LEGAL SERVICES NYC

August 11, 2026

Via CM/ECF

Hon. Arun Subramanian
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

RE: ***Fouda v. Salazar*, No. 26-cv-6559**
Supplemental briefing pursuant to the Court's August 10, 2026 Order

Dear Hon. Judge Subramanian:

We represent Petitioners "E.X." and "P.X.," two minor children, in a pending petition for writ of habeas corpus in the above-captioned case. On August 10, 2026, the Court ordered Petitioners to state our position with respect to:

> the Government's argument that the suitable custodian requirements of 8 U.S.C. § 1232 apply even if a child's parent is the sponsor, is in the United States, and is "available"—in the sense of being able and willing—to provide care and custody. 6 U.S.C. § 279(g)(2).[1]

For clarity's sake, we provide Petitioners' response via letter and separate from our concurrently filed Reply Brief. As elaborated below, our position is that these Petitioners, E.X. and P.X., were properly designated and remain statutorily defined "unaccompanied children"; we respectfully urge the Court to reserve ruling on this

[1] Order (Aug. 10, 2026), Dkt. 18.

statutory issue for a future case in which the parties contest and fully brief the proper interpretation of 6 U.S.C. § 279(g)(2)(C)(ii).

By statute, an unaccompanied noncitizen child is a person who (1) "has no lawful immigration status in the United States"; (2) "has not attained 18 years of age"; and (3) for whom either (i) "there is no parent or legal guardian in the United States" or (ii) "no parent or legal guardian in the United States is available to provide care and physical custody."[2] Respondents assert that the statutory language "available to provide care and physical custody" incorporates the suitable-custodian requirement of 8 U.S.C. § 1232(c)(3)(A) and therefore means both "available" and "capable of providing for the child's physical and mental well-being."[3] The Fourth Circuit adopted this construction in *D.B. v. Cardall*, holding that a detained minor with an "available" parent remains an unaccompanied child until ORR separately determines the parent's suitability as a "sponsor."[4]

The proper interpretation of 6 U.S.C. § 279(g)(2) "is not settled law."[5] Respondents' position finds support in the Agency's own interpretation[6] and several

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[2] Homeland Security Act of 2002, Pub. L. No. 107-296, § 462(g)(2), 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 279(g)(2)).
[3] *See* Resp'ts' Mem. of Law in Opp'n to the Pet. for Writ of Habeas Corpus at 10–11, Dkt. 17.
[4] 826 F.3d 721, 734 (4th Cir. 2016).
[5] *E.H.C.F. v. Kennedy*, No. 3:25-CV-2142 (VDO), 2026 WL 145229, at *10 (D. Conn. Jan. 16, 2026) (quoting *Souza v. Sessions*, No. 18 CV 4412, 2018 WL 10436697, at *1 (N.D. Ill. June 28, 2028)).
[6] *See* 45 C.F.R. §§ 410.1201(a) (conditioning a child's release to a parent on "an assessment of sponsor suitability"), 410.1903(j) ("[A]n unaccompanied child may not be released unless ORR identifies a safe and appropriate placement . . . .").

recent judicial opinions.[7] Other courts have disagreed.[8] Resolution of this complex question of statutory interpretation will have effects far beyond the present Petitioners.[9] For instance, minors who lose unaccompanied-child status are no longer entitled to non-adversarial asylum adjudications; are subject to harsh, mandatory grounds of asylum denial; lose access to voluntary departure at government expense; and may even face removal without a hearing before an immigration judge.[10] A statutory interpretation that jeopardizes these essential rights for unaccompanied children would risk nullifying "Congress's unmistakable desire to protect that vulnerable group" and achieving other unintended results.[11]

For these reasons, Petitioners urge the Court to assume, per the parties' agreement, that E.X. and P.X. remain unaccompanied children and to adjudicate this matter on the constitutional, statutory, and other grounds set forth in Counts

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[7] *See Lopez v. Sessions*, No. 18 Civ. 4189 (RWS), 2018 WL 2932726, at *8–10 (S.D.N.Y. June 12, 2018) (holding that a habeas petitioner remained an unaccompanied child, and retained the protections that status provides, even upon reunifying with his mother); *Jose L.P. v. Whitaker*, 431 F. Supp. 3d 540, 547–48 (D.N.J. 2019) (holding that a habeas petitioner was no longer an unaccompanied child "once he was placed in the care and custody of his father," though his father was present in the United States during the petitioner's preceding detention in ORR custody).

[8] *See E.H.C.F.*, 2026 WL 145229, at *10 ("[A]s a matter of statutory interpretation[,] where the parent's fitness is not disputed, it is reasonably likely that [a detained child] no longer falls under § 279(g)(2)."); *K.O. v. United States*, 651 F. Supp. 3d 331, 344 (D. Mass. 2023) (holding that, where a father is "available," his children "were never [unaccompanied children]"); *Mendez Ramirez v. Decker*, 612 F. Supp. 3d 200, 210–13 (S.D.N.Y. 2020) (holding that a habeas petitioner ceased to be an unaccompanied child "when ORR determined that his mother was available to provide for his care and physical custody"); *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 606–08 (S.D.N.Y. 2022) (finding that a minor held in ORR custody ceased to be an unaccompanied child "upon [the father's] release from immigration detention"); *Souza*, 2018 WL 10436697, at *1 (finding it reasonably likely that, "where the parent's fitness is not disputed," ORR "has no statutory basis to keep [the child] in custody"); *Maldonado v. Lloyd*, No. 18 Civ. 3089 (JFK), 2018 WL 2089348, at *5–6 (S.D.N.Y. May 4, 2018) ("[A] child is not 'unaccompanied' . . . if a parent is physically present in the United States and, as a practical matter, is available to provide care and physical custody.").

[9] *See J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 378 (D. Md. 2019) (finding "serious reliance interests" related to redeterminations of unaccompanied-child status).

[10] *See* 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C), 1232(a)(5)(D)(i)–(ii).

[11] *D.B.*, 826 F.3d at 738–39.

I–V of the Petition.[12] Other habeas courts have recently taken this approach, ruling on constitutional grounds though the petitioners sought release from ORR custody to the care of an available parent.[13] The Court should also do so here and leave interpretation of 6 U.S.C. § 279(g)(2)(C)(ii) for another day, in a case where the parties dispute and thoroughly brief the issue.

Dated: August 11, 2026

Respectfully submitted,

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[12] Courts routinely assume factual or legal issues agreed upon by the parties where other grounds exist for resolving the questions in actual dispute. *See, e.g.*, *Vugo, Inc. v. City of New York*, 931 F.3d 42, 48 n.5 (2d Cir. 2019); *Nabisco, Inc. v. Warner–Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000).
[13] *See, e.g.*, *M.A. v. Molina*, No. 4:26-cv-00415, 2026 WL 741623, at *9 (N.D. Ohio Mar. 17, 2026); *Santos v. Smith*, 260 F. Supp. 3d 598, 616 (W.D. Va. 2017).