UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIEGO N., *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Civil Action No. 1:26-cv-577-CJN

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

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INTRODUCTION

Defendants U.S. Department of Health and Human Services ("HHS"), the Office of Refugee Resettlement ("ORR"), Secretary Robert F. Kennedy, Jr., and Acting Director of ORR Angie Salazar respectfully move to dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief, ("Compl.") ECF No. 1, under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6). Plaintiffs are four unaccompanied alien children ("UAC") who allege that ORR has a "policy" of requiring previously approved sponsors to reapply to have an unaccompanied child released to them if the UAC returns to ORR custody. However, as alleged in the Complaint, the "policy" that Plaintiffs challenge is simply ORR following its statutory and regulatory duties to vet sponsors *every time* it is considering whether to release UAC.

ORR abides by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), wherein Congress imposes on ORR a paramount obligation to "establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity." 8 U.S.C. § 1232(c)(1). As the agency entrusted with the responsibility for caring for the thousands of UAC under the Homeland Security Act of 2002, 6 U.S.C. § 279, ORR must balance its obligation to protect UAC from human trafficking and exploitation, with promptly reunifying UAC, where possible, with their parents or other suitable sponsors. 8 U.S.C. § 1232(c)(2)(A). Plaintiffs' case rests on the flawed assumption that time has stood still since the UAC were released to their previously vetted sponsors. However, ORR must take all *current* information into account, to include assessing previously vetted sponsors anew and even assessing the circumstances of the re-referral.

The claims of three of the four named Plaintiffs are now moot because they are no longer in ORR custody. The Court should dismiss their claims for lack of jurisdiction under Rule 12(b)(1).

As to the sole remaining named Plaintiff (and the putative class, if the Court certifies one), the Court should dismiss the Complaint for failure to state a claim under Rule 12(b)(6).

In Count I, Plaintiffs fail to allege a plausible procedural due process claim. As alien minors without lawful status in the United States, Plaintiffs have very limited liberty interests, and they are subject to the political branches' control over immigration matters. Plaintiffs do not plausibly allege that they have a constitutionally cognizable liberty interest that is being erroneously infringed. And Plaintiffs do not show that additional procedures would be warranted.

Plaintiffs' claims in Counts II and III under the Administrative Procedure Act ("APA") fail for several reasons. Plaintiffs cannot bring an APA claim because they do not challenge final agency action and because they have another adequate remedy through a writ of habeas corpus. In addition, Plaintiffs fail to plausibly allege that ORR is acting contrary to law or arbitrarily and capriciously when ORR is following its statutory, regulatory, and policy requirements—all of which require an assessment of a potential sponsor's *current* suitability. For these reasons, the Court should dismiss the Complaint.[1]

BACKGROUND

I. Legal Background

The legal framework governing the federal care and custody of UAC establishes that anytime UAC are referred to ORR, the agency must consider the UAC's current circumstances

[1] Plaintiffs raise claims under the APA. The Local Rules state that the government should file a certified list of the contents of the administrative record simultaneously with this motion. Local Civ. Rule 7(n)(1). But the government does not rely on anything in the administrative record and instead relies only on the allegations in the complaint. The government requests that the Court excuse it from having to file the certified list at this time. *See, e.g., Akbar v. Cuccinelli*, Civ. A. No. 18-2808, 2020 WL 1287817, at *4 (D.D.C. Mar. 18, 2020) (granting government's motion for relief from Local Civil Rule 7(n)(1) "to conserve scarce agency resources" where government had filed a motion to dismiss for lack of subject-matter jurisdiction); *District of Columbia v. Trump*, 810 F. Supp. 3d 19, 35 n.8 (D.D.C. 2025).

and verify the potential sponsor's present suitability prior to release. UAC "may not be placed with a person or entity unless the Secretary of Health and Human Services makes 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) (emphasis added). ORR must conduct certain steps, including background and criminal records checks, "[i]n all cases." 45 C.F.R. § 410.1202(b)–(c). And ORR must consider the UAC's "*current* functioning and strengths in conjunction with any risks or concerns." 45 C.F.R. § 410.1202(f) (emphasis added). The legal framework balances the mandate that ORR protect UAC from harm with the requirement that ORR "promptly" place UAC "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A).

A. Statutory Framework

In 2002, Congress enacted the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135 (codified in relevant part at 6 U.S.C. § 279), abolishing the Immigration and Naturalization Service ("INS") and transferring the responsibility for the care and placement of UAC from INS to ORR. 6 U.S.C. §§ 279(a), (b)(1)(A), (g)(2).

The HSA defines a UAC as "a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2). Further, it assigns ORR broad authority over the care and custody of UAC while they are in federal custody due to their immigration status, including coordinating their care and placement, ensuring their best interests in custodial decisions and that they are protected from smugglers, traffickers, and others who might seek to victimize and exploit UAC. 6 U.S.C. § 279(b)(1)(A) & (b)(2)(A)(ii). These responsibilities are carried out through cooperative agreements and contracts with care providers under ORR policies and oversight. *See* 6 U.S.C. § 279(b)(1); 31 U.S.C. § 6305.

Congress enacted the TVPRA to strengthen protections for UAC and support their safe repatriation or appropriate placement. Pub. L. No. 110-457. The statute, consistent with the HSA, makes the Secretary of HHS responsible for the care and custody of UAC. 8 U.S.C. § 1232(b)(1). Pursuant to the TVPRA, "any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child." 8 U.S.C. § 1232(b)(3).

The TVPRA also states that HHS, and other agencies, "shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity." 8 U.S.C. § 1232(c)(1). It also provides that UAC "may not be placed with a person or entity unless the Secretary of Health and Human Services makes 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). This safety and suitability determination must "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.* Thus, the TVPRA is explicit that ORR must prioritize the safety and well-being of UAC while in its care and upon release.

B. The Unaccompanied Children Program Foundational Rule

In the Unaccompanied Children Program Foundational Rule, codified at 45 C.F.R. Part 410, ORR established comprehensive regulations governing its UAC program consistent with its statutory responsibilities. Specifically, the Foundational Rule provides that ORR must release UAC from its custody "[s]ubject to an assessment of sponsor suitability," 45 C.F.R. § 410.1201, a process which starts with an "application package" that "[p]otential sponsors shall complete." *Id.*

§ 410.1202(a). The assessment of sponsor suitability includes "review of the potential sponsor's application package, including verification of the potential sponsor's identity, physical environment of the sponsor's home, and relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child." *Id.* § 410.1202(b). ORR also verifies "the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child," *id.* § 410.1202(c), and "[i]n all cases, ORR shall require background and criminal records checks," which may include a criminal history check based on fingerprints, *id.* The Foundational Rule reinforces congressional intent articulated in the HSA and TVPRA that HHS ensure UAC protection from human traffickers and release UAC only to those sponsors capable of protecting their well-being. 45 C.F.R. § 410.1003.

