TODD W. BLANCHE
U.S. Deputy Attorney General

ALINA HABBA
Acting United States Attorney
Special Attorney

ALEX SILAGI
Deputy Chief, Civil Division
MARGARET ANN MAHONEY
Assistant U.S. Attorneys
970 Broad Street
Newark, NJ 07102
(973) 645-2700
Attorneys for Respondents

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EVGENY M. and EVGENIA M. (on behalf of themselves and their minor child M.M.), *Petitioners,* v. ERIC ROKOSKY, Warden, Elizabeth Detention Center, *et al.,* *Respondents.*	HON. ROBERT KIRSCH Civil Action No. 25-12387 (RK)

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

On the Brief:
Alex Silagi
Deputy Chief, Civil Division
Margaret Ann Mahoney
Assistant U.S. Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
PRELIMINARY STATEMENT 1
BACKGROUND 3
I. Relevant Legal Background 3
A. Detention of "Arriving Aliens" under INA § 235(b) 3
B. Asylum Applications and Presidential Proclamation 10888 5
C. Relief under the Convention Against Torture 7
II. Petitioners' Immigration History 7
LEGAL ARGUMENT 9
I. Petitioners' Detention Without Bond is Required By § 1225(b) 9
II. Petitioners Cannot Seek Asylum 10
III. Petitioners Have Received a CAT Screening 11
IV. Petitioners' *Flores* Argument Fails 12
CONCLUSION 16

TABLE OF AUTHORITIES

Federal Cases — Page(s)

ACLU v. Azar
No. 16-3539, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018) 12

Ashish v. Att'y Gen. of U.S.
490 F. App'x 486 (3d Cir. 2013) 5, 10

Bunikyte v. Chertoff
Nos. 07-164, 07-165, 07-166, 2007 WL 1074070 (W.D. Tex. Apr. 9, 2007) 13

D.B. v. Cardall
826 F.3d 721 (4th Cir. 2016) 14, 15

Davis v. Carlson
837 F.2d 1318 (5th Cir. 1998) 14

Dep't of Homeland Sec. v. Thuraissigiam
591 U.S. 103 (2020) 3

El-Khader v. Monica
366 F.3d 562 (7th Cir. 2004) 10

Flores v. Lynch
828 F.3d 898 (9th Cir. 2016) 12, 13, 14

Jennings v. Rodriguez
583 U.S. 281 (2018) 4, 5, 10

Landon v. Plasencia
459 U.S. 21 (1982) 3

Negusie v. Holder
555 U.S. 511 (2009) 7

Nishimura Ekiu v. United States
142 U.S. 651 (1892) 3, 4

Rathod v. Barr
No. 20-161, 2020 WL 1492790 (W.D. La. Mar. 5, 2020) 14, 15

Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem
No. 25-306, 2025 WL 1825431 11

Troxel v. Granville
530 U.S. 57 (2000) 15

United States v. Dominguez-Portillo
Nos. 17-4409, 17-4455, 17-4461, 17-4462, 17-4499,
(W.D. Tex. Jan. 5, 2018) 13

