**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **R.M.H., a minor, and FELIPA DE LA CRUZ, as her next friend and on her own behalf,** | ) | **Case No.** |
| | ) | |
| **Plaintiffs-Petitioners,** | ) | |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **SCOTT LLOYD, Director, Office of Refugee Resettlement et al.** | ) | |
| | ) | |
| **Defendants-Respondents.** | ) | |
| | ) | |

**MOTION FOR A TEMPORARY RESTRAINING ORDER AND REQUEST FOR EMERGENCY HABEAS RELIEF**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

**Other Authorities**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs R.M.H. and Felipa De La Cruz, as R.M.H.'s next friend and on her own behalf, move this Court for a temporary restraining order. Defendant Office of Refugee Resettlement ("ORR") is currently holding R.M.H. in its custody in violation of her legal and constitutional rights. Plaintiffs ask this Court to order R.M.H.'s immediate release from ORR custody and return to the care and custody of her family.

**BACKGROUND**

R.M.H. is a 10 year old girl who moved to the United States with her parents when she was three months old, and has lived in Laredo, Texas, since then in the continual care and custody of her parents. Decl. of Felipa De La Cruz ¶¶ 1-5. Felipa De La Cruz is R.M.H.'s mother. R.M.H. has cerebral palsy and the cognitive development of a six year old. *Id.* ¶¶ 1, 7. She requires specialized care and consistent therapy, which her parents have provided since she was born. *Id.* ¶¶ 6-11.

Last Wednesday, on October 25, 2017, U.S. Customs and Border Patrol ("CBP") agents arrested R.M.H. at the Driscoll Children's Hospital in Corpus Christi, Texas while she recovering from gallbladder surgery, for the purpose of pursuing her deportation. *Id*. ¶¶ 12-17; Decl. of Aurora Cantu ¶¶ 3-20. At the time of her arrest, R.M.H. was in the company of her 34-year-old U.S. citizen cousin, Aurora Cantu, who had travelled with R.M.H. at the request of her parents to be with her during the surgery and bring her home after she was discharged. De La Cruz Decl. ¶ 14; Cantu Decl. ¶ 4. Although R.M.H. entered the United States with her family in June 2007 and has lived with her parents for her entire life, and the government has never even suggested that R.M.H.'s parents are unfit to provide for her care and custody, CBP transferred R.M.H. to the custody of ORR as an "unaccompanied child." R.M.H. is currently being held in

ORR custody at a shelter in San Antonio, Texas, where she will remain unless and until ORR deems her parents to be adequate custodians and releases her. *See* Cantu Decl. ¶¶ 21-22.

## ARGUMENT

Plaintiffs satisfy the required factors for a temporary restraining order. *See Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 435 (5th Cir. Unit B 1981) (listing factors). "As the level of persuasion in relation to the other three factors increases, the degree of persuasion necessary on the substantial likelihood of success factor may decrease." *35 Bar and Grille, LLC v. City of San Antonio*, 943 F. Supp. 2d 706, 722 (W.D. Tx. 2013).

### I. EVERY ADDITIONAL DAY OF R.M.H.'S DETENTION IS CAUSING PLAINTIFFS IRREPARABLE HARM.

R.M.H.'s continued detention is causing R.M.H and her mother irreparable harm. *First*, as set forth in Point II, *infra*, R.M.H's detention violates Plaintiffs' constitutional rights, which, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (addressing First Amendment harms). Where "'an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995)).

*Second*, the "unnecessary deprivation of [R.M.H.'s] liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988); *see also Advocacy Center for Elderly and Disabled v. Louisiana Dept. of Health and Hospitals*, 731 F. Supp. 2d 603, 625 (E.D. La. 2010); *Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000) (habeas petitioner "suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution").

*Third*, every additional day that R.M.H. remains in custody is likely to exacerbate her medical condition and increase the risk of lasting and profound developmental harm. R.M.H.'s family plays a critical role in ensuring that she receives ongoing medical treatment for cerebral palsy, a permanent neurological condition, and the emotional trauma of being separated from her family is particularly acute for a child with R.M.H.'s condition. *See* Decl. of Dr. Marsha Griffin ¶¶ 5-17 (describing cerebral palsy and treatment); ¶ 24 (describing the "heightened fear of separation and anxiety" of children with cerebral palsy and family role in managing care of children with cerebral palsy), ¶¶ 25-28 (describing how family separation causes "significant harm to physical wellbeing of a child with cerebral palsy" and how detention prevents families from ensuring children with disabilities receive mandated therapeutic services from their medical team and school."); *see also* De La Cruz Decl. ¶¶ 6-11 (describing the care and services R.H.M. receives at school, at home, and from her doctors). "Given the limited health reserve of most children with CP [cerebral palsy], parental loss or separation can have grave impact on the child's overall prognosis and health trajectory with resultant acute decline which would have otherwise been potentially delayed." Decl. of Dr. Rachel Vandermeer ¶ 16.