Moreover, the Foundational Rule requires ORR to consider the UAC's "*current* functioning and strengths in conjunction with any risks or concerns," including history or risk of being a victim of sex or labor trafficking and history of involvement in the criminal or juvenile justice system. 45 C.F.R. § 410.1202(f) (emphasis added).

While ORR is attempting to identify and vet a sponsor, ORR generally places minors in "standard programs that are not restrictive placements." 45 C.F.R. § 410.1104. Standard programs must be "licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children" or meet the requirements of state licensing that would otherwise be applicable in states that do not license programs that care for UAC. 45 C.F.R. § 410.1001. Standard programs must meet a variety of minimum standards and provide numerous services for children. 45 C.F.R. §§ 410.1302–1311.

C. ORR's Release Policies and Practices

To carry out its statutory and regulatory mandate under the HSA and TVPRA, and the Foundational Rule, ORR has developed policies and procedures for identifying and conducting suitability assessments of potential sponsors. These procedures are generally set out in ORR's publicly available UACB Bureau Policy Guide ("UACB Policy Guide"). *See* UACB Policy Guide, *available at* https://perma.cc/Q2C3-3SC5 (last visited March 4, 2026). In light of ORR's obligation to protect UAC from smugglers, traffickers, and others who may seek to victimize them, "safe and timely release . . . involves several steps, including: the identification of sponsors; sponsor application; interviews; the assessment (evaluation) of sponsor suitability, including verification of the sponsor's identity and relationship to the child (if any), background checks, and in some cases home studies; and post-release planning." UACB Policy Guide § 2.1. There are four categories of potential sponsors: (1) Category 1, consisting of parents or legal guardians, including qualifying step-parents that have legal or joint custody of the child or teen; (2) Category 2, consisting of siblings, grandparents, or other immediate relatives (such as aunts, uncles, first cousins), and includes biological relatives, relatives through marriage, and half-siblings; (3) Category 3, consisting of other sponsors, such as distant relatives, unrelated adult individuals, or an institutional/organizational sponsor; (4) Category 4: no sponsor identified. *Id.* § 2.2.1. ORR conducts suitability assessments of any potential sponsor (with the assistance of a care provider), including a review of the potential sponsor's strengths, resources, risk factors, and special concerns within the context of each child's needs, strengths, risk factors, and relationship to the sponsor. *Id.* §§ 2.2.2, 2.4.

A potential sponsor must complete a sponsorship application package, provide unexpired government-issued identification documentation for the sponsor and any other adults living in the household or identified in a sponsor care plan, and, along with any adult living in his or her

household, undergo a background check. *Id.* §§ 2.2.4, 2.5. All potential sponsors must also submit proof of address, income, sponsor-child relationship, individual taxpayer identification number or social security number, and criminal history documents (if applicable). *Id.* § 2.2.4. Additionally, in certain circumstances, a home study, which consists of interviews, a home visit, and a written report containing the home-study case worker's findings, is performed. *Id.* § 2.4.2.

Once the assessment of the potential sponsor is complete, the care provider makes a release recommendation. *Id.* § 2.7. ORR makes the final release decision. *Id.* Release decisions include: (1) approve release to sponsor; (2) approve release with post-release services; (3) conduct a home study before a final release decision; (4) deny release; or (5) remand for further information. *Id.* ORR denies release if: (1) the potential sponsor is not willing or able to provide for the child's physical or mental well-being; (2) the potential sponsor is not willing to complete the mandatory fingerprint check; (3) the physical environment of the home presents a risk to the child's safety or well-being; or (4) release of the UAC would present a risk to him or herself, the sponsor, household, or community. *Id.* § 2.7.4. If ORR denies the application of a parent, legal guardian, or close relative potential sponsor, the denied potential sponsor may appeal that decision through a detailed administrative process. 45 C.F.R. § 410.1206.

II. This Lawsuit

Plaintiffs initiated this lawsuit on February 23, 2026, by filing their Complaint for Declaratory and Injunctive Relief. *See* Compl. Plaintiffs allege that they are UAC who "were previously in ORR custody, determined to be eligible for release, and released to a suitable sponsor who was vetted and approved by ORR pursuant to the TVPRA." *Id.* ¶ 8. Plaintiffs assert that, after they were released from ORR custody, the U.S. Department of Homeland Security ("DHS") detained them and referred them to ORR. *Id.* According to Plaintiffs, ORR has required them "and their previously approved sponsors to recommence the sponsorship application process as if there

was no prior sponsor approval decision." *Id.* Plaintiffs contend that ORR has a "blanket policy of requiring all previously approved sponsors to reapply for sponsorship." *Id.* Plaintiffs argue that "ORR applies this blanket policy to all children and does not make any individualized determination that the child was re-referred to ORR because of any concern related to the child's safety or wellbeing." *Id.* ¶ 35. Plaintiffs do not allege when ORR supposedly adopted this policy. Plaintiffs also do not identify any document or regulatory action taken to adopt the alleged policy.

Plaintiffs allege that "prior to 2025, it was uncommon for a child to re-enter ORR custody after being released to a vetted and approved sponsor." *Id.* ¶ 33. Plaintiffs contend that DHS has apprehended and re-referred them to ORR for "many different reasons that do not necessarily implicate sponsor suitability." *Id.* ¶ 50. Plaintiffs assert that UAC's average length of time in ORR custody has increased since ORR implemented additional sponsorship application requirements in 2025. *Id.* ¶ 37.

Plaintiffs are four UAC: Diego N., Renesme R., Mario C., and Benito S. *See generally* Compl. According to the Complaint, Diego N. is 14 years old. *Id.* ¶ 60. Diego N. arrived in the United States, spent time in ORR custody, and was released to his father Alexis N. in October 2024. *Id.* ¶¶ 10, 60. In November 2025, DHS encountered Diego N. and referred him to ORR. Compl. ¶¶ 10, 61–62. When the Complaint was filed, Diego N. was in ORR custody at a shelter. *Id.* ¶ 10. Alexis N. applied to sponsor Diego N. again. Compl. ¶¶ 63–64. On March 12, 2026, ORR released Diego N. to the custody of his father. May 4, 2026 Declaration of Toby Biswas ("Biswas Decl.") ¶ 3 (attached hereto as Exhibit A).

According to the Complaint, Renesme R. is 16 years old. Compl. ¶ 16. After Renesme R. arrived in the United States, ORR released her to her father Michael R. in 2023. *Id.* ¶¶ 11, 67. In November 2025, DHS encountered Renesme R. and referred her to ORR care on November 9,

2025. *Id.* ¶ 68. At the time the Complaint was filed, Renesme R. was in ORR custody at a shelter. *Id.* ¶ 11. On March 25, 2026, ORR released Renesme R. to the custody of her father. Biswas Decl. ¶ 4.

