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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 LUCAS R., et al.,

15 Plaintiffs,

16 v.

17 ALEX AZAR, et al.,

18 Defendants.

Case No. 2:18-CV-05741 DMG PLA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION**

Hearing: None Set

Judge: Hon. Dolly M. Gee

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Harris v. Bd. of Supervisors, Los Angeles Cty.,
366 F.3d 754 (9th Cir. 2004) 22, 23

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4 *In re Request to Commute or Suspend Cnty. Jail Sentences,*
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8 *Rosenbaum v. Washoe Cty.,*
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10 *Small v. Avanti Health Sys., LLC,*
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11 *Spark Indus., LLC v. Kretek Int’l, Inc.,*
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20

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22

23 *Washington v. Trump,*
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27 *Xochihua-Jaimes v. Barr,*
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1 **I. INTRODUCTION**

2 Plaintiffs request a temporary order protecting children whom the Office of
3 Refugee Resettlement (“ORR”) has placed in congregate detention from the clear and
4 present danger the COVID-19 pandemic poses to their health and well-being. While
5 medical experts unanimously demand that we all practice physical distancing, avoid
6 groups of ten or more, and self-isolate, such precautions are all but impossible for
7 children in congregate settings, who are therefore at unacceptable risk.

8 Last Sunday, CNN reported that a 12-year-old child with no preexisting health
9 conditions and no known contact with an infected person was diagnosed with
10 pneumonia, tested positive for coronavirus, and was on a ventilator fighting for her life.¹
11 As her cousin observed, “Everyone keeps saying ‘it doesn’t impact younger people.’
12 But here’s a 12-year-old fighting for her life. People need to practice social distancing.
13 *People need to take care of their children.*”²

14 The spread of COVID-19 into ORR facilities is not hypothetical: It has infiltrated
15 ORR’s MercyFirst and Abbott House congregate facilities in New York,³ and an ICE
16 immigration detainee has tested positive for COVID-19.⁴ Children in ORR’s custody
17 will be placed in life-threatening danger when – not if – the contagion spreads through
18 ORR’s congregate facilities.

19 ORR has immediate legal duties under the TVPRA, *Flores* Settlement, and Fifth
20 Amendment to the Constitution to avoid detaining children in congregate settings as
21 much as possible. The obvious ways of doing so are (1) expediting children’s release to
22 waiting family whenever it is safe to do so, and (2) transferring as many children as

23
24 ¹ See Amara Walker, et al., *12-year-old girl with coronavirus is on a ventilator and fighting for her life*, CNN (Mar. 22, 2020, 11:35 AM), <https://cnn.it/39mU77W>.

25 ² *Id.* (emphasis added).

26 ³ See H. Aleaziz, *A Staff Member at a Facility Housing Unaccompanied Immigrant Children Has Tested Positive for the Coronavirus*, BUZZFEED NEWS (Mar. 19, 2020), <https://bit.ly/39fRPYa>.

27 ⁴ Priscilla Alvarez & Catherine E. Shoichet, *First ICE detainee tests positive for coronavirus*, CNN, <https://cnn.it/39aEyju> (last updated Mar. 24, 2020).

1 possible who must remain in ORR custody to non-congregate settings. A growing
2 number of jails and prisons are taking analogous steps to reduce their populations; ORR
3 has no excuse for failing to follow suit.

4 Presently before the Court, *inter alia*, are the rights of all children in ORR custody
5 whom the agency “is refusing or will refuse to release to parents or other available
6 custodians within 30 days of the proposed custodian’s submission of a complete family
7 reunification packet on the ground that the proposed custodian is or may be unfit (i.e.,
8 the ‘unfit custodian class’).” (Amended Order re Defendants’ Motion to Dismiss and
9 Plaintiffs’ Motion for Class Certification, Dec. 27, 2018 (ECF No. 141) at 27.)

10 Under the current circumstances, an order requiring ORR to release children it
11 has already detained for 30 days to ready custodians, transfer them to non-congregate
12 settings, or else justify why it has done neither, is both reasonable and necessary to
13 protect the rights of the nearly 1,200 children who are members of this certified class.
14 As a collateral benefit, should ORR place a significant number of currently detained
15 children with their families, those remaining in detention will have both more ability to
16 practice social distancing and more medical resources available to them if they fall ill,
17 increasing their chance of protecting themselves against the current pandemic.

18 II. STATEMENT OF FACTS

19 A. The COVID-19 Global Pandemic Demands Extraordinary Measures 20 Be Taken to Protect Class Members.

21 COVID-19 is a deadly and highly infectious disease that has evolved into a global
22 pandemic and spread to all 50 states in the U.S. (Ex. B (Declaration of Dr. Julie DeAun
23 Graves ¶ 6 (“Graves Decl.”)); Ex. C (Declaration of Dr. Jaimie Meyer ¶ 20 (“Meyer
24 Decl.”))).⁵ The disease spreads through respiratory droplets and can be transmitted
25 through person-to-person contact – including contact with asymptomatic individuals –
26 and through contact with inanimate surfaces. (Meyer Decl. ¶ 20.; Graves Decl. ¶ 11.)

27
28 ⁵ Declarations are submitted as exhibits to the concurrently filed Declaration of Carlos
Holguín (“Holguín Decl.”).

1 As of March 24, 2020, the U.S. Centers for Disease Control and Prevention
2 (“CDC”) reported 46,481 cases in the U.S. and 593 deaths. (Graves Decl. ¶ 6.)⁶ Given
3 the severe shortage of COVID-19 tests, these numbers underestimate the true spread of
4 the disease. (*Id.* ¶ 7.) Unfortunately, this pandemic has already reached the ORR system,
5 with several staff members at ORR facilities testing positive for COVID-19.⁷

6 **B. Class Members Residing in Congregate Settings Are at Grave Risk of**
7 **Contracting COVID-19.**

8 The vast majority of children in ORR custody live in congregate settings, where
9 they spend all of their time in close proximity to other children and staff members.⁸ The
10 CDC has warned that detained individuals who “live, work, eat, study, and recreate
11 within congregate environments” are at heightened risk of contracting COVID-19.⁹

12 **1. Pandemic risks in congregate settings are dire.**

13 There is no cure or vaccine for this highly contagious virus. (Graves Decl. ¶ 8.)
14 The only way to avoid transmission of COVID-19 is for individuals to practice “social
15 distancing” (maintaining a distance of at least six feet from the nearest person) and
16 frequent hand washing. (*Id.*; Ex. E (Declaration of Dr. Nancy Y. Wang ¶ 12 (“Wang
17 Decl.”))). For this reason, the CDC deems social distancing a “cornerstone of reducing
18 transmission of respiratory diseases such as COVID-19.”¹⁰

19
20 ⁶ For updated statistics, see *Coronavirus COVID-19 Global Cases*, Ctr. Systems
21 Science & Engineering, Johns Hopkins Univ., (JHU),
<http://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.

22 ⁷ Camilo Montoya-Galvez, *3 workers at facilities housing migrant kids in U.S. custody*
23 *test positive for coronavirus*, CBS NEWS (Mar. 23, 2020), <https://cbsn.ws/39hlkbY>.

