

1 Zoe Sperber, 036542
2 Laura Belous, 028132
3 Elizabeth J. Bradley, 041239
4 Florence Immigrant & Refugee Rights Project
5 P.O. Box 86299
6 Tucson, AZ 85754
7 zsperber@firrp.org – (601) 207-1142
8 lbelous@firrp.org – (520) 934-7257
9 lbradley@firrp.org – (602) 492-6851

10 *Attorneys for Petitioners*

11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA**
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15 Susan Kettlewell, et al.,
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17 Petitioners/Plaintiffs,
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19 v.
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21 Markwayne Mullin, et al.,
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23 Defendants/Respondents.
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No. CV-26-00340-RM

**REPLY TO ANSWER AND RETURN
TO PETITIONER/PLAINTIFF'S
FIRST AMENDED COMPLAINT**

Susan Kettlewell, acting as next friend for 108 Child Petitioners/Plaintiffs, and the Florence Immigrant and Refugee Rights Project, hereby files the following Reply.

1. Plaintiff/Petitioners Have Standing Because ORR Merits No Presumption of Regularity

ORR asks this Court to credit its statements that the 108 children who bring this action are not going to be transferred away from counsel to other jurisdictions unless warranted by specific circumstances contemplated in regulation and ORR policies. (Docs. 18 at 8; 18-1 ¶ 17). ORR emphatically declares that it has policies and procedures in place to ensure that counsel for those children are timely notified of transfer, either 48 hours before their transfers, or in case of emergency or runaway risk, within 24 hours of the transfer (Docs. 18 at 9-10; 18-1 ¶ 10). However reassuring ORR's policies on paper may be, they offer cold comfort: when transferring a Petitioner Child away from counsel in Arizona, ORR failed to follow—in at least four ways—its own rules that apply to this matter and that it avows here it is bound by law to respect. (Doc. 18 at 9-10).

L.M.D.A. is a 17-year-old child and a Petitioner/Plaintiff Child in this case. (*See* Doc. 14-1; *see also* Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 3). Florence Project attorneys filed notices of appearance with L.M.D.A.'s ORR-contracted shelter on July 14, 2026 indicating that he was represented by counsel. (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 5). On August 2, 2026, shelter staff in Arizona sent an email to Florence Project alleging that L.M.D.A. had run away but provided no other information about where he was or whether he had returned. (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 5). Although ORR Declarant Biswas agrees that the ORR Policy Guide

§ 1.4¹ and 45 C.F.R. § 410.1601(a)(3) require that counsel be notified within 24 hours after that transfer, L.M.D.A.’s counsel *did not* receive that notice from the agency. (*See* Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 5; *see also* Roxana Avila-Cimpeanu CLSEPA Declaration ¶ 34 (hereinafter “CLSEPA Declaration”). Likewise, the notice of discharge that Florence Project staff received on August 3 did not detail whether L.M.D.A. was back in ORR custody. (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 5; CLSEPA Declaration ¶ 34). Rather, Mr. Biswas’s August 18 declaration provided the notice that was supposed to have been provided two weeks earlier. (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 6).

Second, Mr. Biswas alleges that, preceding transfer to a staff secure facility in Texas, L.M.D.A. absconded from the Arizona facility, was apprehended by the Phoenix Police Department, referred to Immigration and Customs Enforcement (ICE), and then re-referred to ORR custody. (Doc. 18-1 ¶ 13). ORR failed to notify the client’s attorney regarding a law enforcement encounter as required by ORR Policy Guide § 5.8.11, even though the attorney specified that her representation includes “[a]ll interactions with ICE/DHS/law enforcement.” (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 7)

Third, ORR also did not provide L.M.D.A.’s counsel with a Notice of Placement in the higher security facility within 48 hours, as required by ORR Policy Guide §§ 1.2.4, 1.4.2. (Supplemental Declaration of Roxana Avila-Cimpeanu ¶ 8). Finally, Mr. Biswas states that L.M.D.A. was arrested on Aug 9, 2026, in Texas following this transfer. (18-1 ¶ 16). ORR again failed to notify counsel despite documents on file with the agency

¹ All ORR Policy Guide citations are available at <https://acf.gov/orr/policy-guidance/unaccompanied-children-bureau-policy-guide>

1 describing the scope of representation to any interaction with law enforcement and ORR's
2 own policy requirement that counsel be notified of arrest within four business hours or the
3 morning of the next calendar day. (Supplemental Declaration of Roxana Avila-Cimpeanu
4 ¶ 8; *see also* ORR Policy Guide § 5.8.11).