As alleged in the Complaint, Mario C. is 17 years old. Compl. ¶ 71. ORR previously released Mario C. to his mother Marisol C. in 2023 after Mario C. arrived in the United States. *Id.* ¶¶ 12, 71. In November 2025, Mario C. spent three nights in jail and was subsequently detained by ICE. *Id.* ¶ 72. ICE referred Mario C. to ORR. *Id.* When the Complaint was filed, Mario C. was in ORR custody at a shelter. *Id.* ¶ 12. Mario C.'s mother applied to sponsor him again. *Id.* ¶ 73. On March 28, 2026, ORR released Mario C to the custody of his mother. Biswas Decl. ¶ 5.

In the Complaint, Plaintiffs allege that Benito S. is 17 years old. Compl. ¶ 75. ORR previously released Benito S. to his aunt after he arrived in the United States in 2023. *Id.* ¶ 75. In December 2025, local police arrested Benito S. *Id.* ¶ 77. ICE then detained him and referred him to ORR. *Id.* Benito S.'s aunt has been unable to sponsor him because she does not have a form of identification that ORR requires. *Id.* ¶ 77. When the Complaint was filed, Benito S. was in ORR custody at a shelter. *Id.* ¶ 13. Benito S. remains in ORR custody in a long-term foster care program. Biswas Decl. ¶ 6. Additionally, Benito S.'s case is categorized as a Category 4 case pursuant to UAC Policy Guide Section 2.2.1 because he has no sponsor identified. *Id*.

The named Plaintiffs seek to represent a class of:

> noncitizen minors who are or will be in the custody of HHS and (1) who were previously in ORR custody, (2) who were approved for release by ORR to a sponsor, (3) who have been or will be re-detained by DHS and re-referred to ORR, and (4) whom ORR has not released to their previously approved sponsor pursuant to ORR's policy requiring the previously approved sponsor to submit a new sponsor application and obtain a new approval for release.

Id. ¶¶ 9, 80.

Plaintiffs bring three causes of action. In Count I, Plaintiffs allege that ORR's purported reapplication policy deprives Plaintiffs of liberty without procedural due process in violation of the U.S. Constitution's Fifth Amendment. *Id.* ¶¶ 87–92. In Count II, Plaintiffs contend that ORR's purported reapplication policy is contrary to law and beyond statutory authority in violation of the APA. *Id.* ¶¶ 93–92. In Count III, Plaintiffs assert that ORR's purported reapplication policy is arbitrary and capricious in violation of the APA. *Id.* ¶¶ 102–07.

As for relief, Plaintiffs ask the Court to "[h]old unlawful and set aside ORR's reapplication policy under 5 U.S.C. § 706(2);" declare that the Defendants' actions are unlawful; and "[e]nter preliminary and permanent injunctions enjoining ORR's blanket reapplication policy and requiring ORR to provide children and their previously approved sponsors procedural due process regarding the necessity of a new sponsor approval decision." Compl., Prayer for Relief, ¶¶ d.–f.

Plaintiffs moved for class certification on February 23, 2026. ECF No. 4. Plaintiffs also moved for a preliminary injunction and requested provisional class certification on February 24, 2026. ECF No. 10. Plaintiffs' motion for class certification is fully briefed and remains pending.

III. April 30, 2026 Order Denying Plaintiffs' Motion for a Preliminary Injunction

On April 30, 2026, this Court issued its Order denying Plaintiffs' motion for a preliminary injunction, ECF No. 44, and separately issued a Memorandum Opinion in support, ECF No. 43, ("Mem. Op."). Notably, this Court found that when it came to Plaintiffs' procedural due process rights, Plaintiffs could not show a risk of erroneous deprivation of their liberty interests considering the process that the government is already providing. *See* Mem. Op. at 11. Additionally, when it came to assessing the availability of APA review, this Court found that Plaintiffs claims were foreclosed because habeas is "the most appropriate relief for Plaintiffs." *Id*. at 16. This Court also found that "Plaintiffs do not appear likely to show that ORR is acting outside its statutory authorization." *Id*. at 20. In its analysis, this Court highlighted that Congress requires ORR to

"promptly" place those UAC "in the least restrictive setting that is in the best interest of the child." *See id*. (quoting 6 U.S.C. § 279(b)(2)(A)(ii); 8 U.S.C. § 1232(c)(2)(A)). However, "[r]equiring sponsors to submit new applications . . . is the agency's choice to make so long as it comports with other constitutional limits." Mem. Op. at 20. Lastly, when it came to arbitrary and capricious review, this Court noted that ORR's "[d]ecision to require previously approved sponsors to resubmit new applications may err on the side of 'providing safe and secure placements' at the expense of 'prompt[ness],' but the Court cannot say at this stage that ORR's decision is likely so unreasonable that it constitutes arbitrary agency action." *Id.* at 23 (quoting 8 U.S.C. § 1232(c)(2)(A)).

Defendants now move to dismiss the Complaint in its entirety.

LEGAL STANDARDS

I. Rule 12(b)(1)

Federal Rule of Civil Procedure ("Rule") 12(b)(1) requires dismissal of claims where the Court "lack[s] jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). "Rule 12(b)(1) presents a threshold challenge to the Court's jurisdiction . . . [and] the Court is obligated to determine whether it has subject-matter jurisdiction in the first instance." *Curran v. Holder*, 626 F. Supp. 2d 30, 32 (D.D.C. 2009) (internal citation and quotation marks omitted). "A federal court presumptively lacks jurisdiction in a proceeding until a party demonstrates that jurisdiction exists." *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 n.9 (D.C. Cir. 1984) (emphasis added); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[I]t is presumed that a cause lies outside [the federal courts'] limited jurisdiction."). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). In deciding a motion to dismiss for lack of subject-matter jurisdiction, the Court "may consider materials outside the pleadings." *Cason v. Nat'l Football League Players Ass'n*, 538 F.

Supp. 3d 100, 108 (D.D.C. 2021) (quoting *DePolo v. Ciraolo-Klepper*, 197 F. Supp. 3d 186, 189 (D.D.C. 2016)).

II. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true," to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is "plausible" if the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Mere "labels and conclusions," "formulaic recitation[s] of the elements of a cause of action," and "'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). For purposes of a 12(b)(6) motion, the "complaint" includes matters incorporated therein, *e.g.*, *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009), and the Court may also consider "documents attached [to the complaint as exhibits] or incorporated [by reference], and matters of which the court may take judicial notice." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

ARGUMENT

I. Diego N., Renesme R., and Mario C.'s claims are moot and no exception applies.

Three of the four named Plaintiffs' claims are moot. Specifically, Plaintiffs Diego N., Renesme R., and Mario C., have been released from ORR custody. *See* Biswas Decl. ¶¶ 3–5.[2] Article III of the Constitution limits the jurisdiction of the federal courts to "cases" or "controversies;" thus, a federal court cannot render an opinion in the absence of a justiciable controversy. *See* U.S. Const. art. III, § 2. "Even where litigation poses a live controversy when

[2] While Benito S. is in long-term foster care, he is still within ORR custody. Biswas Decl. ¶ 6.

filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (citations omitted); s*ee also Natural Res. Def. Council v. NRC*, 680 F.2d 810, 813–14 (D.C. Cir. 1982) ("'[N]o justiciable controversy is presented . . . . when the question sought to be adjudicated has been mooted by subsequent developments.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)); *see also Newdow v. Roberts*, 603 F.3d 1002, 1008 (D.C. Cir. 2010) ("It is a basic constitutional requirement that a dispute before a federal court be 'an actual controversy. . . . extant at all stages of review, [and] not merely at the time the complaint is filed.' This rule assures that 'federal courts are presented with disputes they are capable of resolving,' . . . . and are not mere opportunities to engage in spirited sophistry.") (citations omitted). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013).

Here, Plaintiffs challenge the lawfulness of ORR's practice of subjecting all potential sponsors of a UAC, whether they are first time applicants or were previously approved, to thorough vetting procedures. *See* Compl. at 11. However, Diego N., Renesme R., and Mario C. are no longer subject to these requirements since they are no longer in ORR custody and have been released to sponsors. *See* Biswas Decl. ¶¶ 3–5. Plaintiffs' claims were rendered moot once they were released from ORR custody, therefore, they must be dismissed because there is no longer controversy for which meaningful relief can be provided.

Additionally, Plaintiffs cannot meet their burden to prove that either of the two narrow exceptions to the mootness doctrine applies here. *See Honeywell Int'l, Inc. v. Nuclear Regulatory*

Comm'n., 628 F.3d 568, 576 (D.C. Cir. 2010) ("The initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot, but the opposing party bears the burden of showing an exception applies."); *see Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009) (describing two exceptions: (1) where "the specific claim [is] capable of repetition, yet evading review," and (2) "the voluntary cessation doctrine") (citation omitted).

The voluntary cessation exception may be applicable when "a defendant voluntarily changes its allegedly unlawful conduct and ensures that federal courts do not leave a wily defendant 'free to return to his old ways.'" *See Sharp v. Rosa Mexicano, D.C., LLC*, 496 F. Supp. 2d 93, 98 (D.D.C. 2007) (citation omitted). But this exception cannot apply here. First, Defendants' conduct is not unlawful. As discussed *infra*, the TVPRA requires that ORR verify that a sponsor, whether previously approved or a first-time applicant, remains "capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). This requires thorough and proper vetting for all potential UAC sponsors. Second, the three named Plaintiffs who were released to sponsors were released in the normal course. *See* Biswas Decl. ¶¶ 3–5. The named Plaintiffs received the same processes as all UAC receive, and the agency has not voluntarily changed the alleged unlawful conduct. *See id.*; *see also* March 10, 2026 Declaration of Toby Biswas, ECF No. 33-1 ¶¶ 45–48 (Plaintiffs' Case Statuses). Thus, the voluntary cessation exception does not apply.

Plaintiffs also cannot invoke the "capable of repetition, yet evading review" exception to mootness. This exception is limited to cases where: "(1) the challenged action was in its duration too short to be fully ligated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subject to the same action again." *See*

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (stating that exception "applies only in exceptional situations").

It is highly speculative that the three named Plaintiffs will again be re-referred to ORR custody. Mere speculation or "[a] 'theoretical possibility,' . . . is not sufficient to qualify as 'capable of repetition'[;] . . . . [t]here must instead be a 'reasonable expectation' or 'demonstrated probability' that the action will recur." *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 951 (D.C. Cir. 2005) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam)); *see also Weinstein*, 423 U.S. at 149 ("While petitioners will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number.").

Accordingly, these three named Plaintiffs cannot save their claims from mootness, and they must be dismissed from the lawsuit pursuant to Rule 12(b)(1).

II. Plaintiffs fail to state a plausible procedural due process claim in Count I.

The Court should dismiss Count I of the Complaint because Plaintiffs fail to allege a plausible procedural due process claim under the U.S. Constitution's Fifth Amendment. *See* Compl. ¶¶ 87–92. The Due Process Clause of the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. To bring a procedural due process claim, "the plaintiff must show the Government deprived her of a liberty or property interest to which she had a legitimate claim of entitlement, and that the procedures attendant upon that deprivation were constitutionally insufficient." *Roberts v. United States*, 741 F.3d 152, 161 (D.C. Cir. 2014) (citation modified). "A cognizable liberty or property interest is essential because process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* (citation modified); *see also Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S.

886, 895 (1961) ("Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required.") (footnote omitted).

"If the plaintiff has been deprived of a protected interest, [the Court] then consider[s] whether the procedures used by the Government in effecting the deprivation 'comport with due process.'" *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). Due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Jifry v. F.A.A.*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (citation modified). "It is well settled that the requirements of due process are flexible and highly dependent on context." *Al-Hela v. Biden*, 66 F.4th 217, 237 (D.C. Cir. 2023) (en banc). When resolving procedural due process claims in the administrative context, courts generally weigh three factors:

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

Jifry, 370 F.3d at 1183 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see Al-Hela*, 66 F.4th at 228–29 (applying the *Mathews* test to a habeas petition); *but see id.* at 269 & n.10 (Randolph, J., concurring in the judgment and dissenting) (arguing that *Mathews* does not apply to "cases involving illegal aliens held at the border").

Here, Plaintiffs' due process claim fails because Plaintiffs have not alleged a constitutionally cognizable liberty interest given their age and lack of lawful immigration status.

At best, Plaintiffs have alleged only weak private interests that do not justify additional procedures when weighed against the government's interests.

A. Plaintiffs allege, at best, a weak liberty interest.

Plaintiffs allege that they have three cognizable liberty interests: (1) personal liberty; (2) family integrity; (3) and "a statutory claim of entitlement to placement in the least restrictive setting with their previously approved sponsor." Compl. ¶ 89. However, to resolve the due process claim, the Court must carefully assess the "precise nature of the private interest" that Plaintiffs assert. *See Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("Only after that interest has been identified, can we properly evaluate the adequacy of the State's process.") (citation omitted). Here, Plaintiffs' status as alien minors without lawful status in the United States undercuts the asserted liberty and family unity interests, and the TVPRA does not create a statutory entitlement.

1. <u>As alien minors never admitted to the United States, Plaintiffs lack a constitutionally protected right to be released at liberty into the country.</u>

Plaintiffs lack a cognizable personal liberty interest, or possess only a weak private interest, because they are aliens without lawful status and are minors placed in non-secure settings.

