

1 (DOUGLAS E. HEWLETT, JR. (SBN 293438)

2 **ARENT FOX LLP**

3 555 West Fifth Street, 48th Floor
4 Los Angeles, California 90013-1065

5 Telephone: 213.629.7400

6 Facsimile: 213.629.7401

7 Email: douglas.hewlett@arentfox.com

8 ERIKA D. PINHEIRO (SBN 275711)

9 HUGO IVAN SALAZAR (SBN 324209)

10 **AL OTRO LADO, INC.**

11 511 San Ysidro Blvd. #333

12 San Ysidro, California 92173

13 Telephone: 619.254.1261

14 Facsimile: 323.430.8793

15 Email: erika@alotrolado.org

16 hugo@alotrolado.org

17 Attorneys for Petitioner, N.B.

18 UNITED STATES DISTRICT COURT

19 SOUTHERN DISTRICT OF CALIFORNIA

20 N.B, a minor child,

21 Petitioner,

22 v.

23 WILLIAM P. BARR, Attorney
24 General of the United States; KEVIN
25 K. MCALEENAN, Acting Secretary
26 of the U.S. Department of Homeland
27 Security; MARK A. MORGAN,
28 Acting Commissioner of U.S.
Customs and Border Protection;
MATTHEW T. ALBENCE, Acting
Director of Immigration and Customs
Enforcement; DR. STEWART D.
SMITH, Assistant Director for ICE
Health Services Corps; FRED
FIGUEROA, Warden of the Otay
Mesa Detention Center; OLIVER
CASTANEDA, Deportation Officer,
Otay Mesa Detention Center;
CORECIVIC, LLC, a Delaware
limited liability corporation,

Defendants.

Case No. _____

**VERIFIED PETITION FOR WRIT
OF HABEAS CORPUS**

INTRODUCTION

1
2 1. Petitioner, N.B., is a 17-year old boy from the Republic of Guinea who
3 is being unlawfully detained and classified as an adult, and who is being detained
4 with adults, by Immigrations and Customs Enforcement (“ICE”), an agency of
5 Department of Homeland Security (“DHS”) at the Otay Mesa Detention Center.
6 N.B.’s three-month detention with adults is the result of unlawful, inaccurate,
7 arbitrary, and capricious age determinations by ICE and ICE Health Services Corps
8 (“IHSC”) made via dental x-ray age estimation.

9 2. On or about May 22, 2019, N.B. presented himself at the United States
10 port of entry in San Ysidro as an unaccompanied immigrant minor and immediately
11 produced a copy of his valid birth certificate bearing the seals of the Office of the
12 Registrar and Chief Clerk of the Republic of Guinea. His birth certificate
13 conclusively shows he is a minor, as it shows he was born on [REDACTED], 2001.
14 Rather than beginning efforts at reunifying N.B. with his adult cousin, who is a
15 United States citizen, U.S. Customs and Border Protection (“CBP”) held N.B. in
16 solitary confinement for four (4) days, and an additional twenty-four (24) days in a
17 CBP processing detention center known colloquially as “*la hielera*” (the ice-box).
18 While detained, N.B. complained to officials of the “hielera’s” cold temperature
19 and of the 24-hour fluorescent lighting that kept him from sleeping.

20 3. On or about June 18, 2019, N.B. was transferred to the Otay Mesa
21 Detention Center, an adult detention center administered by CoreCivic corporation,
22 even though he notified CoreCivic and CBP officials that he was a minor.

23 4. On or about June 24, 2019, IHSC then ordered a dental x-ray
24 examination of N.B., which estimated N.B.’s “mean age” to be 20.24, with a
25 standard deviation of 2.98 years—even just one standard deviation below the mean
26 would indicate an age of 17.26 years (a minor). Despite N.B. having presented his
27 certified birth certificate and despite the results of the inherently flawed and
28 inaccurate dental age assessment, ICE concluded N.B. “will be treated as an adult”

1 because “the empirical statistical probability the subjects (*sic*) attained 18 years of
2 age is 93.53%” Given that N.B. is over 17 and 1/2-years old, it is not
3 surprising that “the empirical statistical probability” that he has attained 18 years of
4 age, whatever that may mean, is high. But to detain a minor child as an adult in the
5 face of a certified birth certificate conclusively showing the child is a minor based
6 solely on a generic statistical estimate is arbitrary, capricious, unlawful, and against
7 ICE’s own policy.

8 5. N.B. regularly pleads with his counsel for his release and reunification
9 with his adult cousin and family-member-sponsor, Ms. Mariama Tounkara. N.B.
10 feels helpless and in constant fear as he is being detained with adults in the Otay
11 Mesa Detention Facility.

12 6. Last week, on August 5, 2019, undersigned counsel, Mr. Salazar,
13 formally requested N.B.’s release and reunification with N.B.’s cousin. ICE
14 responded barely an hour later and rejected the request, asserting ICE will treat
15 N.B. as an adult solely because of the generic statistical probabilities returned by
16 the dental age estimate the government performed.

17 7. The government has stated to undersigned counsel, Mr. Salazar, that
18 N.B. has been detained since May 22, 2019, for no other reason than the
19 government’s dental age estimate.

