot have it both ways: a requirement it defends as statutorily compelled is necessarily a final agency action. Nor

[6] Ignoring the availability of ORR's own PRPs, the Government asserts that ORR would need to enter into an agreement with the Departmental Appeals Board to provide children with due process. Appellee Br. 49 (citing J.A.113). There is no evidence that drafting that agreement would pose anything more than a ministerial burden for the agency.

can the Government square its claim that the full reapplication process is mandatory with its assertion that ORR is currently reviewing its procedures. *Id.* These contradictions confirm what the record shows: ORR adopted its reapplication policy without reasoned analysis, without weighing reliance interests, and without considering reasonable alternatives. And any policy that categorically keeps children with approved sponsors in ORR detention based only on an arrest by DHS contravenes both the TVPRA and the Foundational Rule. Finally, Plaintiffs' APA claims are reviewable: Plaintiffs seek vacatur of a nationwide policy—not release from custody—and no alternative statutory remedy offers relief sufficient to displace the strong presumption of APA review.

A. ORR's Reapplication Policy is Contrary to Law

ORR's reapplication policy conflicts with the text and purposes of both the TVPRA and the Foundational Rule. Contrary to the Government's framing, Plaintiffs are not asking ORR to skip vetting of potential sponsors. *Cf.* Appellee Br. 58. The dispute here is narrow: whether ORR may categorically revoke its prior sponsor approvals and restart the entire application process for sponsors it has already vetted and approved. Nothing in the TVPRA authorizes that approach, and it defies the statute's command to place children "promptly" in the "least restrictive setting." 8 U.S.C. § 1232(c)(2)(A); *see also* 45 C.F.R. § 410.1201(a).

Here, as in *Saravia*, ORR has already determined that the "least restrictive setting that is in the best interest of the child" is placement with a sponsor and that "each of these sponsors is suitable." 8 U.S.C. § 1232(c)(2)(A), (3)(A); *Saravia*, 905 F.3d at 1143. ORR has also disclaimed continued legal custody. *See* Preamble to Foundational Rule, 89 Fed. Reg. 34384, 34449 (Apr. 30, 2024). The Government's attempt to distinguish *Saravia* falls flat: the procedural differences identified have no bearing on the Ninth Circuit's textual holding, which squarely addressed the statutory interpretation question at issue here.

The Government concedes that "[t]he TVPRA and Foundational Rule do not contain special rules" regarding children re-referred to ORR custody. Appellee Br. 57. It nonetheless insists that the statute's present-tense phrasing requires a new application. But the present tense in the TVPRA and Foundational Rule speaks to ORR's *initial* sponsorship decision. *See* 8 U.S.C. § 1232(c)(3)(A) (determination of suitability of "proposed custodian"); 45 C.F.R. §§ 410.1202(b), (d) (same with respect to "potential sponsor").

This case doesn't involve "*potential* sponsors"; each Plaintiff was living with a sponsor whom ORR already approved. If the statute and rule actually imposed an ongoing obligation for continuous sponsor vetting, ORR would be required to perpetually take thousands of children back into custody to reassess their sponsors. But ORR, correctly, disclaims continual custodial authority once a child is released. Appellee Br. 38; *see* J.A.101.

The Government also relies on 45 C.F.R. § 410.1203(e). This provision, unlike the Government's other citations, at least is fairly read to encompass re-referred children. This provision permits ORR to refuse release to a person whom the agency "has reason to believe may harm or neglect" the child, *id.*, but does not support the agency's policy of refusing release even when it has no cause whatsoever to doubt the sponsor's fitness. To give effect to section 410.1203(e), ORR could readily craft a policy on remand that requires further tailored vetting in cases where there are individualized reasons to believe the sponsor is unsuitable (and indeed, Plaintiffs' requested due process protections would accomplish this goal).

ORR's choice to categorically require a new application even when there is no reason to believe the approved sponsor is unsuitable is irreconcilable with its duty to release children without unnecessary delay, 8 U.S.C. § 1232(c)(2)(A); 45 C.F.R. § 410.1201(a), and the district court erred in holding otherwise.

