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UNITED STATES DISTRICT COURT

EASTER DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

MDS, a minor,

Plaintiff,

vs.

JONATHAN HAYES, in his official capacity as Interim Director of the Office of Refugee Resettlement, and ELICIA SMITH, in her capacity as Federal Field Specialist, US Office of Refugee Resettlement,

Defendants.

Case No. 2:20-cv-00738-TLN-EFB

AMENDED PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING ORDER

M.D.S., a minor, by and through the undersigned, his counsel of record, hereby moves this court for a Temporary Restraining Order pursuant to FRCP 65, and in support thereof states as follows:

I. PRELIMINARY STATEMENT

Petitioner M.D.S. files the instant Motion for a Temporary Restraining Order relating to a decision by Respondent ORR officials to designate Petitioner as a child with no viable sponsors, and their refusal to consider a sponsor designated by Petitioner and his parents, which refusal deprives Petitioner of his legal and constitutional rights. Petitioner seeks release from federal custody and placement in the care of his chosen sponsor. However, in view of the COVID-19 pandemic, and the imminent risk of infection to M.D.S resulting from his internment in a congregate setting, Petitioner brings this Motion for a Temporary Restraining Order seeking to have him immediately removed from Respondent's designation as a Category 4 child with no viable sponsor, so that the application of his designated sponsor may be considered in a timely fashion by Respondents during the pendency of the underlying cause of action.

II. BACKGROUND FACTS

1. Petitioner is a 16-year-old unaccompanied child of Mayan descent, and national of Guatemala. He is an abandoned and trafficked child who has been held in federal custody for over a year pending his immigration proceedings. He has been shuttled between four different facilities while detained by Respondents, and is currently held at the Baptist Children and Family Services (BCFS) facility in Fairfield, California.

2. M.D..S has no family or friends in the U.S. who could act as his sponsors.

3. Seeking to avoid his continued and prolonged incarceration, Petitioner was able to find and select a sponsor in the person of Bryce Tache and his family, after having met the family by video conference. M.D.S.'s parents also met the sponsor by video conference and designated Mr. Tache as a sponsor for their son by affidavit.

4. On November 22, 2019, Mr. Tache submitted ORR's Family Unification Application to Respondent on Petitioner's behalf. However, this application was summarily rejected on January 16, 2020, without any consideration whatsoever, because Mr. Tache was not related to M.D.S., and he could not show proof of a pre-existing social relationship between the families. **See Exhibit 1.**

5. Respondents designate children under its care who have no suitable sponsors as Category 4 children, or children which Respondent have determined have no "viable sponsor." M.D.S. has been so categorized. In effect this classification has condemned M.D.S. to continued prolonged and indefinite detention at least until he reaches the age of 18, fourteen months from now. Respondent is challenging his classification as a Category 4 child with no viable sponsor as a violation of his legal and constitutional rights, and seeks release to the custody of his designated sponsor.

6. The novel Coronavirus contagious disease (COVID-19) is an aggressive pandemic now affecting every state in the territorial U.S. California has been one of the hardest hit states. There is no vaccine against COVID-19, and no known cure. Due to its novelty, not only is no one immune but no one other than those who have been infected since December have any antibodies in their blood to fight off the virus once exposed. Although to date COVID-19 has caused serious illness and death mostly in older adults and persons suffering from certain medical conditions, young people are also susceptible to contracting the disease and are at risk of severe symptoms and even death. **Exhibit 2.**

7. The Coronavirus is not only highly infectious, its human carriers may be asymptomatic despite being infectious. Anyone who enters the BCFS- Fairfield facility may be infectious despite not having any symptoms of the COVID-19 disease.

8. The danger posed by the COVID-19 outbreak violates M.D.S.'s constitutional right to safety in government custody, as his continued detention creates a risk that is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.". *Heeling v.*

McKinney, 509 U.S. 25, 36 (1993). This is so because there is an alternative to his continued detention with a sponsor family that provides for a safe and healthy environment.

III. STANDARD FOR TRO

9. TROs are governed by the same standard applicable to preliminary injunctions. *Niu v. United States*, 821 F. Supp. States, 821 F. Supp.2d 1164, 1167 (C.D. Cal. 2011) (internal quotation omitted); see also *Stuhlbarg Int'l Sales Co. v. John D. Brush* & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking preliminary injunctive relief must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc*., 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). An injunction is also appropriate when a plaintiff raises "serious questions going to the merits," demonstrates that "the balance of hardships tips sharply in [their] favor," and "shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (quoting *Lands Council v. McNair,* 537 F.3d 981, 987 (9th Cir. 2008)). In the Ninth Circuit, the four "elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at 1131.

