UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENETH MENA TORRES Petitioner, v. CAMILA H. WAMSLEY, Seattle Interim Field Office Director, Enforcement and Removal Operations, United States Immigration and Customs Enforcement (ICE), *et al.* Respondents	**No. 3:25-cv-05772-TSZ-MLP** **Agency No. A** [redacted] **PETITIONER'S RESPONSE TO FEDERAL RESPONDENTS' OPPOSITION TO PETITIONER'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Petitioner Keneth Mena Torres (Mr. Mena) makes a clear showing he is entitled to the extraordinary remedy of a temporary restraining order (TRO)—he will probably suffer irreparable harm in the form of violation of his Constitutional due process right to be free from unlawful detention, his Constitutional due process right to a hearing on his re-detention before a neutral arbiter where DHS must establish flight risk and/or dangerousness through clear and convincing evidence, and relatedly his right in the re-detention context to a pre-detention hearing. *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), is irrelevant to Mr. Mena's custody because it centers on a mandatory detention statute from which Mr. Mena was immune when he arrived in the United States. *Yajure Hurtado* finds that noncitizens present without admission, even if not encountered upon arrival, are applicants for admission and thus subject to the same mandatory detention statue applicable to noncitizens who arrive at the nation's shores. But even assuming the Board is correct in its analysis of the relationship of the various statutes its cites in the INA, it overlooks that the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) removes authority for detention of unaccompanied children (UAC), from DHS under the statutes it administers and places it in Office of Refugee Resettlement within HHS under a completely different statute not providing for mandatory detention. The UAC detention statute requires consideration of placement in the least restrictive setting considering individualized danger/flight risk. The VAWA 2013 amendments, Pub. L. 113–4 § 126) also added age out protection that requires this detention standard be continued by DHS when a detainee is transferred upon reaching 18. The most reasonable reading of this statute is that it applies if a person is released by ORR and then re-detained, as a matter of statutory construction of an ambiguous ameliorative statute, and as matter of due process owed to Mr. Mena if he is to be deprived of the liberty interest he acquired when released from ORR into the least restrictive setting.

ARGUMENT

RESPONDENTS IMPROPERLY RELY ON *MATTER OF YAJURE HURTADO* BECAUSE SECTION 235 DETENTION DOES NOT APPLY TO CURRENT AND FORMER UAC UNDER THE PLAIN TERMS OF THE SUBSEQUENTLY ENACTED TVPRA

Respondents compare Petitioner's case to *Matter of Yajure Hurtado* because the two noncitizens were charged with the same charge of removability under 8 U.S.C. §1182(a)(6)(A)(i) for being"[a]n alien present in the United States without being admitted or paroled, who arrive[d] in the United States at any time or place other than as designated by the Attorney General." But Mr. Mena and Mr. Yajure were in fundamentally different positions at the time of entry, DHS designated Mr. Mena an Unaccompanied Child (UAC) entitled to the protections of the Trafficking Victims Protection Reauthorization Act of 2008 (TVRPA); 8 U.S.C. § 1232. By virtue of this designation, Mr. Mena's detention by DHS was prohibited until his 18th birthday—so which INA provision governed his detention and the limitations on release were irrelevant, except for the initial apprehension authority. The Immigration and Nationality Act prohibited DHS from detaining Mr. Mena at the time of his arrival at age 11 or 12. His detention was authorized by the Office of Refugee Resettlement, within the Department of Health and Human Services, through 6 U.S.C. § 279 (conferring authority on HHS) and 8 U.S.C. § 1232(b)(1) (divesting DHS of such authority and establishing the requirement of transfer of UAC). The reference to DHS in the unaccompanied minor statutes and regulations consistently describes DHS' role in UAC matters as apprehension, care, control, and transfer, rather than detention. TVPRA has specific custody provisions that directly contradict the (allegedly) mandatory 235 detention language for the three types of applicants for admission (not just those who are deemed applicants for admission due to presence without admission or parole which is the theory of *Matter of Yajure Hurtado*). The ORR statute establishes a rule providing for the least restrictive environment and best interests of the child when in its custody

While he has turned 18, he nevertheless entitled under the statute to transfer from ORR custody to ICE custody with the same detention standard: into the least restrictive environment, taking into consideration his flight risk and danger to self/others, and considering alternatives to detention. NWIPC is not that. Mr. Mena also asserts *infra* that he acquired a liberty interest when released by ORR and his freedom cannot be rescinded without a predeprivation hearing.