Federal Statutes

6 U.S.C. § 279(b)(1) 12, 13

8 U.S.C. § 212(a)(7)(A)(i) 1

8 U.S.C. § 1101(a)(15) 11

8 U.S.C. § 1101(a)(42)(A) 6

8 U.S.C. § 1158 6

8 U.S.C. § 1158(a)(1) 5, 6, 11

8 U.S.C. § 1182(f) 6, 11

8 U.S.C. § 1225(a)(1) 4, 5

8 U.S.C. § 1225(b)(1) 9

8 U.S.C. § 1225(b) 9

8 U.S.C. § 1231(g)(1) 5

8 U.S.C. § 1232(b)(1) 12

8 U.S.C. § 1232(c)(2)(A) 13

8 U.S.C. § 1429 6

Federal Regulations

8 C.F.R. § 1.2 4

8 C.F.R. § 208.22 6

8 C.F.R. § 209.2 6

8 C.F.R. §§ 1208.16-1208.18 7

PRELIMINARY STATEMENT

Petitioners Evgeny Mashchenko, Evgenia Mashchenko and their son, [redacted], are nationals of the Russian Federation. *See* Pet. at ¶ 1, ECF No 1. They allege a fear of returning to their native country due to their political activism against the Russian government. *See* Pet. at ¶¶ 15 and 17. On or about April 29, 2025, Petitioners sought admission into the United States after crossing the border from Mexico without documentation. *See* Pet. at ¶¶ 2, 15; Ex. A, Notice to Appear ("NTA") at 1. U.S. Customs and Border Protection ("CBP") accordingly found Petitioners to be inadmissible under Immigration and Naturalization Act ("INA") § 212(a)(7), 8 U.S.C. § 212(a)(7)(A)(i), because they were "arriving aliens" who did not possess valid documentation to enter the country and placed them into expedited removal proceedings. *See* Ex. A, NTA at 4; Ex. B, NTA at 4; *see also* Ex. F, Form I-860 Determination of Inadmissibility and Expedited Removal Order.

But Petitioners then claimed a feat of returning to Russia and sought protection under the Convention Against Torture ("CAT"). ICE then detained Petitioners under the mandatory-detention requirements of INA 235(b)(1), 8 U.S.C. § 235(b)(1)(B)(i)(IV). After U.S. Citizenship and Immigration Services ("USCIS") performed a CAT assessment, ICE placed Petitioners Evgeny and Evgenia in removal proceedings in immigration court. *See* Exs. A and B. ICE cannot remove or release Petitioners until their CAT claim is resolved by the immigration court because INA § 235(b)(1) requires ICE to detain Petitioners while that process plays out. ICE detained Petitioners Evgeny and Evgenia, and [redacted], was placed into temporary foster care through the U.S. Department of Health and Human Services ("HHS")

Office of Refugee Resettlement ("ORR") until Petitioners are released from ICE Custody or removed from the United States, or until [redacted] can be placed with his extended family. *See* Pet. at ¶ 16.

On June 30, 2025, Petitioners filed this habeas petition *pro se*, asserting (1) a violation of their Fifth Amendment Due Process rights because they have not received a custody determination, (2) violation of INA § 235(b)(1)(A) because they had not received a credible fear interview for their asylum claim, (3) violation of the regulations governing their CAT claims because they had not received a CAT screening interview, and (4) violation of substantive due process and the nationwide settlement in *Flores v. Reno*, which regulates the treatment of unaccompanied minors in federal immigration custody, by separating them from M.M. *See* Pet. at ¶¶ 37-51.

The Court should dismiss or deny the petition. As to Count One, Petitioners cannot obtain a custodial determination because ICE detained them under the mandatory-detention procedures of INA § 235(b)(1). And although INA § 212(d)(5)(A) authorizes ICE, in its discretion, to parole non-citizens "for urgent humanitarian reasons" or "significant public benefit," Petitioners have not requested parole, and, even if they did, the INA bars administrative or judicial review of DHS's parole decision. As to Count Two, Petitioners are not entitled to apply for asylum because of Presidential Proclamation 10888, 90 Fed. Reg. 8333 (Jan. 20, 2025). As to Count Three, Petitioners received their CAT assessment after filing this petition. On June 6, 2025, a USCIS Asylum Officer performed a credible fear interview of Petitioners and determined Petitioners established that it is more likely than not that

they will be tortured in Russia. *See* Ex. C, CAT Assessment Worksheet and CAT Assessment Notice, dated June 6, 2025. *Id.* Because of that finding, Petitioners were transferred from expedited removal proceedings to full removal proceedings, where they will raise their CAT claim to an immigration judge. *See* Exs. A and B. Count Three is accordingly moot. As to Count Four, neither substantive due process nor the *Flores* Settlement Agreement require ICE to return M.M. to ICE custody. Rather, because ICE did not place Petitioners in a family detention center, [redacted] cannot be in federal immigration custody and must either be in private foster care or with a guardian or family member.