A. Due Process

10. Respondents summarily rejected the sponsorship application of Bryce Tache without any process whatsoever, or an opportunity to dispute the determination. Respondents clearly violated M.D.S.'s right to procedural due process as guaranteed by the Constitution in refusing to provide a

hearing regarding classifying him as a Category 4 child with no viable sponsor, and refusing thereby to consider the application of his chosen sponsor.

11. The 9th Circuit recently made clear that "the government's discretion to incarcerate non-citizens is always constrained by the requirements of due process." *Hernandez v Sessions, 872 F. 3d976, 981 (9th Cir. 2017).* The Supreme Court has held that "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Joint Anti- Fascist Comm. V. McGrath, 341 U.S. 123, 168 (1951)) (internal quotations omitted).* The Supreme Court has also held that "the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id. (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).* According to the 9th Circuit, "Due process always requires, at a minimum, notice and an opportunity to respond." *United States v. Raya- Vaca, 771 F. 3d 1195, 1204 (9th Cir. 2014*).

12. When evaluating due process claims, the Supreme Court employs a balancing test, implementing an "analysis of the governmental and private interests that are affected." *Id. At 334*. M.D.S.'s continued, and prolonged detention undoubtedly imposes a "grievous loss" on M.D.S. The Court has clarified this point in the context of prison parole hearings. In *Wolff v. McDonnell*, where the Court held, "revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless inflicts a grievous loss on the parolee and often on others. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him." *418 U.S 539, 560-61 (1974) (citations and internal quotations omitted).* As in *Wolff*, Respondents deprive M.D.S. of his "good time" by summarily classifying him as a Category 4 child, which prevents his release to the Tache family and subjects him to prolonged and indefinite detention. Further, by arbitrarily classifying M.D.S. as a Category 4 child, Respondents impose a "grievous loss"

to his physical health, confining M.D.S. in a congregate facility which poses a heightened risk of infection during the COVID-19 outbreak. M.D.S.'s right to be heard at a "meaningful time" requires immediate relief in the context of this global pandemic. As the 9th Circuit recently noted in *Hernandez v. Sessions*, the "minimal costs to the government" of providing a hearing "are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of the individuals' physical liberty." *872 F.3d 976, 993 (9th Cir. 2017).*

13. Even more recently, the 9th Circuit delivered a decision in a separate *Flores* settlement case reprimanding Respondents for failing to provide hearings in violation of Due Process. *Saravia for A.H. v. Sessions, 905 F.3d 1137 (9th Cir. 2018).* By refusing to provide notice or a hearing regarding its classification of M.D.S., and thereby summarily rejecting the application of his chosen sponsor, Respondents clearly violated his right to procedural due process.

B. Administrative Procedure Act

14. While Respondents' written policies allow for sponsorship of children by unrelated adults with no proof of a pre-existing social relationship, Respondents in the instant case arbitrarily changed this rule to designate M.D.S. as having no viable sponsor, by classifying him as a Category 4 child, and refused thereby to consider the Tache application. **Exhibit 4.** Respondents violated the Administrative Procedure Act by arbitrarily changing its categorization policy without offering an explanation.

15. "Final agency actions" are subject to judicial review under 5 U.S.C. § 704. "Two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision[-]making process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear, 520 U.S. 154, 177-78*

(1997) (internal citations and quotations omitted). For a final agency action to survive review, "the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (internal citations and quotations omitted).*

16. Respondents' change to its categorization policy clearly amounts to a final agency action. *Lucas R.V. Azar, No. CV185741DMGPLAX, 2018 WL 7200716 (C.D. Cal Dec. 27, 2018) (holding that multiple ORR policies amount to "final agency actions" because they are already in effect and affect the rights of children in its custody).* The change is already in effect and thus not "tentative or interlocutory." The change forces M.D.S. to remain confined in Respondents' facilities endangering his safety in the midst of a global pandemic, and thus determines his "rights or obligations." Respondents have entirely failed to articulate any reasons at all for changing its categorization policy with respect to M.D.S., in contravention of and contrary to its own rules, rendering that decision as prima facie arbitrary and capricious. Further, its change in categorization policy directly contradicts its written policy position with no explanation. This arbitrary change shows flagrant disregard for M.D.S.'s reliance interests.

17. The facts clearly indicate that Respondents did not conduct the analysis necessary to justify its action. Thus, Respondents clearly violated the APA by changing its policy contrary to its own established guidelines without articulating any rationale reason whatsoever.

C. Flores and TVPRA

18. The Flores Settlement Agreement (FSA) and the Trafficking Victims Protection Reform Act (TVPRA) require that M.D.S. be released without unnecessary delay while he awaits his immigration status determination. Respondents' refusal to even consider a qualified sponsor designated by Petitioner and his parents is in clear contravention of the both FSA and the TVPRA.

While Respondents are charged with ensuring the safety of the children in its custody, refusing to consider a sponsorship application, arbitrarily and contrary to its own rules and policies, is a failure to release Petitioner without unnecessary delay and a violation of the FSA and the TVPRA.

