

1 **VERIFIED PETITION FOR HABEAS CORPUS**

2 Jose Antonio Hernandez Velasquez¹ respectfully petitions this Court for a Writ of
3 Habeas Corpus, pursuant to 28 U.S.C. §2241 and the Administrative Procedure Act, 5 U.S.C.
4 § 551, *et seq.*, to remedy his continued unlawful detention by Respondents. As such, Jose
5 hereby requests that an immediate hearing be set on this matter. Due to the exigencies in this
6 case, Jose also requests that he be released during the pendency of this Petition. In support of
7 this Petition, Jose alleges as follows:

8 **PRELIMINARY STATEMENT**

9 1. Petitioner Jose Antonio Hernandez Velasquez is an eighteen-year old citizen and
10 national of Guatemala currently detained by Immigration and Customs Enforcement (“ICE”)
11 in an adult detention center, the Adelanto ICE Processing Center in Adelanto, California.

12 2. Jose’s current period of detention by ICE began when ICE took him from the
13 custody of the Office of Refugee Resettlement (“ORR”),² shackled at the wrists and ankles, at
14 6:30 am on his eighteenth birthday.

15 3. Upon his arrival in the United States, Jose had been designated an
16 “Unaccompanied Alien Child” (“UAC”). ICE was therefore required to consider Jose for
17 placement “in the least restrictive setting available” upon his eighteenth birthday and to make
18 available to him “alternative to detention programs,” 8 U.S.C. § 1232(c)(2)(B), and indeed,
19 Jose’s *pro bono* asylum attorney had informed ICE that a U.S. citizen couple was ready to
20 sponsor him and to provide a safe and stable home. Nevertheless, ICE removed him from ORR
21 custody on his eighteenth birthday and placed in him adult detention at Theo Lacy Jail, a
22 maximum-security jail facility with an ICE subcontract for the detention primarily of known
23 and suspected gang members, individuals with violent criminal convictions, and individuals
24 with mental health issues. When Theo Lacy Jail’s contract with ICE expired, ICE relocated
25 Jose to the Adelanto ICE Processing Center, where he is currently detained.

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27 ¹ Although Jose’s immigration paperwork erroneously recorded his first name as “Josue,” this petition refers to Mr.
Hernandez by his proper first name, “Jose.”

28 ² Office of Refugee Resettlement is a subcomponent of the U.S. Department of Health & Human Services and is
responsible for the care and placement of unaccompanied immigrant children who enter the United States from other
countries without an adult guardian.

1 4. As of the date of this Petition, Jose has been detained in ICE custody in
2 conditions identical to those of adult detainees for 340 days following his eighteenth birthday,
3 as well as for approximately 300 days when he was still a minor and wrongfully detained as
4 an adult, for a total of over 630 days. He has not been afforded the opportunity to challenge
5 his detention before a neutral decision-maker.

6 5. Other district courts have recently adjudicated matters involving related facts
7 and granted relief to similar UACs who been placed directly into ICE detention upon their
8 eighteenth birthdays without consideration of the “least restrictive setting” available or
9 “alternative to detention programs”. *See, e.g., Lopez v. Sessions*, No. 18 Civ. 4189, 2018 WL
10 2932726 (S.D.N.Y June 12, 2018) (granting writ of habeas corpus based on violation of APA
11 and due process violation of former minor detained in ICE custody); *Ramirez v. ICE*, 310 F.
12 Supp. 3d 7 (D.D.C. 2018) (granting preliminary injunction requiring defendants to consider
13 the least restrictive placements pursuant to 8 U.S.C. § 1232(c)(2)(B) where unaccompanied
14 alien children who reached majority while in the physical custody of Health and Human
15 Services (“HHS”) had been transferred to adult detention without consideration of the least
16 restrictive placement); *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (granting
17 habeas relief and preliminary injunction requiring the government either to release petitioners
18 or provide a prompt hearing when undocumented minors are released to suitable sponsors by
19 the ORR and subsequently rearrested without probable cause). Such relief is warranted here.

20 6. Jose fled Guatemala after suffering years of severe physical and psychological
21 abuse by his mother, who is a drug addict and a member of the 18th Street Gang, as well as
22 physical violence, death threats, and a brutal attempt on his life by other members of the 18th
23 Street Gang. The 18th Street Gang is one of two gangs, along with MS-13, which have a
24 stranglehold on business and private citizens in Guatemala. After years of harassment and
25 physical violence, the 18th Street Gang tried to murder Jose when he was sixteen years old
26 because he refused to carry out an extortion attempt on the gang’s behalf: they shot him in the
27 stomach and left him for dead. The gunshot resulted in massive hemorrhaging, subsequent
28 infection, and multiple surgeries and required a year of hospitalization and recuperation with

1 a restricted diet, physical therapy, and antibiotics. Death threats from the gang continued as
2 Jose convalesced in hiding; he fled for his life once he had recovered enough to do so. After
3 fleeing Guatemala, Jose presented himself at the United States border on or about October 27,
4 2017, seeking protection and expressing a fear of return to Guatemala.

