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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

Jenny Lisette Flores, *et al.*,

Plaintiffs,

v.

Jefferson B. Sessions, Attorney General,
et al.,

Defendants.

Case No. CV 85-4544-DMG (AGR_x)

MEMORANDUM IN SUPPORT OF MOTION
TO ENFORCE CLASS ACTION
SETTLEMENT

Hearing: May 18, 2018
Time: 9:30 a.m.
Room: 1st St. Courthouse
Courtroom 8C

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1 **I INTRODUCTION**

2 On January 28, 1997, the Court approved a class-wide settlement of this action.
3 Exhibit 80, Plaintiffs’ Exhibits, filed herewith (“PX”), at 556 (“Settlement”). The
4 agreement sets standards for the detention and release of juveniles detained for
5 alleged civil violations of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et*
6 *seq.*¹ The Settlement binds successors to the Immigration and Naturalization Service
7 (“INS”), including Department of Health and Human Services’ Office of Refugee
8 Resettlement (“ORR”), which since 2002 has been responsible for the custody and
9 release of unaccompanied class members.²

10 The Settlement requires ORR to minimize the detention of children and,
11 thereby, the harm detention causes them. In the William Wilberforce Trafficking
12 Victims Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044,
13 *codified in pertinent part at* 8 U.S.C. § 1232 (“TVPRA”), Congress incorporated this
14 bedrock principle into federal law.

15 ORR has nonetheless adopted certain policies and practices that prolong
16 children’s detention under ever-harsher conditions, creating a continuum of trauma
17 that class members—many of whom arrive in the United States having suffered
18 horrific abuse abroad—are ill-equipped to endure.

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20
21 ¹ The Settlement covers “all minors who are detained in the legal custody of the INS,”
22 and binds the INS and Department of Justice, as well as “their agents, employees,
23 contractors, and/or successors in office.” Settlement ¶ 1. The Settlement is binding
24 until “45 days following defendants’ publication of final regulations implementing
25 this Agreement.” Exhibit 3, Plaintiffs’ First Set of Exhibits, etc., Feb. 2, 2015 (Dkt.
26 101), at 54. Defendants have never published such regulations.

27 ² In 2002, the Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (“HSA”),
28 dissolved the INS and transferred most of its functions to the Department of
Homeland Security (“DHS”). Congress directed, however, that the ORR should have
authority over unaccompanied minors detained pursuant to the INA. 6 U.S.C § 279.
The HSA included savings provisions that continue the Settlement in effect as to the
INS’s successor agencies. HSA §§ 462(f)(2), 1512(a)(1).

1 First, ORR “steps up” youth from shelters to medium-secure, secure, and
2 psychiatric facilities without the most rudimentary procedural fairness or
3 transparency. Youth housed in shelters report being awakened in the small hours of
4 the morning and soon thereafter finding themselves confined in juvenile halls or
5 psychiatric facilities. ORR allows youth no administrative procedure—no interview,
6 hearing or administrative appeal—by which they may defend themselves against
7 needless step-up.

8 Second, ORR routinely administers children psychotropic drugs without lawful
9 authorization. When youth object to taking such medications, ORR compels them.
10 ORR neither requires nor asks for a parent’s consent before medicating a child, nor
11 does it seek lawful authority to consent in parents’ stead. Instead, ORR or facility
12 staff sign “consent” forms anointing themselves with “authority” to administer
13 psychotropic drugs to confined children.

14 Finally, the above practices—unlawful in and of themselves—work a further
15 injustice: once ORR steps up a class member, winning release to available custodians
16 becomes exponentially more difficult, and prolonged detention all but certain.
17 According to ORR policy, children who have ever been in a staff-secure or secure
18 facility remain detained until ORR’s director or his designee consents to release; such
19 consent is typically many weeks in coming, if it comes at all, and is required even
20 when the step-up was based on “inaccurate, or erroneous information.”

21 Once ORR steps up a youth to a residential treatment center (“RTC”), an RTC
22 doctor must authorize release. In effect, ORR’s summarily dispatching a child to a
23 psychiatric facility converts immigration-related custody into indefinite civil
24 commitment, and ORR does so without affording youth the most rudimentary
25 procedural protection.

26 Such a continuum of trauma would not be inflicted today on any other
27 population. But ORR detains immigrant and refugee children and freely exalts its
28

1 own administrative convenience to deny basic protections the Settlement confers. It
2 falls to this Court to remedy a palpable injustice.

3 **II THE COURT MAY AND SHOULD PRESCRIBE PROCEDURAL REMEDIES TO**
4 **PROTECT THE SETTLEMENT’S SUBSTANTIVE PROVISIONS.**

5 This Court has affirmed its jurisdiction to enforce the Settlement and set out
6 the principles for doing so. Order re: Plaintiffs’ Motion to Enforce Settlement, July
7 24, 2015 (Dkt. 177), at 3 (“24A Order”). Those principles remain apposite and need
8 not be repeated here.

9 As concerns remedy, the Court has “‘inherent power to enforce consent
10 judgments, beyond the remedial contractual terms agreed upon by the parties
11 [because] a consent judgment contemplates judicial interests apart from those of the
12 litigants.’” *United States v. N.Y.C. Dist. Council of N.Y.C.*, 229 Fed. Appx. 14, at *18,
13 181 L.R.R.M. 3105 (2d Cir. 2007). “Until the parties have ‘fulfilled their express
14 obligations’ to comply with a consent decree, ‘the court has continuing authority and
15 discretion—pursuant to its independent, juridical interests—to ensure compliance.’”
16 *Id.* at *18 n.5 (internal citation omitted, alteration in original); *United States v. Volvo*
17 *Powertrain Corp.*, 758 F.3d 330, 343 (D.C. Cir. 2014) (“Where, as here, a consent
18 decree ‘does not specify the consequences of a breach,’ the district court has
19 ‘equitable discretion’ to fashion a remedy for violations of the decree.”) (internal
20 citations omitted).

21 In *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 & n.20 (9th
22 Cir. 1992), the Ninth Circuit held that a federal court’s authority to remedy violations
23 of a consent decree are the same as when constitutional violations occur. The
24 Supreme Court, of course, has often prescribed procedures, independently of the Due
25 Process Clause, to protect constitutional rights. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103,
26 112, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975) (“To implement the *Fourth Amendment’s*
27 protection against unfounded invasions of liberty and privacy,” magistrate must
28 review probable cause for arrest) (emphasis in original); *Miranda v. Arizona*, 384

1 U.S. 436, 478-79 (1966) (when detained individual is subjected to police questioning,
2 “the privilege against self-incrimination is jeopardized [and] [p]rocedural safeguards
3 must be employed to protect the privilege.”).