B. ORR's Reapplication Policy is Arbitrary and Capricious

Even the most deferential review requires a reasoned explanation from the agency. The Government supplies none—only *post hoc* argument. It admits there is no administrative record of reasoned decisionmaking specific to re-referred children, that ORR never considered reliance interests, and that it never weighed reasonable alternatives to requiring all previously approved sponsors to repeat the entire application process—including steps that are unlikely to yield any new information, such as requiring sponsors to prove their identities a second time. *See* Appellee Br. 55, 61.

The best justification the Government can offer is its belief that the TVPRA and Foundational Rule compel ORR to revoke prior approvals and force every vetted sponsor to start from scratch. *Id.* As discussed above, the text does not support that reading and multiple courts—including the district court here—have rejected it. *See, e.g.*, J.A.25, 30-31; *see also Saravia*, 905 F.3d at 1143; *E.F.E.L. v. Noem*, No. 26-cv-02507, 2026 WL 1045550, at *5 (N.D. Ill. Apr. 17, 2026); *A.N.P.S.*, 2025 WL 3707333, at *6; Appellee Br. 57 (acknowledging the TVPRA and Foundational Rule are silent on cases of re-referred children).

Because ORR wrongly believes its hands are tied, its policy cannot be upheld "as an exercise of the discretion that the agency disavows." *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017). Even ORR's position that it is bound by the TVPRA is unaccompanied by any record of contemporaneous consideration of the relevant law or agency documents—and rationalizations developed for litigation are no substitute for agency reasoning. *See City of Kansas City v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991). ORR's belated explanation is also belied by its own words and actions: the Government acknowledges that ORR has authority to waive steps of the application process and that it is considering different procedures for re-referred children previously in the custody of a parent or legal guardian. Appellee Br. 15-16; 62.

Confronted with "a relatively new situation"—previously released children re-referred to ORR custody in unprecedented numbers—ORR had a policy choice to make. Appellee Br. 15, 61. "Changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). ORR did neither. It reflexively applied its "generally applicable sponsor-vetting procedures," Appellee Br. 61, designed for *potential* sponsors rather than tailoring a policy to children whose sponsors ORR had already vetted and approved, and with whom those children have lived for years. By ignoring the critical factual differences between newly arrived and previously released children, ORR "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency is not owed deference for discretion it never exercised. *Cf.* Appellee Br. 62.

ORR likewise never considered the reliance interests of children who have spent years living with their families, attending school, and participating in their communities following their sponsorship approval. *See* Opening Br. 50-51 (citing, *e.g.*, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020)). The Government's rebuttal misses the point. It says only that "ORR is making new determinations." Appellee Br. 63. That only restates the policy—it does not show that ORR weighed Plaintiffs' reliance interests against any safety concerns, as *Regents* requires.

Nor did ORR consider the reapplication policy's impact on the children themselves, including the harm that prolonged detention and family separation create for children's mental and emotional well-being. *See* Opening Br. 51-52; *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019). ORR further failed to consider alternatives to repeating the *entire* application process—most obviously, a streamlined process that omits unnecessary steps.[7] Opening Br. 51-52 (citing *Spirit Airlines, Inc. v. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021)); *see also Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986). And ORR never considered making individualized determinations based on each child's circumstances—a failure that was likewise arbitrary. *Solondz v. FAA*, 141 F.4th 268, 279 (D.C. Cir. 2025).

[7] Defendants appear to confuse the relief requested in Plaintiffs' Due Process claims with the relief requested in Plaintiffs' APA claims. *See* Appellee Br. 53. Plaintiffs seek an injunction providing procedural protections for their Due Process claims. For their APA claims, Plaintiffs seek a stay or vacatur of the unlawful policy.