5 7. At the time of his entry into the United States, Jose was barely seventeen years
6 old and was properly designated as an Unaccompanied Alien Child by U.S. Customs & Border
7 Protection (“CBP”). Pursuant to the William Wilberforce Trafficking Victims Protection
8 Reauthorization Act of 2008 (“TVPRA”)³, the ORR took custody of Jose, determined that he
9 was a low flight risk, and placed him at David and Margaret Youth and Family Services, a
10 non-secure children’s shelter in La Verne, California.⁴

11 8. November 2017, based on a dental scan practice used to estimate the age of
12 unaccompanied minors in immigration custody who are unable to document their age, the
13 Department of Homeland Security (“DHS”) wrongly and arbitrarily decided that Jose was not
14 a minor—notwithstanding the fact that in 2008, based on evidence that such dental scans are
15 inadequate to determine the age of individuals, Congress passed legislation prohibiting the sole
16 use of dental scans to age unaccompanied minors in immigration custody. *See* 8 U.S.C. §
17 1232(b)(4) (specifying that when HHS develops “procedures to make a prompt determination
18 of the age of an alien,” such procedures “*shall take into account multiple forms of evidence,*
19 *including the non-exclusive use of radiographs,* to determine the age of the unaccompanied
20 alien” (emphasis added)). Jose was immediately transferred into ICE custody and placed in a
21 maximum-security adult detention facility where he remained for approximately ten months,
22 at the age of seventeen.

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24 ³ Congress enacted the TVPRA in 2008 to protect immigrant children who come to the United States without a
parent or guardian. *See* Pub. L. 110-457 (codified at 8 U.S.C. § 1232). *See* Legal Background, *infra*.

25 ⁴ The facilities used by ORR have three security levels. The least restrictive level, for UACs who present the least
26 flight risk, is a shelter facility, such as the shelter where Jose was placed. The medium level is a staff-secure facility,
and the most restrictive level is a secure facility, which is akin to a local juvenile hall. In fact, ORR uses local
27 juvenile halls to house the most dangerous unaccompanied minors, pursuant to contracts with local governments. *See*
Declaration of Marion Donovan-Kaloust in Support of Petitioner’s Petition for Writ of Habeas Corpus (“Donovan-
28 Kaloust Decl.”), ¶ 4.

1 9. On September 24, 2018, the Guatemalan Consulate produced a birth certificate
2 for Jose showing that he had been born on October 26, 2000, and was therefore a minor.
3 Because DHS is prohibited from detaining minors in its custody, DHS remanded Jose to ORR
4 custody immediately upon learning of Jose’s actual age. ORR returned Jose to the non-secure
5 shelter where he had originally been placed.

6 10. On October 26, 2018, Jose’s eighteenth birthday, DHS re-arrested and
7 transferred Jose from David and Margaret Youth and Family Services to the Theo Lacy Jail in
8 Orange County, California.

9 11. Upon Jose’s transfer to ICE custody on his eighteenth birthday, ICE did not
10 comply with the non-discretionary statutory requirements set forth in the TVPRA, 8 U.S.C.
11 Section 1232(c)(2)(B). Specifically, ICE did not “consider placement in the least restrictive
12 setting available” or make any alternative to detention programs available, even though his
13 asylum pro bono attorney had contacted ICE and provided information about a U.S. citizen
14 couple willing to serve as sponsors for Jose and provide a safe and stable home for him. Quite
15 the opposite, ICE automatically placed Jose in maximum-security adult detention without
16 considering any alternatives.

17 12. On information and belief, the ICE Field Office in Los Angeles is routinely and
18 systematically failing to comply with the requirements of 8 U.S.C. §1232(c)(2)(B) with respect
19 to unaccompanied immigration children transferred into ICE’s custody when they turn 18. *See*
20 *Donovan-Kaoust Decl.*, ¶ 8. Since the spring of 2017, most youth who turn eighteen while in
21 custody in the greater Los Angeles Area have been detained on their eighteenth birthday, even
22 though many, like Jose, have pending asylum applications and sponsors ready and willing to
23 accept them into their homes. *Id.*, ¶ 6. With the exception of pregnant and parenting girls, it is
24 the norm for ICE to place unaccompanied immigrants who have just turned 18 automatically
25 into adult detention without considering or making available the least restrictive (or other)
26 alternatives. *Id.*, ¶ 7-10.

27 13. After approximately six months in maximum-security adult detention, Jose
28 received a custody redetermination hearing pursuant to *Rodriguez v. Robbins*, 804 F.3d 1060

1 (9th Cir. 2015), a Ninth Circuit decision holding that noncitizens who are detained pending
2 their removal cases are entitled to an automatic bond hearing before an Immigration Judge at
3 six months of detention.⁵ At Jose’s hearing, the immigration judge did not account for the fact
4 that ICE had failed to consider him for placement in the least restrictive setting when he was
5 originally taken into ICE custody, summarily denied him bond, and ordered his continued
6 detention. He was subsequently transferred to the Adelanto ICE Processing Center in
7 Adelanto, California, when ICE’s contract with Theo Lacy Jail expired.

8 14. Jose respectfully asks this Court to grant injunctive relief to enjoin ICE from
9 detaining him without considering placement in the least restrictive setting available after
10 taking into account the danger to himself and others and risk of flight and making alternatives
11 to detention programs available to him, including release to individual and organizational
12 sponsors and supervised group homes.

13 15. During the pendency of this Petition, the Court should order the Respondents to
14 immediately release Jose.