24 ⁸ See ORR, *Children Entering the United States Unaccompanied: Guide to Terms*, HHS
25 (Mar. 21, 2016), <https://bit.ly/3allAR2>; see also Amra Uzicanin & Joanna Gaines, *Field*
26 *Epidemiology Manual: Community Congregate Settings*, CDC, <https://bit.ly/3drRgO9>
(last reviewed Dec. 13, 2018) (“congregate settings” includes “detention facilities”).

27 ⁹ *Interim Guidance on Mgmt of Coronavirus Disease 2019 (COVID-19) in Correctional*
28 *and Detention Facilities*, CDC, <https://bit.ly/3aiq8za> (last updated Mar. 23, 2020) (Ex.
L.)

¹⁰ *Id.*

1 The rapid transmission of COVID-19 in congregate settings is clearly evidenced
2 by the tragic spread of the virus within cruise ships, nursing homes, and prisons
3 worldwide. Over 800 people tested positive for COVID-19 on cruise ships in Japan and
4 off the coast of California.¹¹ At a nursing home facility in Washington, two-thirds of
5 the residents and 47 staff tested positive for COVID-19, with 35 people ultimately dying
6 from the virus.¹² On March 21, 2020, Mayor de Blasio announced that at least 21
7 inmates and 17 employees at the Rikers Island Correctional Center tested positive for
8 COVID-19, a drastic increase from the first case identified just three days earlier.¹³ For
9 this reason, correctional public health experts recommend the release of those most
10 vulnerable to COVID-19. (Ex. D (Letter to Congress at 6) (“Finally, regarding the need
11 to implement immediate social distancing to reduce the likelihood of exposure to
12 detainees, facility personnel, and the general public, it is essential to consider releasing
13 all detainees who do not pose an immediate risk to public safety.”).)

14 Reducing the number of individuals in congregate care protects the safety of
15 those individuals as well as the communities around them. An outbreak of COVID-19
16 in a congregate environment could quickly overwhelm local health care services and
17 cause individuals to be transported to more distant hospitals and clinics, utilizing more
18 resources and potentially exposing health care workers in communities where the
19 disease is not yet prevalent. (Graves Decl. ¶ 31; Ex. D (Letter to Congress at 4).)

20 2. The conditions at ORR facilities increase the pandemic risks.

21 The communal living that defines congregate care renders it nearly impossible
22 for detained individuals, including children in ORR facilities, to engage in practices –

23
24 ¹¹ Victoria Forster, *What Have Scientists Learned About COVID-19 and Coronavirus
By Using Cruise Ship Data?*, FORBES, (Mar. 22, 2020) <https://bit.ly/2UeSgNS>.

25 ¹² Jack Healy & Serge F. Kovalski, *The Coronavirus’s Rampage Through a Suburban
Nursing Home*, N.Y. TIMES (Mar. 21, 2020), <https://nyti.ms/2QIcVaS>; *see also* John
26 Balance, et al., *Louisiana identifies new cluster of coronavirus cases in Donaldsonville
retirement home*, THE ADVOCATE, (Mar. 23, 2020), <https://bit.ly/39hxQZ9>.

27 ¹³ *21 Inmates, 17 Employees Test Positive for COVID-19 on Rikers Island*, NBC NEW
28 YORK, <https://bit.ly/2y1J6eZ> (last updated Mar. 22, 2020).

1 such as social distancing and increased hygiene – necessary to mitigate the risk of
2 COVID-19 transmission. (Wang Decl. ¶ 16, Graves Decl. ¶¶ 10-11; Ex. D (Letter to
3 Congress at 4).) The majority of children in ORR shelters, group homes, residential
4 treatment centers, staff-secure facilities, and secure facilities live in close quarters, share
5 multiple communal spaces, and cannot consistently maintain the minimum six foot
6 distance from others. (Graves Decl. ¶¶ 10-11; Wang Decl. ¶ 16; Ex. F (Declaration of
7 Anthony Enriquez ¶¶ 11, 21, 29 (“Enriquez Decl.”)); Ex. G (Declaration of Hannah P.
8 Flamm ¶ 12 (“Flamm Decl.”))).

9 ORR facilities often house multiple children in single rooms, with some sleeping
10 in bunk beds placed close together. (Enriquez Decl. ¶¶ 12, 22, 30; Flamm Decl. ¶¶ 13,
11 25.) Children are required to participate in group activities and classes where they share
12 space with others in a confined area. (Enriquez Decl. ¶¶ 7, 18; Flamm Decl. ¶¶ 8-9, 22-
13 23; Ex. H (Declaration of Rachel Rutter ¶¶ 5-6, 26 (“Rutter Decl.”))). Children share
14 school materials, telephones, televisions, dining tables, and other equipment with other
15 children. (Enriquez Decl. ¶¶ 7, 18, 26; Flamm Decl. ¶¶ 6, 20; Rutter Decl. ¶¶ 4-6, 11.)
16 Children also eat their meals in communal areas, in close proximity to other children
17 and staff, which creates a dangerous situation for the spread of COVID-19. (Enriquez
18 Decl. ¶¶ 13, 23, 31; Flamm Decl. ¶¶ 15, 27; Rutter Decl. ¶¶ 14-15; Graves Decl. ¶ 10.)

19 In addition, toilets, sinks, and showers are shared and regularly used by large
20 numbers of children. (Flamm Decl. ¶ 14; Rutter Decl. ¶¶ 12-13, 16.) Some facilities
21 require children to ask permission to use the bathroom and require staff to accompany
22 children to the bathroom. (Flamm Decl. ¶¶ 14, 26.)

23 Like other detention centers, ORR facilities are accessible to staff and other
24 outside visitors who may transmit the virus. (Meyer Decl. ¶ 8; Graves Decl. ¶¶ 10, 23;
25 Wang Decl. ¶ 17.) The CDC has warned that “[t]here are many opportunities for
26 COVID-19 to be introduced into a correctional or detention facility, including daily
27 staff ingress and egress; transfer of incarcerated/detained persons between facilities and
28 systems, to court appearances, and to outside medical visits; and visits from family,

1 legal representatives, and other community members.”¹⁴ Program staff – including case
2 managers, teachers, youth care workers, medical providers, and clinicians – enter and
3 leave these facilities in shifts and interact closely with the children. (Enriquez Decl. ¶¶
4 8-10, 19-20, 27-28, 33; Flamm Decl. ¶¶ 7, 11, 21; Rutter Decl. ¶ 25.) To date, staff at
5 two ORR facilities have tested positive for COVID-19 – Abbott House in Irvington,
6 New York, and Mercy First in Syosset, New York.¹⁵ It has also recently been reported
7 that an ICE detainee tested positive for COVID-19.¹⁶

8 **3. The pandemic risks to detained children are particularly grave.**

9 Children in ORR custody are at risk of serious illness if they contract COVID-
10 19, and often face particular vulnerabilities to the virus. Severe illness and death from
11 COVID-19 have been reported in people of all ages, including children. (Graves Decl.
12 ¶ 7; Wang Decl. ¶ 9.) Even children without identifiable risk factors can become
13 seriously ill from COVID-19.¹⁷ The largest study of pediatric COVID-19 patients to
14 date shows that approximately 6% of infected children and 11% of infected infants had
15 severe or critical cases. These cases included children and infants who suffered from
16 respiratory failure, shock, encephalopathy, heart failure, coagulation dysfunction, acute
17 kidney injury, and life-threatening organ dysfunction.¹⁸ Tragically, California reported
18 its first death of a minor linked to COVID-19 on March 24, 2020.¹⁹

19 _____
20 ¹⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
Correctional and Detention Facilities (Ex. L.)