For all these reasons, the Court should dismiss the Petition in full.

BACKGROUND

I. Relevant Legal Background

A. Detention of "Arriving Aliens" under INA § 235(b) (8 U.S.C. § 1225(b))

"The power to admit or exclude [non-citizens] is a sovereign prerogative." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (alteration omitted) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). And "the Constitution gives 'the political department of the government' plenary authority to decide which [non-citizens] to admit." *Id.* (emphasis added) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)). "[A] concomitant of that power is the power to set the procedures to be followed in determining whether a[] [non-citizen] should be admitted." *Id.*; see *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("To implement

its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.").

A noncitizen "who has not been admitted or who arrives in the United States" is considered an "applicant for admission" under the INA. 8 U.S.C. § 1225(a)(1). All "[a]pplicants for admission must 'be inspected by immigration officers' to ensure that they may be admitted into the country consistent with U.S. immigration law." *Jennings*, 583 U.S. at 287 (quoting 8 U.S.C. § 1225(a)(3)). "[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Id.* at 287.

Under § 1225(b)(1), which applies to Petitioners here, applicants for admission who are "arriving" are subject to expedited removal. In general, an immigration officer who finds the applicant inadmissible "shall order" removal without further hearing. *Id.* § 1225(b)(1)(A)(i). An "arriving alien" is "an applicant for admission coming or attempting to come into the United States at a port-of-entry[.]" 8 C.F.R. § 1.2. If the "arriving alien" announces an intention to apply for asylum or expresses a fear of persecution (including torture under CAT), removal is postponed pending further proceedings on the application. *Id.* § 1225(b)(1)(B). However, the applicant "shall be detained" throughout this process. *Id.* § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV).

Although detention under § 1225(b) is mandatory, it is not indefinite. On the contrary, "§§ 1225(b)(1) and (b)(2) . . . provide for detention for a specified period of time." *Jennings*, 583 U.S. at 299. Specifically, "detention must continue until

immigration officers have finished 'consider[ing]' the application for asylum or until removal proceedings have concluded." *Id.* (internal citation omitted). "Once those proceedings end, detention under § 1225(b) must end as well." *Id.* at 297.

Although section 1225(b) does not provide for bond hearings, *see id.* at 297–303, it does contain "a specific provision authorizing release from . . . detention": The Secretary of Homeland Security "may 'for urgent humanitarian reasons or significant public benefit' temporarily parole [non-citizens] detained under §§ 1225(b)(1) and (b)(2)." *Id.* at 300 (quoting 8 U.S.C. § 1182(d)(5)(A)). Federal courts lack jurisdiction "to review the . . . exercise of discretion in decisions to grant or deny parole." *Ashish v. Att'y Gen. of U.S.*, 490 F. App'x 486, 487 (3d Cir. 2013); *see* 8 U.S.C. § 1252(a)(2)(B)(ii).

The federal government further possesses statutory authority to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." *See* 8 U.S.C. § 1231(g)(1).

B. Asylum Applications and Presidential Proclamation 10888

The INA permits noncitizens present in the Unites States to apply for asylum, subject to certain exceptions. 8 U.S.C. § 1158(a)(1). It also permits "arriving aliens," like Petitioners, to apply for asylum. *Id.* § 1225(b)(1)(B). The applicants must first demonstrate they are unwilling or unable to return to their home country due to past persecution, or a well-founded fear of future persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B). If the applicant satisfies this burden, the Secretary of Homeland Security or the Attorney General has discretion to grant asylum. *Id.*

§ 1158(b)(1)(A). Asylum confers several benefits, including protection from deportation or removal, *id.*, 8 C.F.R. § 208.22, a pathway to lawful permanent residence, 8 C.F.R. § 209.2, and, eventually, citizenship, 8 U.S.C. § 1429.