20 8. Yet, federal law and regulations, and ICE’s own guidance, prohibit
21 ICE from making age determinations based solely on radiograph (x-ray)
22 assessments. Further, given the unreliability of this method for assessing age,
23 ICE’s own guidance also warns that dental radiographs should only be employed
24 “[a]s a last resort” and only “when no conclusive information is available.” N.B.’s
25 continued detention with adults and the government’s refusal to recognize his true
26 age violates: (1) the special protections for noncitizen children that Congress
27 mandated in the Trafficking Victims Protection Reauthorization Act of 2008; (2)
28 the implementing ORR Guidance; (3) the binding class action settlement overseen

1 by the Central District of California in *Flores v. Reno* (the “*Flores* Settlement
2 Agreement”); and (4) N.B.’s constitutional rights. ICE has violated and continues
3 to violate the law by detaining N.B. with adults based exclusively on the results of
4 his dental x-ray age estimate. His unlawful detention mandates habeas relief.

5 9. N.B. is a minor. He does not lose his rights as a minor under the
6 TVPRA, *Flores* Settlement Agreement, nor any other body of law, until he has
7 reached the age of majority, which he has not.

8 10. For the reasons listed above, and as explained further below, N.B.’s
9 continued detention is unlawful and he respectfully requests that this Court order
10 the U.S. Department of Homeland Security (“DHS”), ICE, and all above-captioned
11 Defendants to release and reunify him to the custody of his family-member-
12 sponsor. Ms. Tounkara has supplied all information necessary for this Court to
13 declare that Ms. Tounkara qualifies as N.B.’s family-member-sponsor pursuant to
14 ¶ 14 of the *Flores* Settlement Agreement and order that N.B. shall be released to
15 her custody immediately. N.B. hereby requests such a declaration and order.

16 11. Furthermore, N.B. requires expeditious if not immediate relief because
17 he will reach the age of majority in approximately four (4) months, but has already
18 lost nearly three (3) months of time to assert his rights under the TVPRA and
19 *Flores* Settlement Agreement, due to the government’s unlawful age determination
20 and detention of N.B. as an adult, in an attempt to preclude him relief under the
21 TVPRA and *Flores* Settlement Agreement. Furthermore, N.B. was recently told by
22 his deportation officer that he would be deported soon. N.B. therefore submits
23 concurrently herewith an Application for Issuance of Order to Show Cause pursuant
24 to 28 U.S.C. § 2243.

25 JURISDICTION

26 12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2241
27 (habeas jurisdiction); Art. I § 9, cl. 2 of the United States Constitution (Suspension
28 Clause); 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1346(a)(2)

1 (United States as a defendant); 28 U.S.C. § 1361 (action to compel an officer or
2 employee of the United States or any agency thereof); 5 U.S.C. §§ 702, 706 (review
3 of final agency decision); and ¶ 24(B) of the *Flores* Settlement Agreement.
4 Jurisdiction lies to grant declaratory relief pursuant to 28 U.S.C. §§ 2201–2202
5 (Declaratory Judgment Act).

6 13. Sovereign immunity against actions for relief other than money
7 damages has been waived pursuant to 5 U.S.C. § 702.

8 14. This Petition action arises under the Constitution of the United States;
9 the Immigration and Nationality Act (“INA”); the William Wilberforce Trafficking
10 Victims Protection Reauthorization Act of 2008 (“TVPRA”), Public Law 110-457;
11 the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*; and the *Flores*
12 Settlement Agreement, which is binding on Defendants.

13 15. This Court may grant relief under the habeas corpus statute, 28 U.S.C.
14 § 2241 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, the All
15 Writs Act, 28 U.S.C. § 1651, and the APA, 5 U.S.C. § 702.

16 **VENUE**

17 16. Venue is proper in the Southern District of California because a
18 substantial part of the events or omissions giving rise to N.B.’s claim occurred in
19 the Southern District of California. N.B. was originally in CBP’s custody in San
20 Ysidro, California, where IHSC also conducted its dental age determination. N.B.
21 was taken into, and is currently in, ICE custody at Otay Mesa Detention Center,
22 San Diego, California, in this District.

23 17. Venue is further proper with this Court pursuant to 28 U.S.C.
24 § 1391(e) because Defendants are officers or employees of the United States, acting
25 in their official capacity and/or under color of the authority of the United States, in
26 this District.

27 //

28 //

PARTIES

18. Petitioner N.B. is a noncitizen minor child from the Republic of Guinea, in west Africa, who arrived at the port of entry in San Ysidro, California, and lawfully presented himself to immigration authorities on or about May 22, 2019. N.B. is currently detained by ICE at the Otay Mesa Detention Center in San Diego, California.

19. Defendant William P. Barr is the Attorney General of the United States and the head of the United States Department of Justice ("DOJ"). Defendant Barr is responsible for advising the government Defendants on the lawful administration and enforcement of the immigration laws and policies. Defendant Barr further has ultimate authority over the Executive Office for Immigration Review ("EOIR"), the agency within DOJ responsible for the immigration court system. He in his official capacity is the ultimate legal custodian of Petitioner N.B. Defendant Barr is sued in his official capacity.

20. Defendant Kevin K. McAleenan is the Acting Secretary of DHS, the Department of the Executive Branch of the U.S. government that oversees the component agencies responsible for enforcing the immigration laws of the United States. Those component agencies include ICE; CBP; and U.S. Citizenship and Immigration Services ("USCIS"). Defendant McAleenan directs and is responsible for the administration and enforcement of the immigration laws in the United States. He is sued in his official capacity.

21. Defendant Mark A. Morgan is the Acting Commissioner of CBP, the agency within DHS that is responsible for the initial processing and detention of noncitizens apprehended near the U.S. border. In that capacity, Defendant Morgan has direct authority over all CBP policies, procedures, and practices relating to the apprehension of unaccompanied immigrant minors. CBP's *Flores* responsibilities include, among others, determining whether and in what manner to transfer and/or release and reunify unaccompanied immigrant minors with their sponsors, and

1 briefly detaining unaccompanied immigrant minors during initial processing. He is
2 sued in his in official capacity.