6 These serious failures to follow policy raise a more troubling question: at what
7 point can the parties and the Court rely on ORR's assurances that these children will not
8 be transferred when the agency has already shown that it understands its obligations under
9 the law but does not follow them? ORR is entitled to the presumption of regularity where
10 there is some evidence that it properly discharged the relevant official duties. *Gov't of*
11 *Guam v. Guerrero*, 11 F.4th 1052, 1055 (9th Cir. 2021) (citing *United States v. Chem.*
12 *Found.*, 272 U.S. 1, 14–15 (1926); *see also League of United Latin Am. Citizens v. Exec.*
13 *Off. of the President*, 780 F. Supp. 3d 135, 177 (D.D.C. 2025) (when an agency is
14 required to use specific procedures, courts sometimes presume that the agency followed
15 those procedures before acting). However, the presumption of regularity is only a
16 presumption; it may be rebutted by clear evidence to the contrary. *United States v.*
17 *Armstrong*, 517 U.S. 456, 464 (1996). While the Court “cannot simply assume” that the
18 agency will violate its own rules, the record here demonstrates that ORR has repeatedly
19 violated its own rules to the detriment of children. *League of United Latin Am. Citizens v.*
20 *Exec. Off. of the President*, 780 F. Supp. 3d 135, 177 (D.D.C. 2025) (cleaned up); *see also*
21 *Cnty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Hum. Servs.*, No. 25-cv-
22 02847-AMO, Dkt. No. 179 (N.D. Cal. Aug. 25, 2026) (finding that evidence raised
23 “serious questions” about compliance with an injunction and ordering an ORR
24 representative to appear in person to explain substantial “opacity” in his declaration).

1 First, as argued above, ORR blatantly violated its own rules regarding notice
2 throughout the process of L.M.D.A.'s transfer even as the agency files declarations
3 insisting that it will follow them. Second, ORR has already shown its willingness to
4 bypass its own rules regarding notice of transfer over Labor Day weekend 2025 when it
5 failed to notify counsel of plans to repatriate Guatemalan children. (Supplemental
6 Declaration of Roxana Avila-Cimpeanu ¶ 12-15). This Court has already found that the
7 agency's past actions violated the presumption of regularity when it held that that "...the
8 lack of an imminent plan means little when Defendants' past actions demonstrate that
9 efforts to transport unaccompanied alien children out of the country may occur in the
10 middle of the night and with only hours or minutes of notice." *Kettlewell v. Noem*, 2025
11 WL 2733309, at *8 (D. Ariz. Sept. 25, 2025).