15 16. Due to his age, language barriers, and vulnerability, Petitioner is suffering
16 irreparable harm in adult detention. The Adelanto ICE Processing Center has received constant
17 scrutiny from the press, Members of Congress, and DHS’s own Inspector General for
18 unsanitary conditions, spoiled and expired food, egregiously substandard food handling,
19 inappropriate administrative and disciplinary segregation of detainees, misuse of solitary
20 confinement, and delayed medical care.⁶ In testimony submitted to the House Committee on
21 the Judiciary on September 26, 2019, an asylum seeker who had been detained at Adelanto for
22 six months described the facility as a “cruel place” where the detainees “weren’t given enough
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24 ⁵ See *Rodriguez*, 804 F.3d at 1089-90, *rev’d in part by Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (remanding for
25 further proceedings); *but see* Joint Status Report, *Rodriguez v. Marin*, No. CV 07-3239, at *2 (C.D. Cal. Mar. 5, 2018)
(ECF No. 478) (acknowledgement by government defendants that the class-wide permanent injunction entered by the
26 district court in *Jennings* for detainees held in the Central District of California remains in place until it is vacated by
some further action by the district court or the Ninth Circuit).

27 ⁶ See, e.g., CNN Wire Article, “*Adelanto Processing Center Among ICE Facilities Found to Have ‘Egregious’*
28 *Conditions in 2018: DHS Watchdog*”, available at <https://ktla.com/2019/06/06/adelanto-processing-center-among-ice-facilities-found-to-have-egregious-conditions-in-2018-dhs-watchdog/>; *see also* Office of Inspector General,
Department of Homeland Security, OIG-18-86, Management Alert – Requiring Action of the Adelanto ICE
Processing Center in Adelanto, California (2018).

1 food” and were “hungry all the time,” where “the lights didn’t go out till one in the morning
2 and [detainees] were woken up only a few hours later, between four and five a.m.”⁷ Above and
3 beyond these hardships, and in stark contrast to ORR custody, there are no school or other
4 educational opportunities, no mental health care services, no on-site social workers or social
5 services, and no children or youth from similar backgrounds and similar ages and points of
6 development for Jose to interact with.

7 17. Indeed, during the course of his detention, Jose underwent a psychological
8 evaluation arranged by his *pro bono* asylum counsel and was diagnosed with Post-Traumatic
9 Stress Disorder. *See* Declaration of Lindsay Toczykowski in Support of Petitioner’s Petition
10 for Writ of Habeas Corpus (Toczykowski Decl.), ¶ 3-4, Ex. A. According to the evaluator,
11 Jose’s mental condition is being exacerbated by his ongoing detention. Toczykowski Decl.,
12 Ex. A, at p. 67. The evaluator noted that “his mental health needs have not been adequately
13 addressed by medical staff” in detention and recommended “a continued safe and stable
14 environment” to help him recover. *Id.* at pg. 73. Jose, however, has received no mental health
15 treatment while in ICE custody. The harm that Jose is suffering to his mental and physical
16 health is having a lasting impact on his life. Given the irreparable harm being caused, Jose
17 should be immediately released pending the resolution of this Petition.

18 18. As Petitioner’s continued immigration detention violates his statutory and
19 constitutional rights, this Court should use its authority under 28 U.S.C. § 2243 to order the
20 government to file a response within three days, unless it can show good cause for additional
21 time. *See* 28 U.S.C. § 2243 (order to show cause why a petition for a writ of habeas corpus
22 should not be granted should be “returned within three days unless for good cause additional
23 time, not exceeding twenty days, is allowed.”).

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28 ⁷ *The Expansion and Troubling Use of ICE Detention Before the S. Comm. on Immigration and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 1 (2019) (Statement of Blanche Engochan).

JURISDICTION AND VENUE

1 19. This Court has jurisdiction over the claims alleged in this Petition pursuant to
2 28 U.S.C. § 1331, as they arise under federal statutes, including 8 U.S.C. § 1232(c)(2)(B) and
3 5 U.S.C. § 704.

4 20. The Administrative Procedure Act, 5 U.S.C. § 702, waives the U.S.
5 government’s sovereign immunity where, as here, federal agencies have acted in violation of
6 the law.

7 21. While the courts of appeals have jurisdiction to review removal orders directly
8 through petitions for review, see 8 U.S.C. § 1252(a)(1), (b), the federal district courts have
9 jurisdiction under 28 U.S.C. § 2241(d) to hear habeas claims by non-citizens challenging the
10 lawfulness or constitutionality of their detention by ICE. *See, e.g., Demore v. Kim*, 538 U.S.
11 510, 516-517 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

12 22. Venue is proper in this District pursuant to 28 U.S.C.A. § 1391(e) and 8 U.S.C.
13 § 1447(b) because Petitioner resides within this district, and under 28 U.S.C. § 2241(d),
14 because Petitioner is physically present and in the custody of Respondents within this district.

PARTIES

15 23. Petitioner Jose Antonio Hernandez Velasquez is an eighteen-year-old native of
16 Guatemala who entered the United States on October 27, 2017 after fleeing gang threats,
17 repeated physical gang violence, and an attempt on his life in his home country. At the time of
18 Jose’s entry to the United States, he was seventeen years old and properly designated as a UAC
19 by Customs and Border Protection and transferred to the custody of ORR. One month later,
20 however, after employing an unreliable type of radiographic dental examination technique for
21 evaluating Jose’s age, DHS erroneously decided that Jose was not a minor and transferred him
22 into ICE custody. While in ICE custody and stripped of the protections guaranteed to UACs
23 under the TVPRA, an Immigration Judge ordered Jose removed to Guatemala.

24 24. Respondent Kevin McAleenan is the Acting Secretary of the Department of
25 Homeland Security (“DHS”) and is sued in his official capacity. The Secretary of Homeland
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1 Security is charged with the administration and enforcement of immigration laws. 8 U.S.C. §
2 1103(a).

