

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

LIDIA KARINE SOUZA; and her son, D.F.,  
by and through his mother, LIDIA KARINE  
SOUZA;

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS  
III, Attorney General of the United States;  
U.S. DEPARTMENT OF HOMELAND  
SECURITY ("DHS"); KIRSTJEN  
NIELSEN, Secretary of DHS; U.S.  
IMMIGRATION AND CUSTOMS  
ENFORCEMENT ("ICE"); THOMAS  
HOMAN, Acting Director of ICE;  
RICARDO WONG, Director, ICE Field  
Office for Enforcement Removal Operations  
in Chicago, Illinois; U.S. CUSTOMS AND  
BORDER PROTECTION ("CBP"); KEVIN  
K. MCALEENAN, Acting Commissioner of  
CBP; U.S. CITIZENSHIP AND  
IMMIGRATION SERVICES ("USCIS"); L.  
FRANCIS CISSNA, Director of USCIS;  
U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES ("HHS"); ALEX  
AZAR, Secretary of the Department of  
Health and Human Services; OFFICE OF  
REFUGEE RESETTLEMENT ("ORR");  
SCOTT LLOYD, Director of the Office of  
Refugee Resettlement; HEARTLAND  
ALLIANCE INTERNATIONAL, LLC; and  
CECILIA CONTRERAS, Program  
Operations Manager, Heartland Human Care  
Services;

Defendants.

Civil Action No. \_\_\_\_\_

**COMPLAINT**

## **INTRODUCTION**

1. This case arises out of the federal government's controversial practice of forcibly separating migrant parents and minor children who enter the United States without any finding that the parent is unfit or presents a danger to the child. Last Wednesday, June 20, 2018, President Trump issued an Executive Order that purports to address this policy. However, it is estimated that several thousand minor children remain separated from their parents without any clear path or timeline for reunification. This case involves one such parent and child.

2. Nearly one month ago, Plaintiff Lidia Karine Souza ("Ms. Souza") arrived in the United States from Brazil, along with her then-eight-year-old son ("D.F."). After voluntarily presenting herself to U.S. immigration authorities, Ms. Souza was interviewed and found to possess a credible fear of persecution in her home country entitling her to full consideration for asylum here in the United States. Shortly after this interview, however, the federal government forcibly separated Ms. Souza from her son, detained Ms. Souza in a federal Bureau of Prisons facility in Texas, and transferred D.F. to the custody of the Department of Health and Human Services ("HHS"), which subsequently transferred D.F. to a shelter in Chicago, Illinois.

3. On June 9, 2018, Ms. Souza was released from custody. She currently has been staying with family members in Massachusetts.

4. Ms. Souza has not seen her son since May 30, 2018. D.F. currently is being held in a facility in Chicago under the purported authority of Defendant Office of Refugee Resettlement ("ORR"), a component of HHS.

5. Over the past several weeks, Ms. Souza has only been able to communicate with her son by telephone, and then only for a total of only 20 minutes per week. During these phone

calls, D.F. frequently cries and begs Ms. Souza to do everything in her power to get him out of the shelter and back into her care.

6. With the assistance of counsel, Ms. Souza has undertaken every effort to have her son returned to her. Upon her release, Ms. Souza immediately began to try to ascertain D.F.'s whereabouts, but she was given no information about her son and only handed a toll-free number she could call to try to get in touch with her son. Undeterred, Ms. Souza reached out to another mother who had been forcibly separated from her child as a result of the government's "zero tolerance" policy and ultimately determined that D.F. was being housed at a Heartland Alliance ("HA") facility in Chicago.

7. Upon reaching out to the HA facility, Ms. Souza was provided a packet of documents and told that she would need only to fill out and return the documents in the packet in order to be reunited with her son. Last week, Ms. Souza completed and submitted 36-pages of materials. Rather than her son being promptly released from custody, however, Ms. Souza was told that, due to recently amended ORR rules, the two other relatives in the household in which she is staying would need to visit a designated location in Massachusetts to be fingerprinted and that the earliest date they could be fingerprinted is July 6, 2018. She was told that, after the fingerprints were submitted (along with other identifying information), ORR would require an additional approximate 20+ days to process her release application—a process that included a criminal background check and investigation of the household members' immigration status.