12 Finally, and more recently, ORR allowed the legal services contract to lapse on
13 July 31, 2026, without public information about its successor contract. (CLSEPA Dec.
14 ¶4). The TVPRA requires HHS, "to the greatest extent practicable," to ensure
15 unaccompanied children have counsel to represent them and protect against mistreatment,
16 exploitation, and trafficking. 8 U.S.C. § 1232(c)(5). ORR policy implements this mandate
17 by requiring access to legal services and reasonable assistance to obtain and communicate
18 confidentially with counsel. ORR Policy Guide §§ 3.7–3.7.2. The Florence Project
19 continues to provide legal services to UCs with reserve funds. (CLSEPA Dec. ¶4). There
20 has been significant confusion and lack of clarity surrounding the government's plan to
21 transition legally required work to a new provider, including to whom the contract has
22 been assigned, how services will transfer over, and how attorneys of record may maintain
23 ethical representation of clients without any direct communication from ORR. The
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1 “government’s purported plan has sown confusion and, in some cases, led to interference
2 with existing attorney-client relationships.” (CLSEPA Dec. ¶ 18). ORR has demanded
3 Florence Project attorneys provide lists of the children we represent, sometimes with only
4 a few hours’ notice. (CLSEPA Dec. ¶¶ 19-21). Another organization, U.S. Committee for
5 Refugees and Immigrants, seems to have an agreement or ORR, and has appeared at
6 immigration court dockets and attempted to appear to request continuances on behalf of
7 children that Florence Project represents. (CLSEPA Dec. ¶¶ 19-21). They have also
8 asked Florence Project to disclose the personal identifying information of the children we
9 represent. (CLSEPA Dec. ¶¶ 19-21). This chaos is consistent with other reports from
10 around the country.² This has occurred without any public disclosure of the successor
11 contract or a full accounting of newly contracted parties.
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15 These examples of ORR’s failure to follow its own rules and regulations rebut a
16 presumption of regularity. Petitioners/Plaintiffs thus request that the Court grant the
17 Petition. If the Court is not inclined to move forward on this claim at this time, as an
18 interim measure, Petitioners/Plaintiffs ask the Court to order Respondents/Defendants to
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23 ² See Ruth Marcus, *How Trump Is Trying to Weaken Migrant Children’s Legal*
24 *Defense*, New Yorker (Aug. 15, 2026), [https://www.newyorker.com/news/the-lede/how-](https://www.newyorker.com/news/the-lede/how-trump-is-trying-to-weaken-migrant-childrens-legal-defense)
25 [trump-is-trying-to-weaken-migrant-childrens-legal-defense](https://www.newyorker.com/news/the-lede/how-trump-is-trying-to-weaken-migrant-childrens-legal-defense) (describing the disruption of
26 established attorney-client relationships after ORR allowed its nationwide legal-services
27 contract to expire). Gonzalez, *Law Firm with Ties to Trump Administration Declines*
28 *Offer to Represent Migrant Children*, Associated Press (Aug. 12, 2026),
[https://apnews.com/article/texas-migrant-children-deport-immigration-](https://apnews.com/article/texas-migrant-children-deport-immigration-d070db48239d70082d22a52197e58e10)
[d070db48239d70082d22a52197e58e10](https://apnews.com/article/texas-migrant-children-deport-immigration-d070db48239d70082d22a52197e58e10) (reporting that interim attorneys appeared
unannounced in immigration court claiming to represent children they had never met,
causing confusion among judges and existing counsel).

1 provide notice of proposed transfer with at least 14 days written notice so that
 2 Petitioners/Plaintiffs could again raise their claim.³

3 **2. Habeas is a remedy for unlawful detention, regardless of a release request.**

4 The Supreme Court has held repeatedly that habeas petitions do not necessarily
 5 require a request for release. In *Trump v. J. G. G.*, a group of Venezuelan men filed
 6 habeas petitions and complaints for declaratory and injunctive relief to challenge both the
 7 use of the Alien Enemies Act (AEA) and their designation and removal under that Act.
 8 604 U.S. 670, 672 (2025). *Trump v. J. G. G.*, 604 U.S. 670, 145 S. Ct. 1003, 221 L. Ed. 2d
 9 529 (2025). The Court held that “[r]egardless of whether the detainees formally request
 10 release from confinement, because their claims for relief necessarily imply the invalidity
 11 of their confinement and removal under the AEA, their claims fall within the ‘core’ of the
 12 writ of habeas corpus and thus must be brought in habeas.” *Id.* at 672 (internal citations
 13 omitted); *see also Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (holding that habeas is
 14 not limited to immediate release from illegal custody and may be used to “attack future
 15 confinement.”); *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968) (the federal habeas corpus
 16 statute “does not deny the federal courts power to fashion appropriate relief other than
 17 immediate release. Since 1874, the habeas corpus statute has directed the courts to
 18 determine the facts and dispose of the case summarily, as law and justice require”)
 19 (citations omitted). Respondents (Doc. 18 at 11) rely on *Pinson v. Carvajal*, 69 F.4th
 20 1059, 1070 (9th Cir. 2023) for the proposition that a habeas petition must necessarily

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 28 ³ Likewise, Petitioners/Plaintiffs are open to pleading this claim in the alternative or consider dismissing it if they have written assurances approved by the Court that they will have notice of an intent to transfer clients so they can timely raise the claim again if necessary.

1 request release. Not so. That case involved immigration detainees who alleged that poor
2 conditions inside the detention center during the COVID-19 pandemic violated the Eighth
3 Amendment and the court rejected habeas as the vehicle for making conditions-of-
4 confinement claims. *Id.* at 1063–65. But Petitioners/Plaintiffs do not challenge the
5 circumstances or treatment inside their shelters—they instead allege that if they were to
6 be transferred away from counsel in Arizona, they would suffer injury to their Fifth and
7 First Amendment rights along with a violation of access to counsel under the TVPRA.
8 (Doc. 14 at ¶ 6). Thus, unlike the claims in *Pinson*, Petitioners’ claims attack the legality
9 of the exercise of custodial authority, not “ancillary harms resulting from the conditions of
10 confinement.” *Pinson*, 69 F.4th at 1069. Indeed, just as in *J.G.G. v. Trump, Pinson*
11 reaffirmed that habeas allows attacks on the “legality or duration of confinement,” *id.* at
12 1065 (quoting *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979), and that this Court can
13 craft a remedy outside of release “as law and justice require.” *Peyton v. Rowe*, 391 U.S. at
14 66–67.