3 25. Respondent William Barr is the Attorney General of the United States and is
4 sued in his official capacity as the head of the Department of Justice. The Attorney General is
5 responsible for the fair administration of the laws of the United States.

6 26. Respondent Kenneth T. Cuccinelli is the Acting Director of the United States
7 Immigration and Customs Enforcement, Department of Homeland Security, and is sued in his
8 official capacity. In this capacity, he has responsibility for the enforcement of the immigration
9 laws, and has responsibility for and authority over the detention and removal of noncitizens
10 throughout the U.S. As such, he is a legal custodian of Petitioner.

11 27. Respondent Thomas Giles is sued in his official capacity as the Acting Field
12 Office Director for the U.S. Immigration & Customs Enforcement (“ICE”) Los Angeles Office
13 of Enforcement and Removal Operations. In this capacity, he has responsibility for and
14 authority over the detention and removal of noncitizens housed at the Adelanto ICE Processing
15 Center; is authorized to release Petitioner; and is a legal and immediate custodian of Petitioner.
16 He has supervisory authority over ICE detention and deportation officers assigned to the
17 Adelanto ICE Processing Center.

18 **STATEMENT OF FACTS**

19 **Petitioner’s Background and Immigration History**

20 28. Jose was born in Monjas, Guatemala on October 26, 2000.

21 29. Jose received very little schooling during his childhood. His mother, who was
22 affiliated with the 18th Street Gang, abandoned him shortly after his birth, and he went to live
23 with a couple he called his “grandparents,” although their relationship to him is still unclear.
24 When he was 12, the woman he called his grandmother died and his grandfather relocated to
25 Guatemala City, leaving him alone in Monjas. He was forced to support himself by earning a
26 subsistence wage in agriculture, and his schooling ended shortly thereafter.

27 30. Jose faced persecution, abuse, and death threats in Guatemala for the duration
28 of his short life. Although his mother abandoned him at birth, she would visit him at his

1 grandparents' and later at his own apartment, when he was forced to live on his own, and
2 would subject him to severe psychological and physical abuse. She was a member of the
3 notorious 18th Street Gang even in his early childhood years and would often show up on
4 drugs, violent and emotionally abusive, and threatened to kidnap him and give him to others.
5 As he grew older, she pressured Jose to join the 18th Street Gang and repeatedly threatened
6 him, telling him to "watch his back" or else she or the 18th Street Gang would kill him. To
7 this day, Jose suffers from post-traumatic stress disorder due to his mother's constant abuse.

8 31. The 18th Street Gang relentlessly targeted and threatened Jose once he began
9 living on his own because he was forced to rent an apartment in a dangerous neighborhood in
10 Monjas called La Libertad, which was and still remains under the gang's control. They targeted
11 him for recruitment because of his mother's gang membership, but when he refused to join,
12 they subjected him to threats of violence against himself and his mother, daily harassment on
13 his way to and from work, and physical abuse. He was unable, however, to report to the police
14 the harm or threats he suffered from 18th Street Gang members, because the gang threatened
15 to kill him if he reported them to the police; and because Guatemalan police officers are often
16 gang members themselves, he was afraid they would share information about him with the
17 gang. Eventually, after Jose refused to carry out an extortion attempt on behalf of the gang,
18 they tried to murder him, shooting him in the stomach. The gunshot caused massive
19 hemorrhaging and later became infected, and Jose was forced to undergo multiple surgeries
20 and months of hospitalization and recuperation. While at the hospital, his mother visited him
21 and admonished him for not joining the gang and told him that the only way he could save his
22 life was to join.

23 32. After his release from the hospital, Jose, fearful for his life, did not return to his
24 apartment in La Libertad. He recuperated in hiding with his aunt until he recovered enough to
25 flee Guatemala to save his own life.

26 33. Once he was well enough to do so, Jose fled Guatemala and presented himself
27 at the United States border on October 27, 2017, seeking protection. He expressed a fear of
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1 returning to Guatemala because of the certainty of persecution and torture he faces there from
2 his mother and the rest of the 18th Street Gang.

3 34. Upon his entry to the United States, Jose was properly placed in the custody of
4 ORR pursuant to applicable law, as laid out in the *Flores* Settlement, 8 U.S.C. § 1232(b)(3) of
5 the Trafficking Victims Protection Reauthorization Act (“TVPRA”), and 6 U.S.C. § 279.

6 35. In November 2017, however, the DHS employed the practice of a dental scan to
7 estimate his age, even though Congress had passed legislation in 2008 prohibiting the sole use
8 of dental scans to age unaccompanied minors in immigration custody based on evidence that
9 such scans are inadequate to determine the age of individuals. *See* 8 U.S.C. § 1232(b)(4)
10 (specifying that “procedures to make a prompt determination of the age of an alien . . . shall
11 take into account *multiple forms of evidence*, including the *non-exclusive use of radiographs*,
12 to determine the age of the unaccompanied alien” (emphasis added)). Based on the results of
13 the scan, DHS erroneously determined that Jose was not a minor and transferred him to ICE
14 custody. He was placed in adult detention at the age of seventeen and remained there for
15 approximately ten months.