3 22. Defendant Matthew T. Albence is the Acting Director of ICE, the
4 agency within DHS that is responsible for carrying out removal orders, oversees
5 enforcement and removal operations, and is responsible for the detention of
6 noncitizens throughout the United States. Defendant Albence has direct authority
7 over all ICE policies, procedures, and practices relating to the detention and
8 deportation of noncitizens. ICE's *Flores* responsibilities include, among other
9 things, placing each detained unaccompanied immigrant minor in the least
10 restrictive setting appropriate to the minor's age and special needs, provided that
11 such setting is consistent with ICE's interests to ensure the minor's timely
12 appearance before immigration courts, release and reunification, and to protect the
13 minor's well-being and that of others; and the responsibility to make and continue
14 efforts at reunification pursuant to ¶ 14 of the *Flores* Settlement Agreement.
15 Defendant Morgan is sued in his official capacity.

16 23. Defendant Dr. Stewart D. Smith is the Assistant Director for IHSC, the
17 division of ICE that is responsible for ordering and/or conducting dental age
18 assessments, i.e. dental x-ray analysis for purposes of estimating detainees' ages.
19 In that capacity, Defendant Smith has direct authority over all dental age
20 assessments ordered or conducted by IHSC. He is sued in his official capacity.

21 24. Defendant Fred Figueroa is the Warden of the Otay Mesa Detention
22 Facility operated by CoreCivic on behalf of ICE, an agency of DHS. Defendant
23 Figueroa is in his official capacity, the immediate custodian of N.B. Defendant
24 Figueroa is sued in his official capacity.

25 25. Defendant Oliver Castaneda is the Deportation Custody Officer at
26 Otay Mesa Detention Facility and, in that official capacity, serves as the approval
27 authority for the transfer and release of unaccompanied children within the
28 geographic region of Southern California. He works in the Otay Mesa Detention

1 Center in San Diego, California, and maintains a workspace there. He is the
2 Deportation Custody Officer responsible for managing N.B.'s case and who refused
3 undersigned counsel Mr. Salazar's formal request for N.B. to be released as an
4 unaccompanied minor to his family-member-sponsor pursuant to the *Flores*
5 Settlement Agreement. Defendant Castaneda is also responsible for maintaining
6 N.B.'s ongoing detention as an adult, rather than as an unaccompanied minor.
7 Defendant Castaneda is sued in his official capacity.

8 26. Defendant CoreCivic, LLC ("CoreCivic") is a Delaware limited
9 liability corporation with its principal place of business in Tennessee, and is the
10 operator/manager of the Otay Mesa Detention Center in San Diego, California,
11 pursuant to a contract with ICE. Defendant CoreCivic is the immediate physical
12 custodian of Petitioner N.B.

13 **FACTS**

14 27. N.B. is a 17-year old boy from the Republic of Guinea, a country in
15 west Africa. On or about May 22, 2019, N.B. presented himself at the United
16 States port of entry in San Ysidro as an unaccompanied minor. He immediately
17 presented a copy of his valid birth certificate bearing the seals of the Office of the
18 Registrar and Chief Clerk of the Republic of Guinea. See **Exhibit 1** (Birth
19 Certificate – French). His birth certificate conclusively shows he is a minor. His
20 birth certificate shows his exact date of birth, which is [REDACTED]/2001 (late 2001), and
21 N.B. has not yet had his eighteenth (18th) birthday. See *id.*; **Exhibit 2** (Birth
22 Certificate – Certified English Translation).

23 28. N.B. was taken into DHS custody and referred to CBP processing.
24 However, N.B. was first held in solitary confinement for four (4) days.

25 29. After holding N.B., an unaccompanied child, in solitary confinement
26 for four (4) days, and in the ice box for another twenty-four (24) days, on or about
27 June 24, 2019, IHSC ordered a dental x-ray examination of N.B., for purposes of
28 determining or verifying his age. The dental x-ray examination estimated N.B.'s

1 “mean age” to be 20.24 years of age, with a standard deviation of 2.98 years. One
2 standard deviation below the mean is an age of 17.26 years (a minor). Despite N.B.
3 having presented his certified birth certificate, despite the results of the inherently
4 flawed and inaccurate dental age assessment, and despite controlling federal law (8
5 U.S.C. § 1232(b)(4)) and agency policy (e.g., ORR Guidelines § 1.6.2) which
6 prohibit the government from relying solely on dental x-rays to determine age, ICE
7 concluded that N.B. “will be treated as an adult” because “the empirical statistical
8 probability the subjects (*sic*) attained 18 years of age is 93.53%” See **Exhibit**
9 **12** (Def. Castaneda Response to Request for Release).