15 **3. The petition has been properly verified.**

16 28 U.S.C. § 2242 provides that an application for a writ of habeas corpus shall be
17 in writing signed and verified by the person for whose relief it is intended or by someone
18 acting in his behalf. This expressly contemplates verification by an attorney acting as the
19 petitioners’ representative, and the vast majority of cases support this proposition. *Evans*
20 *v. Bennett*, 467 F. Supp. 1108, 1109-1110 (S.D. Ala. 1979) (recognizing that as early as
21 1908, courts of appeal reasoned that a habeas petition may be verified by an inmate’s
22 attorney in cases of infancy, incompetency, or lack of time); *see also Manuel P.*,
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1 *Petitioner, v. Todd Blanche, et al.*, 2026 WL 2281048, at *3 (D. Minn. Aug. 7, 2026)
2 (finding attorney verification appropriate and compliant with the habeas statute).

3 Holdings to the contrary are usually concerned with addressing improper actions of
4 litigants, including “uninvited meddlers, styling themselves as next friends.” *Wilson v.*
5 *Dixon*, 256 F.2d 536, 537–38 (9th Cir. 1958); *see also Padilla Paz v. Hernandez*, No.
6 2:26-CV-01394-BAT, 2026 WL 1413096, at *4 (W.D. Wash. May 15, 2026) (allowing
7 verification and noting that the Respondents also identify no specific allegation in the
8 petition as inaccurate or inadequately supported). Petitioners/Plaintiffs here are 108
9 children, ranging in age from 5 months to 17 years, who bring this case through their next
10 friend. Not only is it entirely impractical to ask those children or their next friend to sign
11 a verification and file it with the court, but Respondents also make no allegation of any
12 “meddling” or “specific allegation in the petition as inaccurate or inadequately
13 supported,” and therefore bring a pro forma challenge that has already been rejected by
14 almost all the courts that have considered it. The Petition has been properly verified.

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18 **4. The FOIA claims are properly joined.**

19 *Animal Legal Defense Fund v. USDA* and 5 U.S.C. § 552(a)(2) impose judicially
20 enforceable affirmative disclosure obligations under § 552(a)(4)(B). 935 F.3d 858, 869–
21 74 (9th Cir. 2019). A district court has authority to order an agency to make records
22 subject to § 552(a)(2) electronically available to the public rather than merely produce
23 them to an individual requester. Those affirmative duties imposed by § 552(a)(2) are
24 enforceable through FOIA’s injunctive-remedy provision. *Id.* While
25 Respondent/Defendants assert (at 13) that bringing these claims in the instant case is
26 “improper,” they do not contest and therefore concede that the Defendant ORR is in
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1 violation of § 552(a)(2), nor do they cite any legal authority to support their objection.
2 Instead, they merely contend (at 14) that Petitioners/Plaintiffs' habeas and FOIA claims
3 are "best" litigated separately due to differing procedural timelines and objectives.
4 Though Defendants make much of the "expedited" timeline for Habeas relief versus the
5 longer FOIA timeline, Arizona District Court typically assigns FOIA suits to its
6 "expedited track" due to the claims' relative simplicity. LRCiv 16.2.

8 Contrary to Respondent/Defendants' assertions (at 13) that these claims are
9 "incompatible," the issues they address arise from the same nucleus of fact:
10 Defendants/Respondents have made significant indications that children in their custody
11 may be moved but have denied that there is any formal plan in place to do so, and they
12 have also allowed a legal services contract to lapse in violation of their duty under statute
13 and regulation to provide access to counsel and legal orientations to unaccompanied
14 children. *See* 8 U.S.C. § 1232(c)(5); ORR Policy Guide §§ 3.7–3.7.2; 45 C.F.R. §
15 410.1309. Petitioners/Plaintiffs seek to understand which representation they should rely
16 on and to respond accordingly. Though Respondents/Defendants object that the differing
17 procedural and adjudicatory timelines for these claims render this vehicle so inconvenient
18 as to be improper, this argument carries no legal force. Following over a month of chaos
19 caused by Respondents/Defendants' disparate representations regarding the end of the
20 legal services contract and possible plans to centralize children at one large detention
21 center, Respondents/Defendants must produce the requested documentation underlying
22 the potential unlawful detention challenged in Plaintiff's Habeas petition.