Mr. Mena's detention and release were not governed by INA § 236(a) (8 U.S.C. § 1226(a)) (general detention statute), INA § 1226(c) (8 U.S.C. § 1226(c)) (mandatory detention statute for persons with certain criminal convictions), INA § 235 (mandatory detention of arriving noncitizens and applicants for admission) (8 U.S.C. § 1225), or INA §§ 241(a)(2) or (6) (8 U.S.C. §§ 1231(a)(2) or (6)) (noncitizen with final order of removal detained during 90 day removal period, or continued detention due to risk to community and other grounds).

Rather, Mr. Mena's apprehension by DHS was initially authorized by INA § 287(a)(2) (8 U.S.C. § 1357(a)(2)). This statute is the immigration officer investigatory detention and probable cause apprehension ("reason to believe) provisions of the INA. DHS may apprehend and hold a UAC for the Office of Refugee Resettlement, but the statues and regulations prohibit detention. Section 287(a)(2) provides:

(a) Powers without warrant

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-
>
> ...

> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

8 U.S.C. §1357.

"Immigration officers will make a determination as to whether an alien under the age of 18 is a UAC at the time of encounter or apprehension and prior to the detention or release of such alien." 8 C.F.R. § 236.3(d)(1) (emphasis added). UACs include those who arrive at the border without their parents who live in the U.S. 8 C.F.R. § 236.3(b)(3).

The regulations provide that, unlike accompanied children who may be "detained" by DHS, unaccompanied children are "held" in "custodial care":

> (2) DHS custodial care immediately following apprehension.
>
> (i) Following the apprehension of a minor or UAC, DHS will process the minor or UAC as expeditiously as possible. Consistent with 6 CFR 115.114, minors and UACs shall be held in the least restrictive setting appropriate to the minor or UAC's age and special needs. . .

8 C.F.R. § 236.3(g)(2)(i).

In contrast, the regulations consider that non-UAC are detained in DHS custody:

> (i) Detention of minors who are not UACs in DHS custody. In any case in which DHS does not release a minor who is not a UAC, said minor shall remain in DHS detention. Consistent with 6 CFR 115.14, minors shall be detained in the least restrictive setting appropriate to the minor's age and special needs,

8 C.F.R.§ 236.3(i).

During this initial custody stage, the ordinary detention statues (§§ 235, 236(a) 236(c), 241(a)(1), 241(a)(6)) do not apply even to non-UAC minors and adults. Rather, detention authority continues to be pursuant to the apprehension authority of INA § 287(a)(2) (8 U.S.C. § 1357(a)(2)).

Section 8 C.F.R. § 287.3 adopts standards for warrantless arrest and requires the subject be examined as to admissibility. Section 287.3(b) provides that the examining officer determine whether there is prima facie evidence of removability and whether the subject will be ordered expeditiously removed, processed for a credible fear/reasonable fear interview after being ordered expeditiously removed under (8 C.F.R. § 235 or § 238), issued a notice to appear in full Immigration Court removal proceedings under (8 C.F.R. § 239), or granted voluntary departure (8 C.F.R. § 240). However, UAC who are not from Mexico or Canada are not subject to expedited removal under INA § 235 (8 U.S.C. § 1225). 8 U.S.C. § 1232.