10 30. Last week, on August 5, 2019, undersigned counsel Mr. Salazar
11 completed a DHS Form G-28 (Notice of Entry of Appearance as Attorney or
12 Credited Representative) and sent to Defendant Castaneda a formal request for
13 N.B.’s release, attached hereto as **Exhibit 4**, which requested that N.B. be
14 immediately released, pursuant to the *Flores* Settlement Agreement, to his family-
15 member-sponsor, Ms. Mariama Tounkara. The request for release:

- 16 a. outlined that N.B. is a 17-year old boy from the Republic of
17 Guinea;
- 18 b. stated that undersigned counsel Mr. Salazar is aware that N.B.
19 presented his birth certificate to ICE, CBP, and CoreCivic
20 personnel, yet remains detained;
- 21 c. explained that as an unaccompanied minor, N.B. must not be
22 detained more than 20 days at a maximum in a facility that does
23 not include separate facilities for detaining children;
- 24 d. noted that N.B. has been detained for nearly fifty (50) days by that
25 point (and subsequent facts discovered reveal that N.B. has
26 actually been detained for nearly ninety (90) days);
- 27 e. requested N.B.’s immediate release to N.B.’s cousin, Ms.
28 Tounkara; and

1 f. attached all of Ms. Tounkara's information necessary to determine
2 that N.B. should be released to her custody and care (N.B.'s birth
3 certificate; Ms. Tounkara's proof of residence; Ms. Tounkara's
4 U.S. Passport and proof of U.S. Citizenship; Ms. Tounkara's
5 Letter of Employment and pay stubs; and Ms. Tounkara's sponsor
6 letter, sworn under penalty of perjury in conformity with ¶ 14 of
7 the *Flores* Settlement Agreement).

8 31. Defendant Castaneda almost immediately rejected the request for
9 release and stated that ICE has and will continue to treat N.B. as an adult.
10 Defendant Castaneda offered no basis for this other than the results of the dental x-
11 ray exam. Defendant Castaneda did not reference in his response N.B.'s birth
12 certificate showing N.B. is a minor, or other evidence submitted. Thus, DHS and
13 ICE have stated to undersigned counsel that N.B. has been detained since May 22,
14 2019, for no other reason than the government's dental age estimate.

15 32. The Otay Mesa Detention Facility does not have separate facilities to
16 accommodate children, so N.B. is being detained in group quarters where he eats,
17 sleeps, showers, and shares bathroom facilities with more than 100 adult men in his
18 detention unit—this being after N.B. was detained in solitary confinement initially.

19 33. Undersigned counsel, Mr. Salazar, has met with N.B. approximately
20 five (5) times, during which meetings N.B. pleaded with Mr. Salazar to obtain his
21 release and reunification with his cousin. N.B. feels helpless, distraught, and in
22 constant fear, continuing to be detained with adults in the Otay Mesa Detention
23 Facility.

24 34. On August 8, 2019, N.B. retained undersigned counsel Mr. Douglas
25 Hewlett's firm, Arent Fox LLP, to represent him *pro bono*. Arent Fox LLP and Al
26 Otro Lado, Inc. hereby jointly submit this Petition on behalf of their client, N.B.

27 35. Ms. Tounkara, N.B.'s adult cousin to whose custody N.B. seeks
28 release, is a United States citizen. Ms. Tounkara grew up with N.B., having spent

1 much of their childhoods in the same house. Ms. Tounkara is prepared, willing,
2 and able to care for N.B. See **Exhibit 9** (Sworn Sponsor Letter). She currently
3 resides in Columbus, Ohio, where she is gainfully employed as a full-time
4 employee of Three C Care Health Care, LLC (3 C Health Care). She is willing and
5 able to financially support N.B. See **Exhibits 8–11**. She is also willing and able to
6 ensure that N.B. appears at any and all immigration hearings. See **Exhibit 9**.

7 36. This Petition attaches, in addition to the evidence submitted by N.B.
8 personally to ICE, CBP, and CoreCivic (his birth certificate), the evidence
9 submitted by Ms. Tounkara along with the request for release pursuant to the *Flores*
10 Settlement Agreement (**Exhibits 4 – 11**) and N.B.'s government-issued education
11 system I.D., which also shows his exact birthdate and confirms he is a minor. See
12 **Exhibit 3** (N.B. I.D. Card).

13 **DILIGENCE IN PURSUING ADMINISTRATIVE REMEDIES**

14 37. Although exhaustion of administrative remedies is not required in the
15 immigration detention habeas context, N.B. has diligently pursued administrative
16 remedies and is left with no other recourse but this habeas petition.

17 38. Specifically, on or about May 22, 2019, N.B. presented himself to the
18 San Ysidro port of entry as an unaccompanied minor, and at that time presented his
19 birth certificate.

20 39. On or about May 22, 2019, N.B. was placed into CBP processing and
21 held in solitary confinement for approximately four (4) days. He was then held for
22 an additional twenty-four (24) days in the ice box.

23 40. On or about June 18, 2019, N.B. was transferred to the Otay Mesa
24 Detention Center and detained there even though he notified CoreCivic and CBP
25 officials that he was a minor, attempting to assert his rights as an unaccompanied
26 minor.

27 41. On or about June 24, 2019, IHSC directed a contracted entity to
28 conduct the x-ray dental assessment to estimate N.B.'s age. Based on that x-ray

1 dental assessment, IHSC and ICE declared that N.B. is not a minor but instead “will
2 be treated as an adult” for purposes of his immigration detention and proceedings.

3 42. On August 5, 2019, undersigned counsel Mr. Salazar submitted on
4 N.B.’s behalf a Form G-28 and formally requested his immediate release and
5 reunification with his adult cousin, in conformity with the *Flores* Settlement
6 Agreement.

7 43. On August 5, 2019, ICE, acting by and through Defendant Castaneda,
8 denied the request for N.B.’s release pursuant to the *Flores* Settlement Agreement,
9 on the sole ground that the x-ray dental assessment showed an “empirical statistical
10 probability” of 93.53% that N.B. was 18 years of age, regardless of N.B.’s
11 conclusive proof of his exact birthdate. Thus, Defendants thereby concluded that,
12 because they have determined to treat N.B. as an adult for purposes of his detention
13 and immigration proceedings, he is not entitled to relief under the TVPRA nor
14 *Flores* Settlement Agreement, which include the right to seek review of ICE’s
15 placement determination or to allege noncompliance with the *Flores* Settlement
16 Agreement. See **Exhibit 13** (*Flores* Settlement Agmt.) ¶ 24.B. These rights are
17 only available to minors.