8. On the morning of June 25, 2018, after being informed that Ms. Souza was planning to file this lawsuit in federal court, an ORR representative informed Ms. Souza's counsel that the fingerprinting of the two other relatives currently housing Ms. Souza could be done on June 29, 2018 (one week earlier than the previously offered date of July 6). Regardless,

ORR still would require the additional 20+ days after the fingerprinting to process the release application. Accordingly, under the government's timeline, Ms. Souza cannot be reunited with her son until, at the earliest, late July 2018—nearly two months since their forcible separation.

9. This delay is unacceptable, unnecessary, and unconstitutional. Ms. Souza's son is being held under the purported authority of the ORR to oversee the care and placement of an "unaccompanied alien child." However, because Ms. Souza is available to provide care and custody, and has been available to do so since arriving in the United States, her son is not an "unaccompanied alien child" under the relevant authority. Accordingly, ORR has no basis to hold D.F.

10. Moreover, the government's baseless refusal to immediately release D.F. to Ms. Souza's custody represents a fundamental violation of the Fifth Amendment due process rights of Ms. Souza and her son.

11. In addition, this Court is empowered to issue a writ of mandamus requiring the relevant government officials to ensure the immediate release of Ms. Souza's son.

12. Finally, the government's actions in this case violate both the Administrative Procedures Act ("APA") and the settlement agreement in *Flores v. Sessions*, 85-cv-4544 (C.D. Cal.).

13. Ms. Souza came to the United States with her young son seeking asylum. The federal government forcibly separated her from her son and has kept them apart for nearly one month. The Executive Order issued on June 20, 2018 was intended to address this practice, but it provides no relief for parents, like Ms. Souza, who have waited far too long to be reunited with their minor children and have been given no clear assurance that any reunion is forthcoming. For these reasons, and the reasons set forth below, the Court should enter an order requiring

Defendants to immediately release Ms. Souza's son into her custody, awarding attorneys' fees and costs incurred in bringing this case, and providing any other relief that is just and proper.

14. As soon as practicable, Ms. Souza and her undersigned counsel intend to file a motion seeking emergency relief to have Ms. Souza immediately reunited with her child.

### **JURISDICTION**

15. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), the federal Declaratory Judgment Act (28 U.S.C. §§ 2201-2202), the Fifth Amendment to the United States Constitution, 28 U.S.C. § 2241 (habeas jurisdiction), 28 U.S.C. § 1346 (United States as defendant), Art. I, § 9, cl. 2 of the United States Constitution ("Suspension Clause"), the Administrative Procedures Act (5 U.S.C. § 704), and ¶ 24(B) of the *Flores* settlement agreement. Plaintiff D.F. is in custody for purposes of habeas jurisdiction.

### **VENUE**

16. Venue is proper under 28 U.S.C. § 1391 because Plaintiff D.F. is presently detained at a shelter located in Chicago, Illinois and a substantial portion of the relevant facts occurred within this District.

### **PARTIES**

17. Plaintiff Lidia Karine Souza is a citizen of Brazil. She is the mother of Plaintiff D.F.

18. Plaintiff D.F. is a citizen of Brazil. He brings suit by and through his mother, Ms. Souza.

19. Defendant Jefferson Beauregard Sessions III is sued in his official capacity as the Attorney General of the United States ("Attorney General"). In this capacity, he has



responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office of Immigration Review, is empowered to grant asylum or other relief, and is a legal custodian of Plaintiff D.F.

20. Defendant U.S. Department of Homeland Security (“DHS”) has responsibility for enforcing the immigration laws of the United States.

21. Defendant Kirstjen Nielsen, is sued in her official capacity as the Secretary of the Department of Homeland Security. In this capacity, she directs each of the component agencies within DHS. As a result, Defendant Nielsen has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, is empowered to grant asylum or other relief, and is a legal custodian of Plaintiff D.F.

22. Defendant U.S. Immigration and Customs Enforcement (“ICE”) is the sub-agency of DHS that is responsible for carrying out removal orders and overseeing immigration detention.

23. Defendant Thomas Homan is sued in his official capacity as the Acting Director of ICE, and is a legal custodian of Plaintiff D.F.

24. Defendant Ricardo Wong is sued in his official capacity as the Director of the ICE Field Office for Enforcement Removal Operations in Chicago, Illinois, and is a legal custodian of Plaintiff D.F.

25. Defendant U.S. Customs and Border Protection (“CBP”) is the sub-agency of DHS that is responsible for the initial processing and detention of noncitizens who are apprehended near the U.S. border.