21 ¹⁵ Mazin Sidahmed, *Another Worker in a New York Shelter for Migrant Children has*
22 *Tested Positive for COVID-19*, DOCUMENTED (Mar. 20, 2020), <https://bit.ly/33Hs8yx>;
23 *Brooklyn Count Soars, as Coronavirus Cases in N.Y.C. Near 4,000*, N.Y. TIMES,
<https://nyti.ms/2J9GxtR> (last updated Mar. 20, 2020).

24 ¹⁶ Priscilla Alvarez and Catherine E. Shoichet, *supra* note 4.

25 ¹⁷ See Amara Walker, et al., *supra* note 1; *Panama: 13-year-old girl with coronavirus*
dies, officials say, AL JAZEERA (Mar. 23, 2020), <https://bit.ly/2wzvrvb>.

26 ¹⁸ See Yuanyuan Dong, et al., *Epidemiological characteristics of 2143 pediatric*
27 *patients with 2019 coronavirus disease in China*, PEDIATRICS, <https://bit.ly/39hz1Yz>
(last visited Mar. 24, 2020).

28 ¹⁹ See Jenny Gross and Tim Arrango, *Teenager’s death in California is linked to*
Coronavirus, N.Y. TIMES (Mar. 24, 2020),

1 Moreover, many children in ORR custody have experienced intense trauma in
2 their home countries and on their journey to the United States that may be exacerbated
3 by the stress and uncertainty of detention.²⁰ Post-traumatic stress disorder and related
4 conditions are associated with weakened immune systems and a heightened
5 susceptibility to infection. (Graves Decl. ¶ 12; *see generally* Ex. I (Declaration of Dr.
6 Mira Zein (“Zein Decl.”)). Certain children are at even higher risk of serious illness if
7 they contract COVID-19, including those with pre-existing health conditions or
8 compromised immune systems,²¹ or who are pregnant or parenting. (Flamm Decl. ¶ 31;
9 Wang Decl. ¶ 19.)

10 And yet many ORR facilities have limited capacity to provide appropriate
11 medical care or mental health services. (Graves Decl. ¶ 31; Enriquez Decl. ¶ 33; Flamm
12 Decl. ¶ 17-18; Rutter Decl. ¶¶ 18-23, 27.)

13 The uncertainty and anxiety created by this pandemic creates particular risks for
14 children. (Ex. J (Declaration of Dr. Craig Haney ¶¶ 12-16 (“Haney Decl.”))). Now more
15 than ever, children need the support of caring family or caregivers. (*Id.*) To the extent
16 that ORR programs respond to this public health risk by further isolating children and
17 limiting opportunities for recreation or visits, this may further traumatize vulnerable
18 children. (Haney Decl. ¶ 12; Meyer Decl. ¶¶ 30, 34; Wang Decl. ¶ 23.)

19 **C. ORR’s Recently Adopted Safety Measures for Congregate Care**
20 **Facilities Fail to Protect Class Members from COVID-19.**

21 **1. ORR’s COVID-19 Guidelines Do Not Comply with CDC and**
22 **Epidemiological Mandates Regarding Vital Safety Measures.**

23 On March 19, 2020, ORR distributed the “COVID-19 Interim Guidance for ORR
24 Programs” (“ORR Guidance”) to its contracted facilities. (Ex. K) The policies included
25 in the ORR Guidance are inadequate to protect children in ORR custody from the

26 <https://www.nytimes.com/2020/03/24/us/california-coronavirus-death-child.html>.

27 ²⁰ OIG, *Care Provider Facilities Described Challenges Addressing Mental Health*
28 *Needs of Children in HHS Custody*, HHS (Sept. 3, 2019), <https://bit.ly/2QKIHEe>.

²¹ *See Are you at risk for serious illness?*, CDC, <https://bit.ly/39ciF37> (last reviewed
Mar. 20, 2020).

1 transmission of COVID-19 and contrary to current CDC guidelines as well as
2 widespread public health practice. (See Graves Decl. ¶¶ 13-20; Wang Decl. ¶¶ 20-26.)

3 The CDC has stated in no uncertain terms that “[t]he best way to prevent illness
4 is to avoid being exposed to this virus.”²² In order to minimize exposure, current CDC
5 guidance stresses the importance of practicing “social distancing” and frequently
6 washing hands.²³ The CDC defines social distancing as “remaining out of congregate
7 settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2
8 meters) from others when possible.”²⁴ On March 16, 2020, the White House introduced
9 “The President’s Coronavirus Guidelines for America,” which asked everyone in the
10 nation to “avoid social gatherings in groups of more than 10 people,” avoid visiting
11 “long-term care facilities unless to provide critical assistance,” “[d]isinfect frequently
12 used items and surfaces as much as possible,” and “close schools in affected and
13 surrounding areas” as well as indoor and outdoor venues where groups of people
14 generally congregate, such as restaurants, food courts, and gyms.²⁵

15 The ORR Guidance makes no mention of requiring or encouraging social or
16 physical distancing between children or staff, nor of limiting the gathering of groups of
17 children or staff within facilities. (See Graves Decl. ¶14, Wang Decl. ¶ 21; Ex. K (ORR
18 Interim Guidance).) This is not surprising, as it is nearly impossible for children
19 detained in ORR facilities to engage in appropriate social distancing to prevent the
20 transmission of COVID-19. (Enriquez Decl. ¶¶ 11, 21, 29; Flamm Decl. ¶ 12.) Unless
21 the number of children at these facilities is drastically reduced, the majority of these
22 facilities have insufficient space to allow children to maintain the required six-foot

23 _____
24 ²² *How to Protect Yourself*, CDC, <https://bit.ly/33Pkr9p> (last reviewed Mar. 18, 2020).

25 ²³ *Id.*

26 ²⁴ *Interim US Guidance for Risk Assessment and Public Health Management of Persons*
27 *with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk*
28 *and Contacts of Laboratory-confirmed Cases*, CDC, <https://bit.ly/2QKU4w1> (last
updated Mar. 22, 2020).

²⁵ *The President’s Coronavirus Guidelines for America: 15 Days to Slow the Spread*,
THE WHITE HOUSE & CDC (Mar. 16, 2020), <https://bit.ly/2Jfk7r7>.

1 distance between themselves and the nearest child or staff member. (Graves Decl.
2 ¶¶ 28-32; Wang Decl. ¶ 28.)

3 The ORR Guidance also neglects to:

- 4 • Provide information on managing the spread of disease among particularly
5 vulnerable children, such as those with compromised immune systems, heart
6 disease, diabetes, asthma or other chronic respiratory disease, and infants. (*See*
7 Graves Decl. ¶ 18; Wang Decl. ¶ 22.)
- 8 • Anticipate a situation in which more children need to be quarantined than
9 facilities' isolation rooms can handle. (Graves Decl. ¶ 17; Wang Decl. ¶ 24.)
- 10 • Ensure that children have independent access to hand washing and sanitizing
11 supplies. (*See* Graves Decl. ¶ 20.)
- 12 • Provide a screening or testing protocol for children not deemed to be “at risk” but
13 still exhibiting COVID-19 symptoms, who could spread the disease. (*See* Graves
14 Decl. ¶ 19; Wang Decl. ¶ 25.)