Because R.M.H. has also just undergone surgery, the harm to her wellbeing is even worse. *See id.* ¶ 8 (describing the parent's critical role in the post operation period in managing pain, noting that "[c]hildren who have cerebral palsy are most often unable to readily communicate pain verbally" and that "medical providers heavily rely on the parent to assess the child's pain" and "[u]ntreated pain can lead to acutely worsening spasticity, agitation and seizures"); ¶ 10 (children with cerebral palsy "are at high risk of acute respiratory decompensation related to viral and bacterial illness" in public spaces); ¶¶ 14-15 ("[a]ny child with neurological impairment is at high risk for worsened feeding related issues in the post op

period" and problems related to "poor wound healing"); Griffin Decl. ¶ 30 (describing how "[f]amily separation and detention following a surgical procedure on a child with a physical and cognitive disability is particularly harmful" in light of the specialized challenges of pain management, wound care, and the need to adapt ongoing therapy). Indeed, upon releasing her from the hospital, R.M.H.'s physician specifically recommended that it was in R.M.H.'s "best interest" to be "discharged to a family member that is familiar with her medical and psychological needs." Declaration of Lisette Diaz, Exh. A. Yet the government has placed R.M.H. in ORR custody, separating her from her family.

Further worsening the ongoing harm, the ORR facility where R.M.H. is detained is not equipped to address the special needs of a child her age. *See* Declaration of Jessica Jones ¶¶ 19-21. For example, such shelters typically do not provide any special education evaluations and other protections and accommodations guaranteed to children who qualify for such services under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act, *id*. ¶ 19, nor are shelter staff typically trained to provide occupational and physical therapies required for children with cerebral palsy. *Id*. ¶ 20.

*Fourth*, Plaintiff De La Cruz and the rest of R.M.H.'s family are suffering deeply from their separation from R.M.H. Ms. De La Cruz cannot sleep and is distraught by her child being away from her for the first time and alone in custody, more than 150 miles away. De La Cruz Decl. ¶¶ 18-20. She cannot bear the fact that she cannot hold R.M.H. during this frightening time for provide for her care. *Id.* ¶ 19. She cannot talk about R.M.H.'s circumstances without breaking down in tears. *Id*. ¶ 20. R.M.H.'s separation has been traumatic for her sisters, age 13 and 9, as well. One of R.M.H.'s sisters cries out for her in the middle of the night. *Id.* ¶ 22. What started as a necessary medical procedure has turned into this family's worst fear—R.M.H, a young girl

with cerebral palsy, has been ripped apart from those who love her most and care for her best. *Id.* ¶¶ 19-22.

## II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

Plaintiffs are likely to succeed on their claims and move for a temporary restraining order based on their first, second, third, and fourth claims for relief. *See* Pet. ¶¶ 82-105.

*First*, the governing statutes do not authorize Defendants to arrest, transfer and hold R.M.H. in ORR custody as an "unaccompanied child," while knowing that she entered and was living in the United States in the care and custody of her parents. The Homeland Security Act of 2002 ("HSA") defines an "unaccompanied child" as a child under the age of 18 with no lawful status in the United States, and "with respect to whom (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." 6 U.S.C. § 279(g)(2)(C). The HSA vests authority to detain "unaccompanied alien children" with ORR. *Id.* § 279(b)(1)(A). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") further provides generally that "any department or agency of the Federal Government that has an unaccompanied [] child in custody shall transfer the custody of such child to the Secretary of [HHS] not later than 72 hours after determining that such child is an unaccompanied [] child." 8 U.S.C. § 1232(b)(3).

CBP and ORR have exceeded their statutory authority by transferring and detaining R.M.H. as an "unaccompanied child" rather than releasing her to her parents. At the time of R.M.H.'s arrest at the hospital where she was having surgery, CBP knew that R.M.H. had parents in the United States available to provide care and physical custody. Cantu Decl. ¶¶ 7-8, 15-17. R.M.H.'s cousin, Ms. Cantu, repeatedly provided CBP officers—who were carefully

monitoring R.M.H.'s circumstances during the hospital visit—with information showing that R.M.H. was living with her parents in Laredo. *Id.* ¶¶ 15-17. Similarly, at the time that R.M.H. was transferred to ORR custody, ORR knew that she had parents in the United States who was providing care to her before her arrest. Accordingly, at the time of her apprehension, R.M.H. had a "parent or legal guardian in the United States" who "is available to provide care and physical custody," 6 U.S.C. § 279(g)(2), and yet the government chose to separate her from her parents and put her in custody.