26. Defendant Kevin K. McAleenan is sued in his official capacity as the Acting Commissioner of CBP.

27. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is the sub-agency of DHS that, through its Asylum Officers, conducts interviews of certain individuals apprehended at the border to determine whether they have a credible fear of persecution in their home countries and should be permitted to apply for asylum.

28. Defendant L. Francis Cissna is sued in his official capacity as the Director of USCIS.

29. Defendant U.S. Department of Health and Human Services (“HHS”) is a department of the executive branch of the U.S. government which has been delegated with authority over “unaccompanied” noncitizen children.

30. Defendant Alex Azar is sued in his official capacity as the Secretary of the HHS.

31. Defendant Office of Refugee Resettlement (“ORR”) is the component of HHS which provides care of and placement for “unaccompanied” noncitizen children.

32. Defendant Scott Lloyd is sued in his official capacity as the Director of ORR.

33. Defendant Heartland Alliance International, LLC (“HA”) is the entity operating the Heartland Human Care Services shelter in Chicago, Illinois, a contracted ORR facility that currently has physical custody of Plaintiff D.F.

34. Defendant Cecilia Contreras is the Program Operations Manager of the Heartland Human Care Services shelter in Chicago, Illinois, the contracted ORR facility that currently has physical custody of Plaintiff D.F.

## **FACTS**

### **A. Background Facts on Forcible Separation of Migrant Families**

35. Over the past year, the federal government has separated thousands of migrant families for no legitimate purpose. Many of these migrant families fled persecution and are

seeking asylum. The federal government has forcibly separated parents from their minor children and detained the children, often far away, in shelters for “unaccompanied” minors. The government has undertaken this forcible separation without any showing, or even any allegation, that the parents are unfit or otherwise unable to take custody of their children.

36. There is overwhelming medical evidence that the separation of a young child from his or her parent will have a devastating negative impact on the child’s well-being, especially where there are other traumatic factors at work, and that this damage can be permanent.

37. The American Association of Pediatrics has recently denounced the practice of separating migrant children from their parents, noting that: “The psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation—even after the eventual reunification with a parent or other family.”

38. On June 20, 2018, President Trump issued an Executive Order titled “Affording Congress an Opportunity to Address Family Separation.” Whitehouse.gov, Executive Orders, June 20, 2018 (available at <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>). Among other things, the Executive Order clarified that, “[i]t is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.”

**B. The Government Forcibly Separated Ms. Souza From Her Minor Son.**

39. On May 25, 2018, Ms. Souza and her then-eight-year-old son, D.F., fled their home country of Brazil to escape an immediate threat to their physical well-being.



40. On May 29, 2018, Ms. Souza and her son arrived in Santa Theresa, New Mexico (a town on the U.S.-Mexico border where New Mexico, Texas, and Mexico converge) and presented themselves to immigration authorities. Ms. Souza expressed to the authorities that she had a fear of returning to Brazil and was therefore referred for an initial screening before an asylum officer, called a “credible fear interview.”

41. The asylum officer determined that Ms. Souza had a credible fear that she would be persecuted if she returned to Brazil, which entitled her to a full hearing before Immigration Judge on her asylum claim. *See* U.S. Citizenship and Immigration Services, Questions & Answers: Credible Fear Screening (available at <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening>) (“If the asylum officer finds you have a credible fear of persecution or torture, the asylum officer will refer your case to an Immigration Judge for a full hearing on your claim.”).

42. On May 30, 2018, a CBP agent used Google Translate to explain to Ms. Souza (whose native language is Portuguese) that, because she had not presented herself at an official port of entry, she had entered the United States illegally and would go to jail. Ms. Souza’s son, D.F., erupted in tears as his mother was handcuffed in front of him and taken away.

43. On June 1, 2018, Ms. Souza was taken to the United States District Court in El Paso, Texas. However, there was no Portuguese translator available, so she was sent back to prison.

44. On June 6, 2018, Ms. Souza was taken back to the United States District Court in El Paso, Texas. After the hearing, Ms. Souza was transferred into ICE’s custody.

**C. Ms. Souza Is Released From Government Custody.**

45. On June 9, 2018, ICE released Ms. Souza and dropped her off at the El Paso Airport. During this drop-off, ICE provided her a paper with a phone number to call to reach her son. Ms. Souza tried to call the number multiple times, but found that she could not get through to anyone. Ms. Souza then flew to Dallas and subsequently to Boston, where she was met by family members. ICE provided Ms. Souza with notice that she must report to an Enforcement and Removal Operations Office in Burlington, Massachusetts on June 21, 2018.