Once a subject is determined to be a UAC, DHS lacks authority to detain them despite INA § 235(b)(l)(B)(ii) (8 U.S.C. § 1225(b)(1)(B)(ii)) and INA § 235(b)(2)(A) (8 U.S.C. § 1225(b)(2)(A)) (mandating detention of applicants for admission placed in expedited removal who are referred to see asylum before an Immigration Judge, and those placed directly in Section 240 proceedings upon arrival to seek asylum, respectively). Sections 235, 236, and 241 are the detention provisions initially adopted in IIRAIRA, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) (codified at 8 U.S.C. §§ 1225, 1226, and 1231.

It is only once non-UAC and adults reach this step in the arrest/inspection process that INA statutory authority for more long-term detention is determined. But by that point, UAC are not even within the group of potentially regulated parties and thus one can see why they are not discussed in much detail in the Title 8 detention statutes.

An I-213, record of deportable alien (I-213) was provided by Defendant. It confirmed that Mr. Mena was apprehended at the U.S.-Mexican border while not accompanied by a parent, pursuant to a warrantless arrest and that he was designated a UAC and issued a warrant of arrest later.

As a person DHS has designated a UAC, DHS was prohibited from detaining Mr. Mena, except for a 72-hour temporary "hold" for purposes of transferring Mr. Mena to the custody of ORR. See 8 U.S.C. § 1232(b)(3). ORR then had responsibility for his placement in a shelter, foster care, or other child-appropriate setting. "Subject to section 279 of title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human <u>Services shall be promptly placed in the least restrictive setting</u>

that is in the best interest of the child." 8 U.S.C. § 1232 (c)(2)(A) (emphasis added). ORR is then required to release the UAC to an appropriate sponsor as soon as practicable after the appropriate background checks of the sponsor have been conducted. *Id.* These requirements mirror those agreed to by the United States in the Flores settlement, USDC C.D.Cal., No. 85-cv-4544-DMG-AGR.

To be clear, Mr. Mena is not arguing that the mere fact he was placed in a full removal proceeding, instead of expedited removal proceedings, means his custody status is not governed by Section 235 but rather by 236 and that he therefore can seek bond before an Immigration Judge. Rather it is the ORR detention authority and mandatory, more generous features that require this result. Respondent seems to concede that Mr. Mena arrived as a UAC. Resp. Opp. at 3 (citing the petition). And it concedes that "[w]hile he was initially in custody of the Department of Health and Human Services' Office of Refugee Resettlement; he was released the following month." *Id.* quoting Sica Decl., ¶ 6". However, Respondent does not address in any way the UAC detention statute enacted in 2008 in the TVPRA and how it directly conflicts with the 1996-1997 IIRAIRA detention amendments contained in Sections 235, 236, and 241 (at least as Respondents have interpreted these). A standard requiring prompt placement in the least restrictive setting that is in the best interest of the child and considering a subject's flight risk and danger to self/others is directly contrary to the idea of mandatory (carceral) detention Respondent says is required under the INA. Flight risk and dangerousness are irrelevant in a mandatory detention context. And the least restrictive environment for someone who is not dangerous or a flight risk is release on recognizance to their home.

MR. MENA'S RELEASE BY ORR UNDER THE TVPRA ENTITLED HIM TO "AGE OUT" CUSTODY TREATMENT SIMILAR TO THE ORDINARY OCC STANDARD WHICH IS CONTRARY TO DHS POLICY AND RELEVANT STATUES

Mr. Mena is now 19, but the TVPRA's special provisions still displace the (allegedly) mandatory detention statutes of the INA. When a UAC in ORR custody turns 18 and is transferred to DHS detention, the statute requires that "[t]he Secretary of Homeland Security shall . . consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight," and provides that "[s]uch aliens shall be eligible to participate in alternative to detention programs... which may include placement... with an individual or an organizational sponsor, or in a supervised group home." 8 U.S.C. § 1232(c)(2)(B) (added by VAWA 2013, Pub. L. 113-4 § 1261). Courts have enforced these duties against ICE. *Garcia Ramirez v. ICE*, No. 18-508, ECF No, 367 Mem. Op. (D.D.C. Sept. 21, 2021) (permanent injunction requiring compliance with § 1232(c)(2)(B)'s requirement that ICE consider the least restrictive environment and finding systematic noncompliance). Given Mr. Mena's law abiding, non-violent, education-seeking-character and a formal IJ finding that he is not a flight risk or dangerous, any reasonable finder of fact would be compelled to conclude that ICE did not even <u>consider</u> these options under the TVPR.