The President, however, recently limited "arriving aliens'" ability to seek asylum. On January 20, 2025, the President issued Proclamation 10888, 90 Fed. Reg. 8333. (Jan. 20, 2025). The President invoked his statutory authority under INA §§ 212(f) and 215(a), 8 U.S.C. §§ 1182(f) and 1185(a), to "suspend[]" unlawful entry into the United States across the southern border by "restrict[ing]" noncitizens "from invoking provisions of the INA that would permit their continued presence in the United States." Proclamation §§ 1, 2, 90 Fed. Reg. at 8335. INA § 212(f), by its terms authorizes the President to "suspend the entry of all aliens or any class of aliens" and "impose on the entry of aliens any restrictions he may deem to be appropriate" "[w]henever the President finds that the entry of [such] aliens into the United States would be detrimental to the interests of the United States[.]" 8 U.S.C. § 1182(f).

As a result of the Proclamation, noncitizens apprehended at the southern border are subject to the Proclamation's suspension and restrictions on entry. In relevant part, they are not permitted to apply for asylum under 8 U.S.C. § 1158 or statutory withholding of removal under § 1231(b)(3), as these are "provisions of the INA that would permit their continued presence in the United States." Proclamation § 2. But noncitizens who raise a CAT claim are referred to USCIS for an assessment to determine if it is more likely than not that the alien will be tortured in the designated country of return or removal. *See* Ex. G, CAT Assessment Instructions

and Implementation Guidance for Alien(s) Whose Entry Has Been Suspended and/or Restricted Pursuant to INA §§ 212(f) and 215(a) (Jan. 31, 2025).

C. Relief under the Convention Against Torture

Asylum and CAT address different concerns. *Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009). Unlike asylum, which protects against removal from United States, the Convention Against Torture protects against removal to certain countries. *Id.* To obtain protection under CAT, the applicant must establish that it is more likely than not that they would be tortured if removed to the proposed country of removal. 8 C.F.R. §§ 1208.16-1208.18.

II. Petitioners' Immigration History

Petitioners are citizens of the Russian Federation. *See* Pet. at ¶ 15. On April 29, 2025, Petitioners applied for admission into the United States from Mexico at the Otay Mesa, California Port of Entry. *See* Pet. at ¶¶ 2, 15. CBP found Petitioners to be inadmissible to the United States and ordered them removed. *See Id.* ¶ 16; *see also* Ex. F. That is, because Petitioners were detained as "arriving aliens" at the border, CBP placed Petitioners into expedited removal proceedings pursuant to INA § 235(b)(1). Pet. at ¶ 16; *see also* Ex. F. CBP then transferred Petitioners into the custody of ICE for removal to Russia. Pet. at ¶ 16. According to information provided to this Office from ICE, Petitioners did not agree to leave the country, and according to the Petition, they requested asylum and relief under the CAT. *See* Pet. at ¶¶ 16-18. Accordingly, on or about May 15, 2025, ICE detained Petitioners at the Elizabeth Contract Detention Facility and placed M.M. into the custody of HHS's ORR, which in turn placed [redacted] into foster care pending the duration of Petitioners' immigration

proceedings or placement into the care of a guardian. *Id.* ¶ 16; Ex. E, Email Correspondence.[1]

On May 26, 2025, through the assistance of counsel, Petitioners requested family reunification through a transfer to a family residential center. *See*, Ex. D, May 26, 2025, Letter. Petitioners noted they were not seeking parole or release from detention. *Id.* at 1 ("It is critical to underscore that the Mashchenko family is not seeking parole or release at this time").

On June 6, 2025, Petitioner Evgeny received a screening interview under CAT. *See* Ex. C. The USCIS Asylum Officer conducting the interview determined that Petitioners' testimony regarding fear of persecution, imprisonment, and torture should they be returned to Russia was credible. *Id.*

Meanwhile, on June 30, 2025, ICE denied Petitioners' request for transfer to a family residential center. *See* Ex. E, Email Correspondence.