15 On March 23, 2020, the CDC released “Interim Guidance on Management of
16 Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities”
17 (“CDC Detention Facility Guidance”). (Ex. L.) The CDC Detention Facility Guidance
18 acknowledges that “(i)ncarcerated/detained persons live, work, eat, study, and recreate
19 within congregate environments, heightening the potential for COVID-19 to spread
20 once introduced,” and instructs facilities to “implement social distancing strategies to
21 increase the physical space between incarcerated/detained persons (ideally 6 feet
22 between all individuals, regardless of the presence of symptoms),” but acknowledges
23 that “not all strategies will be feasible in all facilities.” (*Id.*) Partial implementation of
24 social distancing will not adequately protect individuals from the spread of disease. (*See*
25 Graves Decl. ¶ 28.)

26 ORR may issue updated guidance in the coming days or weeks that adheres more
27 closely to the new CDC Detention Facility Guidance. However, unless the updated
28 guidance also provides for the expedited release of children such that strict adherence

1 to social distancing within ORR facilities is possible, it will not adequately protect
2 against the transmission of COVID-19 and the risk of serious illness and death for
3 detained children. (See Graves Decl. ¶¶ 28-32; Wang Decl. ¶ 20.)

4 **2. ORR’s COVID-19 Guidelines Fall Far Below Federal, State,
5 and Local Mandates to Reduce the Spread of COVID-19.**

6 In accordance with the CDC and federal guidelines discussed above, numerous
7 federal, state, and local agencies have imposed swift mandates to reduce the spread of
8 COVID-19 in public and congregate settings such as nursing homes, homeless shelters,
9 schools, jails, and prisons. These mandates consistently prioritize social distancing,
10 increased sanitation, education, reduced visitation, and release. In many instances, the
11 actions taken are even more protective than those recommended by the CDC.

12 Indeed, numerous states have issued extraordinary and unprecedented measures
13 to ensure “social distancing” and to date over 160 million Americans have been ordered
14 to “shelter in place.”²⁶ For example, on March 19, 2020, Governor Gavin Newsom
15 ordered 40 million Californians to stay in their homes, with limited exceptions, and
16 maintain a minimum distance of 6 feet from others.²⁷ The following day, New York
17 issued similar orders, requiring a distance of “at least six feet” between people in public,
18 cancelling all “non-essential gatherings of individuals of *any* size for *any* reasons,”
19 closing *all* non-essential business, and requiring those essential business that remain
20 open to “implement rules that help facilitate social distancing of at least six feet.”²⁸
21 Within the past two weeks, Washington D.C. and forty-six states have mandated
22 statewide school closures,²⁹ with only four states left to follow.³⁰

23 ²⁶ Sarah Mervosh and Denise Lu, *See Which States and Cities Have Told Residents to*
24 *Stay Home*, THE NEW YORK TIMES, Mar. 24, 2020.

25 ²⁷ *Coronavirus (COVID-19) in California*, CALIFORNIA STATE GOVERNMENT,
26 <https://covid19.ca.gov/> (last Mar. 24, 2020).

27 ²⁸ Gov. Andrew M. Cuomo’s Press Office, *Governor Cuomo Signs the ‘New York State*
28 *on PAUSE’ Executive Order*, <https://on.ny.gov/2UtTYtO> (last visited Mar. 24, 2020).

29 David Nagel, *Updated List of Statewide School Closures with Closure Dates*, THE
JOURNAL, <https://bit.ly/2UjPKWV> (last updated Mar. 24, 2020).

³⁰ Dante Chinni, *School closures skyrocket, nearly 54 million students sent home*, NBC

1 States have also adopted measures to limit exposure in congregate settings like
2 homeless shelters. On February 24, 2020, New York issued guidance for homeless
3 shelters, which recommends a minimum distance of three to six feet between beds and
4 head-to-toe or toe-to-toe sleeping arrangements; barriers between beds (such as
5 curtains); separating symptomatic residents in private rooms with separate bathrooms
6 where available; and staggered mealtimes and use of common areas.³¹ Staff are advised
7 to clean their hands in accordance with CDC guidelines, and hand sanitizer is to be
8 made available to residents along with tissues, soap and paper towels for hand washing,
9 and face masks.³² Even so, individuals in New York homeless shelters have still tested
10 positive for COVID-19.³³ Recognizing that large shelters are particularly susceptible to
11 the spread of COVID-19, California is setting up shelters in trailers, hotels and motels
12 to facilitate social distancing.³⁴

13 In the prison and jail context, similar concerns have been raised. Although the
14 U.S. Bureau of Prisons has implemented some precautions, they have proven
15 inadequate³⁵ and raise valid concerns from experts in detention health, infectious
16 disease, and public health, as well as U.S. Senators, who urged the release of “those
17 who do not pose an immediate danger to public safety.”³⁶ The U.S. government is now

18 _____
19 NEWS (Mar. 22, 2020, 9:00 AM), <https://nbcnews.to/2Ue3m5P>.

20 ³¹ *Interim COVID-19 Guidance for Homeless Shelters*, NYC DEPT. OF HEALTH,
<https://on.nyc.gov/39g0slr> (last visited Mar. 24, 2020).

21 ³² *Id.*

22 ³³ *Coronavirus ‘Attack Rate’ in N.Y. Concerns White House*, N.Y. TIMES (Mar. 24,
2020), [https://www.nytimes.com/2020/03/23/nyregion/coronavirus-new-york-
update.html](https://www.nytimes.com/2020/03/23/nyregion/coronavirus-new-york-update.html).

23 ³⁴ *Governor Newsom Takes Emergency Actions & Authorizes \$150 Million in Funding
to Protect Homeless Californians from COVID-19*, OFFICE OF GOV. GAVIN NEWSOM
24 (Mar. 18, 2020), <https://bit.ly/3bpbG8B>.

25 ³⁵ Craig McCarthy, *NYC jails see outbreak of coronavirus cases with exponential
increase expected*, N.Y. POST (Mar. 22, 2020), <https://bit.ly/2xmGhVA>.

26 ³⁶ Josiah Rich, et al., *We must release prisoners to lessen the spread of the coronavirus*,
27 WASH. POST (Mar. 17, 2020), <https://wapo.st/33IpbO5>; Zack Budryk, *Harris pushes for
release of low-risk federal prisoners amid coronavirus outbreak*, THE HILL (Mar. 19,
28 2020), <https://bit.ly/2Uh2JZi>. Relatedly, the American Bar Association policy favors

1 entertaining the possibility of releasing some inmates to reduce the risk of a larger
2 outbreak.³⁷ State and local jurisdictions, also concerned with their inability to protect
3 inmates, staff, and the community are making concerted efforts to release detainees as
4 expeditiously as possible.³⁸

5 **III. STANDARDS FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER**

6 A plaintiff seeking preliminary relief under Federal Rule of Civil Procedure 65
7 must establish “that he is likely to succeed on the merits, that he is likely to suffer
8 irreparable harm in the absence of preliminary relief, that the balance of equities tips in
9 his favor, and that an injunction is in the public interest.” *Winter v. Nat’l Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 20 (2008); *Washington v. Trump*, 847 F.3d 1151, 1159 n.3
11 (9th Cir. 2017) (noting standards for issuing temporary restraining orders and
12 preliminary injunctions are “substantially identical”). In balancing these elements, “a
13 stronger showing of one element may offset a weaker showing of another.” *All. for the*
14 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, when the likelihood
15 of grave irreparable injury is palpable and the balance of equities tips sharply in a
16 plaintiffs’ favor, the plaintiffs need only “demonstrate a fair chance of success on the
17 merits or questions serious enough to require litigation.” *Arc of Cal. v. Douglas*, 757
18 F.3d 975, 993-94 (9th Cir. 2014) (internal quotations and citation omitted).