The UAC transfer statute is most reasonably read to apply to anyone (like Mr. Mena) who has been detained under authority of ORR and who was released to a sponsor under the least restrictive setting available standard and who is later detained by ICE while their UAC removal case/asylum application remains pending. First, the UAC statute has been interpreted to permit reliance on features available to UACs even if factually the child is over 18 and accompanied—so long as an action was taken before the person's 18th birthday showing reliance. *Matter of M-A-C-O*, 27 I&N Dec. 477 (BIA 2018) (asylum applicant in in removal could pursue asylum application initially before USCIS if application filed before 18th birthday). A UAC would have applied for release and been approved under the favorable detention standard before 18, which is largely the same standard applied to adult transfers. Second, once ORR continues to have ancillary jurisdiction over a UAC's custody for the limited purpose of enforcing and recognizing its prior order. So, at the point of re-detention following an 18th birthday by DHS, a transfer does occur from ORR to DHS—either explicitly or tacitly. The ORR statute also provides " the Director of the Office of Refugee Resettlement shall be responsible for. . . (K) collecting and compiling statistical information from. . ., <u>the Department of Homeland Security</u>, . . <u>relating to</u> unaccompanied alien children." 6 U.S.C. § 279(b)(1). This statute presumes a legal duty to provide this information. And information regarding compliance with custodial transfer per the UAC age-out rules clearly "relates to" unaccompanied alien children even if the subjects of the data have turned 18. ORR's duties could include, for example, auditing DHS detention records regarding placements of former OCC detainees to determine if ICE is complying with the transfer mandate.

Third, a contrary reading would cause absurd results that are demonstrably contrary to the purposes of the drafters. Take for example, a 17-year-old who is released and then re-detained at age 18 into ICE mandatory custody. In contrast another person aged 18 goes directly to ICE custody, but in the least restrictive setting. The abrupt shift from social-worker group living environment to a carceral setting would be obviously traumatic—yet more so for a young person returned to the community and then abruptly detained in a carceral setting. Fourth, interpreting the statute to provide protection to prior detainees who are not physically transferred on their 18th birthday is supported by the ameliorative statute rule which the Ninth Circuit and the Board have repeatedly cited, and the statute is ambiguous regarding whether Congress wanted to create a regulatory "donut hole" that deprives UAC of the special protection they are generally provided under the TVPRA due to the happenstance of their release to a sponsor prior to turning 18, and then being transferred to ICE.

Ninth Circuit precedent in the context of ameliorative statutes supports the broader reading of the statute Mr. Mena promotes. TVPRA and its UAC provision are an ameliorative statute "designed forestall harsh results." For example, in *U.S. v. Sanchez-Guzman*, the Eastern District of Washington court held VAWA was "a generous enactment, intended to ameliorate the impact of harsh provisions of immigration law . . . when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion.... This is particularly so in the immigration context where doubts are to be resolved in favor of the alien." *United States v. Sanchez–Guzman*, 744 F.Supp. 997, 1002 (E.D.Wash.1990); see also *Matter of Vizcaino*, 19 I. & N. Dec. 644, 648 (BIA 1988) (noting that expansion of relief "clearly was intended as a generous provision, and it should therefore be generously interpreted"), *Lopez–Birrueta v. Holder*, 633 F.3d 1211, 1216 (9th Cir. 2011) (same). (cleaned up).