"For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Mathews v. Diaz,* 426 U.S. 67, 81 (1976)). "[O]ver no conceivable subject is the legislative power of Congress more complete." *Id.* (quoting *Fiallo v. Bell,* 430 U.S. 787, 792 (1977)). For that reason, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 305–06 (quoting *Fiallo*, 430 U.S. at 792). Here, Plaintiffs' liberty interest is subject to Congress's "broad power over immigration and naturalization." *Id.*; *see also DHS v. Thuraissigiam*, 591 U.S. 103, 138 (2020) ("[A]s to foreigners

who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.").

In addition, Plaintiffs have a limited interest in physical liberty because they are minors placed in non-secure group homes or foster care. In *Flores*, the Supreme Court held that the "freedom from physical restraint . . . is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement." 507 U.S. at 302. Under the Juvenile Care Agreement, minors were placed in facilities "that meet 'state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children,' and are operated 'in an open type of setting without a need for extraordinary security measures.'" *Id.* at 298 (citations omitted). The Supreme Court found that "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement." *Id.*

Similarly, Plaintiffs allege that they are in "shelter[s]." Compl. ¶¶ 10–13. Except in certain circumstances, ORR places minors in "standard programs that are not restrictive placements." 45 C.F.R. § 410.1104. Standard programs must be "licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children" or meet the requirements of state licensing that would otherwise be applicable in states that do not license programs that care for UAC. 45 C.F.R. § 410.1001. Standard programs must meet a variety of minimum standards and provide numerous services for children. 45 C.F.R. §§ 410.1302–.1311. Thus, "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement." *Flores*, 507 U.S. at 302. Although ORR placements impose rules and structure on minors, Plaintiffs cannot claim a "right to come and go at will" because, as juveniles, they "are

always in some form of custody." *Id.* (citation modified); *see Hutchins v. District of Columbia*, 188 F.3d 531, 538–39 (D.C. Cir. 1999) ("[U]nemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.,* the right to come and go at will." (quoting *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 654 (1995)).

Thus, as alien minors in non-secure facilities, Plaintiffs have at most a weak interest in personal liberty.

2. The only Plaintiff with a live claim, Benito S., has no constitutionally protected interest in family integrity, and the putative class has only a weak interest at most.

Plaintiffs' interest in "family integrity" does not equal a constitutional right for an alien to be released to a family member in the United States.

As an initial matter, this asserted right would not apply to any members of the putative class who were previously released from ORR custody into the custody of a non-family member. In *Flores*, the Supreme Court held that alien children "for whom the government is responsible" do not have a due process right to be placed in the custody of a non-family member who is a "willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Flores*, 507 U.S. at 302–06; *see also id.* at 308 (rejecting "for the same reasons" an attempt to "recast" the "substantive due process" argument in "procedural due process" terms).

The Court in *Flores* did not have occasion to rule on whether there is a release right for those seeking to go to the custody of parents, legal guardians, or close relatives. *Id.* at 302. But the well-settled principle that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government" suggests that there is no such right. *Flores*, 507 U.S. at 305 (quoting *Mathews,* 426

U.S. at 81). Aliens do not have a constitutional right to enter the United States to reside with their family members. *Cf. Dep't of State v. Munoz*, 602 U.S. 899, 910–12 (2024) ("[T]he through line of history is recognition of the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens. And Muñoz points to no subsidiary tradition that curbs this authority in the case of noncitizen spouses."). And there is no "substantive due process right to family unity in the context of immigration detention pending removal." *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 210–11 (4th Cir. 2019). Because no right of family unity exists in that context, the Fourth Circuit in *Reyna* also rejected the plaintiffs' procedural due process claim based on that alleged right. *Id.* at 211. The cases that Plaintiffs principally rely on do not address the context of alien minors at all, much less the specific asserted right for an alien minor to be released from government custody into the United States to live with a family member. *See* Compl. ¶ 53 (citing cases).

Benito S.'s claim further illustrates the disconnect between Plaintiffs' asserted right and the precedent that they cite. Benito S. is the only Plaintiff who remains in ORR custody and has a live claim in this lawsuit. *See* Biswas Decl. ¶ 6. He was previously placed with his aunt, not a parent. Compl. ¶ 75. The law recognizes the fundamental liberty "interest of *parents* in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (emphasis added) (collecting cases). But the right of parents to care for their children is a far cry from the right that Benito S. asserts as an alien minor to be released from ORR custody to live with his aunt. To be sure, the state cannot criminally charge close relatives for living in the same household. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 497, 500–01 (1977) (plurality opinion). But the right of family members to share a household without being criminally charged is also quite different from the right that Benito S. asserts here.

Benito S. has no constitutionally protected interest in being released as an alien minor from government custody to the custody of his aunt. And the putative class either has no interest or at best a weak interest in family unity given their alienage.

3. The TVPRA does not provide a constitutionally protected interest.

Contrary to Plaintiffs' claim, the TVPRA does not provide them "a statutory claim of entitlement to placement in the least restrictive setting *with their previously approved sponsor*." Compl. ¶ 89 (emphasis added); *compare* 8 U.S.C. § 1232(c)(2)(A).

Procedural due process "does not protect everything that might be described as a 'benefit.'" *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). To have a "property interest" in a benefit created by statute, an individual must "have a legitimate claim of entitlement to it." *Id.* (quoting *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)). The Supreme Court holds that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Id.* Moreover, "state-created procedures do not create such an entitlement where none would otherwise exist." *Doe by Fein v. District of Columbia*, 93 F.3d 861, 868 (D.C. Cir. 1996), *certified question answered*, 697 A.2d 23 (D.C. 1997).

Here, Plaintiffs assert that the following provision of the TVPRA grants them an enforceable right to placement in their previous sponsors' custody:

> Subject to section 279(b)(2) of Title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.

8 U.S.C. § 1232(c)(2)(A). That provision does not create a legitimate claim of entitlement because it leaves the placement decision ultimately within the government's discretion. The statute sets out general standards that do not require ORR to release a minor to any particular sponsor. ORR may also decide that the least restrictive setting in the best interest of the child is to remain in ORR

custody. "Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague." *Town of Castle Rock*, 545 U.S. at 763.

The D.C. Circuit has recognized that "release to a sponsor is at the discretion of the government." *J.D. v. Azar*, 925 F.3d 1291, 1332 (D.C. Cir. 2019). Even in a case where the district court largely held an expansive view of UAC's due process rights, the court nevertheless ruled that the TVPRA's statement, "that a minor 'shall be promptly placed in the least restrictive setting,' does not contain specific substantive limits on Defendants' discretion." *Lucas R. v. Becerra*, No. CV 18-5741-DMG (PLAX), 2022 WL 2177454, at *15 (C.D. Cal. Mar. 11, 2022); *see also id.* at *24 ("Without any specific substantive predicates, the TVPRA creates no liberty interest relating to release to a custodian for the unfit-custodian class."). Thus, the TVPRA does not provide a basis for Plaintiffs' due process claim.

Plaintiffs have alleged, at most, a weak liberty interest that does not require additional procedures.