18 44. Accordingly, ICE’s determination that N.B. is to be treated for
19 purposes of his detention and immigration proceedings as an adult precludes and
20 has denied N.B. any and all relief to which he is entitled as a minor under the
21 TVPRA and *Flores* Settlement Agreement.

22 45. N.B. has therefore diligently pursued and, although it is not required,
23 exhausted all administrative remedies and is entitled to file the instant Petition.¹

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25 //

26 ¹ Relatedly, an immigration bond hearing would be inappropriate in N.B.’s case, as
27 immigration bond hearings assess the flight risk and dangerousness of a detainee,
28 not the authority to detain the individual in the first place, which is the archetypal
habeas issue.

LEGAL FRAMEWORK FOR THE RELIEF SOUGHT

46. In 1985, a class action was brought against the government challenging immigration enforcement policies directed toward migrant children. After over 10 years of litigation, in 1997, the plaintiff class and the government entered into the “*Flores* Settlement Agreement,” which established national standards regarding the detention, release and treatment of all children in immigration custody. As a general principle, the *Flores* Settlement Agreement maintained that, “[t]he [legacy Immigration and Naturalization Service] treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.” *Flores* Settlement Agreement ¶ 11. The *Flores* Settlement Agreement “continues to govern those agencies that now carry out the functions of the former INS.” *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). It remains binding on DHS, ICE, and other government agencies, and indeed, was recently reaffirmed by the Ninth Circuit in *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).²

² In the two decades since the FSA was approved, there have been dramatic changes to the bureaucratic landscape of immigration law. Twice, Congress has passed laws directly addressing the care and custody of unaccompanied minors. In 2002, Congress passed the Homeland Security Act which abolished the former INS, and established the Department of Homeland Security (DHS). 6 U.S.C. §§ 111, 251, 291. The Act also transferred a number of the functions relating to the care of unaccompanied minors from the former INS to the Director of the Office of Refugee Resettlement (“ORR”) of the Department of Health and Human Services (“DHHS”). 6 U.S.C. § 279(a), (b)(1)(A), (g)(2).

In 2008, Congress again addressed the treatment of unaccompanied minors when it passed the Trafficking Victims Protection Reauthorization Act (“TVPRA”), principally codified in at 8 U.S.C. § 1232. Like the Homeland Security Act, the TVPRA gives ORR responsibility for certain aspects of the care and custody of unaccompanied minors. The TVPRA “partially codified the [*Flores*] Settlement by creating statutory standards for the treatment of unaccompanied minors.” *Flores*, 828 F.3d at 904. Under the TVPRA, the “care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.” 8 U.S.C. §

1 47. The *Flores* Settlement Agreement requires expeditious release of
2 minors from custody to a designated adult guardian, except where detention is
3 necessary to ensure the minor's appearance in immigration court or to ensure the
4 minor's safety or the safety of others. *Flores* Settlement Agreement ¶ 14. It
5 applies to all minors in immigration custody, regardless of whether the child is
6 apprehended unaccompanied or accompanied. *See Flores*, 828 F.3d at 905–06;
7 *Flores* Settlement Agmt. ¶ 10.

8 48. Of critical importance, “any person under the age of eighteen (18)
9 years who is detained in legal custody of the INS,” is a “minor” for purposes of
10 immigration detention and the *Flores* Settlement Agreement. *Flores* Settlement
11 Agmt. ¶ 9.

12 49. Where the minor does not have an adult guardian to whom he or she
13 may be released, the government must place the minor in the least restrictive
14 setting—e.g., a state-licensed care provider, including group homes or shelters for
15 children—until an adult guardian may be located or until immigration proceedings
16 are terminated, whichever occurs first. *Id.* ¶¶ 11, 19. The government is prohibited
17 from placing a minor in a secure facility when a less restrictive alternative is
18 available and appropriate. *Id.* ¶ 23.

19 50. Following the *Flores* Settlement in 1997, the former INS codified
20 regulations that further implement these protections for juveniles. These
21 regulations specify that, “[i]n the case of a juvenile for whom detention is
22 determined to be necessary, for such interim period of time as is required to locate
23 suitable placement for the juvenile, . . . the juvenile may be temporarily held by
24 Service authorities or placed in any Service detention facility *having separate*
25 *accommodations for juveniles.*” 8 C.F.R. § 1236.3(d) (emphasis added).

26 51. In December 2008, Congress recognized the need for increased
27 standards of care and custody for unaccompanied children arriving in the United

28
1232(b)(1).

1 States. It enacted the Trafficking Victims Protections Reauthorization Act
2 (“TVPRA”), 110 Pub. L. 457, 122 Stat. 5044, principally codified in relevant part
3 at 8 U.S.C. § 1232. The TVPRA expressly recognizes the vulnerability of
4 unaccompanied minors, and “requires better care and custody of unaccompanied
5 [noncitizen] children to be provided by the Department of Health and Human
6 Services (HHS).” H. Rept. 110-430, 110th Cong., 1st Sess., 57 (2007).

7 52. In order to determine whether an individual is covered by the
8 protections of the TVPRA, the statute requires HHS to “develop procedures to
9 make a prompt determination of the age of a [noncitizen], which shall be used by
10 the Secretary of Homeland Security and the Secretary of Health and Human
11 Services for children in their respective custody.” 8 U.S.C. § 1232(b)(4).
12 Accordingly, both DHS and HHS must use these procedures.