16 36. Shortly after he was placed in ICE custody, on November 16, 2017, DHS began
17 removal proceedings against Jose, serving him with a Notice to Appear (“NTA”) that charged
18 him as removable under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act
19 (“INA”). Jose was forced to appear alone at each court hearing from December 1, 2017 through
20 January 9, 2018, and to defend himself without any of the TVPRA protections that he was
21 entitled to as an UAC. If he had remained in ORR custody, Jose could have applied for asylum
22 in a non-adversarial process through the USCIS, with the assistance of counsel. Instead, while
23 still a minor with little education and English fluency, he was forced represent himself *pro se*
24 in an adversarial proceeding before an immigration judge.

25 37. Jose appeared before an immigration judge (“IJ”), who provided no meaningful
26 assistance and deemed his asylum application abandoned because, as an uneducated, underage
27 refugee representing himself *pro se*, Jose was simply unable to fill out the requisite paperwork
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1 by himself to move his case forward. The IJ issued a removal order on January 9, 2018, which
2 Jose timely appealed to the Board of Immigration Appeals (“BIA”).

3 38. On May 24, 2018, the Board dismissed Jose’s appeal. While acknowledging his
4 claims of due process violations, the Board found that, because he had failed to file his asylum
5 application, the IJ did not err in failing to develop his claim of fear of returning to Guatemala.

6 39. Subsequently, DHS received Jose’s birth certificate from the Guatemalan
7 Consulate, which confirmed that he was seventeen years old and a minor, and on September
8 24, 2018, ICE remanded Jose back to ORR custody and restored his UAC status.

9 40. With the assistance of newly acquired *pro bono* counsel, Jose filed an I-589
10 asylum application with the USCIS Nebraska Service Center on October 5, 2018, exercising
11 his right to apply for asylum with USCIS as a UAC pursuant to the TVPRA. On October 23,
12 2018, he filed a Motion to Reopen (“MTR”) immigration proceedings with the Board,
13 requesting the Board to exercise its *sua sponte* authority to reopen proceedings and dismiss the
14 order of removal, given his status as a vulnerable unaccompanied minor. But on October 26,
15 2018, his eighteenth birthday, DHS removed Jose from ORR custody, transferred him to a
16 maximum security adult detention facility, and moved to execute his order of removal.

17 41. On November 8, 2018, Jose filed a petition for writ of habeas and an emergency
18 motion for temporary restraining order with the U.S. District Court for the Central District of
19 California, requesting an immediate stay of removal from the United States until the Board
20 ruled on his Motion to Reopen. Within a month, the government eventually agreed to delay
21 Jose’s removal and the parties entered a joint stipulation to take his habeas petition off a
22 briefing schedule.

23 42. The delay of his removal enabled Jose to have an affirmative asylum interview,
24 after which USCIS subsequently referred Jose’s I-589 to the immigration court on December
25 7, 2018. On February 14, 2019, the Board reopened Jose’s case and remanded his record to the
26 immigration court for further proceedings regarding his asylum application.

27 43. On March 18, 2019, Jose appeared for his first master calendar hearing before
28 the IJ following the Board’s remand. He subsequently appeared for two additional hearings,

1 on April 16, 2019, May 13, 2019, and a final merits hearing on June 5, 2019. On June 5, 2019,
2 the same day as Jose’s merits hearing, the IJ issued an oral decision denying Jose’s applications
3 for asylum and withholding of removal, and further denied Jose’s request for relief under the
4 Convention Against Torture. Jose filed a timely appeal to the BIA; briefing concluded on
5 September 12, 2019; and the case remains pending adjudication before the BIA. While his case
6 remains on administrative appeal, the removal order against Jose remains non-final.

7 44. Throughout the pendency of his case, Jose has been in United States government
8 custody since presenting himself at the border in 2017.

9 **LEGAL BACKGROUND**

10 **The Laws And Agreements Governing The Care And Custody Of** 11 **Unaccompanied Minor Children**

12 45. Three key laws and agreements govern the federal government’s treatment and
13 custody of unaccompanied immigrant children: the 1997 Flores Settlement Agreement; the
14 Homeland Security Act of 2002; and the TVPRA.

15 46. The Flores Settlement Agreement resulted from a lawsuit filed by a group of
16 immigrant children challenging their detention and seeking to be released to family members
17 and/or sponsors within the United States. *See Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir.
18 2017) (discussing the history of the *Flores* litigation); *see also Flores v. Sessions*, Case No.
19 2:85-cv-4544-DMG (C.D. Cal., July 9, 2018) (*Flores* court reaffirms the terms of Settlement
20 Agreement). In 1997, the plaintiff children entered into a consent decree with the federal
21 government that created a nationwide policy governing the custody and release of immigrant
22 children by immigration authorities (the “Flores Settlement Agreement” or the “Agreement”).
23 *Flores v. Reno*, No. 2:85-cv-4544, Settlement Agreement, available at
24 https://cliniclegal.org/sitcs/default/files/attachmcnts/flores_v._reno_settleme
25 [nt_agreement_1.pdf](https://cliniclegal.org/sitcs/default/files/attachmcnts/flores_v._reno_settleme). The Agreement applies to this case and, among other things, requires: (a)
26 release without unnecessary delay, (b) release to an adult caregiver, with parents and other
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1 family members given priority, and (c) placement in the “least restrictive setting.”⁸ Flores
2 Settlement Agreement, Paras. 11, 14.