4 This Court may accordingly prescribe procedures in furtherance of the
5 Settlement’s substantive standards. *E.g.*, *EEOC v. Local 580, Int’l Ass’n of Bridge,*
6 *Structural & Ornamental Ironworkers*, 925 F.2d 588, 592 (2d Cir. 1991) (affirming
7 “creation of backpay hearings” to further compliance with consent decree).

8 Constitutional principles of due process are in accord. Because the Government
9 voluntarily entered into the Settlement, the substantive rights it provides are “state-
10 created.” *Smith v. Sumner*, 994 F.2d 1401, 1406 (9th Cir. 1993). ORR may not,
11 therefore, deny class members those rights without due process. *Id.*³ Each of the
12 remedies Plaintiffs seek is justified under the familiar test for determining what
13 process is due. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

14 The Court should enter a remedial order in the form proposed herewith.

15 **III ORR UNLAWFULLY DENIES CLASS MEMBERS LICENSED PLACEMENTS.**

16 **A Youth have a compelling interest in licensed placement.**

17 Settlement ¶ 19 requires ORR to place the general population of class members
18 in non-secure facilities licensed to care for dependent, as opposed to delinquent,
19 minors. ORR may deny youth a licensed placement only under defined
20 circumstances. Settlement ¶ 21.

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28 ³ Other circuits may hold to the contrary, at least as concerns prospective relief. *E.g.*,
Benjamin v. Jacobson, 172 F.3d 144, 164 (2d Cir. 1999).

1 At any given time, ORR confines approximately 200 youth in three types of
2 unlicensed facilities:⁴ (1) “staff-secure” facilities; (2) RTCs; and (3) juvenile jails.⁵
3 Class members have a clear interest in avoiding step-up to unlicensed facilities.

4 In contrast to children in licensed placements, children in staff-secure facilities
5 and RTCs typically must wear institutional clothing, are kept under 24-hour
6 surveillance, have limited contact with family, and are summarily disciplined for
7 violations of facility rules. Decl. of Isabella M., Exhibit 10 (PX 61) ¶ 2 (“Isabella
8 M.”) (minor under 24-hour surveillance); Decl. of Gloria P., Exhibit 41 (PX 233) ¶ 2
9 (“Gloria P.”) (same); Decl. of John Doe 2, Exhibit 74 (PX 470) ¶ 27 (“If you lose two
10 points in a day, you don’t go outside your room.”). A children’s lawyer describes
11 security at a staff-secure facility as follows:

12 The entrance to the area of the building where the UAC children are detained is
13 always locked, and I must press a buzzer and wait for security to allow me to
14 enter. The door is locked from both sides, and so a staff member is also
15 required to unlock the door and let me out . . . Once I have entered the
16 Morrison Facility, I must . . . await staff to open a second locked door before I
17 can enter the hallway leading to the locked room where I meet with [my
18 client]. To my recollection, every door that I have seen be opened at Morrison
19 must be opened by a staff member with a key.
20

21 ⁴ A “licensed program” must be “licensed by an appropriate State agency to provide
22 residential, group, or foster care services for dependent children. . . . All homes and
23 facilities operated by licensed programs . . . [must] be non-secure as required under
24 state law. . . .” Settlement Definition 6. Although staff-secure, RTC, and secure
25 facilities may hold a license of some sort, they are not “licensed placements” as the
Settlement defines them. *See* 24A Order at 4 (Yolo juvenile hall “not licensed to care
for dependent children.”).

26 ⁵ ORR currently houses detained youth in three juvenile jails: Yolo County Juvenile
27 Hall in California, and Shenandoah Valley Juvenile Center (“SVJC”) and Northern
28 Virginia Juvenile Detention Center (“NoVA”) in Virginia. Decl. of Carlos Holguín,
Exhibit 87 (PX 648) ¶ 3 (“Holguín”).

1 Decl. of Leland Baxter-Neal, Exhibit 5 (PX 32) ¶¶ 9-10; *see also* Decl. of Nicolás C.,
2 Exhibit 2 (PX 13, 16-17) ¶¶ 7-8 (“The conditions of Paso are very different from
3 those of the shelter in Kansas City. . . . Everything has a key. . . . I always have to
4 wear a uniform, which makes me feel like a prisoner.”).

5 Conditions in secure facilities are more restrictive and prison-like still. Class
6 member Samuel W. describes them as follows:

7 I am suffering a lot being in the Yolo Juvenile Detention Center. It is a jail and
8 I sleep in a locked, small jail cell. I can’t leave here and have no freedom at all.

9 We only get one hour of time outside each day. I have to live in a small cell
10 with concrete walls. We have to sleep on hard beds with very thin mattresses.

11 Decl. of Samuel W., Exhibit 44 (PX 248) ¶ 8 (“Samuel W.”).

12 Youth in secure facilities report being handcuffed, locked in cells, and pepper
13 sprayed. Decl. of Julio Z., Exhibit 64 (PX 420-21) ¶¶ 29, 31 (“Julio Z.”) (“I sleep in a
14 locked jail cell. . . . The guards also push us, pepper spray us[.] . . .”); Decl. of John
15 Doe 1, Exhibit 73 (PX 460, 462) ¶¶ 9, 20 (“At Shenandoah, my room had a mattress,
16 a sink, and a toilet . . . I was forced to wear handcuffs on my wrists and shackles on
17 my feet for approximately 10 days in a row.”); Decl. of John Doe 3, Exhibit 75 (PX
18 475) ¶ 12 (“[W]henever I was put in restriction, they took away my mattress and
19 blanket. They took my clothes away about 8 times.”); Decl. of D.M., Exhibit 76 (PX
20 483-84) ¶¶ 16-18 (Children strapped into chairs, and bags placed over their heads;
21 youth thought, “they are going to suffocate me. . .”).

22 **B ORR affords youth neither adequate notice nor opportunity to be**
23 **heard in denying them licensed placements.**

24 Despite their clear interest in licensed placement, ORR regularly steps up youth
25 without giving them notice or the least opportunity to be heard. Class member
26 Roberto F.’s description is fairly typical:

27 One day I had a disagreement on the soccer field. A staff member approached
28 me suddenly. I was surprised and without thinking I reacted, but I was accused

1 of beating him. About two days later, suddenly at four in the morning the
2 supervisor came to tell me that they were going to move me to another
3 program. And that is how I arrived at Shenandoah. They gave me no hearing or
4 opportunity to explain my side of the facts.