13 **Requirement for the Non-Exclusive Use of Radiographs in Making Age**
14 **Determinations**

15 53. The TVPRA does not itself establish the procedures to be used, but
16 requires that “[a]t a minimum, these procedures shall take into account multiple
17 forms of evidence, including the *non-exclusive use of radiographs*, to determine
18 the age of the unaccompanied [noncitizen].” *Id.* (emphasis added). Radiographs are
19 dental or skeletal x-rays.

20 54. The several prohibitions on the exclusive reliance on dental x-rays
21 exist for good reason. The Office of Inspector General notes that “ICE’s use of
22 radiographs . . . has been criticized as unreliable by some in the medical and
23 advocacy communities.” DHS OIG Report, Age Determination Practices for
24 Unaccompanied Alien Children – Update, OIG-10-122 (Sept. 29, 2010)
25 (https://www.oig.dhs.gov/assets/Mgmt/OIG_10-122_Sep10.pdf). Likewise, ICE’s
26 own guidance recognizes that ICE’s age determination must be based on “the
27 totality of the evidence” because “no medical assessment method can determine an
28 exact age.” Juvenile & Family Residential Mgmt. Unit Field Office Juvenile

Coordinator Handbook, *Enforcement and Removal Operations* § 3.1.2 (Sept. 1, 2017) (“Juvenile Coordinator Guidance”) (<https://www.aila.org/File/DownloadEmbeddedFile/75783>).

55. Per the TVPRA’s requirements, HHS and DHS created procedures to conduct age determinations for unaccompanied children. *See* Children Entering the United States Unaccompanied: Section 1 Placement in ORR Care Provider Facilities (Published Jan. 30, 2015) (<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>) (“ORR Guidelines”). Section 1.6 of the ORR Guidelines establishes procedures for “Determining the Age of an Individual without Lawful Immigration Status.” *Id.* As acknowledged in Section 1.6., “the TVPRA requires the age determination procedures, at a minimum, to take into account multiple forms of evidence.” *Id.* Section 1.6 further requires that “each case *must be evaluated carefully based on the totality of all available evidence*, including the statement of the individual in question.” *Id.* (emphasis added)

56. Section 1.6.2 provides examples of the types of evidence that should be sought and considered when conducting age determinations, including:

- a. “Official government-issued documents, *including birth certificates*. If the unaccompanied alien child in question is not in possession of original documentation, or if the authenticity of the original documentation is in question, government officials of the unaccompanied alien child’s home *must* be consulted in order to verify the validity of the documentation.” *Id.* § 1.6.2 (emphasis added).
- b. “Other reliable records (e.g., . . . *school records* . . .) that indicate the unaccompanied alien child’s date of birth.” *Id.* (emphasis added).

1 57. Section 1.6.2 further states that “[s]tatements by individuals (including
2 the unaccompanied alien child) determined to have personal knowledge of the
3 unaccompanied alien child’s age, and who HHS concludes can credibly attest to the
4 age of the unaccompanied child” are additional examples of evidence that must be
5 considered in the determination. This includes:

- 6 a. “Statements provided by the unaccompanied alien child
7 regarding his . . . birth date.” *Id.*
8 b. “Statements from the unaccompanied alien child’s parent(s)
9 or legal guardian(s)” *Id.*
10 c. “Statements from other persons.” *Id.*

11 58. N.B. has provided *each* of the aforementioned additional evidence of
12 his ag. *See Exhibits 1 – 5.*

13 59. Regarding “Medical Age Assessments,” the ORR Guidelines state:
14 “Dental and skeletal (bone) maturity assessments using radiographs may be used to
15 determine age, *but only in conjunction with other evidence.*” *Id.* (emphasis
16 added).

17 60. Thus, the controlling statute and implementing guidance make explicit
18 that ORR cannot rely solely on radiographs to determine an individual’s age. *See* 8
19 U.S.C. § 1232(b)(4) (“At a minimum, these procedures shall take into account
20 multiple forms of evidence, *including the non-exclusive use of radiographs*, to
21 determine the ag of the unaccompanied alien.” (emphasis added)). Congress
22 requires the consideration of multiple forms of evidence to preclude DHS and ICE
23 from relying solely on dental and bone scan assessments, which are inherently
24 inaccurate and thereby, depending on the circumstances, arbitrary, capricious, and
25 prejudicial.

26 61. ICE also has its own policy regarding age determinations of
27 individuals in ICE custody, which was released in August 2004 prior to the TVPRA
28 and has not been updated since. *See* Memo. from ICE to Field Office Directors,

1 Age Determination Procedures for Custody Decisions (Aug. 20, 2004),
2 https://www.ice.gov/doclib/foia/dro_policy_memos/agedeterminationproceduresfor
3 [custodydecisionsaug202004.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/agedeterminationproceduresfor) (“ICE Age Determination Guidance Memo”). The
4 ICE policy specifically includes a procedure for assessing claims by individuals in
5 adult ICE facilities that claim they are juveniles. The policy requires the ICE Field
6 Office Juvenile Coordinator to consider information that the juvenile submits as
7 evidence of his or her age. *Id.* at 2. ICE “must base age determinations upon the
8 totality of the evidence presented to them and not solely upon the results of dental
9 and/or wrist-bone x-rays.” *Id.* at 1. A birth certificate and statements by an
10 individual with personal knowledge of the minor’s age “must be considered, if
11 available.” *Id.* at 3. Further guidance to ICE Field Office Juvenile Coordinators
12 (the official ultimately responsible for each age determination) states that dental and
13 skeletal assessments “may be used” “[a]s a ***last resort*** . . . when no conclusive
14 information is available.” Juvenile Coordinator Guidance § 3.1.2.