A case with relevant themes (immigration status, limiting age deadlines, and selection of an interpretation of a statute that increases beneficiaries of an ameliorative program where the statue is ambiguous and an expansion is clearly consistent with the policy aim. In those cases, the mentioning of one favored group does not imply the intent to limit the humanitarian benefit only to that group. See *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004) (regarding the V visa for minor children and the impact of their turning 21 years of age on maintenance of that visa). Akhtar found that children of permanent residents did not lose their V visa upon turning 21 because the statute was ambiguous about what should happen extending their visas was more consistent with the very strongly expressed Congressional purpose of reuniting families in the statute creating the V visa. Reaffirming *Hernandez v. Ashcroft*, the court adhered to "the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. Id. (cleaned up) It also noted the irony of inducing the children to leave their home country to join family, and the arbitrarily separating them from family after they had lived in the U.S.

Enforceable Liberty Interest

And fifth, Mr. Mena also has an enforceable liberty interest in his release from ORR custody which includes a pre-deprivation hearing at which the government must prove dangerousness and flight risk though clear and convincing evidence. Numerous cases have addressed the need for a "pre-deprivation hearing because the released detainee acquires a liberty interest and due process rights. See, e.g. *Arzate v. Andrews*, No. 1:25-cv-00942 (E.D. Cal. Aug. 2025) (TRO granted, Immigration Judge bond reinstated, and new bond hearing required to re-detain habeas petitioner if he was to be detained, requiring DHS to show dangerousness or flight risk through clear and convincing evidence); *Ramirez-Clavijo v. Kaiser*, No. 5:25-cv-06248-BLF (N.D. Cal. July–Aug. 2025) (TRO granted, pre-detention hearing required, and DHS could not change statutory basis for detention from Section 236(a) to 235(b) ; *Garro Pinchi v. Noem*, No. 5:25-cv-05632-PCP (N.D. Cal. July 2025) (predetention hearing); *Enamorado v. Kaiser*, No. 5:25-cv-04072-NW (N.D. Cal. May 2025) (DHS enjoined from re-detaining before

AN APPEAL WAS FILED WITH THE BOARD OF IMMIGRATION APPEALS BUT ADMINISTRTIVE EXHAUSTION IS NOT REQUIRD FOR STATUTORY JURISDICTION, THE COURT SHOULD WAIVE PRUDENTIAL EXHAUSTION DUE TO IRREPARABLE HARM, AND THEAPPELLATE CHALLENGE MAY BE FUTRLE

Respondents argue Petitioner has failed to establish a violation of his Due Process rights to a timely appellate process because he filed his appeal to the BIA on September 3, 2025. He holds no hope of receiving a timely review of his custody at the Board of Immigration Appeals (BIA). According to the agency's own data, during FY 2024, the agency's *average* processing time for a bond appeal was 204 days, or nearly seven months (emphasis added). *Matter of Yajure Hurtado* was decided five months after the noncitizen's appeal. Another case on which the Respondents rely, *Matter of Q. Li* 29 I&N Dec. 66 (BIA 2025), was also decided five months after the initial appeal. This processing time defies the Due Process Clause and makes appellate review at the BIA effectively meaningless. Mr. Mena also has reasonable grounds to conclude that pursuing the appeal will be futile, given that the Board recently issued a precedent decision in *Yajure Hurtado*—so the agency's position is clear.

CONCLUSION

Petitioner has overwhelmingly shown that he is entitled to a TRO. Through his response here and in his initial application, he has demonstrated that the law and facts are clearly in favor of his position, continued unlawful detention will probably cause him irreparable harm, and that the balance of the interests tips sharply in his favor. Alternatively, he is eligible because "serious questions going to the merits are raised and the balance of hardships tips sharply in [his] favor." *See Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

Dated: September 15, 2025

Respectfully submitted,

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VERIFICATION

I represent Petitioner, Keneth Mena Torres, and submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing Petitioner's Response to the Federal Respondent's Opposition to the Petitioner's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction are true and correct to the best of my knowledge.

Dated: September 15, 2025

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Exhibits

1	IJ bond hearing evidence #1
2	IJ bond hearing evidence #2
3	BIA receipt for appeal
4	Bond hearing notice
5	E26 notice of appeal (bond)
6	I-730
7	I-730 receipt
8	IJ Bond Memorandum
9	Motion for custody hearing