5 Decl. of Roberto F., Exhibit 37 (PX 214, 218) ¶ 7 (“Roberto F.”); *see also* Decl. of
6 Jaime V., Exhibit 45 (PX 252-53) ¶¶ 11-14 (youth not told where he was going;
7 thought he was being deported); Decl. of Ricardo U., Exhibit 39 (PX 225) ¶ 2
8 (stepped up minor falsely told he was being stepped down); Gloria P. (PX 233) ¶ 3
9 (stepped up minor falsely told she was going to another shelter).⁶

10 And ORR step-ups are *entirely* unilateral. The agency purports to use a
11 “placement tool,” into which it enters information about a child. ORR, Children
12 Entering the United States Unaccompanied: § 1.3.2, *available at*
13 [www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.3.2)
14 [section-1#1.3.2](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.3.2) (last rev. Apr. 22, 2016). The tool generates a “score” and
15 recommends placement: licensed or stepped up. Only ORR supervisory federal field
16 specialists may override the tool’s recommendation. *Id.*

17 Once ORR decides to step up a youth, it sometimes uses a form, “Notice of
18 Placement in a Restrictive Setting,” Exhibit 22, PX 114-15, which, to Plaintiffs’
19 knowledge, exists only in English, to explain its reasons for step-up. Most youth
20 report never having seen the form. Samuel W. (PX 248) ¶¶ 2, 7 (“I speak Spanish and
21 only a few words of English. . . . When the government sent me to Yolo Juvenile
22 Detention Center, . . . I don’t remember them ever giving me any explanation of my
23 rights in Spanish . . .”); Supp. Decl. of Isabella M., Exhibit 11 (PX 66-67) ¶ 6 (minor
24 never given form notice of placement in restrictive setting); Supp. Decl. of David I.,
25 Exhibit 15 (PX 86-87) ¶ 3 (same).

26
27 ⁶ ORR’s failing to notify children of the basis for step-up also denies notice of their
28 right to judicial review in violation of Settlement ¶ 24C.

1 Even were ORR to issue its form notice consistently, it would do class
2 members little good. Few read English, and ORR allows neither children nor their
3 lawyers to inspect or rebut its evidence or otherwise oppose step-up. Short of going to
4 federal court, children simply have no procedure by which they may contest ORR
5 decisions to deny licensed placement.⁷ Decl. of Sofia O., Exhibit 40 (PX 228) ¶ 5
6 (“Sofia O.”) (“I did not have an opportunity to object to the transfer.”); Gloria P. (PX
7 233) ¶ 3 (“I don’t remember receiving any document that explained that I had the
8 right to challenge the government’s decision to send me to Shiloh.”); Decl. of Javier
9 C., Exhibit 30 (PX 170) ¶ 4 (“Javier C.”) (same); Decl. of D.M., Exhibit 76 (PX 481)
10 ¶ 5 (“But I never had a chance to dispute this [transfer.]”).

11 This is not exactly what the Ninth Circuit envisioned when it affirmed this
12 Court’s order requiring ORR to provide minors bond hearings:

13 For those minors in secure detention, bond hearings additionally provide an
14 opportunity to contest the basis of such confinement. For example, the TVPRA
15 allows children to be placed in secure detention facilities only if they pose a
16 safety risk to themselves or others, or have committed a criminal offense.

17 These are precisely the determinations made by an immigration judge at a bond
18 hearing.

19 Providing unaccompanied minors with the right to a hearing under Paragraph
20 24A therefore *ensures that they are not held in secure detention without cause.*

21
22 ⁷ ORR purports to allow children to request “reconsideration” of placement in a
23 secure or RTC facility, but only *after* they have spent 30 days in one. Exhibit 22, PX
24 115. Youth who have spent far longer in such facilities report knowing nothing about
25 this or any other means to request step-down. *E.g.*, Gloria P. (PX 233) ¶ 4 (youth
26 detained nearly four months in RTC; “No one has sat down with me and reviewed
27 whether I should be stepped down . . . or told me . . . what I have to do in order to
28 step down.”); Decl. of Carlos A. Exhibit 31 (PX 175) ¶ 5 (“Carlos A.”) (youth
detained three months in juvenile hall; “I don’t remember them ever telling me that I
could ask for the decision to put me here to be reviewed . . .”); Decl. of Gabriela N.,
Exhibit 19 (PX 103) ¶ 7 (same; youth detained three months in RTC).

1 *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017) (emphasis added).

2 ORR simply disregards the Ninth Circuit’s holding, insisting that it “only
3 applies to the question of dangerousness as it applies to release. An immigration
4 judge’s order may be taken under advisement when making a placement decision but
5 is not binding on ORR . . .” Email from T. Biswas, Feb. 23, 2018, Exhibit 70, PX
6 448.⁸

7 Nor is class members’ suing in federal court a viable remedy. ORR contrives to
8 deny them counsel to challenge step-ups, thus ensuring that indigent, non-English-
9 speaking minors have no meaningful chance to do so.

10 TVPRA § 235(c)(5) requires ORR to “ensure, to the greatest extent practicable
11 . . . that all unaccompanied alien children who are or have been in the custody of
12 [ORR], and who are not [from contiguous countries], have counsel to represent them
13 in *legal proceedings or matters and protect them from mistreatment. . .*” (Emphasis
14 added.)

15 Congress appropriates funds so ORR may provide lawyers to minors in its
16 custody. Between 2009 and 2013, ORR paid the Vera Institute of Justice nearly \$40
17 million to provide legal services. Exhibit 16, Plaintiffs’ Exhibits, Aug. 12, 2016 (Dkt.
18 239-3), at 51. Vera sub-contracts with legal aid programs to represent class members.
19 *Id.* at 7-9.

20 All this does class members little good in securing their rights under the
21 Settlement:

22 Lawyers whom the Vera Institute funds had, and continue to have, [little]
23 latitude in advocating for detained immigrant and refugee children. . . .

24 [D]uring my employment with [Vera-funded] HIAS Pennsylvania I was
25 instructed that I could not assist detained children [to] challenge ORR’s release
26

27 ⁸ Mr. Biswas issued his email in the case of former class member Santiago H. An
28 immigration judge found Santiago not dangerous and ordered ORR to step him down.
Custody Order, Feb. 21, 2018, Exhibit 68, PX 443. ORR simply refused.

1 or placement decisions, no matter how arbitrary or otherwise unlawful ORR’s
2 decisions appeared. I know of no Vera-funded legal services provider who has
3 ever represented a minor in federal court against ORR.

4 Decl. of Justin Mixon, Exhibit 81 (PX 588) ¶ 9 (“Mixon”); *see also* Affidavit of
5 Lorilei Williams, Exhibit 85 (PX 617) ¶ 19 (ORR “hobbles free legal services
6 providers who undertake to represent detained children.”); Decl. of Megan Stuart,
7 July 29, 2016, Exhibit 86 (PX 626-27) ¶¶ 22-24 (same).