46. When she reached Massachusetts, Ms. Souza continued to try the telephone number provided by ICE officials. However, she was unable to get through to anyone. During this time, she was devastated, desperate, and crazed because she had not talked to her son since they were separated on May 30, 2018.

47. Although the phone number ICE provided Ms. Souza proved to be a dead-end, Ms. Souza, on her own, located her child. On June 12, 2018, Ms. Souza searched Facebook for a Brazilian woman she had met in detention whose child had also been removed from her. The woman told Ms. Souza that her daughter had been at an ORR shelter in Chicago called “Casa Guadalupe” and had befriended a Brazilian boy there with the same name as D.F. The woman gave Ms. Souza the number for the “Casa Guadalupe” shelter.

**D. The Government Refuses To Release Ms. Souza’s Son To Her Custody.**

48. On June 12, 2018, Ms. Souza called the number she had been given for the “Casa Guadalupe” shelter, also known as the Heartland Human Care Services shelter, located in Chicago, Illinois. For the first time in twelve days, Ms. Souza was able to speak with her son. On the call, her son sobbed and pled with her to come and get him. Since this time, Ms. Souza has called and spoken with her son as often as is allowed. However, Ms. Souza has been

allowed to speak with her son for no more than 20 minutes a week (either through one 20-minute call or through two 10-minute calls each week).

49. On the same day, June 12, 2018, Ms. Souza spoke with an ORR case manager at the ORR shelter. The case manager told Ms. Souza that she would need to fill out certain paperwork to secure her son's release. On June 14, 2018, the case manager sent Ms. Souza an email with certain paperwork to fill out in order to have her son released into her custody.

50. On June 15 and 16, 2018, the same ORR case manager called Ms. Souza and told her that D.F. was very upset, was crying. Ms. Souza was able to talk to her son and help him to calm down.

51. On June 18, 2018, Ms. Souza retained undersigned counsel, Mr. Bless, an attorney at the Law Offices of Jeff Goldman. It was the same day that D.F. experienced his ninth birthday, separated from his mother by hundreds of miles, in an unfamiliar place, and surrounded by people he does not know. Ms. Souza called the facility in Chicago but was not permitted to speak with D.F. on his birthday.

52. On June 20, 2018, Ms. Souza's counsel sent to the ORR case manager the full 36-pages of completed materials that she had emailed to Ms. Souza on June 14, 2018. On the same day, Ms. Souza spoke to her son and wished him a happy belated birthday.

53. On June 21, 2018, Ms. Souza reported to the Enforcement and Removal Operations Office in Burlington, Massachusetts, as ordered by ICE. The officials at the office told her to return in one year for further proceedings.

54. That same day, the ORR case manager called Ms. Souza and told her that ORR had recently amended its rules regarding the paperwork required to release an "unaccompanied alien child." The case manager explained that ORR now required additional documents to

complete the application for her son's release. Specifically, the amended ORR rules purportedly require Ms. Souza to provide a release form signed by the two other relatives currently housing Ms. Souza. In addition, the amended ORR rules purportedly require fingerprints from Ms. Souza and these same relatives.

55. Ms. Souza was told that the earliest available date to obtain the required fingerprints was July 6, 2018. An ORR agent also explained to Ms. Souza that it would take an additional approximate 20+ days after the fingerprints were submitted to process her request for the return of her son, during which time criminal background checks, as well as verification of the other household members' immigration status, would be conducted.

56. On June 23, 2018, Ms. Souza signed a release allowing U.S. Senator Edward Markey to use her information to help in expediting the release of her son. On the same day, Senator Markey's office contacted ORR and its agents seeking to secure the immediate release of Ms. Souza's son.

57. On June 24, 2018, Ms. Souza and her counsel met with U.S. Representative Joseph Kennedy III. After hearing her story, Congressman Kennedy called representatives at ORR and its agents asking that Ms. Souza's son be released immediately.

58. On the morning of June 25, 2018, after being informed that Ms. Souza was planning to file this lawsuit in federal court, an ORR representative informed Ms. Souza's counsel that the fingerprinting of the two other relatives currently housing Ms. Souza could be done on June 29, 2018 (one week earlier than the previously offered date of July 6). Regardless, ORR still would require the additional approximate 20+ days after the fingerprinting to process the release application. Accordingly, under the government's timeline, Ms. Souza cannot be

reunited with her son, at the earliest, until late July 2018—nearly two months since their forcible separation.