19 **IV. CLASS MEMBERS WILL SUCCEED ON THE MERITS**

20 The foregoing demonstrates beyond any shadow of a doubt that Class Members

21 _____
22 release of prisoners in exceptional circumstances, including serious illness concerns.
23 *Criminal Justice Standards: Standards on Treatment of Prisoners*, ABA, Standard 23-
24 8.9(g), <https://bit.ly/39nj4QF> (last visited Mar. 24, 2020).

24 ³⁷ Johnson, *Trump weighs release of some federal prisoners after inmate tests positive*
25 *for coronavirus*, USA TODAY, <https://bit.ly/3bsYpMp> (last updated Mar. 22, 2020).

25 ³⁸ New Jersey’s Supreme Court issued a Consent Order that is expected to result in the
26 release of at least 1,000 inmates. Consent Order, *In re: Request to Commute or Suspend*
27 *Cnty. Jail Sentences*, N.J. ECF No. 084230 (Mar. 22, 2020). Iowa reported the expedited
28 release of 700 incarcerated people, Los Angeles County has already released over 600
inmates, and other jurisdictions are promptly following suit, including in Ohio and
Texas. Prison Policy Initiative, *Responses to the Covid-19 Pandemic* (Mar. 23, 2020).

1 in ORR congregate detention are vulnerable to contract COVID-19. The threat of
2 irreparable injury to their health and safety is palpable, and for those detained at least
3 30 days while ORR evaluates their potential custodians, the balance of the equities
4 clearly tips sharply in their favor.

5 Class Members therefore need only demonstrate “a fair chance of success on the
6 merits or questions serious enough to require litigation” to secure preliminary relief.
7 *Arc of Cal.*, 757 F.3d at 993-94 (internal quotations and citation omitted); *All. for the*
8 *Wild Rockies*, 632 F.3d at 1132 (“[S]erious questions going to the merits’ and a
9 hardship balance that tips sharply toward the plaintiff can support issuance of an
10 injunction, assuming the other two elements of the *Winter* test are also met.”). Class
11 Members’ prospects here far exceed a “fair chance” of succeeding on the merits.

12 The *Flores* Settlement, the TVPRA, and the First and Fifth Amendments to the
13 U.S. Constitution each vest children who have custodians available to receive them with
14 substantive rights against ORR’s keeping them in congregate care, especially during a
15 global pandemic. Given a health crisis that will only worsen in the coming days and
16 weeks, Class Members’ requested due process relief easily satisfies the *Mathews v.*
17 *Eldridge*, 424 U.S. 319 (1976), balancing test. *See infra* Sec. IV.C.3.

18 **A. ORR Violates The TVPRA By Continuing To Detain Children With**
19 **Viable Sponsors In Congregate Settings.**

20 The TVPRA requires ORR to “promptly” place detained children “in the least
21 restrictive setting that is in the best interest of the child,” generally with “a suitable
22 family member . . .” or other available guardian. 8 U.S.C. § 1232(c)(2)(A). Only if a
23 suitable family member or other guardian is not available to take custody of a minor
24 may ORR continue to detain him or her “in a specialized juvenile program or
25 facility.” *Flores v. Sessions*, 862 F.3d at 871.

26 By definition, all members of the “unfit custodian” class – and, *a fortiori*, those
27 whom the requested relief would protect – have family or other custodians available to
28

1 receive them. Their ongoing detention in congregate care in the face of a rapidly
2 spreading public health crisis is a *prima facie* violation of the TVPRA.

3 According to the most recent ORR data at Plaintiffs' disposal, as of March 13,
4 2020, ORR had 3,622 children in custody, 1,193 – nearly a third – of whom have been
5 placed in congregate settings for 30 days or more. (Holguín Decl., ¶ 3.) ORR's data do
6 not indicate why the agency has yet to release these children, nor how many of them
7 have available custodians, yet the vast majority likely do.³⁹

8 Unless they meet the specific criteria, the TVPRA requires ORR to release
9 children to any available custodian who “is capable of providing for the child’s physical
10 and mental well-being.” 8 U.S.C. § 1232(c)(3)(A). In determining whether a proposed
11 custodian meets this standard, the TVPRA requires ORR (1) to verify “the custodian’s
12 identity,” and (2) “relationship to the child, if any,” and (3) “make an independent
13 finding that the individual has not engaged in any activity that would indicate a potential
14 risk to the child.” *Id.*

15 The first two determinations are fairly straightforward, and may be verified
16 following the submission of a completed “family reunification application” (“FRA”).
17 (*See* Ex. N (ORR Policy Guide § 2.2.4 (when submitting an FRA, “potential sponsors
18 must provide documentation of identity, address, and relationship to the child”).) As for
19 the third determination – whether the proposed sponsor has “engaged in any activity
20

21 _____
22 ³⁹ ORR categorizes detained children pursuant to their relationship with potential
23 custodians. (Ex. N (ORR Policy Guide § 2.2.1).) The approximate percentage of
24 children in ORR custody in each category are as follows:

- 25 • 42% in “Category 1” – i.e., they have parents or guardians in the U.S.;
- 26 • 47% in “Category 2” – i.e., they have an “immediate” relative – brother, sister,
27 grandparent, aunt, uncle, or first cousin –to whom they could be released;
- 28 • 11% in “Category 3” – i.e., children with “other sponsors,” such as “more distant
relatives and unrelated adult individuals”;
- The remainder are “Category 4” – i.e., children for whom ORR has identified no
potential custodian.

(Holguín Decl. ¶ 4; Ex. O (Shiloh PowerPoint Presentation)).

1 that would indicate a potential risk to the child” – ORR requires potential custodians to
2 “immediately” advise whether the proposed custodian has “a record of a criminal charge
3 or child abuse” and submit “detailed documentation of the charges, dispositions, police
4 reports, and evidence of rehabilitation.” (Ex. N (ORR Policy Guide § 2.5.3).) ORR also
5 completes background checks of all sponsors and adult household members through a
6 public records criminal history check and a sex offender registry check. (Ex. N (ORR
7 Policy Guide § 2.5).) These are simple internet searches that can be completed
8 expeditiously by a case manager. (Ex. M. (ORR Manual of Procedures at § 2.5).)
9 Although ORR chooses to require certain sponsors, household members, and adult
10 caregivers to further undergo an FBI National Criminal History Check, Child Abuse
11 and Neglect (CA/N) Check, and State Criminal History Repository Check and/or Local
12 Police Check, these are not mandated by the TVPRA.