Indeed, R.M.H. moved to the United States with her parents when she was three months old, and has lived in the United States in her parents' care for almost her entire life. De La Cruz Decl. ¶¶ 1-5. No one has challenged the legal rights of R.M.H.'s parents to the custody of their child, or asserted that her parents are not fit to care for her. To the contrary, R.M.H.'s parents have provided R.M.H. with care and custody throughout her life in the United States to the best of their abilities. *Id*. ¶¶ 1-11. The HSA and TVPRA did not contemplate that CBP and ORR can render children "unaccompanied" by knowingly *removing* children from the custody of their parents who live in the United States.[1] Because the HSA and TVPRA do not permit Defendants

[1] R.M.H. is different from many other children in ORR custody, who enter the United States alone and are apprehended by immigration enforcement officers when they are *not* in their parents' care and custody. *See* Declaration of Jessica Jones ¶ 14. Because such children need to be reunified with parents or legal guardians from whom they have been separated, or have no parents or legal guardians available to provide care and custody, they require ORR to find appropriate placements for them. *See Bunikyte v. Chertoff*, 2007 WL 1074070 at *2 (W.D. Tex. Apr. 9, 2007) ("Children who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied' and if their welfare is not an issue, they should not be placed in ORR custody." (quoting *House Committee on Appropriations, Dep't of Homeland Sec. Appropriations Bill, 2006: report together with additional views (to accompany H.R. 2360)*, 109th Cong., 1st Session, 2005, H. Rep. 109-79)). In contrast, Defendants have known at all relevant times that R.M.H. had parents in the United States who were *already* providing her with care and custody.

to separate children from their existing parents and family members in the United States, R.M.H. is entitled to immediate release to her family.

*Second*, R.M.H.'s arrest, transfer, and detention violate the *Flores* Consent Decree. That Decree applies to "all minors" apprehended by the Department of Homeland Security ("DHS"). *See* Diaz Decl., Exh. B ("*Flores* Decree") at 7; *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. September 16, 1996) (encompassing "all minors who are detained in the legal custody of the INS"); Homeland Security Act of 2002, Pub. L. 107-296, §§ 402, 441, 451(b) (transferring former INS's authority and responsibilities to DHS); *Flores v. Sessions*, 862 F.3d 863, 881 (9th Cir. 2017).

The *Flores* Decree requires that the government place a minor in the "least restrictive setting appropriate to the minor's age and special needs . . . ." *Flores* Decree ¶ 11. It also provides that whenever "the detention of a minor is not required either to secure his or her timely appearance before the [agency] or the immigration court, or to ensure the minor's safety or that of others, the agency *shall* release a minor from its custody *without unnecessary delay* . . . ." *Id.* ¶ 14 (emphasis added). *Flores* creates a "preference of release" to a parent, legal guardian, adult relative or an adult individual or entity "designated by the parent or legal guardian as capable and willing to care for the minor's well-being," over release to a licensed facility or other entity. *Id.*

CBP and ORR violated the *Flores* Decree by transferring and detaining R.M.H. rather than releasing her immediately to her parents or another family member. R.M.H. has been detained in ORR custody since last Wednesday, in violation of the requirement that she be placed in "the least restrictive setting appropriate to her age and special needs," and that she be released from government custody "without unnecessary delay." *Id.* ¶¶ 11, 14. There is no argument that her detention is necessary to ensure her appearance in court or that her release

would pose a danger to herself or others, as her parents are available to bring her to court proceedings and ensure her safety. De La Cruz Decl. ¶ 17. Thus, the *Flores* Decree provides a separate and independent reason R.M.H. should be immediately released to her family.

*Third*, R.M.H.'s ongoing detention violates Plaintiffs' due process rights to family integrity. The Fifth Amendment to the U.S. Constitution prohibits deprivations of fundamental liberty without due process of law. This case involves "perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court—"the interest of parents in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). This due process right belongs to R.M.H. as well as to her mother.[2]

To protect this fundamental freedom, the Supreme Court has held that due process entitles a parent to "a hearing on [her] fitness as a parent *before* [her] children [are] taken from [her]." *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). This is so because "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id*. at 68-69.