59. Desperate for a solution, Ms. Souza has also shared her story with media outlets including the New York Times,<sup>1</sup> the Boston Globe,<sup>2</sup> and others<sup>3</sup> in hopes that broader attention may help bring about the return of her child.

60. Ms. Souza has not seen her son since he was taken from her on May 30, 2018. She worries about him constantly and does not know when she will see him again. She is desperate to be reunited with him.

61. D.F. has been having a difficult time emotionally and psychologically since being separated from his mother. Each day they are separated causes him greater harm and could potentially lead to permanent emotional trauma.

62. The government has no legitimate interest in separating Ms. Souza from her son. There is no evidence, or even allegation, that Ms. Souza is an unfit parent. To the contrary, all of the evidence and the efforts undertaken by Ms. Souza and her counsel demonstrate that she is acting in the best interests of her child. She should be reunited with her son immediately.

63. On June 25, 2018, agents from Defendant ICE allowed Ms. Souza to fly from Boston to Chicago for the express purpose of picking up her “minor child from ORR.” Ms.

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<sup>1</sup> Miriam Jordan, “*Torn Apart by Zero Tolerance, Kept Apart by Red Tape*,” New York Times (June 24, 2018) (available at <https://www.nytimes.com/2018/06/24/us/family-separation-brazil.html>).

<sup>2</sup> Akilah Johnson, “*A Brazilian mother seeking asylum was freed from detention. Her son was not*,” Boston Globe (June 22, 2018) (available at <https://www.bostonglobe.com/news/nation/2018/06/22/brazilian-mother-seeking-asylum-was-freed-from-detention-her-son-was-not/kIYT1F4fHTsHxdkfmHh73I/story.html>).

<sup>3</sup> Ted Daniel, “*Mother, 9-year-old son separated after fleeing Brazil for United States*,” Fox25 Boston (June 21, 2018) (available at <https://www.fox25boston.com/news/mother-9-year-old-son-separated-after-fleeing-brazil-for-united-states/774619018>); Malcolm Johnson, “*He Cries a Lot: Woman Separated From Her Son at Border Shares Their Story*,” (June 21, 2018) (available at <https://www.nbcboston.com/news/local/Woman-Separated-From-Her-Son-at-Border-Shares-Her-Story-486212351.html>).



Souza arrived in Chicago on the night of June 25, 2018 for the sole purpose of reuniting with her son and returning with him to Massachusetts.

## **CAUSES OF ACTION**

### **COUNT I**

#### **(Declaratory Judgment Act)**

64. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

65. The federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides that “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

66. As part of the Homeland Security Act, Congress delegated to the ORR the responsibility for the care of “unaccompanied alien children.” The statute defines such children as those under the age of 18, who have no lawful immigration status in the United States, and for whom “there is no parent or legal guardian in the United States” or “no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. §§ 279(a), 279(g)(2).

67. The ORR’s own internal procedures define “unaccompanied minors” as persons who have “not yet attained 18 years of age” and “who entered the United States unaccompanied by and not destined to [] a parent.” 45 C.F.R. § 400.111.

68. As explained above, Plaintiff D.F. currently is being held at a shelter under the purported authority of the ORR. However, D.F. is not an “unaccompanied alien child” under the relevant statute or an “unaccompanied minor” under the ORR’s own internal procedures.

69. To the contrary, when he arrived in this country, D.F. was accompanied by his mother, Ms. Souza. At the time of their arrival in the United States, Ms Souza was available to provide care and physical custody to D.F.

70. Even when federal agents seized and imprisoned Ms. Souza on May 30, 2018, she was still willing, able, and available to provide care and physical custody to D.F. If the government had held D.F. and Ms. Souza in custody together, rather than forcibly separating them, Ms. Souza would have continued to provide care and physical custody to D.F. Accordingly, D.F. was never an “unaccompanied alien child” or an “unaccompanied minor.”

71. Even assuming, for the sake of argument, that Ms. Souza was not available to provide care and physical custody to D.F. while in custody, she was released from such custody on June 9, 2018. Since that time, Ms. Souza has unquestionably been available to provide care and physical custody to D.F. Accordingly, since at least June 9, 2018, D.F. has not been an unaccompanied minor.

72. The ORR and the other Defendants thus have no basis to hold or maintain custody over D.F. Defendants should immediately release D.F. into the custody of his mother, Ms. Souza.