23 This Court should therefore order Respondents/Defendants to produce the
24 requested documents in their online reading room. ORR must affirmatively publish the
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1 successor Unaccompanied Children Program contract (“the contract”) and all policies,
2 procedures, and staff guidance governing that contract and the same information
3 regarding transfer of unaccompanied children pursuant to § 552(a)(2) because they
4 “constitute the ‘working law’ of the agency” that “have the force and effect of law.”
5 *N.L.R.B. v. Sears, Roebuck & Co. (Sears)*, 421 U.S. 132, 153 (1975). Documents that
6 “‘determine [the agency’s] interaction with outsiders’ and ha[ve] ‘real-world effects on
7 the behavior of . . . agencies . . . fit comfortably within the working law framework”
8 because they “reflect[] [the agency’s] formal or informal policy.” *Elec. Frontier Found. v.*
9 *U.S. DOJ*, 739 F.3d 1, 8 (D.C. Cir. 2014) (quotation omitted).

12 **5. The FOIA Claim is properly plead.**

13 Respondents/Defendants further argue (at 14-15) that Plaintiffs have failed to state
14 a claim for relief under 5 U.S.C. § 552(a)(2) because their FOIA claim relies on
15 “conclusory statements” instead of “sufficient factual matter,” therefore failing the
16 applicable pleading standard. Confoundingly, the lone support Respondents/Defendants
17 offer is that Plaintiffs’ claim requests categories of records specifically enumerated in 5
18 U.S.C. § 552(a)(2)(B) and (C). What Respondents/Defendants characterize as a
19 “recitation” of the statute is simply language that complies with its requirements and
20 supports Plaintiffs’ claim for relief under it. Respondents/Defendants misunderstand the
21 appropriate pleading standard and the substance required to meet it. Defendants rely (at
22 14-15) on *Citizens for Resp. & Ethics in Washington v. United States Dep’t of Just.*, 922
23 F.3d 480 (D.C. Cir. 2019) to articulate Plaintiff/Petitioners’ burden in a FOIA reading
24 room claim. The court there found that, in order to reach Defendants’ affirmative duty to
25 publish records to the FOIA reading room under 5 U.S.C. § 552(a)(2), Plaintiff/Petitioners
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1 must first allege “sufficient factual matter, accepted as true, to ‘state a claim to relief that
2 is plausible on its face,’” in this case a claim that the government has failed in its
3 affirmative duty to publish a record enumerated in the section. *Id.* at 488. In order to
4 satisfy this burden, Plaintiff/Petitioners need not identify discreet records in the agency’s
5 possession or describe them with surgical precision. Instead, Plaintiff/Petitioners satisfy
6 their burden by alleging sufficient facts about requested records which, taken as true,
7 would place them within any one of the enumerated categories under § 552(a)(2). *Id.* In
8 doing so, Plaintiff/Petitioners support a claim to relief—publication where the
9 government has failed to do so proactively.
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12 Plaintiff/Petitioners have done just that. If Respondents/Defendants have executed
13 a proper successor contract for legal services, as extensive reporting and first-hand
14 knowledge would indicate, the new terms and practices therein would necessarily result in
15 “statements of policy.” *See* 5 U.S.C. § 552(a)(2)(B). If Respondents/Defendants are
16 mobilizing to transfer children out of their current placements, as extensive reporting and
17 recent agency action would suggest, they would have to rely upon “statements of policy”
18 and “statements to staff” to do so. *Id.* Far from Respondent/Defendants’ claims (at 15) of
19 a strategy of “sue[ing] first, ask[ing] questions later,” Plaintiff/Petitioners are forced to
20 pursue this relief to make sense of months of chaos. Plaintiff/Petitioners cannot rely on
21 Respondents/Defendants’ representations alone after being shown time and again that this
22 could result in harm to clients.
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26 Dated: August 26, 2026

Respectfully submitted,

27 s/Laura Belous

28 Florence Immigrant and Refugee Rights Project

Attorney for Petitioners/Plaintiffs