3 47. At the time of the Flores Settlement Agreement, a single agency – the
4 Immigration and Naturalization Service (“INS”) – administered the custody, detention, and
5 deportation of immigrant children. In 2002, Congress passed the Homeland Security Act
6 (“HSA”), which abolished the INS, created a new Department of Homeland Security, and
7 transferred all functions related to the care and custody of unaccompanied immigrant children
8 to the Office of Refugee Resettlement (“ORR”), a sub-department of the Department of Health
9 and Human Services. Pub. L. 107-296, 116 Stat. 2153 (Nov. 25, 2002). Section 462 of the
10 HSA extended the key terms of the Flores Settlement Agreement to all unaccompanied
11 immigrant children, including the requirement that ORR place such children in the least
12 restrictive setting. *Id.*

13 48. In 2008, Congress further strengthened protections for unaccompanied children
14 through the TVPRA. See Pub. L. 110-457, 122 Stat. 5044 (Dec. 23, 2008). The TVPRA
15 requires federal officials to screen unaccompanied children for certain vulnerabilities,
16 including whether they are victims of trafficking and whether they fear persecution in their
17 home countries. *See* 8 U.S.C. § 1232(a)(4). The TVPRA also enacted procedures for ensuring
18 “safe and secure placements” for these children, *see* 8 U.S.C. § 1232(c)(1). Like the Flores
19 Settlement Agreement, the TVPRA mandates that an unaccompanied child “shall be promptly
20 placed in the least restrictive setting that is in the best interest of the child.” *Id.* (emphasis
21 added).

22 49. In 2013, Congress enacted a statutory provision to address the placement of
23 unaccompanied immigrant children, like Jose, who have turned 18 and have been transferred
24 out of ORR and into ICE custody. *See* Violence Against Women Act in 2013, Pub. L. 113-4,
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26 ⁸ On September 27, 2019, the *Flores* court once again reaffirmed the terms of the Settlement Agreement and rejected
27 the government’s attempt to promulgate new regulations that would terminate the settlement. *See Flores v. Barr*, Case
28 No. 2:85-cv-04544 (C.D. Cal. Sept 27, 2019), (ECF No. 688). The Flores court admonished the government for trying
to “ignore the dictates of the consent decree merely because they no longer agree with its approach as a matter of
policy” and held that “Defendants cannot simply impose their will by promulgating regulations that abrogate the
consent decree’s most basic tenets,” including a limit on the detention of children to 20 days. *Flores*, at pg. 24

1 127 Stat. 156, (codified at 8 U.S.C. § 1232(c)(2)(B) (March 7, 2013). That provision, which
2 was codified in Title 8, Section 1232(c)(2)(B), requires that ICE “shall consider placement” of
3 such 18-year-olds “in the least restrictive setting available after taking into account the alien’s
4 danger to self, danger to the community, and risk of flight.” *Id.* (emphasis added).

5 50. Section 1232(c)(2)(B) further requires that such children “shall be eligible to
6 participate in alternative to detention programs, utilizing a continuum of alternatives based on
7 the alien’s need for supervision, which may include placement . . . with an individual or an
8 organizational sponsor, or in a supervised group home.” *Id.* (emphasis added).

9 51. The term “least restrictive setting” was first used in the Flores Settlement
10 Agreement, which required the government to release children to the “least restrictive setting
11 appropriate to the minor’s age and special needs” Flores Settlement Agreement, Para. 11.

12 52. Congress subsequently codified the term “least restrictive setting” in the
13 TVPRA, requiring that immigrant children “shall be promptly placed in the least restrictive
14 setting that is in the best interest of the child.” 8 U.S.C. § 1232(c)(2)(A).

15 53. ORR has multiple placement options for unaccompanied children. First, if a
16 suitable sponsor is available, ORR will release the unaccompanied child to that sponsor. *See* 8
17 U.S.C. §§ 1232(b)(2)(A); 1232(c)(3). If a suitable sponsor is not available, ORR will house
18 the child in one of three types of facilities—shelter care, a staff secure shelter, or a secure
19 shelter, which is “akin to a local juvenile hall.” *Saravia v. Sessions*, 280 F. Supp. 3d 1168,
20 1178 (2017), appeal docketed No. 18-15114.

21 54. The TVPRA requires that a child shall not be placed in a secure facility absent
22 a finding that he or she is a flight risk or dangerous. 8 U.S.C. § 1232(c)(2)(A). And, when ORR
23 places a child in a secure facility, it is required to review that placement every 30 days. *Id.*

24 55. Critically, when Congress amended Section 1232 in 2013, it chose to extend the
25 foregoing protections afforded by the TVPRA to unaccompanied children to those immigrant
26 children who turn eighteen and are transferred into ICE custody. *See* Pub. L. 113- 4, § 1261.
27 *See also Ramirez v.ICE*, 310 F. Supp. 3d 7, 12 (D.D.C. 2018) (“And, of course, children do
28 not stay children forever. Congress accounted for that fact of life, extending certain protections

1 to newly adult immigrants who were formerly in the care and custody of HHS.” (citing 8
2 U.S.C. § 1282(c)(2)(B)).

3 56. As discussed above, Section 1232(c)(2)(B) requires that ICE place such newly
4 turned eighteen-year-olds “in the least restrictive setting available after taking into account the
5 alien’s danger to self, danger to the community, and risk of flight,” and that ICE make available
6 to them “alternative to detention programs, utilizing a continuum of alternatives . . . which
7 may include placement . . . with an individual or an organizational sponsor, or in a supervised
8 group home.” 8 U.S.C. § 1232(c)(2)(B). The 2013 Amendment to the TVPRA is a clear
9 expression of Congressional intent to continue the protection of vulnerable young people past
10 the age of 18.