R.M.H. has been in the care and custody of her parents since birth—a fact known to the government before it arrested her and placed her in ORR custody. Moreover, at no point have Defendants even suggested that Ms. De La Cruz is unfit to care for R.M.H., much less provided a

[2] *See Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]the reciprocal rights of both parents and children [include the interest] of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent.") (citation omitted); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982)("[T]he child and his parents share a vital interest in preventing the erroneous termination of their natural relationship").

hearing to determine their fitness prior to R.M.H.'s arrest and detention. Nor would there be any cause for such a hearing—the facts make clear that R.M.H.'s parents are committed to and fully capable of providing for her care. Nonetheless, Defendants have now required that R.M.H.'s *parents* prove through the ORR reunification process that they are adequate custodians for a child they have cared for her entire life. But this is precisely backwards; the onus must be on the *government* to justify its decision to take a child from her parents' care. For these reasons, R.M.H.'s continued detention violates the Due Process Clause, and she is entitled to immediate release to her family on this ground as well.

*Fourth*, R.M.H.'s detention violates her right to be free of unlawful restraints on her physical liberty, which "lies at the heart of the liberty that [the Due Process]Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "Children . . . have a core liberty interest in remaining free from institutional confinement." *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring). The Fifth Amendment requires that the "terms and conditions of [R.M.H.'s] confinement . . . are in fact compatible" with the government's stated purposes, and that any custody not be "excessive in relation to" the government's interests in preventing flight risk and danger. *Schall v. Martin*, 467 U.S. 253, 269 (1984).

The government cannot plausibly contend that R.M.H. poses *any* danger to public safety, given that she is a 10-year old child with serious medical needs who is currently recovering from needed surgery. And while the government has recently moved to put her in removal proceedings, there is no evidence that R.M.H. poses a risk of flight. Indeed, all available evidence shows that she is not a flight risk. R.M.H. has been living in the United States for almost the entirety of her life, in the loving care of her mother and other family members. De La Cruz Decl. ¶¶ 1-5. Indeed, she requires the constant care of her family and the supportive

services and treatment that her school and doctors currently provide her. *Id.* ¶¶ 7-11. Given her roots in her community in Texas, the medical care that she requires to maintain her health and quality of life, and her strong family connections to the local area, she has every incentive to attend her immigration court hearings. *Id.* ¶¶ 1-11, 17.

Because holding R.M.H. in custody bears no reasonable relationship to any legitimate governmental interest, the Due Process Clause demands her immediate release to her family.

## III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR GRANTING PLAINTIFFS IMMEDIATE RELIEF.

Finally, the balance of the equities and the public interest plainly weigh in favor of a temporary restraining order. Defendants have riven R.M.H. from her family and put her in a custodial facility that is inappropriate for a child of her particular needs. Every additional day of her custody harms both Plaintiffs and increases the risk that R.M.H. will suffer permanent harm. In contrast, Defendants have no cognizable interest in continuing to separate R.M.H. from her family. Plaintiffs' requested relief would require only that Defendants cease their unlawful conduct and comply with the applicable statutes and the Constitution. "[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve." *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) (quoting district court below).

## CONCLUSION

For the foregoing reasons, this Court should GRANT Plaintiffs' Motion for a Temporary Order and Request for Emergency Habeas Relief and order Defendants to release R.M.H. immediately to the care and custody of her family.

DATED: _____ /s/_____

Michael K. T. Tan*
Omar C. Jadwat*
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 519-7848
Fax: (212) 549-2654
mtan@aclu.org
ojadwat@aclu.org

Edgar Saldivar (Texas Bar No. 24038188)
Trisha Trigilio (Texas Bar No. 24075179)
Andre Segura*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
1500 McGowen Street, Suite 250
Houston, TX 77004
Phone: (713) 325-7011
Fax: (713) 942-8966
asegura@aclutx.org
esaldivar@aclutx.org
ttrigilio@aclutx.org

Stephen Kang*
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 343-0770
Fax: (415) 395-0950
skang@aclu.org

Alina Das*
WASHINGTON SQUARE LEGAL
SERVICES, INC.
Immigrant Rights Clinic
New York University School of Law
245 Sullivan Street, 5th Floor
New York, NY 10012
Phone: (212) 998-6467
Fax: (212) 995-4031
alina.das@nyu.edu

Ranjana Natarajan (Texas Bar No. 24071013)
University of Texas School of Law
Civil Rights Clinic
727 E. Dean Keeton Street
Austin TX 78705
Phone: 512-232-7222
Fax: 512-232-0800
rnatarajan@law.utexas.edu

*pro hac vice application forthcoming

## CERTIFICATE OF SERVICE

I, Edgar Saldivar, hereby certify that on October 31, 2017 true and correct paper copies of this Motion for a Temporary Restraining Order and Request for Emergency Habeas Relief were delivered to the Court and paper copies of all pleadings were mailed to all Defendants.

Dated: October 31, 2017

Respectfully Submitted:
/s/ Edgar Saldivar
Edgar Saldivar