8 As a practical matter, Vera-funded services are the *only* legal help most class
9 members will ever get. Mixon (PX 587) ¶ 8 (“Apart from Vera Institute-funded legal
10 services providers, I know of only a handful of lawyers who are truly versed in the
11 rights of immigrant and refugee minors in ORR custody. In my experience, private
12 practitioners generally lack the resources to pursue federal litigation on behalf of their
13 clients[.] . . .”).

14 ORR’s blocking Vera lawyers from helping detained minors challenge step-up
15 ensures that few, if any, class members will ever do so.

16 **D Peremptory step-ups violate ¶¶ 19, 21 and 24B of the Settlement.**

17 ORR’s policies deny minors licensed placements on grounds neither the
18 Settlement nor the TVPRA authorize.

19 The Settlement permits unlicensed placement in five circumstances⁹: the minor
20 (1) has committed a violent crime or non-petty delinquent act; (2) threatened violence
21 while in federal custody; (3) is an unusual escape-risk; (4) is so disruptive that secure
22 confinement is necessary to protect the minor or others; or (5) must be protected from
23 smugglers and the like. Settlement ¶ 21.¹⁰

24
25 _____
26 ⁹ The TVPRA allows ORR only two: *i.e.*, the youth “is a danger to self or others or
27 has been charged with having committed a criminal offense.” TVPRA
28 § 235(c)(2)(A).

¹⁰ Even if an exception to licensed placement applies, ORR must house children in the
“least restrictive setting” practicable, Settlement ¶ 11, and may not place minors in a

1 ORR’s “Notice of Placement in a Restrictive Setting,” Exhibit 22, however,
2 posits seven reasons for secure, four for staff-secure, and four for RTC placement, a
3 total of 15 grounds for denying class members their right to licensed placement.

4 Some of these “extras” express little more than vague *suspicion* that a juvenile
5 *might* be dangerous: *e.g.*, “inappropriate sexual behavior,” or “[h]av[ing] self-
6 disclosed . . . gang involvement prior to placement in ORR custody that requires
7 further assesment.” Paragraph 21, however, allows step-up under specific
8 circumstances, not mere vague suspicion.

9 There can be no material dispute that ORR in fact dispatches youth to secure
10 facilities precipitously. In *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal.
11 2017), ICE re-arrested several juveniles whom ORR had earlier released, allegedly
12 because they were involved with gangs. *Id.* at 1178. ORR sent the youth to juvenile
13 halls, including Yolo County’s. *Id.* at 1199. Yet according to Yolo County Juvenile
14 Hall’s Chief Probation Officer, ORR’s evidence for sending the minors to his facility
15 was “often insufficient, and . . . the Yolo County Probation Department . . . did not
16 have just cause to detain most of these minors.” *Id.* at 1199.

17 The court preliminarily enjoined ORR to provide re-arrested juveniles bond
18 hearings and to release those whom immigration judges found non-dangerous. *Id.* at
19 1205-06. Twenty-nine youth received hearings; judges ordered ORR to release
20 twenty-six. Request for Judicial Notice, *Saravia v. Sessions*, No. 18-15114 (9th Cir.,
21 March 16, 2018), Exhibit 79 (PX 554-55). All told, ORR had wrongly sent 90 percent
22 to secure facilities.

23 This Court has ample discretion to require meaningful procedural protection
24 against ORR’s wrongfully denying class members their right to licensed placement. It
25 should do so by entering Plaintiffs’ proposed order.

26
27 _____ juvenile hall if “less restrictive alternatives,” such as a “medium security facility” or
28 “another licensed program” are available. Settlement ¶ 23.

1 **IV ORR UNLAWFULLY MEDICATES YOUTH WITHOUT PARENTAL AUTHORIZATION.**

2 ORR also regularly places youth on multiple psychotropic medications. It often
3 tells children little or nothing about the drugs, nor does the agency obtain parental
4 consent, or the legal equivalent thereof, to medicate children.

5 There can be no question that psychotropic drugs can seriously and
6 permanently injure children, yet ORR routinely administers such drugs to youth in
7 utter disregard of state laws designed to support children's mental health. Even when
8 a child may truly benefit from psychotropics, both the law and common decency
9 demand that parents decide whether their child should be medicated. Again, ORR
10 prefers to act autocratically, regularly medicating children without consulting their
11 parents, even those readily available to ORR and facility staff.

12 **A ORR regularly compels youth to take psychotropic medications.**

13 ORR regularly places detained children on multiple psychotropic drugs
14 regardless of the child's concerns or wishes.

15 Sometimes, facility staff will not tell youth what drugs they are being given or
16 why. *See, e.g.*, Julio Z. (PX 418) ¶ 16 ("I never knew exactly what the pills were.");
17 Julio Z. Patient Profile, Exhibit 63 (PX 413) (listing Clonazepam, Divalproex,
18 Duloxetine, Guanfacine, Latuda, Geodon, and Olanzapine); Decl. of David I., Exhibit
19 14 (PX 81) ¶ 7 ("David I.") ("I take four pills in the morning and about four to six
20 pills in the evening. I don't know what all these pills are for, but I think the one I take
21 at night are for depression and anxiety."); David I. Patient Profile, Exhibit 57 (PX
22 400) (listing Clonidine, Escitalopram, and Quetiapine); Decl. of Rosa L., Exhibit 17
23 (PX 95) ¶ 5 ("Rosa L.") ("I take 4 or 5 pills . . . one of the pills is for anxiety. I don't
24 know what the other pills are for."); Rosa L. Patient Profile, Exhibit 58 (PX 402)
25 (listing Aripiprazole, Chlorpromaz, Desmopressin, Escitalopram, Lamotrigine,
26 Lithium, and Trazodone); Javier C. (PX 170) ¶ 5 ("I took nine pills in the morning
27 and seven in the evening. I don't know what medications I was taking . . ."); Decl. of
28 Maricela J., Exhibit 48 (PX 262) ¶ 4 ("Maricela J.") ("I take 4 pills in the morning . . .

1 then I have to take 5 more pills at night. I have not been told why I am required to
2 take all this medication.”).