B. Plaintiffs do not show that the current procedures unduly risk an erroneous deprivation of a protected right or that the proposed substitute procedures would add significant value.

ORR's current vetting process already provides minors an opportunity to be released from ORR custody, 45 C.F.R. § 410.1201(a), provides sponsors the opportunity to prove their suitability, *id.* § 410.1202, and allows close relatives to appeal the denial of their sponsor applications, *id.* §§ 410.1205(c)–(e), 410.1206. ORR' s procedures require ORR or the care provider program to "make and record the prompt and continuous efforts on its part towards family unification and the release" of each child. *Id.* § 410.1203(a). ORR's vetting process is a crucial safety assessment designed specifically to address the vulnerabilities of UAC while in its care. *See* 45 C.F.R. § 410.1003(a). The depth of ORR's vetting reflects the reality that the life circumstances

of both sponsors and UAC are fluid. Changes in household composition, financial stability, or a child's specific needs necessitate contemporaneous screenings to prevent release into unstable environments. *See id.* § 410.1202(b)–(i) (requiring ORR to assess the *current* facts prior to approving a sponsor).

Plaintiffs do not challenge the appropriateness and necessity of ORR's vetting process generally. Rather, Plaintiffs challenge that process as applied to them. Plaintiffs believe the vetting is too slow. Compl. ¶ 36 ("ORR's blanket reapplication policy unnecessarily prolongs children's detention and separation from their families."). But Plaintiffs do not show that they have a constitutionally protected interest in an adjudication within a specific timeframe. Thus, a temporary period of custody while ORR vets the current circumstances in accord with the TVPRA and the Foundational Rule is not an erroneous deprivation of a protected right.

Plaintiffs also allege that the vetting process may erroneously result in the denial of release to a previously approved sponsor. *See* Compl. ¶ 47. But there is no erroneous deprivation of a right to release or family unity if ORR cannot determine that the potential sponsor is currently suitable. Neither due process nor the TVPRA requires release to a potential sponsor who cannot satisfy the vetting procedures that ORR has determined are necessary to fulfill its statutory obligations, protect children, and prevent crime. The sponsors were previously approved under vetting procedures from one to three years ago. *See* Compl. ¶¶ 60, 67, 71, 75. ORR has found it necessary since the prior release of these Plaintiffs to enhance its vetting procedures. *See id.* ¶¶ 38, 40–44. That a sponsor was previously approved one to three years ago does not mean that the sponsor is currently suitable under the standards that ORR has determined are necessary to protect children. And, as discussed in the previous section, the prior sponsorship approval does not create a

constitutionally protected, ongoing entitlement. Therefore, Plaintiffs have not plausibly alleged an undue risk of an erroneous deprivation.

Plaintiffs also do not show that their proposed substitute procedures would be valuable enough to outweigh their costs. Plaintiffs request that ORR be ordered "to make an individualized determination within 72 hours of the class member's re-referral to ORR" as to whether material changed circumstances justify reconsidering the "prior sponsor approval decision." ECF No. 10-2 at 2. And Plaintiffs ask the Court to require ORR to provide all class members "with a hearing before a neutral and detached decisionmaker within seven (7) days of the class member's re-referral to ORR custody or within seven (7) days of this order if the class member is already in custody." *Id.*

To the extent Plaintiffs suggest that DHS should not have arrested them and removed them from their previous sponsor's custody, Compl. ¶ 50, the proposed new procedures would do nothing to stop that alleged harm. Plaintiffs have not sued DHS, and DHS would not be subject to any of Plaintiffs' new procedures.

In addition, the new procedures may not lead to a faster release in many cases. Even the carefully phrased allegations in Plaintiffs' Complaint show that, in many cases, changed circumstances may warrant a thorough investigation of the sponsorship situation. For example, Mario C. and Benito S. were referred to ORR custody after contact with law enforcement. Compl. ¶¶ 72, 76.

The second *Mathews* factor does not support Plaintiffs' claim that additional procedures are needed.

C. The government's interests weigh against the judicial creation of new procedural requirements.

The final factor of the *Mathews* test looks to the "administrative burden and other societal costs that would be associated with requiring" Plaintiffs' proposed procedures, "as a matter of constitutional right." *Mathews*, 424 U.S. at 347. Requiring Plaintiffs' proposed procedures would harm the government's important interests in multiple ways.

First, bypassing the determination of whether the potential sponsor is currently suitable would undermine the government's interest in preventing release to an unsafe sponsor where a UAC could be abused, neglected, endangered, or trafficked. ORR must ensure that potential sponsors are, in fact, suitable and that UAC "are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity." 6 U.S.C. § 279(b)(2)(A)(ii). And ORR must ensure that UAC are "placed in a setting in which they are not likely to pose a danger to themselves or others." *Id.* § 279(b)(2)(A)(iii). Further, ORR must determine that a sponsor "is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). This safety and suitability determination must "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.* Rushing or skipping those determinations could harm the government's and the public's interest in protecting children and preventing crime.

Second, Plaintiffs' proposed procedures would require ORR to violate the statutory scheme that Congress created in its plenary power. In the TVPRA, Congress mandated that UAC "may not be placed with a person or entity unless" ORR determines "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) (emphasis added). This safety and suitability determination must "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.* Thus, by law, ORR must maintain custody of UAC until it makes a determination that the sponsor is currently capable of caring for the child and, as of the time of the release, "has not engaged" in activity that would indicate a risk to the child.

Plaintiffs, however, would flip the analysis. Instead of requiring ORR to maintain custody until it can determine that the sponsor "is capable" to care for the child, Plaintiffs would require ORR to release the child, unless ORR can prove by clear and convincing evidence that the prior sponsor "is not capable" of providing for the child. ECF No. 10-2, at 3. Likewise, Plaintiffs would ignore the statute's command that ORR must make an "independent finding that the individual *has* not engaged in any activity that would indicate a potential risk to the child." 8 U.S.C. § 1232(c)(3)(A) (emphasis added). Plaintiffs would have ORR release a child based on its determination that the sponsor *had* not engaged in such activity as of the time ORR previously vetted the sponsor (years ago, in Plaintiffs' cases). The government "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). That is especially true in the context of immigration matters that are "committed to the political branches of the Federal Government," not the Judiciary. *Flores*, 507 U.S. at 305.

In sum, Plaintiffs fail to allege a plausible due process claim. Plaintiffs have limited liberty interests in this context, and the current regulatory framework as mandated by the TVPRA, HSA, Foundational Rule, and UACB Policy Guide provides the appropriate balance without compromising UAC safety. The Court should dismiss Count I.

III. Plaintiffs fail to state plausible APA claims in Counts II and III.

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. APA review is unavailable here because Plaintiffs do not challenge final agency action and they have another adequate remedy in a court through a writ of habeas corpus. In addition, Plaintiffs fail to show that ORR's actions are contrary to law or arbitrary and capricious. Thus, the Court should dismiss Plaintiffs' APA claims in Counts II and III.