13 In the vast majority of cases,⁴⁰ any additional delay is often attributable either to
14 (1) discretionary investigatory measures, or (2) administrative inefficiency or
15 indifference. In establishing the requirements to vet proposed custodians, ORR has a
16 track record of arbitrariness and vacillation. (*E.g., After policy reversal, hundreds of*
17 *detained children could be released*, PBS, Dec. 19, 2018,
18 [https://www.pbs.org/newshour/show/after-policy-reversal-hundreds-of-detained-](https://www.pbs.org/newshour/show/after-policy-reversal-hundreds-of-detained-migrant-children-could-be-released)
19 [migrant-children-could-be-released](https://www.pbs.org/newshour/show/after-policy-reversal-hundreds-of-detained-migrant-children-could-be-released) (according to HHS Assistant Secretary Lynn
20 Johnson, ORR’s expanded fingerprinting policy was “not adding anything to the
21 protection or the safety for these children”); *Flores v. Barr*, No. 2:85-cv-04544-DMG-
22 AGR, Order re Pls.’ Mot. to Enforce Class Action Settlement, July 30, 2018 (ECF No.
23

24 ⁴⁰ The TVPRA requires ORR to conduct home studies before releasing trafficking and
25 abuse victims and children with special needs, 8 U.S.C. § 1232(c)(3)(B); but relatively
26 few class members – and certainly not a third – fall within these special categories. Nor
27 is there any apparent reason ORR could not generally complete a home study within 30
28 days. (*See* Ex. M (ORR Manual of Procedures at § 2.4.2) (directing that cases be
referred for home studies within three business days and completed within ten business
days of acceptance of the referral).)

1 470) at 27-29 (disapproving ORR requirement that its director approve release of any
2 child placed in a restrictive setting); *id.* at 29-30 (disapproving ORR requirement that
3 myriad post-release services be in place before a child is released to a sponsor subjected
4 to a home study).

5 The harm that detention inflicts upon children is well established *See, e.g.*, Julie
6 M. Linton et al., *Detention of Immigrant Children*, PEDIATRICS, Apr. 2017, at 6
7 (“[E]xpert consensus has concluded that even brief detention can cause psychological
8 trauma and induce long-term mental health risks for children.”). Plaintiffs reject the
9 presumption that ORR’s obligation to vet proposed custodians necessarily offsets that
10 harm. These delays must now be evaluated in light of the extraordinary circumstances
11 presented by this pandemic. The science is clear: if ORR fails to end congregate
12 detention, or at least reduce it dramatically, it is only a matter of time before COVID-
13 19 illness rages among children forced into close proximity with one another.

14 Thirty days should be more than enough for ORR to assess post-release risk.
15 (*E.g.*, Ex. P (Declaration of James M. Owens ¶ 6 (“Owens Decl.”) (state dependency
16 courts determine whether there is cause to detain children within three days)); Ex. M
17 (ORR Manual of Procedures, at § 2.2.2 (care providers generally expected to complete
18 custodian evaluations within 10-21 days), § 2.7.2 (case coordinators expected to make
19 recommendation within 1 business day), and § 2.7.3 (Federal Field Specialists expected
20 to make release decisions within 1-2 business days of receiving case coordinator
21 recommendations)). Any marginal gains to child safety from ORR’s distending
22 investigations for more than 30 days cannot outweigh the harm congregate detention
23 will inevitably cause. Leaving children on the tracks with the COVID-19 train fast
24 approaching while ORR takes even more time is unconscionable.

25 There is accordingly no serious question that ORR detaining over one thousand
26 children in congregate settings for more than 30 days during a raging pandemic, even
27 though they have custodians available to care for them, is a *prima facie* violation of the
28

1 TVPRA’s requirement that it promptly place children in the least restrictive setting that
2 is in their best interest.

3 **B. ORR Violates The *Flores* Settlement By Refusing To Release Children**
4 **To Available Custodians, And Instead Forcing Them To Remain In**
5 **Unsafe Or Unsanitary Conditions.**

6 The injunctive relief Plaintiffs seek is also a necessary step to protect against the
7 erroneous deprivation of children’s substantive rights under the *Flores* Settlement⁴¹ to
8 (1) prompt release and (2) safe and sanitary conditions, rights that have become vastly
9 more important to children in congregate detention during a pandemic. In particular, the
10 *Flores* Settlement requires:

- 11 • “Where [ORR] determines that the detention of the minor is not required either
12 to secure his or her timely appearance before [DHS] or the immigration court, or
13 to ensure the minor’s safety or that of others, [ORR] *shall release a minor from*
14 *its custody without unnecessary delay . . . [to] an adult*
15 *relative . . .*” (*Flores* Settlement ¶ 14 (emphasis added));
- 16 • “[ORR] . . . shall make and record the prompt and continuous efforts on its part
17 toward . . . the release of the minor . . .” (*id.* ¶ 18);
- 18 • ORR must house children “in facilities that are safe and sanitary and that are
19 consistent with [its] concern for the particular vulnerability of minors” (*Id.* ¶ 12);
- 20 • ORR must place detained children in state-licensed facilities that comply with
21 both state health and safety standards and the minimum standards listed in Exhibit
22 1 to the Settlement, which include “[p]roper physical care and maintenance,
23 including suitable living accommodations.” (*id.* ¶¶ 6, 19 Ex. 1, ¶ A.1).

24 During a public health crisis, ORR holding class members in congregate
25 detention even after it has already had 30 days to evaluate available custodians is in

26 ⁴¹ This Court has clarified that, although Plaintiffs may not seek to enforce
27 the *Flores* Settlement in this action, “Plaintiffs may pursue due process claims
28 predicated on Defendants’ failure to provide sufficient procedural safeguards for alien
minors to exercise their *Flores* rights” (ECF No. 141 at 10-11).

1 prima facie violation of each of these provisions, yet class members have been deprived
2 of adequate process to protect these rights. This Court should require ORR to articulate
3 good cause for exposing children to the clear dangers of congregate detention in lieu of
4 release to their families or transfer to non-congregate settings.

5 **C. ORR Violates the Due Process Clause Of The Fifth Amendment By**
6 **Exposing Vulnerable Children To Clearly Dangerous Conditions.**

7 The Due Process Clause of the Fifth Amendment protects individuals against (i)
8 “arbitrary action of government” – a denial of procedural due process – or (ii) “the
9 exercise of power without any reasonable justification in the service of a legitimate
10 government objective” – a denial of substantive due process. *City of Sacramento v.*
11 *Lewis*, 523 U.S. 833, 845-46 (1998) (citations and internal quotations omitted).
12 Detaining Class Members in congregate facilities that are inherently unsafe in the midst
13 of the COVID-19 pandemic rather than releasing them to available custodians violates
14 both substantive and procedural due process.

15 **1. ORR has an affirmative duty to guarantee Class Members’**
16 **reasonable health and safety.**

17 ORR has an affirmative duty to place Class Members in facilities capable of
18 ensuring their reasonable health and safety. “When the State takes a person into
19 its custody and holds him there against his will, the Constitution imposes upon it a
20 corresponding duty to assume some responsibility for his safety and general well-
21 being.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200
22 (1989); *see also Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). The Ninth
23 Circuit has found that a special relationship “applies to children in foster care,” *Henry*
24 *A.*, 678 F.3d at 1000, as well as others in government custody. *See Wang v. Reno*, 81
25 F.3d 808, 818 (9th Cir. 1996). As a result, ORR’s obligation to provide children in its
26 custody with, *inter alia*, “medical care, and reasonable safety,” *DeShaney* at 200,
27 includes reasonable protections from the risks presented by the COVID-19 pandemic.