3 ORR gives class members no choice but to take whatever psychotropic
4 medications it prescribes. Youth report being told that if they refuse drugs they will
5 remain detained, be denied release or privileges, or be physically forced to take them.
6 *See, e.g.*, Julio Z. (PX 417-18) ¶¶ 15, 16 (“The staff threatened to throw me on the
7 ground and force me to take the medication. I also saw staff throw another youth to
8 the ground, pry his mouth open and force him to take the medicine. . . . They told me
9 that if I did not take the medicine I could not leave, that the only way I could get out
10 of Shiloh was if I took the pills.”); David I. (PX 82) ¶ 8 (“I have not refused taking
11 the pills because I was told that . . . would make me stay at Shiloh longer . . .”); Rosa
12 L. (PX 95) ¶ 6 (“Sometimes they give me forced injections . . . one or two staff hold
13 my arms and the nurse gives me an injection.”); Maricela J. (PX 263) ¶ 8 (“I
14 witnessed staff members forcefully give medication four times . . . two staff members
15 pinned down the girl . . . and a doctor gave her one or two injections . . .”); Isabella
16 M. (PX 62) ¶ 14; Sofia O. (PX 229) ¶ 11.¹¹

17 Nor does ORR allow children who object to being medicated any procedural
18 recourse. *See, e.g.*, Julio Z. (PX 418) ¶ 20 (“I tried to ask [the doctor] why I was
19 being forced to take the medications but he would ignore my questions . . . I wasn’t
20 told of any way that I could challenge the decision to be on the medications.”);
21 Maricela J. (PX 262) ¶ 5 (“I have complained about receiving too many medications
22 and Dr. Ruiz says it is not within his control . . .”); Javier C. (PX 171) ¶ 10 (“I wanted
23
24

25 ¹¹ Youth report that Shiloh staff, in particular, will leave medicated children in
26 common areas until they recover their senses. *See, e.g.*, Javier C. (PX 171) ¶ 8
27 (“[T]hey would come and give me a shot to tranquilize me. . . . [Then] they left me in
28 the classroom near the wall to sleep.”); David I. (PX 83) ¶ 11 (“Two staff grabbed
me, and the doctor gave me the injection despite my objection and left me there on
the bed.”).

1 to stop taking all these medications . . . but . . . they told me that I had to continue
2 because it calmed me.”).

3 **B ORR unlawfully usurps parental rights to make medication**
4 **decisions.**

5 ORR medicates children wholly without regard for their parents’ wishes. *See,*
6 *e.g.*, Decl. of Mother of Isabella M., Exhibit 12 (PX 71, 74) ¶ 4 (“Mother of Isabella
7 M.”) (“Nobody asked me for my permission to give medications to my daughter,
8 even though the staff at Shiloh has always had my telephone number and address.”);
9 Maricela J. (PX 263) ¶ 7 (“I don’t think anyone in my family was asked if it was okay
10 for me to take medicine.”); David I. (PX 81) ¶ 7 (“As far as I know, ORR did not ask
11 my mother for permission before they gave me the medication.”).

12 ORR or facility staff instead sign forms “consenting” to children’s medication,
13 though the forms themselves recognize the consenting authority only of a “Parent,
14 Guardian, or Conservator.” *See, e.g.*, Decl. of Carter White, Exhibit 89 (PX 654-55)
15 (Shiloh staff sign consent form, not parent, relatives or potential sponsor); (Isabella
16 M. Medication Forms, Exhibit 59, PX 404-05 (medication forms signed by Shiloh
17 staffer Tabatha Ketner as “Parent, Guardian, or Conservator”); Gabriela N.
18 Medication Form, Exhibit 60, PX 407 (same); Sofia O. Medication Form, Exhibit 61,
19 PX 409 (same); Julio Z. Parental Medical Authorization Form, Exhibit 62, PX 411
20 (medical consent supplied by Yolo Director F. Ray Simmons, not parent or
21 guardian).¹²

22
23
24

25 ¹² ORR’s forms appear to require its own consent before facilities medicate children,
26 but they do not suggest that facilities obtain consent from a child’s parent or
27 judicially authorized consenter. *See, e.g.*, ORR Authorization for Medical, Dental,
28 and Mental Health Care for Carlos A., Exhibit 88, PX 651-52. As discussed below,
Texas law requires such judicial authorization in the absence of parental consent.
Tex. Fam. Code Ann. § 266.004(b).

1 **C Psychotropic drugs threaten children with serious, long-term injury.**

2 Psychotropic medications act on the central nervous system and affect
3 cognition, emotions, and behavior, and serious, long-lasting adverse effects are
4 common. In adults, psychotropic drugs can have serious and sometimes irreversible
5 side effects, including psychosis, seizures, irreversible movement disorders, suicidal
6 ideation, weight gain, and organ damage. Government Accountability Office, GAO-
7 12-270T, *Foster Children: HHS Guidance Could Help States Improve Oversight of*
8 *Psychotropic Prescriptions*, 5-6 (Dec. 1, 2011) (“HHS Guidance”).

9 Comparatively little is known about the effects of psychotropic drugs on
10 children and adolescents. ACF Children’s Bureau, ACYF-CB-IM-12-03, *Information*
11 *Memorandum*, 7-8 (Apr. 11, 2012) (“ACF Memorandum”). The FDA has approved
12 only a few such drugs for children, and when these are prescribed, careful oversight
13 and monitoring are essential. HHS Guidance at 4. Giving children *multiple*
14 psychotropic drugs is almost always to be avoided because “[i]ncreasing the number
15 of drugs used concurrently increases the likelihood of adverse reactions and long-
16 term side effects, such as high cholesterol or diabetes . . .” *Id.*

17 The importance of oversight when giving psychotropic medications to children
18 is well established. Without it, the potential for abuse—including using drugs as
19 “chemical straight-jackets” to control children, rather than to treat actual mental
20 health needs—is unacceptably high. *See* 42 U.S.C. § 622(b)(15)(A) (requiring states
21 to develop “a plan for the ongoing oversight and coordination of health care services
22 for any child in a foster care placement,” including “protocols for the appropriate use
23 and monitoring of psychotropic medications.”); ACF Memorandum 10-11
24 (“Strengthened oversight of psychotropic medication use is necessary” as is “close
25 supervision and monitoring . . . [and] careful management and oversight” in
26 administering children psychotropics.).

27 Not surprisingly, children medicated in ORR custody report negative side
28 effects, including nausea, dizziness, somnolence, depression, and grotesque weight

1 gain. *See, e.g.*, Julio Z. (PX 418) ¶ 18 (“After taking the medication, I was more tired,
2 I felt sad and my eyes got teary . . . I began to gain a lot of weight . . . In
3 approximately 60 days, I gained 45 pounds.”); Javier C. (PX 170) ¶ 5 (“The medicine
4 made me fat. I used to be really skinny.”); Maricela J. (PX 262) ¶ 5 (“When I take
5 medicine, I do not have any mood. . . . I have suffered side effects including
6 headaches, loss of appetite and nausea.”); Mother of Isabella M. (PX 71, 74) ¶ 4
7 (“[T]hey are requiring [my daughter] to take very powerful medications for anxiety. I
8 have noted that [she] is becoming more nervous, fearful, and she trembles. [She] tells
9 me that she has fallen several times . . . because the medications were too powerful
10 and she couldn’t walk.”); Letter re: Psychotropic Medications, Exhibit 27,
11 Attachment 10, PX 158 (Yolo psychologist notes child “overmedicated”;
12 recommends drugs be “taper[ed] off”).