73. There is an actual controversy between the parties because Defendants have refused to immediately release D.F. into his mother’s custody. The Court should exercise its authority under the Declaratory Judgment Act to issue an order setting forth the following declarations of law: (1) D.F. is not an “unaccompanied alien child” under 6 U.S.C. §§ 279(a), 279(g)(2) or an “unaccompanied minor” under 45 C.F.R. § 400.111; (2) the ORR and the other Defendants have no basis to hold or maintain custody over D.F., and (3) Defendants must immediately release D.F. into the custody of his mother, Ms. Souza.

## COUNT II

### (Violation of Due Process)

74. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

75. The Due Process Clause of the Fifth Amendment applies to all “persons” on United States soil and thus applies to Ms. Souza and her son, D.F.

76. Ms. Souza and her son, D.F., have a liberty interest under the Due Process Clause in remaining together as a family.

77. The separation of Ms. Souza from her son violates substantive due process because it furthers no legitimate purpose and no compelling governmental interest.

78. Moreover, Ms. Souza and her son were denied procedural due process when they were forcibly separated and Ms. Souza was not allowed to be reunited with her son.

79. On June 6, 2018, District Judge Dana M. Sabraw of the United States District Court for the Southern District of California denied a motion brought by ICE to dismiss similar due process claims brought on behalf of parents who had been forcibly separated from their children. *See Ms. L. v. U.S. Immigration and Customs Enforcement*, --- F. Supp. 3d ---, 2018 WL 2725736, at \*12 (S.D. Cal. June 6, 2018) (describing allegations of “brutal, offensive” governmental conduct that “shocks the conscience” and “violates Plaintiffs’ constitutional right to family integrity”). For the same reasons identified by Judge Sabraw, the facts alleged above demonstrate that Defendants violated the due process rights of Ms. Souza and her son.

### **COUNT III**

#### **(Petition for Writ of Mandamus)**

80. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

81. Federal district courts have original jurisdiction to hear “any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361; *see also Samirah v. Holder*, 627 F.3d 652, 661 (7th Cir. 2010) (remanding case to district court to issue writ of mandamus commanding Attorney General to take necessary steps to enable alien to reenter United States).

82. Here, as explained above, Defendants owe a duty to Ms. Souza and her son to immediately release D.F. into Ms. Souza’s custody. It is therefore appropriate for this Court to issue a writ of mandamus commanding the Defendants to immediately release Ms. Souza’s son.

### **COUNT IV**

#### **(Violation of Administrative Procedures Act)**

83. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

84. Defendants have violated the APA on two separate grounds, set forth below as Count IV(a) and Count IV(b).

#### **Count IV(a) – Treatment of D.F. As An “Unaccompanied Alien Child”**

85. Under the APA, “final agency action for which there is no other adequate remedy in court [is] subject to judicial review.” 5 U.S.C. § 704. Upon judicial review, “agency action, findings, and conclusions” shall be “h[e]ld unlawful and set aside” when they are “arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law,” or “unsupported by substantial evidence.” 5 U.S.C. §§ 706(2)(A), (E).

86. The ORR’s decision to classify D.F. as an “unaccompanied minor,” as well as its decision to continue to detain D.F. as if he were an “unaccompanied minor,” are final decisions for purposes of the APA. And because the ORR erroneously classified D.F.—who entered the United States accompanied by a parent—as an “unaccompanied minor,” and continues to subject him to procedures intended only for children who enter this country without parents, Plaintiffs suffer consequences that only this Court can rectify.

87. These decisions and actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because, among other reasons, they go beyond the ORR’s statutory grant of authority provided by Congress and do not comply with the ORR’s internal procedures.

88. Plaintiffs respectfully request that this Court enter an order compelling Defendants to immediately cease characterizing D.F. as an “unaccompanied minor,” to immediately cease subjecting D.F. to procedures intended for children who do not have a parent in the United States, and immediately release D.F. into the custody of his mother, Ms. Souza.

#### **Count IV(b) – Application of ORR’s Rules**

89. Because the ORR has improperly classified D.F. as an “unaccompanied minor,” ORR is requiring that Ms. Souza satisfy the ORR’s rules for the release of unaccompanied minors before the ORR will return D.F. to his mother. But the ORR rules being applied were never intended to address situations where an *accompanied* minor is removed from a parent while that parent remains in the United States pending an asylum hearing. Accordingly, ORR’s decision to apply its rules for the return of “unaccompanied minors” to D.F, an accompanied minor, violates the APA.