28 The constitutional guarantee of “reasonable safety” protects against the risk of

1 future harm even in the less protective Eighth Amendment context.⁴² Yet here, Class
2 Members are civil immigration detainees with rights derived from the Fifth
3 Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In *Helling v. McKinney*,
4 the Supreme Court specifically recognized that the *risk* of contracting a
5 communicable disease may constitute an “unsafe, life-threatening condition” that
6 threatens “reasonable safety.” 509 U.S. 25, 33 (1993). The Fifth Amendment thus
7 protects Class Members in the government’s custody from the risk of contracting
8 COVID-19, exacerbated by unsafe conditions inherent to congregate settings.

9 **2. ORR’s failure to release Class Members expeditiously and**
10 **ensure adequate safety measures in the midst of a pandemic**
11 **violates their substantive due process rights.**

12 The Ninth Circuit has recognized that individuals who have been *civilly*
13 committed or detained “cannot be subjected to conditions that ‘amount to punishment.’”
14 *Jones v. Blanas*, 393 F.3d 918, 931, 934 (9th Cir. 2004).

15 Courts in this Circuit have recognized that immigration detention may amount to
16 punishment and violate due process “if it imposes some harm to the detainee that
17 significantly exceeds or is independent of the inherent discomforts of confinement and
18 is not reasonably related to a legitimate governmental objective or is excessive in
19 relation to the legitimate governmental objective.” *Unknown Parties*, 2016 WL
20 8188563, at *5. Here, as the Ninth Circuit recognized, the continued detention of Class
21 Members in congregate care settings both (i) imposes harm that significantly exceeds
22 the inherent discomforts of their confinement and (ii) is excessive in relation to
23 legitimate governmental objectives. *See Xochihua-Jaimes v. Barr*, 18-cv-71460, ECF
24 No. 53 (Mar. 23, 2020) (“In light of the rapidly escalating public health crisis, which
25 public health authorities predict will especially impact immigration detention centers,

26 ⁴² *See Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563,
27 at *5 (D. Ariz. Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017)
28 (immigration detainees “are most decidedly entitled to ‘more considerate treatment’
than those who are criminally detained”; “decisions defining the constitutional rights of
prisoners establish a floor for the constitutional rights of [civil immigration detainees]”).

1 the court *sua sponte* orders that Petitioner be immediately released from detention”).

2 *First*, it is indisputable that the grave risk to all Class Members of potential
3 exposure to COVID-19 is both significantly greater than and unrelated to the “inherent
4 discomforts” generally associated with detention in ORR’s custody.

5 *Second*, although Defendants maintain that ORR’s detention of Class Members
6 beyond 30 days is required by law to prevent the release of children to custodians who
7 may abuse and neglect them, the continued detention of Class Members in life-
8 threatening congregate care settings is grossly excessive in view of the substantial and
9 immediate threat posed by the COVID-19 pandemic. Accelerating release of children
10 to available sponsors would dramatically reduce the harm to all Class Members by both
11 vastly reducing their own risk of exposure to COVID-19 and allowing children without
12 sponsors to be placed in less crowded settings. Defendants’ failure to expedite release
13 to protect the health and safety of all class members is thus excessive and unjustifiable.

14 **3. ORR’s failure to release Class Members expeditiously in the**
15 **midst of a life-threatening pandemic clearly violates their**
16 **procedural due process rights.**

17 In addition, ORR’s failure to expedite release of Class Members given the
18 imminent threat to their health and safety posed by COVID-19 violates procedural due
19 process as guaranteed by the Fifth Amendment. As this Court has recognized,
20 “[Procedural] due process . . . has three elements: (1) a liberty or property interest
21 protected by the Constitution; (2) a deprivation of the interest by the government; (3)
22 lack of process.” (ECF No. 141 at 13 (quoting *Portman v. Cnty. of Santa Clara*, 995
23 F.2d 898, 904 (9th Cir. 1993)).) The Class Members easily satisfy these factors.

24 *First*, as this Court has recognized, Class Members have substantive interests
25 implicated by their detention in ORR custody that give rise to due process protection,
26 all of which are heightened by the unprecedented threat posed by COVID-19:

- 27 • A fundamental right to freedom from detention, *e.g.*, *Zadvydas v. Davis*, 533 U.S.
28 678, 690 (2001); *Reno v. Flores*, 507 U.S. 292, 316 (1993);
- a substantial liberty interest in family unity and family association, *e.g.*,

1 *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011); and
2 • rights to prompt release under the TVPRA and the *Flores* Agreement (*see* ECF
3 No. 141 at 14-15).

4 *Second*, ORR’s actions deprive Class Members of these constitutionally
5 protected interests. Indeed, ORR’s delay in releasing children in its custody is deeply
6 harmful to children even under ordinary circumstances, and is especially dangerous in
7 light of the current pandemic. *See Stanley v. Ill.*, 405 U.S. 645, 647 (1972) (even a
8 temporary deprivation of the right to family integrity is constitutionally significant).

9 *Third*, ORR’s procedures governing release of Class Members fall short of those
10 required under the Due Process Clause. Due process is “flexible and calls for such
11 procedural protections as the particular situation demands.” *See Morrissey v. Brewer*,
12 408 U.S. 471, 481, (1972). Normally, “[t]he consequences of an erroneous commitment
13 decision are more tragic where children are involved” because “childhood is a
14 particularly vulnerable time of life and children erroneously institutionalized during
15 their formative years may bear the scars for the rest of their lives.” *Reno v. Flores*, 507
16 U.S. at 318 (O’Connor, J. and Souter, J., concurring) (internal citations omitted). Now,
17 in light of the COVID-19 pandemic, the consequences of an erroneous commitment
18 decision for these children could be deadly.⁴³ *See supra* Sec. II.

19 Given the extraordinary circumstances presented by this pandemic, due process
20 requires at a minimum that ORR (1) release all Unfit Custodian Class Members to
21 available sponsors absent credible evidence that such sponsors would harm or neglect
22 them, (2) place such Class Members in non-congregate care that satisfies Centers for
23 Disease Control and Prevention guidelines, or (3) provide all such Class Members with
24 evidence supporting ORR’s decision not to release them and an opportunity to be heard
25 regarding the grounds for continued congregate detention as set forth in Plaintiffs’
26 requested Temporary Restraining Order. ORR currently affords Class Members none

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28

⁴³ *See supra* footnote 17.

1 of these minimal procedural protections under any circumstances.⁴⁴ See Office of
2 Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2*,
3 HHS (Jan. 30, 2015), <https://bit.ly/2UwJM3G>.⁴⁵

4 Without such protections, there is a high likelihood that Class Members have
5 been and will continue to be subjected to the risk of death or serious illness, and the
6 traumatic effects of heightened isolation (Graves Decl. ¶ 13; Zein Decl.; Haney
7 Decl. ¶ 12), and will further be deprived of essential support from family members or
8 other caring adults at this time of extreme stress and anxiety. (Haney Decl. ¶¶ 12-16.)