15 62. Furthermore, federal courts have affirmed that the TVPRA prohibits
16 ICE and ORR from relying solely on dental x-ray assessments to place a minor in
17 adult ICE custody. For example, in *B.I.C. v. Asher*, the Western District of
18 Washington granted the *habeas* petition of a minor who was placed in adult ICE
19 custody after ORR made an unlawful age determination based solely on a dental x-
20 ray assessment. *See B.I.C. v. Asher*, No. C16-132-MJP-JPD, 2016 WL 8672760
21 (W.D. Wash. Feb. 19, 2016); *see also B.I.C. v. Asher*, No. 2:16-cv-00132-MJP-
22 JPD, ECF Nos. 20, 22 (W.D. Wash. Apr. 29, 2016) (adopting report and
23 recommendation and granting petition for writ of habeas corpus). In his report and
24 recommendation, the magistrate judge explained that, “Congress’s mandate that
25 radiographs not be the only basis for an age determination reflects concern about
26 the reliability of such determinations.” *See B.I.C.*, 2016 WL 8672760 at *5.
27 District Judge Marsha J. Pechman adopted this finding, stating that the government
28 agencies involved could not “reconcile their policy with the statute’s express

1 prohibition on the exclusive use of radiographs.” Order Adopting Report and
2 Recommendation, Granting Petition for Writ of Habeas Corpus, *B.I.C. v. Asher*,
3 No. C16-132-MJP, ECF No. 22 at 5 (W.D. Wash. May 2, 2016). The court further
4 held that “ORR’s age determination is unlawful. . . . The procedures developed and
5 properly deployed here resulted in the exclusive use of dental radiographs to make
6 an age determination,” in violation of the TVPRA. *Id.* at 4.

7 63. The TVPRA, ORR Guidelines and ICE Age Determination Guidance
8 Memo each expressly prohibit the exclusive use of radiographic evidence to
9 determine the age of an unaccompanied migrant child and instead require the
10 consideration of multiple forms of evidence, including: a birth certificate; other
11 reliable documents such as school records; statements of the unaccompanied minor;
12 and statements of an individual or sponsor with reason to know the minor’s age.

13 64. N.B. has supplied each of these additional forms of evidence.

14 65. In N.B.’s case, however, CBP, ICE, and CoreCivic have failed to
15 comply with their legal mandates. Instead, they have solely relied on the results of
16 N.B.’s dental x-ray assessment and furthermore, have ignored and refused to
17 consider other relevant forms of evidence that clearly show N.B. is a minor—
18 evidence the government is required to take into consideration. 8 U.S.C.
19 1232(b)(4); ORR Guidelines § 1.6; ICE Age Determination Guidance Memo. at 1–
20 3. As a result, Defendants continue to unlawfully detain N.B. with adults.

21 **DHS and ICE’s Documented History of Detaining Children Approaching**
22 **Adulthood and Denying Them Statutorily-Protected Rights**

23 66. DHS and ICE have a documented history, especially under the current
24 administration, of detaining unaccompanied immigrant minors and refusing them
25 their statutory rights under 8 U.S.C. § 1232 in manners that Courts have roundly
26 disapproved.

27 67. For example, in *Flores v. Sessions*, 862 F.3d at 872–74, the Court
28 recounted in detail the “evidence showing that . . . ORR currently detains

1 unaccompanied minors for months, and even years, without providing them with
2 any opportunity to be heard before a neutral person with authority to review the
3 basis for detention.” *Id.* at 872. In one example cited in that case, one
4 unaccompanied minor was detained in ORR custody despite both he and his mother
5 requesting reunification, kept in detention until he reached age eighteen (18), and
6 was then transferred to adult ICE custody where, fortunately, he was finally granted
7 a hearing before an immigration judge and subsequently released. *Id.* at 872–74.

8 68. In another case, *Ramirez v. U.S. Immigration & Customs Enf’t*, 338 F.
9 Supp. 3d , 45–50 (D.D.C. 2018), the court certified a class of unaccompanied
10 minors who alleged they had been detained by ORR as minors, transferred from
11 ORR custody to DHS/ICE adult-detention upon reaching age eighteen (18), placed
12 in adult detention facilities, and each of them denied by DHS/ICE their statutorily-
13 protected right under 8 U.S.C. § 1232 to be placed in the least restrictive setting
14 available. *Id.* at 46–48. The class comprised of 1,000 to 1,200 similarly-situated
15 unaccompanied minors who had alleged a *prima facie* case that their rights under
16 the TVRPA had been denied. *Id.* at 44.

17 69. N.B. alleges herein, and as set forth below, that ICE is continuing its
18 pattern by denying his statutory, *Flores*, and constitutional rights by continuing to
19 detain him as an adult and refusing him reunification on the sole basis of the dental
20 x-ray age estimates ICE performed.

21 70. N.B. further alleges, on information and belief, that several other
22 unaccompanied minor boys from west African countries are also currently being
23 detained as adults at Otay Mesa Detention Center.

24 //

25 //

26 //

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28 //

CLAIMS FOR RELIEF

COUNT ONE

Defendants' Detention of N.B. in Adult Custody Violates the Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232, and Implementing Guidance

71. N.B. re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

72. N.B.'s continued detention by Defendants is unlawful and contravenes the TVPRA, 8 U.S.C. § 1232. The TVPRA requires that: "[a]t a minimum, [age determination] procedures shall take into account multiple forms of evidence, including the *non-exclusive* use of radiographs, to determine the age of the unaccompanied [noncitizen]." 8 U.S.C. § 1232(b)(4) (emphasis added).