90. Congress has charged HHS and, by extension, ORR, with “promptly placing” unaccompanied minors in its custody “in the least restrictive setting that is in the best interest of the child[.]” 8 U.S.C. § 1232(c). In turn, ORR has established rules and procedures (hereafter “ORR Rules”) for the purported “Safe and Timely Release Process” for “Children Entering the United States Unaccompanied.”<sup>4</sup>

91. Certain ORR Rules were amended in June 2018 in connection with a so-called “zero tolerance” policy implemented by the HHS.<sup>5</sup> Purportedly pursuant to those amended rules, ORR has refused to return D.F. to his mother unless, among other things, Ms. Souza, and the two relatives she is currently staying with, submit to a fingerprinting process. *See* ORR Rules 2.5.1.

92. Ms. Souza was initially informed by ORR or its agents that the earliest available appointment for fingerprinting was July 6, 2018, and that after the fingerprinting is completed, it will take approximately 20+ days to process her application. Ms. Souza was already fingerprinted when she was first taken into custody, but was informed that her relatives must also submit to fingerprinting before her son can be released. After ORR learned this Complaint would be filed, the ORR continued to insist that Ms. Souza’s relatives also be fingerprinted, but offered to start the fingerprinting process one week earlier: June 29, 2018. Still, the earliest that ORR could reunite Ms. Souza with her nine year-old son is late July 2018.

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<sup>4</sup> *See* Office of Refuge Resettlement, Children Entering the United States Unaccompanied, Section Two, available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.2.3>. “These policies are posted on ORR’s website but are not promulgated through any formal agency rule-making process and do not appear to have any binding effect.” *Flores v. Sessions*, 862 F.3d 863, 871 (9th Cir. 2017).

<sup>5</sup> HHS’s Deputy Secretary’s statement from May 28, 2018 announced: “[F]amilies with children that enter into the United States illegally will be separated when the parent is transferred to federal custody for breaking United States law. If parents do not wish to be separated from their children, they should not violate the laws of the United States[.]” United States Department Of Health and Human Services, Statement by HHS Deputy Secretary on Unaccompanied Alien Children Program (available at <https://www.hhs.gov/about/news/2018/05/28/statement-hhs-deputy-secretary-unaccompanied-alien-children-program.html>).

93. Given that D.F. was not an “unaccompanied minor” in the first instance, and in light of the ORR’s mission to “promptly place” minors into “the least restrictive setting that is in the best interest of the child,” as well as the terms of the *Flores* Settlement (*infra*), the ORR’s insistence that the D.F. remain separated from his mother while Ms. Souza (and other relatives) complete a month-long fingerprinting process is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

94. ORR’s decision to impose this requirement is a final decision for purposes of the APA. As a result of the ORR’s unlawful decision, Plaintiffs suffer consequences that only this Court can rectify.

95. Plaintiffs respectfully request that this Court enter an order compelling Defendants to immediately refrain from imposing amended ORR Rule 2.5.1’s fingerprinting requirement as a condition of returning D.F. to his mother.

96. Alternatively, Plaintiffs request that the Court require ORR to apply the ORR Rules as they were at the time Plaintiffs were taken into custody—May 30, 2018—rather than the amended rules implemented in connection with the so-called “zero tolerance” policy. While the pre-amendment rules also contained a fingerprinting requirement, that requirement was more narrowly focused and, for that reason, may not result in an additional 30-day (or more) delay to in the family reunification process.

## **COUNT V**

### **(Violation of the *Flores* Settlement Agreement)**

97. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

98. D.F.'s detention in Chicago, Illinois at a HA facility violates the Settlement Agreement in *Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal) ("*Flores* Settlement" or "Settlement"). The United States Department of Justice entered into the *Flores* Settlement in January 1997 and it continues to be binding upon U.S. government agencies, including ICE.

99. The *Flores* Settlement relates to an agreement that sets forth a "nationwide policy for the detention, release, and treatment of minors in the custody of [Immigration and Naturalization Services] INS" which requires INS to treat "all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors." *See Flores* Settlement at ¶¶ 9-11. A "minor" is "any person under the age of eighteen (18) years who is detained in the legal custody of the INS." *See id.* ¶ 4; *see Flores v. Lynch*, 828 F.3d 898, 905-6 (9th Cir. 2016).

100. Paragraph 24(B) of the *Flores* Settlement sets forth a minor's right to challenge a determination to place the minor in a particular facility when in government custody. The minor may seek judicial review in "any United States District Court with jurisdiction and venue over the matter to challenge the placement determination." *See Flores* Settlement at ¶ 24(B).