9 **V. ABSENT A TEMPORARY RESTRAINING ORDER, CLASS MEMBERS IN**
10 **CONGREGATE FACILITIES WILL SUFFER IRREPARABLE INJURY.**

11 A plaintiff must also demonstrate “immediate threatened injury as a prerequisite
12 to preliminary injunctive relief.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d
13 668, 674 (9th Cir. 1988). “Irreparable harm is the single most important prerequisite for
14 the issuance of a preliminary injunction.” *Spark Indus., LLC v. Kretek Int’l, Inc.*, No.
15 CV 14-5726-GW(ASX), 2014 WL 12600262, at *3 (C.D. Cal. July 29, 2014) (citations
16 omitted). Increased risk of exposure to a deadly virus by virtue of placement in
17 congregate care represents a paradigmatic example of imminent irreparable harm.

18 An imminent threat to health and safety constitutes irreparable harm. For
19 example, in *Unknown Parties*, the district court – as later affirmed by the Ninth Circuit
20 – issued an injunction to curb physiological, health and/ or medical risks to civil
21 immigration detainees, including “*being exposed to communicable diseases.*” 2016 WL
22 8188563, at *15 (emphasis added). Likewise, in *Harris v. Bd. of Supervisors, Los*
23

24 ⁴⁴ Plaintiffs assert that due process requires greater protections than currently sought in
25 this Temporary Restraining Order. See First Amended Complaint ¶ 111. Plaintiffs
26 reserve their right to seek such protections through a preliminary injunction.

27 ⁴⁵ In the child welfare systems of all fifty states, children may not be detained for want
28 of a qualified custodian without affording them and/or their parents or other potential
custodians a prompt hearing before a judge or other neutral and detached
decisionmaker, during which allegations of unfitness are tested via trial-like procedures
and any ensuing finding of unsuitability must be based on competent evidence.

1 *Angeles Cty.*, the Ninth Circuit affirmed a preliminary injunction where the closure of
2 a hospital and bed reductions would irreparably injure chronically ill indigent patients
3 by inflicting “pain, infection, amputation, medical complications, and death due to
4 delayed treatment.” 366 F.3d 754, 756 (9th Cir. 2004); *see also Jones v. Tex. Dep’t. of*
5 *Crim. Justice*, 880 F.3d 756, 760 (5th Cir. 2018) (denial of adequate medical care for
6 prisoner’s diabetes constituted irreparable harm).

7 In light of the rapid spread of COVID-19 across the country and the impossibility
8 of maintaining proper social distancing in ORR congregate care facilities, Class
9 Members face an unacceptable risk of contracting COVID-19 in ORR custody. This
10 danger will only grow the longer Class Members remain detained in unsafe facilities.
11 Class Members who contract COVID-19 are at risk of death or serious illness, including
12 the potential for permanent impairment. (Graves Decl. ¶ 7.) Even Class Members who
13 display less severe symptoms will face the discomfort of being ill and, if they are
14 quarantined, the traumatic psychological effects of isolation far from caring family
15 members or other caregivers. (Wang Decl. ¶ 23.)

16 All Class Members, even those who do not become ill, are vulnerable to
17 irreparable psychological harm from the anxiety and likely heightened isolation of
18 being detained in the midst of a pandemic. (Haney Decl. ¶¶ 12-17.) *See Edmo v.*
19 *Corizon, Inc.*, 935 F.3d 757, 797-98 (9th Cir. 2019) (noting that “severe, ongoing
20 psychological distress” can constitute irreparable harm); *Stanley v. Univ. of S. Cal.*, 13
21 F.3d 1313, 1324 n.5 (9th Cir. 1994) (finding legal support for conclusion that “serious
22 emotional distress” cannot be remedied through money damages).

23 Conditions in ORR facilities are incompatible with preserving Class Members’
24 health and mental wellbeing. These unsafe conditions, along with the lack of available
25 medical care pose an extremely high likelihood of irreparable harm to Plaintiffs.

26 **VI. THE BALANCE OF EQUITIES FAVORS INJUNCTIVE RELIEF**

27 In this case, the equities and public interest merge into a single balancing test
28 because Defendants are government officials. *See Nken v. Holder*, 556 U.S. 418, 435

1 (2009); *see also Cal. v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). “A court must balance
2 the competing claims of injury and must consider the effect on each party of the granting
3 or withholding of the requested relief.” *Arc of Cal.*, 757 F.3d at 991 (*quoting Amoco*
4 *Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)). Importantly, “the Ninth Circuit
5 expects lower courts to protect physical harm to an individual over monetary costs to
6 government entities.” *McNearney v. Wash. Dep’t of Corr.*, No. 11-cv-5930 RBL/KLS,
7 2012 WL 3545267, at *15 (W.D. Wash. June 15, 2012).

8 The balance here tips decidedly in favor of Plaintiffs’ interest in health and safety,
9 which Defendants are placing at unnecessary risk. Unless this Court intervenes,
10 Plaintiffs are likely to suffer serious and severe irreparable harm, including likely
11 exposure to COVID-19. No purported government interest justifies subjecting children
12 to this life-threatening virus. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1193 (N.D.
13 Cal. 2015) (holding equities sharply favored detainee who “established that she is
14 suffering and is likely to continue to suffer unnecessary pain”); *see also Lopez v.*
15 *Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (“Faced with . . . a conflict between
16 financial concerns and preventable human suffering, [the court has] little difficulty
17 concluding that the balance of hardships tips decidedly in plaintiffs’ favor.”).

18 Granting Plaintiffs’ motion would not subject Defendants to any identifiable
19 hardship outweighing the irreparable harm to Plaintiffs’ health and safety. Indeed,
20 Defendants cannot point to *any* harm because they “cannot suffer harm from an
21 injunction that merely ends an unlawful practice.” *Ms. L. v. ICE*, 310 F. Supp. 3d 1133,
22 1147 (S.D. Cal. 2018) (*quoting Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir.
23 2013)). Moreover, “it is obvious that compliance with the law is in the public interest.”
24 *N.D. ex rel. parents acting as guardians ad litem v. Haw. Dep’t of Educ.*, 600 F.3d 1104,
25 1113 (9th Cir. 2010); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197
26 (9th Cir. 2011) (The “public interest favors applying federal law correctly.”). Because
27 the requested relief would simply mandate compliance with Constitution, TVPRA, and
28 the *Flores* Settlement, the Government could suffer no harm as a result.

1 Granting Plaintiffs' request for preliminary relief also serves the public interest
2 because allowing COVID-19 to spread in ORR congregate care facilities endangers the
3 general public. As public health experts have explained, reducing the number of
4 individuals in congregate care settings protects both those individuals and the
5 communities around them. An outbreak of COVID-19 in a congregate facility, such as
6 an ORR shelter, could quickly overtake the capacity of local health care resources, and
7 would likely require transport of infected individuals, potentially to areas where
8 COVID-19 has not yet spread. (Graves Decl. ¶ 36; Ex. D (Letter to Congress at 4.))

9 **VII. CONCLUSION**

10 For the foregoing reasons, the Court should grant this application for a temporary
11 restraining order and order Defendants to show cause why a preliminary injunction
12 should not issue in the form lodged herewith.

13 Dated: March 25, 2019

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