As a result of the CAT screening determination, on or about July 4 and 7, 2025, ICE issued Petitioners Notices to Appear in immigration court, where they would begin removal proceedings before an Immigration Judge ("IJ"). *See* Exs. A and B Their formal removal proceedings, where they would be able to continue pursuing their CAT claims, were set to begin on July 21, 2025. According to information provided by ICE, on July 16 and 17, 2025, with the assistance of counsel, Petitioners filed applications for relief in immigration court, and their initial hearing before an

---

1 Petitioner Evgenia was later transferred to Delaney Hall Detention Facility.

IJ occurred on July 21, 2025. The IJ set a Merits Hearing on Petitioners' relief applications for September 17, 2025, at 1:00pm. Ex. A at 7.

III. Procedural History

Petitioners filed this habeas petition on June 30, 2025. ECF No. 1. On July 3, 2025, the Court entered an Order to Answer, which directed Respondents to answer the petition within twenty days. ECF No. 3. On July 10, 2025, Respondents requested a brief extension of time to answer, and, on July 15, 2025, Respondents filed a supplemental letter in further support of their request for an extension of time to answer. ECF Nos. 5 and 6. On July 17, 2025, the Court entered an Order granting Respondents' request and directed Respondents to file an Answer on or before August 6, 2025. ECF No. 7. On July 22, 2025, Petitioners filed a Motion to Clarify or Supplement his Habeas Petition, which largely raised the same issues asserted in the initial petition. ECF No. 9.

LEGAL ARGUMENT

I. Petitioner's Detention Without Bond is Required By 8 U.S.C. § 1225(b).

Petitioners' first claim—violation of procedural due process because they did not receive a custody determination—should fail because ICE lawfully detained them under INA § 235(b)(1), 8 U.S.C. § 1225(b)(1)'s mandatory-detention provision. As explained above, Petitioners were "arriving aliens" who were apprehended by CBP at a port of entry at the U.S./Mexico border. Following the INA's requirement that ICE "shall" detain "arriving aliens" until removal or resolution of their claims for relief, *id.* § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV), ICE was required to detain Petitioners. The

INA forbids ICE or an immigration court from granting Petitioners a bond hearing. *Jennings*, 583 U.S. at 297 ("[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings."). Accordingly, Petitioners' claim that they did not receive a custodial determination should fail.

Relatedly, Petitioners may obtain release on parole. As explained above, INA § 212(d)(5)(A) authorizes ICE, in its discretion, to parole non-citizens "for urgent humanitarian reasons" or "significant public benefit," but Petitioners' counsel has not requested parole and has stressed in communications with ICE that they are not seeking "parole or release." *See* Ex. D at 1 ("It is critical to underscore that the Mashchenko family is not seeking parole or release at this time"). Moreover, the INA would also bar judicial review of ICE's parole decision, were Petitioners to request one here, because it is a discretionary decision outside of a court's subject matter jurisdiction. *See Ashish*, 490 F. App'x at 487; *El-Khader v. Monica*, 366 F.3d 562, 566 (7th Cir. 2004).

II. Petitioners Cannot Seek Asylum

Petitioners' asylum claim under INA § 235(b)(1)(A) also fails. Although INA § 235(b)(1)(A), by its plain terms, permits arriving aliens like Petitioners to apply for asylum,[2] Presidential Proclamation 10888 suspends that process.