The Government does not deny that its policy has kept children in detention for months even when an approved sponsor stands ready. It answers only that the agency chose to prioritize "safe and secure placements" over "promptness" and that this Court should not disturb the agency's weighing of competing statutory goals. Appellee Br. 63. But there is no weighing to disturb: the Government admits there is no record of reasoned agency decisionmaking. Appellee Br. 55–56. And a policy whose effects directly undermine the statute's purpose is arbitrary and capricious regardless. *Air All. Hou. v. EPA*, 906 F.3d 1049, 1064 (D.C. Cir. 2018).

Finally, the Government has no answer for the policy's absurd results. It insists that re-application is necessary because time has passed, Appellee Br. 63-64, yet ignores Plaintiffs' point that many application steps are untouched by the passage of time, such as a sponsor's identity or biological relationship to the child.

C. ORR's Reapplication Policy is a Final Agency Action

The Government admits that, faced with the unprecedented re-referrals of previously released children, ORR decided to "simply follow[] ORR's generally applicable sponsor-vetting policies in response to a relatively new situation." Appellee Br. 61. That decision—to subject all children, even children with approved sponsors, to the same generally applicable vetting process—marks the "consummation of the agency's decisionmaking process" and applies immediately to every child's case. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). It is neither "tentative [n]or interlocutory." *Id.* And as the district court concluded, "[a]utomatic detention pending a second sponsor application is a legal consequence." J.A.25. There is no "risk of premature judicial intervention," Appellee Br. 54, where the Government maintains that its policy is required by law. J.A.25.

Nor do the consequences to children and their families flow from statute rather than agency choice. *Contra* Appellee Br. 55. As discussed above, nothing in the TVPRA or the Foundational Rule requires approved sponsors to repeat the entire application process; that requirement exists only because ORR chose it. ORR's lack of a written policy does not help the Government: "the absence of a written memorialization by the agency does not defeat finality." *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 100 (D.C. Cir. 2020); J.A.25.

Finally, the Government's argument that requiring sponsors to restart the application process is merely the first step in deciding whether to release a child misses the point. Appellee Br. 56. Plaintiffs do not challenge the outcomes of ORR's sponsor-approval decisions—they challenge forcing previously approved sponsors to repeat the entire process in the first place.

D. Plaintiffs' Claims are Reviewable under the APA

The district court failed to apply the strong presumption in favor of APA review. The Government acknowledges that only "clear and convincing evidence of a contrary legislative intent" may override this presumption, but offers *no* evidence of conflicting legislative intent here. Appellee Br. 50 (quoting *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009)). Nor does the Government identify any "special and adequate review procedure[s]" applicable in this case, relying only on the "general habeas statute." *Id.* at 50-51. No more specific statute supplies an alternative remedy tailored to this situation, so the presumption that Congress intends judicial review of administrative action controls. *See Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); Opening Br. 55-56.

The Government's insistence that these are really habeas claims ignores the relief Plaintiffs actually seek: vacatur of an illegal and arbitrary nationwide policy. Habeas cannot provide that relief, which is not "of the same genre" as release from custody. *El Rio Santa Cruz Neigh. Health Ctr. v. DHS*, 396 F.3d 1265, 1270, 1272 (D.C. Cir. 2005) (quoting *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990)). Plaintiffs do not seek their immediate release, and they do not dispute that additional sponsor vetting—and thus additional time in ORR custody—may be necessary based on a child's individualized circumstances. *Contra* Appellee Br. 52 (claiming, erroneously, that "[Plaintiffs'] claims, if true, would invalidate ORR's custody"); *see also* Opening Br. 58-59 (citing *Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 665–66 (D.C. Cir. 2013)).

The Government's own authority undercuts its arguments. In *Garcia v. Vilsack*, a specific statute created a private cause of action, demonstrating clear congressional intent to channel claims through that mechanism rather than the APA. 563 F.3d at 523-24. The Government's gesture toward the general habeas statute comes nowhere close to showing a comparable legislative intent here.