IV. IRREPARABLE INJURY

19. M.D.S. seeks a timely resolution of his claim in view of the risks inherent in being held in detention in a congregate facility in the midst of a global pandemic that places him in imminent exposure to the COVID-19 virus. This court has recently noted that "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm," echoing the Ninth Circuit's "well established" position that "the deprivation of constitutional rights unquestionably constitutes irreparable injury". *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal quotations omitted) (granting a preliminary injunction against law enforcement officers detaining motorists suspected of being in the United States unlawfully). Granting the relief requested herein will avoid this risk in a timely fashion, a grievous risk brought on by Respondents' constitutional and legal violations, and which risks cannot otherwise be avoided absent preliminary relief pending a final resolution of M.D.S.'s claims.

20. The COVID-19 disease can have serious detrimental medical effects. It is highly infectious and deadly. The Tache family can provide a safe family home where M.D.S. may be much better protected from harm than in Respondents' custody in a congregate facility. **Exhibit 5**. See, *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (*citing Estelle v. Gamble*, 429 U.S. 97, 104) (granting a preliminary injunction on an Eighth Amendment claim). Respondents' should not, in view of the pandemic, continue to arbitrarily ignore the application of M.D.S.'s sponsor, and should be enjoined

from placing M.D.S. in a Category 4 classification, and further ordered to consider the application of his chosen sponsor without delay. Respondent's continued classification of M.D.S. as a Category 4 child with no viable sponsor, despite the application of Bryce Tache to act as as his sponsor, causes him irreparable harm, as it places him at risk of contracting a highly infectious disease for which there is no cure or vaccine, and condemns him to continue prolonged incarceration.

V. BALANCE OF EQUITIES

21. The equity analysis requires the court to "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). M.D.S., in view of the pandemic, is asking the court to enjoin Respondents from classifying Petitioner as a Category 4 child, pending further orders of the court and a final determination in this case.

22. Respondents will not be harmed by removing M.D.S. from a Category 4 classification and considering the application of his chosen sponsor. Nor does the minimal bureaucratic cost or effort on Respondents' part in considering Bryce Tache's application change the balance of equites. See, *Saravia* for *A.H. v. Sessions*, 905 F.3d 1137, 1143 (9th Cir. 2018). (cost of transporting minors to facilities did not outweigh the benefits of due process protections.)

23. In refusing to consider the application of Bryce Tache as sponsor for M.D.S., on the basis that Mr. Tache cannot show proof of a pre-existing social relationship between the families, Respondent's acted contrary to their written policies which allow for such sponsorship. **Exhibit 4.** The specific written policies set out by Respondent HAYES with respect to the sponsorship of children under detention in government custody, allows for the sponsorship of children by adults who neither have a familiar relationship with the child or can show proof of a preexisting social

relationship with a child or his family. Nonetheless respondents as betray ally and capriciously regulated petitioner to a Category 4 designation, rejected the application of Bryce Tache to act as M.D.S.'s chosen sponsor.

24. Despite the great har, caused to M.D.S. by his prolonged and indefinite detention as a result of his illegal classification as a Category 4 child with no supposable viable sponsors, respondents cannot articulate any interests which could conceivably outweigh M.D.S.'s interest in his freedom from government custody causing him grievous harm, in remaining free from the infection of a deadly virus of pandemic proportions, by the speedy resolution of his claims. Thus, the balance of equities fall decidedly in M.D.S.'s favor.

VI. PUBLIC INTEREST

25. When the government, as in the instant case, is a party, the balance of equities and public interest provisions of a TRO merge. *Nat'l Ass'n of Wheat Growers v. Zeise,* 309 F. Supp. 3d 842, 853 (E.D. Cal. 2018) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)). As argued above, the balance of equities tip decidedly in favor of M.D.S. as it is of great importance to M.D.S to be protected from infection by a deadly virus, and causes minimal harm to Respondents to re-classify him and consider the application of his chosen sponsor.

26. There can be no greater public interest than protecting the health and safety of a child in government custody. It is clearly in the public interest that the government consider on alternative to the custodial congregate facility in which it incarcerates M.D.S.

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VII. CONCLUSION

Respondent's violated their own rules and guidelines in designating M.D.S. as a Category 4 child with no viable sponsor, and in refusing to consider the application of his chosen sponsor, all in violation of the Due Process Clause of the Constitution, the Administrative Procedure Act, and contrary to the dictates of the FSA and the TVPRA. In view of the COVID-19 epidemic, Respondents should be enjoined from placing Petitioner in their Category 4 designation, and ordered to immediately consider the application of Bryce Tache to act as M.D.S.'s sponsor, pending further orders of this court.

Respectfully submitted

Dated: April 9, 2020

By:

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Pro hac vice motion forthcoming