13 **D ORR’s disregard for state law safeguards in medicating youth**
14 **violates the Settlement.**

15 Facilities in which ORR places minors with mental health needs must “meet
16 those standards . . . set forth in Exhibit 1.” Settlement ¶¶ 6, 8.¹³ Exhibit 1 requires that
17 licensed programs “comply with all applicable *state child welfare laws* and
18 regulations . . . and shall provide or arrange for the following services for each minor
19 in its care: . . . *appropriate* mental health interventions when necessary. (Emphasis
20 added). *See also* Letter from James De La Cruz, April 2, 2018, Exhibit 83, PX 598
21 (acknowledging applicability of Texas law to Shiloh RTC).

22 In Texas, where Shiloh RTC is located,¹⁴ parents have the right to control a
23 minor child’s medical, dental, and psychological treatment absent a judicial
24

25 ¹³ Licensed or not, ORR may place children only in facilities that are “safe” and
26 “consistent with . . . concern for the particular vulnerability of minors . . .” Settlement
27 ¶ 12A.

28 ¹⁴ Though the most severe medication abuses occur at Shiloh RTC, juveniles at other
ORR facilities are also administered psychotropics. *See, e.g.*, Julio Z. Parental

1 determination of unfitness. Tex. Fam. Code Ann. § 151.001(a)(6). Only rarely does
2 Texas law permit non-parents to authorize a child’s medical treatment. Tex. Fam.
3 Code Ann. § 32.001. Even adults with the “actual care, control, and possession of the
4 child” must obtain “written authorization to consent from a person having the right to
5 consent” to treat a minor. Tex. Fam. Code Ann. § 151.001(a)(4).

6 When the state’s Department of Family and Protective Services (“DFPS”) acts
7 *in loco parentis*, Texas law requires that it obtain judicial authorization to treat a
8 minor. Tex. Fam. Code Ann. § 266.004(a), (b). DFPS may not unilaterally designate
9 itself or treatment center staff as a child’s medical consenter. DFPS, CHILD
10 PROTECTIVE SERVICES HANDBOOK § 11113.2.

11 Consent to administer psychotropics to dependent youth must be given by
12 someone lawfully authorized to do so, and the consenting party must be informed of
13 risks and alternatives to the proposed medications. Tex. Fam. Code Ann. § 266.0042.
14 The consenter must also be told about non-pharmacological alternatives to
15 psychotropic drugs. CHILD PROTECTIVE SERVICES HANDBOOK, *supra*, § 11323.

16 Preferring autocracy to due process, ORR does none of this. The Court should
17 order ORR to obtain parental consent, or the lawful equivalent thereof, and to
18 otherwise comply fully with state law when administering psychotropic drugs to
19 detained youth.

20 **V ORR PEREMPTORILY EXTENDS MINORS’ DETENTION ON SUSPICION THAT**
21 **AVAILABLE CUSTODIANS MAY BE UNFIT.**

22 Youth may spend weeks, months or even years in ORR custody. Each day,
23 they risk offending staff or violating facility rules, whereupon ORR may summarily
24 step them up.¹⁵ Beyond subjecting them to institutional security and drugging, step-up

25 Medical Authorization Form, Dec. 4, 2016, Exhibit 62, PX 411 (Yolo Institutional
26 Services Director provide medical consent in place of parent/guardian).

27 ¹⁵ At any given time, ORR detains about 40 youth in RTCs, 50 in juvenile halls, and
28 115 in staff-secure facilities. Holguín (PX 648) ¶ 4. ORR’s data do not include the
average length of stay for youth placed in these facilities. However, in December

1 deals youth an additional blow: once ORR sends a youth to an unlicensed placement,
2 his or her chances of prompt release vanish.

3 Settlement ¶ 14 provides: “Where the INS determines that the detention of the
4 minor is not required either to secure his or her timely appearance before the INS or
5 the immigration court, or to ensure the minor’s safety or that of others, the INS shall
6 release a minor from its custody without unnecessary delay . . .”¹⁶ Further grounding
7 ORR’s obligation to minimize children’s detention, Settlement ¶ 18 provides, “Upon
8 taking a minor into custody, the INS . . . shall make and record the prompt and
9 continuous efforts on its part toward . . . the release of the minor . . .”

10 **A ORR unlawfully demands exceptional abilities in custodians for**
11 **stepped-up youth.**

12 The Settlement is clear: ORR has three—and only three—reasons to continue
13 youth in detention: (1) dangerousness; (2) flight-risk; and (3) the lack of a custodian
14 who will not harm or neglect them. Settlement ¶ 14.

15 ORR professes not to detain youth as flight-risks. ORR, Interim Guidance on
16 *Flores v. Sessions*, July 18, 2017, Exhibit 8, PX 48 (“Interim Guidance”). And since
17 July 2017, immigration judges have reviewed a child’s dangerousness. 24A Order,
18 *aff’d, Flores v. Sessions, supra*, 862 F.3d 863.

19 ORR continues, however, to detain children indefinitely because it suspects a
20 potential custodian may be unfit, and it does so entirely without timely neutral and
21

22 2017 ORR released just one youth to a custodian from Shenandoah Valley Juvenile
23 Center, one from Yolo Juvenile Hall, and none from Northern Virginia Juvenile
24 Detention Center. *Id.* (PX 649) ¶ 5.

25 Children in RTCs faced similar odds: ORR released one class member from
26 MercyFirst to a custodian during December, and one from Shiloh. *Id.*

27 ¹⁶ If a child has more than one potential custodian, ORR must release first to a parent,
28 then to a legal guardian, adult sibling, aunt, uncle, or grandparent, an unrelated adult
or entity designated by the minor’s parent, a juvenile shelter, and finally, if there is no
likely alternative to long-term detention, an unrelated adult. Settlement ¶ 14.

1 detached review. *E.g.*, Interim Guidance, PX 48. In reality, ORR extends non-
2 dangerous children’s confinement for reasons having little or nothing to do with a
3 custodian’s actual propensity to harm or neglect.

4 In June 2017 ORR amended its online “Policy Guide” to provide: “The
5 ORR/FFS elevates release decisions to the ORR Director, or the Director’s designee,
6 for any UAC in a secure or staff secure facility, or for any UAC who had previously
7 been in a secure or staff secure facility. The ORR Director or designee makes release
8 decisions for children in these types of facilities.” ORR, Children Entering the United
9 States Unaccompanied: § 2.7, *available at* [www.acf.hhs.gov/orr/resource/children-](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7)
10 [entering-the-united-states-unaccompanied-section-2#2.7](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7) (last rev. June 12, 2017).