11 57. Unlike ORR, however, which has multiple non-detention options for placing a
12 child (e.g., release to a sponsor, foster care, shelter care, staff-secure shelters, or a secure
13 shelter), ICE maintains, and places all immigrant children who turn eighteen, into only one
14 type of placement: adult detention. In doing so, ICE does not comply with any of the
15 requirements of Section 1232(c)(2)(B). It does not make a determination as to, or place
16 eighteen-year-olds in, “the least restrictive setting available after taking into account the alien’s
17 danger to self, danger to the community, and risk of flight.” *Id.* Nor does it make available to
18 such newly turned eighteen-year-olds “alternative to detention programs, utilizing a continuum
19 of alternatives” that include placement “with an individual or an organizational sponsor, or in
20 a supervised group home.” *Id.*

21 58. Petitioner clearly fits in the statutorily defined group of immigrant children-
22 turned-adults to whom Congress granted additional procedural safeguards in 8 U.S.C. §
23 1252(c)(2)(B).

24 59. Moreover, Jose’s *pro bono* counsel Lindsay Toczyłowski, who began
25 representing him in his asylum proceedings in January 2018, sent a formal request to ICE on
26 the day before Jose’s eighteenth birthday, asking to have Jose released on his own
27 recognizance. *See* Declaration of Lindsay Toczyłowski (“Toczyłowski Decl.”), ¶ 8(a)-(b), Exs.
28 C, D. As part of this request to ICE Officers Oscar Irizarry, Jose Luquin, and Luis Carmona,

1 Ms. Toczyłowski provided documentation from Mark and Cicely Bingener, a U.S. citizen
2 couple, who were willing to receive Jose into a stable, safe home, as well as additional letters
3 of support from other non-governmental agencies all willing to provide community support,
4 including health care, spiritual and religious support, mental health services, and transition
5 assistance from his then-current ORR placement at a licensed, non-secure facility.⁹ *Id.* Ms.
6 Toczyłowski also affirmed that she would continue to represent Jose in his asylum proceedings
7 and would work to ensure his appearances at any future hearings or check-ins.

8 60. In her request, Ms. Toczyłowski further reminded the ICE officers that federal
9 law requires ICE to place youth such as Jose in the “least restrictive setting,” such as “in the
10 care of any available family member or supportive group home or independent living setting,”
11 unless “there are reasons for doing otherwise.” Toczyłowski Decl., Ex. C, D. She specifically
12 quoted language from Section 1232 of the TVPRA stating that whenever a minor in the custody
13 of ORR “reaches 18 years of age and is transferred to the custody of the Secretary of Homeland
14 Security, the Secretary shall consider placement in the least restrictive setting available after
15 taking into account the alien’s danger to self, danger to the community, and risk of flight.”

16 61. If ICE had agreed to release Jose into the custody of the Bingener family, the
17 Bingeners could have petitioned to become his guardian. This would have enabled Jose to seek
18 Special Immigrant Juvenile Status (“SIJS”), which is available to non-citizen youths under 21
19 years of age. If Jose were able to obtain SIJS, then he would have a pathway to legal residency
20 and eventually U.S. citizenship, a benefit that is not available to juveniles who remain detained.

21 62. Ms. Toczyłowski asked Officers Irizarry, Luquin, and Carmona to contact her
22 as soon as ICE had decided whether to release Jose on his own recognizance, and provided her
23 e-mail address and cell phone number. *See* Toczyłowski Decl., Ex. C, D.

24 63. ICE, however, never responded to Ms. Toczyłowski’s request. Instead, at 6:30
25 am on Jose’s birthday, ICE put shackles on his wrists and ankles, took him into custody, and
26 sent him to a secure adult detention facility. He has not been able to seek SIJS as a result.

27 _____
28 ⁹ Due to changed circumstances, the Bingeners are no longer able to serve as sponsors for Jose, but another U.S. citizen couple, Duane and Tracie Lyons, have now offered to open their home to Jose and provide him stable and safe housing, food, transportation, and support through the duration of his asylum case. *See* Toczyłowski Decl., ¶ 5-7, Ex. B.

1 64. In addition to fitting in the statutorily defined group of immigrant children-
 2 turned-adults to whom Congress granted additional procedural safeguards in 8 U.S.C. §
 3 1252(c)(2)(B), Jose is a class member in a certified class action, *Ramirez v. ICE*, challenging
 4 ICE’s practice of transferring unaccompanied minors who reach their eighteenth birthdays to
 5 ICE adult detention facilities without considering less restrictive placements, in violation of
 6 the TVPRA. In April 2018, the District Court for the District of Columbia granted the plaintiffs
 7 a preliminary injunction requiring ICE to reassess its custody of the two original lead plaintiffs
 8 and place them in the “least restrictive setting” possible. *See Ramirez v. ICE*, 310 F. Supp. 3d
 9 7 (D.D.C. 2018) (granting preliminary injunction requiring defendants to consider the least
 10 restrictive placements pursuant to 8 U.S.C. § 1232(c)(2)(B) where unaccompanied alien
 11 children who reached majority while in the physical custody of HHS were transferred to adult
 12 detention without consideration of the least restrictive placement). On August 30, 2018, the
 13 Court certified a class of “[a]ll former unaccompanied alien children who are detained or will
 14 be detained by ICE after being transferred by ORR because they have turned 18 years of age
 15 and as to whom ICE did not consider placement in the least restrictive setting available,
 16 including alternatives to detention programs, as required by 8 U.S.C. § 1232(c)(2)(B).” This
 17 certified includes Jose as a member. *See Ramirez v. ICE*, 338 F. Supp. 3d 1, 50 (D.D.C.
 18 2018).¹⁰

CAUSES OF ACTION

COUNT I

Administrative Procedure Act 5 U.S.C. §706(2)

Respondents are Violating 8 U.S.C. §1232(c) (2) (B) By Failing to Consider the Least Restrictive Setting and Failing to Make Alternatives to Detention Available to Petitioner

23 65. Jose realleges and incorporates the allegations of all preceding paragraphs.