Most fundamentally, habeas cannot give Plaintiffs adequate relief. It cannot secure vacatur of an unlawful policy, and it cannot guarantee that the policy will not be applied to Plaintiffs again. *See* Opening Br. 57; J.A.42. The Government's description of habeas as "prompt, relatively inexpensive review" ignores that habeas is available only after a child has been detained without adequate process—that is, *after* the child's rights have been violated and she may have spent weeks or months in detention. *See supra*, § I.B; *Ramirez v. ICE*, 310 F. Supp. 3d 7, 24 (D.D.C. 2018); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 185 (D.D.C. 2015). And securing habeas counsel is neither easy nor affordable for many detained noncitizen children.

That some children eventually secured delayed release through habeas does not make it an adequate remedy for every child subject to this unlawful policy. *See, e.g.*, *B.S.*, 704 F.3d at 272. And the Government regularly argues in habeas cases that children must first exhaust administrative remedies through a new sponsorship application—meaning there is no guarantee of de novo review in habeas if the Government has its way. *See* Opening Br. 60. The possibility of habeas review is therefore "too doubtful to constitute an adequate remedy precluding APA review." *El Rio*, 396 F.3d at 1270; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 601 (2016).

III. The Remaining Preliminary Injunction Factors Favor Plaintiffs

"Family separation and prolonged detention certainly qualify as irreparable injuries." J.A.35. The Government suggests that these harms are not "beyond remediation," Appellee Br. 64, presumably because Plaintiffs may someday be returned to their families. This argument replicates the errors of the Government's due process analysis; Plaintiffs suffer grievous harm and are deprived of a fundamental right to family integrity when they are held in government custody for months without any evidence that their previously approved sponsor is unfit. *See supra*, § I.A.

The Government's arguments on the balance of equities merely reiterate its assertion that the TVPRA requires a new vetting process and its plea for deference to ORR's expert judgment. But, as noted above, ORR has not made any such judgments, but instead has incorrectly assumed—without reasoned analysis—that its policy is dictated by statute. Indeed, it is *Plaintiffs* that are requesting ORR exercise its independent judgment rather than automatically treating a DHS detention as a revocation of ORR's placement decision.

And if ORR refuses to do so because it "does not have access to detached decisionmakers," Appellee Br. 65 n.4 (quoting J.A.36), it is plainly wrong, given the ready availability of Placement Review Panels, *see supra*, § I.C. Nor is ORR entitled to unfettered discretion over its procedures, Appellee Br. 29, when those procedures implicate the adjudication of fundamental rights. *Cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543 (1978) ("*Absent constitutional constraints* or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure" in the context of rulemaking) (internal quotation omitted) (emphasis added).

The Government offers no citation for its suggestion that Plaintiffs' pursuit of class-wide relief weighs against a preliminary injunction. Class actions exist to efficiently resolve common claims and the Government fails to explain why the public interest favors federal judges making case-by-case determinations in habeas regarding each child's release rather than ORR itself making prompt determinations. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (Rule 23 promotes "efficiency and economy of litigation").

In any event, the child welfare and public safety concerns that the Government raises are not unique to ORR. State agencies deal with similar risks but nonetheless must provide due process. *See supra*, § I.B (due process requirements in context of abuse and neglect investigations); *see also Schall v. Martin*, 467 U.S. 253, 269-70, 277 (1984) (finding preventative detention of minors permissible where "strictly limited in time" and the minor receives a "formal, adversarial probable-cause hearing within three days of his initial appearance").

Even in the context of serious security concerns involving the witness protection program, the D.C. Circuit held that procedural protections are required to protect family integrity rights and "[i]n those instances in which holding such a [pre-entrance] hearing would truly be *impossible*, the requirements of the Due Process Clause would be merely suspended, not eliminated[.]" *Franz*, 707 F.2d at 609 (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) and *Duchesne*, 566 F.2d at 826, 828) (emphasis added). This Court should reject the notion "that ORR exercises all of the powers of child protective services but is subject to none of the same constitutional limitations." *Beltran v. Cardall*, 222 F. Supp. 3d 476, 488 (E.D. Va. 2016).

CONCLUSION

For the foregoing reasons, the district court's order should be reversed and remanded for prompt issuance of a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitations in Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Cir. Rule 32(e)(1). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font.

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