---

[2] It states that when "the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B)." INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii). Section 1158, the asylum provision, in turn states:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .),

The Proclamation's suspension of asylum claims is permitted by the INA. The main basis for the Proclamation, INA § 212(f), 8 U.S.C. § 1182(f), allows the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants," specified classes that include asylees. *See* 8 U.S.C. § 1101(a)(15) ("The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens--..."). The Proclamation does so by prohibiting entry through the asylum processes set out in the INA. Petitioners do not identify any other bases to invalidate the Proclamation. *But see Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. 25-306, 2025 WL 1825431, at *39, --- F. 3d ----, (D.D.C. July 2, 2025) (rejecting § 212(f) argument and holding "the Proclamation and guidance are contrary to law to the extent that they prohibit covered aliens from applying for asylum or implement new limitations on asylum that have not been adopted by regulation."), *appeal filed*, No. 25-5243 (D.C. Cir.).[3]

III. Petitioners Have Received a CAT Screening

Petitioners' third cause of action—failure to receive a CAT screening interview—is now moot. On July 6, 2025, the USCIS Asylum Officer performed a CAT interview and assessment and determined that Petitioners have a credible fear of

---

> irrespective of such alien's status may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1).

[3] That matter is on expedited appeal in the D.C. Circuit with briefing to close on September 26, 2025. *See* No. 25-5243, Aug. 1, 2025 Order. It appears from the D.C. Circuit's August 1 Order that Petitioners fall within the clarified class of noncitizens certified under the District Court's opinion and order prohibiting enforcement of Proclamation 10888's asylum bar. *See id.*

torture if returned to Russia. Petitioners are now pursuing their CAT claim before the Immigration Court, with a merits hearing scheduled for September 17. Accordingly, the Court should dismiss Count Three.

IV. Petitioners *Flores* Argument Fails

Petitioners' last argument concerns family reunification. They assert a violation of substantive due process and the nationwide settlement in *Flores v. Reno*, which regulates the treatment of unaccompanied minors in federal immigration custody, by separating Petitioners and M.M.

In 1996, the federal government entered into a settlement agreement called the *Flores* Agreement[4] that "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the [immigration authorities]." *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (citing *Flores* Agreement ¶ 9). Under the *Flores* Agreement, the U.S. Department of Homeland Security ("DHS") must expeditiously transfer any minor who cannot be released from custody to a non-secure facility that is "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *Id.* at 903 (citing *Flores* Agreement ¶¶ 6, 19).

Today, HHS and its component agency the Office of Refugee Resettlement provide care and custody to unaccompanied minors. *ACLU v. Azar*, No. 16-3539, 2018 WL 4945321, at *2 (N.D. Cal. Oct. 11, 2018) (citing 8 U.S.C. § 1232(b)(1); 6 U.S.C. § 279(b)(1). ORR is responsible for promptly placing unaccompanied minors in "the least restrictive setting that is in the best interests of the child," taking into

---

[4] *See Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal. Feb. 2, 2015) (ECF No. 101).

consideration "danger to self, danger to the community, and risk of flight." *Id.* (quoting 8 U.S.C. § 1232(c)(2)(A)). "Most unaccompanied minors who are referred to ORR are eventually released from government custody to parents or sponsors who live in the United States. These unaccompanied minors often are held in short-term facilities or shelters while they await release to their parents and sponsors." *Id.*

Here, Petitioners assert ICE violated the *Flores* Agreement by not providing "prompt reunification and placement in the least restrictive setting[.]" Pet. at ¶ 51. That argument fails because the *Flores* Agreement applies only to minors. *See Flores*, 828 F.3d at 901. It "does not address . . . the housing of family units and the scope of parental rights for adults apprehended with their children," and it "does not contemplate releasing a child to a parent who remains in custody, because that would not be a 'release.'" *Id.* at 906; *see also United States v. Dominguez-Portillo*, Nos. 17-4409, 17-4455, 17-4461, 17-4462, 17-4499, 2018 WL 315759, at *9 (W.D. Tex. Jan. 5, 2018) ("[*Flores*] does not provide that parents are entitled to care for their children if they were simultaneously arrested by immigration authorities[.]"). Nor does the *Flores* Agreement provide rights to adult detainees, including any rights of release. *Flores*, 828 F.3d at 908; *see also Dominguez-Portillo*, 2018 WL 315759, at *14–15; *Bunikyte v. Chertoff*, Nos. 07-164, 07-165, 07-166, 2007 WL 1074070, at *16 (W.D. Tex. Apr. 9, 2007). Although the *Flores* Agreement gives preference to release of minors to a parent, this "does not mean that the government must also make a parent available; it simply means that, if available, a parent is the first choice." *Flores*, 828 F.3d at 908.