24 66. The Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et. seq.*, authorizes
 25 suits by “[a] person suffering legal wrong because of agency action, or adversely affected or
 26 aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702.
 27

28 ¹⁰ The parties in *Ramirez* are currently briefing summary judgment and the case is set for trial on December 2, 2019. *See Ramirez*, Case No. 1:18-5058, Minute Order (D.D.C. May 2, 2019).

1 67. On October 26, 2018, ICE took Jose from a licensed, non-secure ORR facility
2 and placed him into Theo Lacy Jail, a maximum security jail facility that subcontracts with
3 ICE. There is no evidence that when ICE did so it made a determination that the facility was
4 the least restrictive setting available, or considered alternatives to detention.

5 68. ICE's failure to consider the least restrictive setting for Jose and to make
6 alternatives to detention programs available to Jose violates 8 U.S.C. § 1232(c)(2)(B), which
7 requires that ICE "*shall* consider placement in the least restrictive setting available" for all
8 immigrants who are transferred into its custody after turning 18, and that these immigrants
9 "*shall* be eligible to participate in alternative to detention programs" (emphasis added).

10 69. Jose's detention is the direct result of ICE's failure to make the statutorily
11 required findings under Section 1232(c)(2)(B). Jose has put forth alternatives to detention,
12 including residing in a safe, stable home with a U.S. citizen family sponsor in Culver City,
13 California, but there is no evidence to show that ICE has considered this or any other
14 alternative.

15 70. ICE's decision to take Jose from ORR custody and place him into Theo Lacy
16 Jail constituted a final agency action because ICE failed to take a discrete agency action
17 required by statute, namely the requirement that it consider placement of Jose in the "least
18 restrictive setting"; ICE failed to take into account Jose's danger to self, the community and
19 flight risk; and, ICE has failed to consider alternatives to detention. *See Ramirez v. ICE*, 310
20 F. Supp. 3d 7, 20 (D.D.C. April 18, 2018) ("[T]he Court finds that Plaintiffs have identified
21 discrete agency actions subject to review under the APA."); *see also Norton v. S. Utah*
22 *Wilderness All.*, 542 U.S. 55, 64 (2004); 8 U.S.C. § 1261.

23 71. The decision to place Jose in an adult detention facility, as opposed to
24 considering other alternatives, was a final decision concerning Jose's custody that has
25 immediate and significant consequences for Jose, who is being housed in a restrictive adult
26 facility. *See Ramirez, supra* (finding that similarly situated Petitioners were suffering
27 irreparable harm by detention in adult detention centers rather than the least restrictive setting).
28

1 required actions violates 8 U.S.C. § 1232(c)(2)(B) and section 706(1) of the APA. *See Ramirez*
2 *v. ICE*, 310 F. Supp. at 21-22 (“The placements of Plaintiffs Garcia Ramirez and Hernandez
3 Alfaro in ICE adult detention facilities—purportedly without mandated consideration of less
4 restrictive placements—are agency actions that have actual or immediately threatened effects.
5 . . . The Court concludes that the “agency action” condition is met [i.e., that such agency action
6 is subject to judicial review].”).

7 79. Accordingly, Jose seeks a court order under 5 U.S.C. § 706(1) compelling ICE
8 to take the actions it is required to take pursuant to Section 1232(c)(2)(B).

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Petitioner respectfully requests that this Court:

- 11 a. Assume jurisdiction over this matter;
- 12 b. Pending final resolution of this Petition, and pursuant to the Court’s inherent
13 powers, order the immediate release of Jose, or order a hearing on the Petition as soon as is
14 possible;
- 15 c. Award the writ or issue an order directing the Respondents to show cause why
16 the writ should not be granted, pursuant to 28 U.S.C. § 2243, within three days;
- 17 d. Order that ICE comply with 8 U.S.C. §1232(c)(2)(B) by placing Jose the least
18 restrictive setting available after taking into account Jose’s danger to self, danger to
19 community, and risk of flight, including the fact that ORR already determined that Jose
20 presents no flight risk;
- 21 e. Order that ICE comply with 8 U.S.C. § 1232(c)(2)(B) by making Jose eligible
22 to participate in alternative to detention programs utilizing a continuum of alternatives based
23 on their need for supervision, including placement with an individual or organizational
24 sponsor, or in a supervised group home;
- 25 f. Declare that ICE’s failure to place Jose in the “least restrictive setting available”
26 violates 8 U.S.C. § 1232(c)(2)(B) and 5 U.S.C. § 706;
- 27 g. Declare that ICE’s failure to make “alternative to detention programs” available
28 to Jose violates 8 U.S.C. §1232(c)(2)(B) and 5 U.S.C. § 706;

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- h. Award the Jose his attorneys’ fees and costs; and
- i. Grant such other and further relief as the Court deems equitable, just, and proper.

Dated: October 1, 2019

JUSTICE ACTION CENTER
ESTHER H. SUNG
KAREN C. TUMLIN

MAYER BROWN LLP
ROGER ABBOTT
[To be admitted pro hac vice]

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