11 ORR’s director must now approve the release of all class members “who are in
12 or were previously placed in a secure or staff-secure facility [even if they] have
13 prevailed in a *Flores* bond hearing on a question of dangerousness . . .” or were
14 stepped up on the weight of “incomplete, *inaccurate or erroneous* information” that
15 the minor was affiliated with a gang. FAQ: ORR DIRECTOR’S RELEASE DECISION, Jan.
16 26, 2018, Exhibit 24, PX 120 (emphasis added). Children, their parents and other
17 available custodians describe a Kafkaesque experience in trying to free a child from
18 ORR detention.

19 Class member Santiago H.’s experience illustrates ORR’s refusal to release
20 children from secure detention. In November 2017, ORR confined Santiago at the
21 Shenandoah Valley Juvenile Center (“SVJC”). Case Review, undated, Exhibit 71, at
22 PX 451. SVJC personnel determined that Santiago “does not present any mental
23 health concerns,” “gets along well with others,” and “does not appear to present a risk
24 to himself or the community at this time.” *Id.* at PX 452. SVJC recommended ORR
25 release Santiago to his aunt. *Id.* ORR ignored the findings and recommendation,
26 leaving Santiago in secure confinement for months.

27 In February 2018, Immigration Judge John Bryant held a bond hearing and
28 found Santiago not a danger to the community. The court ordered ORR to step him

1 down to a less secure placement. Custody Order, Feb. 21, 2018, Exhibit 68, PX 443.
2 ORR ignored the order. Email from T. Biswas, Feb. 23, 2018, Exhibit 70, PX 448.

3 In March Santiago turned 18, and ORR turned him over to ICE. ICE
4 dispatched Santiago to an adult detention facility. Later that month, Immigration
5 Judge Karen Donoso-Stevens ordered Santiago released. Order of the Immigration
6 Judge, March 20, 2018, Exhibit 69, PX 445. Santiago is now free to live with his
7 aunt, which ORR could block *only* because she would harm or neglect him. The only
8 difference: Santiago was now a day older.¹⁷

9 In September 2017, ORR placed class member Nicolás C. at the Paso staff-
10 secure facility in Portland, Oregon. According to his mother, ORR prolonged her
11 son's confinement because she had earlier suffered from cancer:

12 [Case worker] Erich . . . assured me again and again that the [release] process
13 would not take long, about 30 days at the most. . . . I sent [all the documents he
14 requested] without delay. . . .

15 However, Erich kept asking me for more and more documents: among them,
16 files from doctors to verify that my cancer would not hinder me from taking
17 care of my son. These . . . caused me great sorrow, and they did not seem
18 necessary to have my son. I believe that a mother has the right to take care of
19 her child even though she is incapacitated, although I am not. It occurred to me
20 that they were looking for an excuse to deny me my son[.] . . .

21 Decl. of Mother of Nicolás C., Exhibit 1 (PX 3, 7) (“Mother of Nicolás C.”) ¶¶ 7-8;
22 *see also* Grandfather of Gabriela N., Exhibit 67 (PX 438) ¶ 9 (“Grandfather of
23 Gabriela N.”) (youth detained six months at Shiloh RTC; “I got the impression that
24 the home investigator didn’t think I made enough money to be able to support [my
25 granddaughter] and myself.”); Decl. of Camila G., Exhibit 55 (PX 393) ¶ 8 (“Camila

26 _____
27 ¹⁷ If Santiago’s example provokes a feeling of *déjà vu*, it is with good reason. *See* 24A
28 Order at 8 (youth spent months in secure ORR detention, only to be released pursuant
to immigration judge’s order after turning 18 and being transferred to ICE custody).

1 G.”) (youth detained for one year and three months; “My case worker told me that the
2 only reason that I haven’t been released to my aunt . . . is because I don’t have an
3 official birth certificate[.] . . . My mother died before she could register me for
4 [one].”).¹⁸

5 **B ORR prolongs children’s detention on the specious ground that**
6 **mental health care is elsewhere unavailable.**

7 ORR also extends detention of youth summarily placed in RTCs on the theory
8 they cannot get mental health care anywhere else. Notice of Placement in a Restrictive
9 Setting, Exhibit 22, PX 114 (grounds for RTC placement include, “ORR has
10 determined that you have a psychiatric or psychological issue that cannot be
11 addressed in an outpatient setting.”).¹⁹

12 _____
13 ¹⁸ Accounts abound of ORR prolonging children’s detention for no apparent reason.
14 *E.g.*, Carlos A. (PX 176) ¶ 10 (minor detained four months; “My case manager said
15 the only reason that I haven’t been released is that the government is now reviewing
16 my case. They have not told me how long it would take . . .”); Decl. of Miguel B.,
17 Exhibit 32 (PX 179) ¶ 5 (youth detained five months; “My mom began trying to get
18 me back . . . Someone came to inspect her house and everything came out well.
19 Neither of us understands why I am still here.”); Roberto F. (PX 214, 217) ¶ 6 (youth
20 detained ten months; “[M]y mom moved from Kansas to Texas to be closer to me. . .
21 . They continued to take long making the decision to let me live with her. According
22 to her, the government did a study of the home, and everything went well.”).

23 ¹⁹ The evidence suggests that months or years of detention itself brings on the
24 psychological distress for which ORR then medicates children:

25 Since last year, when my daughter became a prisoner, I have noticed that she is
26 more and more depressed . . . She tells me that she doesn’t want to be in the
27 detention center. When my daughter and I lived together in Honduras, we
28 never had mental problems. . . . In my opinion, detention is affecting [Isabella]
a lot, and she would quickly get better if they were to return her to me.

29 Mother of Isabella M. (PX 70-71, 73-74) ¶ 3; *see also* Grandfather of Gabriela N.
30 (PX 439) ¶¶ 14-15 (granddaughter “did not have any mental health problems. . . . I
31 think that being locked up for several months has made her be more anxious and
32 upset.”); Excerpts from ORR File for Victoria R., Exhibit 84, PX 605 (“Separation
33 from family” and “Frustration of lengthy reunification process” are “Major Stressors”
34 for the child).

1 Since May 2017—some 10 months now—ORR has detained Isabella M. In
2 early October 2017, ORR placed her at the Shiloh RTC, from which it has doggedly
3 refused to release her because “[t]he doctor has said I can’t leave until I can control
4 myself. He hasn’t told me a time frame for how long it will be before I’m ready.”

5 Isabella M. (PX 61) ¶ 3. Isabella M.’s mother corroborates:

6 During the summer of last year, a home investigator, Jorge Arango, came twice
7 to evaluate my house. . . . When he finished, he told me that everything was
8 approved . . . Much time went by without any further word . . . I called several
9 times asking when they were going to give me [Isabella] back. They always
10 answered that it depended on the doctor . . .