A. Plaintiffs do not challenge final agency action.

As relevant here, the APA strictly limits judicial review to "final agency action." 5 U.S.C. § 704. This finality requirement is a critical prerequisite, preventing premature judicial intervention in administrative processes that are not yet conclusive. Plaintiffs assert that the "reapplication policy, and each application of that policy to each Plaintiff and putative class member to disregard their sponsor's previous approval, is a final agency action." Compl. ¶ 95. That is incorrect. A two-prong test governs whether an agency action is "final." *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature." *Id*. (citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id*. at 178 (citation omitted). Without final agency action, Plaintiffs "lack a cause of action under the APA." *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (citation modified). The alleged agency actions that Plaintiffs challenge do not meet either prong of the *Bennett v. Spear* test.

As to the alleged "reapplication policy," Plaintiffs point to nothing establishing that such a policy exists in its own right. Plaintiffs do not allege when ORR supposedly adopted this policy. Plaintiffs also do not identify any document or regulatory action taken to adopt the alleged policy.

Thus, the supposed policy that Plaintiffs challenge is not the consummation of the agency's decision-making, as required under the first prong. Moreover, legal consequences to Plaintiffs do not flow from the supposed policy (that does not exist). Rather, legal consequences flow to Plaintiffs from the TVPRA and the Foundational Rule that require ORR to conduct certain steps and to consider the potential sponsor's current fitness and the UAC's present circumstances prior to release in all cases. 8 U.S.C. § 1232(c)(3)(A); 45 C.F.R. § 410.1202(b)–(c), (f). The only administrative records available for APA review would be of the TVPRA and Foundational Rule (which Plaintiffs do not challenge) and of the adjudication in each individual case. Similarly, there is nothing for the Court to hold unlawful and set aside other than the decisions in Plaintiffs' particular cases. Therefore, as to the alleged reapplication policy, Plaintiffs also do not meet the second prong of the *Bennett v. Spear* test.

As to each Plaintiffs' particular case, requiring the potential sponsor to reapply is not final agency action either. The sponsorship application is not the consummation of the agency's decision-making; it is a procedural step before the ultimate decision of whether to release the child to the sponsor. And if ORR does ultimately deny release to a close relative, the denial may be appealed. 45 C.F.R. § 410.1206.

Thus, the Court should dismiss Plaintiffs' APA claims because they do not challenge final agency action.

B. Plaintiffs have another adequate remedy in court through habeas.

As this Court highlighted in its Memorandum Opinion, ECF No. 43, Plaintiffs' APA claims fail because Plaintiffs have another "adequate remedy in a court" through a writ of habeas corpus. Mem. Op. at 16 ("Habeas is thus not merely 'adequate' relief but is likely the most appropriate relief for Plaintiffs."); *see* 5 U.S.C. § 704.

In making this determination, the Court "must give the APA a hospitable interpretation such that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) (citation modified). But APA review is precluded "where Congress has otherwise provided a special and adequate review procedure." *Id.* at 522 (citation modified). The alternative remedy must offer more than "doubtful and limited relief." *Id.* (citation modified). The alternative remedy, however, "need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'" *Id.* at 522 (quoting *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. HHS*, 396 F.3d 1265, 1272 (D.C. Cir.2005). "Thus, for example, relief will be deemed adequate 'where a statute affords an opportunity for *de novo* district-court review' of the agency action." *Id.* at 522–23 (quoting *El Rio Santa Cruz Neighborhood Health Ctr.*, 396 F.3d at 1270).

Here, Congress has provided an adequate opportunity for alternative district-court review of the challenged agency action in the general habeas statute, 28 U.S.C. § 2241. Although Plaintiffs do not directly ask for release, they allege that their being in government custody is unlawful without additional procedural protections. And Plaintiffs' goal is to be more quickly released from ORR custody and placed in the custody of their previous sponsors. Thus, Plaintiffs challenge the fact or duration of ORR's custody, and those claims could be heard through a petition for a writ of habeas corpus. *Trump v. J.G.G.*, 604 U.S. 670, 674 (2025) (Kavanaugh, J., concurring) ("[G]iven 5 U.S.C. § 704, which states that claims under the APA are not available when there is another 'adequate remedy in a court,' . . . habeas corpus, not the APA, is the proper vehicle here."); *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus[.]" (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). Courts routinely address habeas claims from

detained aliens alleging that the government must release them or afford them greater procedural protections. *See, e.g.*, *J.G.G.*, 604 U.S. at 672–73; *Demore v. Kim*, 538 U.S. 510, 513–14 (2003); *D.B. v. Cardall*, 826 F.3d 721, 725 (4th Cir. 2016).

Plaintiffs' claims are core habeas claims: They challenge the fact and length of ORR's custody when a previously approved sponsor is available to take custody, and the claims are more appropriately heard on a case-by-case basis. *See I.M. v. U.S. Customs & Border Prot.*, 67 F.4th 436, 442 (D.C. Cir. 2023); *see Al-Hela*, 66 F.4th at 224. Plaintiffs' claims, if true, would invalidate ORR's custody and require release. Indeed, Plaintiffs have regularly cited habeas cases. *See* ECF No. 42 (citing *E.F.E.L. v. Noem*, No. 26-cv-02507, 2026 WL 1045550 (N.D. Ill. Apr. 17, 2026)); ECF No. 10 at 14 (citing *A.N.P.S. v. Salazar*, No. 25-CV-14778, 2025 WL 3707333, at *1 (N.D. Ill. Dec. 22, 2025)).

Notably, "situation-specific litigation affords an adequate, even if imperfect, remedy." *Garcia*, 563 F.3d at 525. Here, though, situation-specific litigation through habeas likely provides a better remedy and a better vehicle for reviewing Plaintiffs' challenges. Resolving due process claims through a class action can be difficult because "[d]ue process is flexible" and "calls for such procedural protections as the particular situation demands." *Jennings v. Rodriguez*, 583 U.S. 281, 313–14 (2018) (citation modified) (instructing the court of appeals, in light of that concern, to "consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause"). In addition, an individual habeas action allows a court to order release, if warranted. Release immediately ends the allegedly unlawful executive detention and does not require the court "to design additional procedures for ORR," a task that is outside a district court's "competen[ce]." *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016).

Consequently, a proceeding for a writ of habeas corpus is an "adequate remedy" that forecloses APA review here. *See Silva v. Bienemy*, No. CV 25-4118 (RC), 2026 WL 261910, at *3 (D.D.C. Feb. 1, 2026); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 78 (D.D.C. 2018); *Stern v. Fed. Bureau of Prisons*, 601 F. Supp. 2d 303, 305 (D.D.C. 2009); *see also Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994).