Moreover, Petitioners do not challenge the type of ORR setting [redacted] is in; they seek to have [redacted] removed from foster care and placed into ICE's custodial detention. When ICE denied the Petitioners' request to place the family in a family detention center, it did not violate the *Flores* Agreement or related regulations because those provisions do not require ORR to place a child into a custodial setting. *See D.B. v. Cardall*, 826 F.3d 721, 732 (4th Cir. 2016) ("The *Flores* Agreement spells out a general policy favoring less restrictive placements of alien children (rather than more restrictive ones) and their release (rather than detention) . . . The *Flores* Agreement specifies that, when an alien child is not released, he ordinarily should 'be placed temporarily in a licensed program until such time as release can be effected ... or until [his] immigration proceedings are concluded, whichever occurs earlier.' The child may be detained in a secure facility only under specified limited circumstances, and then only when no less restrictive alternative is "available and appropriate."). *See also Davis v. Carlson*, 837 F.2d 1318, 1318 (5th Cir. 1998) (denying mandamus and holding that Bureau of Prisons has "no clear duty—nor, indeed, any duty" to transfer a prisoner to a facility near his wife); *Rathod v. Barr*, No. 20-161, 2020 WL 1492790, at *5 (W.D. La. Mar. 5, 2020) (holding in habeas matter that noncitizen "does not have a right to be housed in any particular facility, nor does this court have the authority to order the ICE to house [a noncitizen] in any particular facility").

Relatedly, the *Flores* settlement recognizes the benefit of uniting an unaccompanied minor with a suitable guardian or extended family member when placement with the parent is not feasible. *See D.B.*, 826 F.3d at 732 ("The Agreement

contemplates that, unless detention is necessary to ensure a child's safety or his appearance in immigration court, he must be released 'without unnecessary delay,' preferably to a parent or legal guardian. The appropriate agency may, however, require a 'positive suitability assessment' before releasing the child to the custody of any individual or program."). To that end, Petitioners' counsel has not provided information to ICE regarding whether Petitioners' extended family in the United States have requested custody of [redacted] ICE has also been in contact with the facility responsible for [redacted] care as well as with [redacted] case manager. ICE is awaiting additional updates as to the any efforts by Petitioners' extended family to request custody of [redacted]

Lastly, Petitioners assert a violation of their substantive due process right to family integrity, relying on the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000) and similar cases. Pet. at ¶ 50. There, the Supreme Court recognized that fair processes usually protect against due process intrusions into the parent-child relationship but that some intrusions are so flagrant as to be invalid even if a fair process is afforded. *See Troxel*, 530 U.S. at 67 (sustaining fit parent's substantive due process challenge to statute providing for mandatory third-party visitation with court approval). But *Troxel* concerned the rights of parents who had no restrictions on the family unit. *D.B. v. Cardall*, 826 F.3d 721, 741 (4th Cir. 2016). Here, however, Petitioners' custodial detention distinguishes them from the parents in *Troxel*. ICE has placed Petitioners into adult custodial settings and has denied Petitioners' request for transfer to a family detention center. ORR cannot place [redacted] in the

facility that ICE has placed Petitioners. Accordingly, Plaintiff's substantive due process claim fails.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition.

TODD W. BLANCHE
U.S. Deputy Attorney General

ALINA HABBA
Acting United States Attorney
Special Attorney

By: *s/ Alex Silagi*
ALEX SILAGI
Deputy Chief, Civil Division
MARGARET ANN MAHONEY
Assistant United States Attorneys
Attorneys for Respondents