11 Mother of Isabella M. (PX 71, 74) ¶ 5; *see also* Decl. of Daniella Q., Exhibit 9 (PX
12 57) ¶ 3 (“I have been told that the doctor has to say it is alright to release me to my
13 dad.”); Decl. of Victoria R., Exhibit 13 (PX 78) ¶ 4 (same); Decl. of Arturo S.,
14 Exhibit 21 (PX 110) ¶ 3 (same).

15 **C ORR must give non-dangerous youth a prompt and meaningful**
16 **opportunity to be heard regarding a proposed custodian’s fitness.**

17 Rather than assess custodians’ basic fitness, ORR consistently demands
18 extraordinary prowess of stepped-up class members’ custodians.²⁰ The Settlement,
19 however, allows ORR to detain a non-dangerous minor only if it “has reason to
20 believe [an available custodian] may *harm or neglect* the minor . . .” Settlement ¶ 11
21 (emphasis added).²¹

22 Even assuming, *arguendo*, the Settlement were to allow ORR to demand
23 exceptional qualifications of custodians for stepped-up youth, it affords no
24

25 ²⁰ Inasmuch as ORR steps up youth autocratically in the first place, its leveraging
26 step-up to confine youth until and unless a doyen appears is palpable exacerbation.

27 ²¹ ORR’s prolonging class members’ confinement via such policies also violates their
28 right to placement in the least restrictive setting consistent with their best interests, a
violation of TVPRA § 235(c)(2)(A).

1 meaningful chance to be heard on the need for extra qualifications or whether a given
2 custodian possesses them. Again, ORR simply decrees what qualifications a
3 custodian must have and then decides unilaterally whether he or she possesses them.
4 ORR knows that more process than that is surely due.

5 In *Beltran v. Cardall*, 222 F. Supp. 3d 476 (E.D. Va. 2016), ORR refused to
6 release a youth on the ground he “‘require[d] an environment with a high level of
7 supervision and structure,’ and it did not ‘appear . . . that [his mother’s] home [could]
8 provide the structure and supervision necessary[.] . . .’” *Id.* at 480 (internal citation
9 omitted).

10 The minor’s mother sued to compel ORR to release her son. *Id.* at 481. The
11 district court initially denied a writ, *id.*, but the Fourth Circuit reversed in part and
12 instructed the trial court to decide whether ORR had denied due process. *Id.* Held:
13 “[O]nce ORR decided to withhold RMB from Petitioner’s care, ORR ‘ha[d] the
14 burden to initiate’ proceedings to justify its action. . . . [It] could not simply require
15 Petitioner to change the agency’s mind.” *Id.* at 486 (internal citations omitted). The
16 court ordered ORR to release the minor immediately, adding that ORR could refer
17 any concerns it may have for the youth’s well-being to state juvenile authorities. *Id.* at
18 489.

19 Again in *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017), ORR refused
20 to release a minor to his mother on the ground that “‘he requires an environment with
21 a high level of supervision and structure that [his mother is] unable to provide at this
22 time[.] . . .’” *Id.* at 602. Again, the family sued to compel release. *Id.* at 600. Again,
23 the court held that ORR’s refusing release denied due process: “[H]ad better or more
24 process been given (especially as to the delay and the burden being on Ms. Santos to
25 initiate and justify reunification, rather than the default rule being otherwise), the
26 outcome could have been different. . . .” *Id.* at 614.

27 ORR remains undeterred, regularly extending children’s confinement because
28 it questions their proposed custodians’ fitness while refusing to submit its suspicions

1 to neutral and detached review. *E.g.*, Mother of Nicolás C. (PX 4, 8) ¶ 14 (nobody
2 “has told me anything about my son. I have not been made aware of any procedure by
3 which a mother can oppose the prolonged detention of her child [. . .]”); Decl. of
4 Sister of Victoria R., Exhibit 65 (PX 426-27, 429-30) ¶ 4 (“They didn’t give me any
5 opportunity to explain to them . . . that nothing would happen [to my sister] if they
6 would let me take care of her.”); Grandfather of Gabriela N. (PX 439) ¶ 12 (“When I
7 reached out to [my granddaughter’s] social worker at Shiloh, she told me that ORR
8 threw out my application [to be her custodian] . . . ORR has never officially told me .
9 . . . that my application has been rejected.”); Camila G. (PX 394) ¶ 13 (child detained
10 one year and three months; “I don’t know what I can do or what the next step can be
11 for me to try and get out of the shelter if ORR does not allow me to live with my aunt
12 . . .”).

13 In *Beltran* and *Santos* the courts held ORR’s vetting of custodians lacking in
14 threshold constitutionality.²² Here, a consent decree requires ORR to release minors
15 promptly to qualified custodians whether or not release is constitutionally required.
16
17

18 ²² ORR may not detain youth “for their own good” without proving that their parents
19 are unfit. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“Due Process Clause would
20 be offended ‘[if] a State were to attempt to force the breakup of a natural family . . .
21 without some showing of unfitness and for the sole reason that to do so was thought
22 to be in the children’s best interest.’”) (internal citations omitted).

23 Obviously, ORR detention also impairs children’s right to physical liberty. *Saravia*,
24 *supra*, 280 F. Supp. 3d at 1195.

25 The Settlement expands these rights, entitling class members to release to specified
26 non-parents, including grandparents and adult siblings.

27 ORR’s confining youth until it thinks them mentally fit raises further constitutional
28 concerns. It is hard to distinguish such detention from civil commitment, which, of
course, represents a “massive curtailment of liberty,” lawful only with due process
and proof of dangerousness to others. *O’Connor v. Donaldson*, 422 U.S. 563, 575
(1975) (government may not “confine the mentally ill merely to ensure them a living
standard superior to that they enjoy in the private community”).

1 *Cf. Local No. 93, Int’l Ass’n of Firefighters. v. Cleveland*, 478 U.S. 501, 525 (1986)
2 (consent decree may confer greater relief than could have been obtained at trial).

3 ORR’s peremptorily declaring custodians unfit falls short of constitutional
4 minimums, and it can hardly satisfy the Settlement. The Court should order ORR to
5 release non-dangerous class members promptly to available custodians or else submit
6 doubts about their fitness for neutral and detached review.

7 **VI CONCLUSION**

8 For the foregoing reasons, this Court should grant this motion and enter
9 Plaintiffs’ proposed order.²³

11 Dated: April 16, 2018

Respectfully submitted,

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26 ²³ Counsel wish to acknowledge the invaluable assistance of U.C. Davis students
27 Gladys Hernandez, Christian Hatchett, and Mayra Sandoval in preparing this brief.
28 Plaintiffs will separately move the Court to award them attorney’s fees and costs
incurred in the prosecution of this motion.