101. This action is brought on behalf of D.F., by D.F.'s next friend and mother, Ms. Souza, to enforce the *Flores* Settlement, to secure D.F.'s release, and to allow the reunification of D.F. and his mother.

102. Defendants' policies, practices, acts, and omissions with respect to D.F.'s continued detention deprive D.F. and his mother of their rights under the *Flores* Settlement.

103. Paragraph 14 of the *Flores* Settlement requires that "[w]here the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay[.]" *See Flores* Settlement at ¶ 14.

104. Paragraph 14 also sets forth the following “order of preference” for custodianship of a released minor:

- a. a parent;
- b. a legal guardian;
- c. an adult relative (brother, sister, aunt, uncle, or grandparent);
- d. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor’s well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant’s paternity or guardianship;
- e. a licensed program willing to accept legal custody; or
- f. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

105. Moreover, the *Flores* Settlement requires INS to “place each detained minor in the *least restrictive setting* appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.” *See Flores* Settlement at ¶ 11 (emphasis added).

106. Ms. Souza has been and continues to be available to provide care and custody for D.F. To date, the government has made no attempts to reunite D.F. and his mother.

107. On June 25, 2018, undersigned counsel contacted the Office of the U.S. Attorney in Chicago, Illinois via telephone and facsimile and provided notice of *Flores* Settlement violations pursuant to Paragraph 37 of the *Flores* Settlement. *See Flores* Settlement at ¶ 37.

108. There are three categories for Defendants’ violations of the *Flores* Settlement. First, the government forcibly separated D.F. from his mother in violation of Paragraph 14 of the

*Flores* Settlement which gives priority to placing a child with a parent, regardless of the parent's immigration status, over placing the child in a licensed program. *See Flores* Settlement at ¶ 14.

109. Second, there have been no attempts to reunify D.F. with his mother, nor have Defendants engaged in any individualized custody determinations concerning D.F. with regards to family unity. Despite D.F.'s mother being capable and willing to take custody of her child, and where detention of D.F. with the ORR is neither required nor authorized by law, the government has taken no action towards—and therefore, has unnecessarily delayed in—reuniting D.F. with his mother. *See id.*

110. Third, INS has failed to place D.F. in the “least restrictive setting” that is in the best interests of the child—*i.e.*, with his mother—in violation of Paragraph 11 of the *Flores* Settlement. *See id.* at ¶ 11.

111. The forcible separation of D.F. from his mother is an intentional interference with parental rights. *See Flores* Settlement at ¶ 24. State laws provide substantive and procedural protections of the rights of parents to care for their children, and of children to be with their parents, such that children may only be separated from their parents as a matter of last resort.

112. The *Flores* Settlement permits a child to contest the placement decision of Defendants. D.F., by and through his mother, asserts this right and alleges that his placement thousands of miles away from his accompanying parent is improper. *Flores* Settlement at ¶ 24.

113. As a proximate result of defendants' policies, practices, acts, and omissions, D.F. has suffered and will continue to suffer immediate and irreparable injury, including physical, psychological, and emotional injury. The injunctive relief sought by D.F. is necessary to prevent continued and further injury.



**PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court enter a judgment against Defendants and award the following relief:

- A. Declare that D.F. is not an “unaccompanied alien child” under 6 U.S.C. §§ 279(a), 279(g)(2) or an “unaccompanied minor” under 45 C.F.R. § 400.111;
- B. Declare that Defendants have no basis to hold or maintain custody over D.F.;
- C. Declare that Defendants must immediately release D.F. into the custody of his mother, Ms. Souza;
- D. Hold that Defendants violated the due process rights of Ms. Souza and D.F.;
- E. Issue a writ of mandamus requiring that Defendants immediately release D.F. into the custody of his mother, Ms. Souza;
- F. Hold that Defendants violated the Administrative Procedures Act;
- G. Hold that Defendants violated the *Flores* Settlement Agreement;
- H. Preliminarily and permanently enjoin Defendants from continuing to separate Ms. Souza from her minor son, D.F.;
- I. Enjoin Defendants from removing Ms. Souza from the country until she is reunited with her minor son, D.F.;
- J. Damages in an amount to be determined at trial;
- K. Require Defendants to pay Plaintiffs’ reasonable attorneys’ fees and costs; and
- L. Order all relief that is just and proper.

Dated: June 26, 2018

Respectfully submitted,

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