C. ORR's alleged actions are not contrary to law or beyond statutory authority.

If the Court reaches the merits of Plaintiffs' APA claims, it should nonetheless dismiss them. In Count II, Plaintiffs allege that ORR's reapplication policy is contrary to law and beyond statutory authority. Compl. ¶¶ 93–101. The TVPRA and Foundational Rule do not contain special rules to govern the specific situation of when UAC are re-referred to ORR custody. Therefore, Plaintiffs base their claim on general statements in the statute and regulations. Specifically, Plaintiffs contend that "ORR's reapplication policy violates the TVPRA's command to promptly place children 'in the least restrictive setting that is in the best interest of the child,' which is usually with a 'suitable family member.'" *Id.* ¶ 96 (quoting 8 U.S.C. § 1232(c)(2)(A)). Plaintiffs also argue that "[t]he reapplication policy results in unnecessary delays in release and in ORR preferencing more distant relatives or unrelated sponsors with United States documentation over parents, guardians, and other close relative sponsors who lack such documentation in violation of 45 C.F.R. § 410.1201(a)." *Id.* ¶ 99.

However, determining that a potential sponsor is currently suitable is a prerequisite to a finding that placement with the sponsor is "the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), and to the Foundational Rule's general preference for release to family members, 45 C.F.R. § 410.1201(a). Both the TVPRA and the Foundational Rule require ORR to take specific vetting steps before release in every case. ORR must verify that a sponsor, whether previously approved or a first-time applicant, remains "capable of providing for the

child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). As such, past approvals are not, and should not be, a guarantee for re-approval.

And the regulations support ORR's vetting of sponsors for all UAC. "Prior to releasing an unaccompanied child, ORR *shall* conduct a suitability assessment to determine whether the potential sponsor *is capable* of providing for the unaccompanied child's physical and mental well-being." 45 C.F.R. § 410.1202(b) (emphasis added). This language has no exceptions. And ORR "shall conduct a suitability assessment." "Shall" is mandatory. The regulations further reinforce ORR's duty to conduct sponsor suitability assessments: "Subject to an assessment of sponsor suitability, . . . ORR shall release a child from its custody . . . ." *Id.* § 410.1201(a). This section requires an assessment of sponsor suitability before ORR releases the child. Thus, ORR has a duty to conduct suitability assessment of a sponsor each time it releases a child.

Other provisions reinforce that ORR needs to evaluate even previously approved sponsors. "ORR *shall* assess the nature and extent of the potential sponsor's previous and *current* relationship with the unaccompanied child, and the unaccompanied child's family, if applicable." *Id.* § 410.1202(d) (emphasis added). If ORR excepted previously approved sponsors from suitability assessments, ORR would be ignoring this regulatory command that it "shall assess" the "current relationship" between sponsor, child, and family. *Id.* Regulations must be read so that each provision is given effect. Ignoring this requirement to assess the sponsor and child's current relationship could have consequences too—potentially missing child abuse during the previously approved sponsorship period.

Indeed, "ORR *shall not be required to release* an unaccompanied 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." *Id.*

§ 410.1203(e) (emphasis added). This regulation imposes an ongoing, continuous obligation on ORR. To meet this ongoing, continuous obligation, ORR must evaluate all potential sponsors; excepting previously approved sponsors would ignore this regulatory obligation on ORR to ensure the child's safety and the child's obligation to attend future immigration proceedings.

Therefore, ORR's actions are not contrary to law.

D. ORR's alleged actions are not arbitrary and capricious.

Plaintiffs further allege in its Complaint that ORR's "reapplication policy is plainly arbitrary and capricious because ORR has already determined that the sponsors are suitable and did so pursuant to the requirements of the TVPRA." *See* ECF No. 1. They further state that "Defendants provide no justification for their sudden change in position on sponsor approval, nor do they make an individualized determination of each sponsor's continued suitability." *Id.* However, this argument simply ignores ORR's obligation to follow the requirements of the TVPRA, the HSA, the Foundational Rule, and its own UACB Guidance Policies to ensure that UAC are safe upon their release.

"The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency[.]" *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted); *see FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513* (2009). "[This] standard of review is highly deferential to the agency," *See Bean Dredging, LLC v. United States*, 699 F. Supp. 2d 118, 126 (D.D.C. 2010), and to survive the "arbitrary and capricious" standard, the agency need only articulate "a rational connection between the facts found and the choice made," *See Motor Vehicle Mfrs*., 463 U.S. at 43. "The question is not what [the reviewing court] would have done, nor whether [the court] agree[s] with the agency action. Rather, the question is whether the agency

action was reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015).

Here, the Court should not substitute Plaintiffs' preferred framework for ORR's mandated structure, even if it were to disagree with that structure. Under the deferential arbitrary and capricious standard that the Court applies under the APA, ORR's abiding by the TVPRA, HSA, Foundational Rule, and UACB Policy Guide to re-referred UAC is lawful. ORR has a responsibility to make decisions that are in the best interest of a child in its custody. While Plaintiffs have postured a preferred ORR assessment method for re-referred UAC, there are no such legal requirements based in any text. Rather, ORR must follow the statutes, regulations, and policies in existence when it comes to the safety of UAC in its custody, even those that are re-referred. Similarly, Plaintiffs do not challenge the lawfulness of those policies as a general matter.

Therefore, Plaintiffs arbitrary and capricious arguments are without merit and ORR's actions lawful.

CONCLUSION

For these reasons, the Court should grant Defendants' motion and dismiss Plaintiffs' Complaint.

Dated: May 4, 2026

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIEGO N., *et al*.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.,*

Defendants.

Civil Action No. 26-0577 (JCN)

DECLARATION OF TOBY BISWAS

I, **Toby Biswas**, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. This declaration also incorporates my previous declaration signed on March 10, 2026 (ECF No. 33-1).

2. I am submitting this declaration in the above-captioned matter in order to provide information to the Court concerning the status of the named Plaintiffs.

3. Diego N. was released on March 12, 2026 to his father.

4. Renesme R. was released on March 25, 2026 to her father.

5. Mario C. was released on March 28, 2026 to his mother.

6. Benito S. is currently at a Long Term Foster Care group home. Benito's case is categorized as a Category 4 case pursuant to UAC Policy Guide Section 2.2.1 because he has no sponsor identified.

7. I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, D.C.

May 4, 2026

_____

Toby Biswas
Assistant Deputy Director for Policy
Unaccompanied Alien Children Bureau
Office of Refugee Resettlement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIEGO N., *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Civil Action No. 1:26-cv-577-CJN

[PROPOSED] ORDER

UPON CONSIDERATION of Defendants' motion to dismiss, and the entire record herein, it is hereby

ORDERED that Defendants' motion is GRANTED, and it is further

ORDERED that Plaintiffs' Complaint be DISMISSED in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

SO ORDERED:

_____
Date

_____
CARL J. NICHOLS
United States District Judge