73. Defendants placed N.B. in adult ICE custody based on an unlawful age determination that violated the TVPRA.

74. CBP and ICE officials and employees refused to consider N.B.'s birth certificate in the first instance, during his border interview. They further failed to consider his statements made during that interview.

75. CBP, ICE, and CoreCivic officials and employees also have refused to reconsider N.B.'s age determination: after receiving an official request including additional supporting documentation, including his official records from the office of the Regional Inspector of Education in the Republic of Guinea; and statements from N.B.'s attorney and adult cousin who is his family-member-sponsor.

76. Defendants have and continue to rely exclusively on the results of his dental x-ray assessment to continue to detain him in adult custody.

77. The only evidence used to make N.B.'s age determination was the dental x-ray assessment, in violation of the TVPRA.

78. The government has itself stated that the only evidence relied upon for CBP, ICE, and CoreCivic's continued detention of N.B. with adults is the dental x-ray assessment. *See Exhibit 12.*

80. Because N.B.'s age determination is based solely on a dental x-ray assessment and ignores other evidence that N.B. is a minor, Defendants' continued detention of N.B. in adult custody violates the TVPRA and implementing agency guidance.

Defendants' Decision To Detain N.B. In Adult Custody Is Arbitrary and Capricious, in Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)

82. Defendants' age determination and subsequent decisions to continue detaining N.B. as an adult are arbitrary and capricious and must be set aside, pursuant to the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A). Under the APA, a reviewing court may set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* The standard requires that the agency provide a satisfactory explanation of its decision, and a "rational connection between the facts found and the choice made" in order for the reviewing court to uphold the decision. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted).

1 §§ 551, 701, 702. Whether ICE may keep minors in custody is not committed to
2 agency discretion.

3 84. In N.B.'s case, CBP's initial age determination relied solely on the
4 dental x-ray assessment. Under the requirements of the TVPRA, this determination
5 was "not in accordance with law" because it violated the express language of the
6 statute prohibiting the use of radiographs as the sole method to determine age. 5
7 U.S.C. § 706(2)(A); *see also* 8 U.S.C. § 1232(b)(4).

8 85. Moreover, CBP's decision was arbitrary and capricious because it did
9 not make any "rational connection between the facts found and the choice made."
10 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation marks and citation
11 omitted). Instead, CBP chose to disregard N.B.'s valid birth certificate which
12 expressly states his exact birthdate, and instead chose to rely on a dental x-ray
13 assessment that provides only generic statistical probabilities and an age range, to
14 conclude that based on those generic probabilities, N.B. will be treated as an adult
15 for purposes of his detention and immigration proceedings. Neither CBP nor ICE
16 conducted any further fact-finding to help determine N.B.'s age.

17 86. For instance, if CBP and ICE had reason to doubt the authenticity of
18 N.B.'s birth certificate, they were required to inquire with government officials in
19 the Republic of Guinea to obtain additional information to assess the authenticity of
20 the birthdate asserted on N.B.'s birth certificate. *See* ORR Guidelines § 1.6.2 ("If
21 the unaccompanied alien child is not in possession of original documentation, or if
22 the authenticity of the original documentation is in question, government officials
23 of the unaccompanied alien child's home country **must** be consulted in order to
24 verify the validity of the documentation." (emphasis added); ICE Age
25 Determination Guidance Memo. at 3 (discussing contacting foreign government to
26 determine validity of immigrant's documents and stating "such investigative efforts
27 **shall** also be considered if deemed helpful in establishing the age of an alien")
28

1 (emphasis added)). To date, they have not articulated any such reason to doubt the
2 authenticity of N.B.'s birth certificate.

3 87. CBP and ICE then cited the dental x-ray analysis as generic statistical
4 evidence that N.B. had, as a matter of "probability," likely reached 18 years old, in
5 spite of a certified birth certificate bearing the seal of the Office of the Registrar and
6 Chief Clerk of the Republic of Guinea. Based solely on this evidence, CBP
7 determined and ICE re-asserted that N.B. "will be treated as an adult," and they
8 have kept him in ICE custody and continue to refuse to release him to his family-
9 member-sponsor.

10 88. CBP's failure to conduct further fact-finding and the ultimate reliance
11 exclusively on dental x-ray analysis—in violation of the TVPRA and the ORR's
12 guidelines—was and is arbitrary and capricious.

13 89. ICE's decisions to continue detaining N.B. as an adult is equally
14 arbitrary and capricious and should be set aside under the APA. 5 U.S.C. §
15 706(2)(A). ICE has affirmatively stated that it is relying solely on the dental x-ray
16 analysis to continue classifying and detaining N.B. as an adult, in the face of a valid
17 birth certificate, in direct violation of their own policy, and despite the addition of
18 new evidence, including a government-issued identity document, showing that N.B.
19 is 17 years old. ICE has provided no explanation and has articulated no rational
20 connection between the evidence and the decision made. *Motor Vehicle Mfrs.*
21 *Ass'n*, 463 U.S. at 43 (internal quotation marks and citation omitted).

22 90. Defendants' decisions should be set aside as arbitrary and capricious
23 under the APA. 5 U.S.C. § 706(2)(A).

24 91. Defendants' decisions are also "not in accordance with law" because
25 they violate the provisions of the TVPRA requiring the non-exclusive use of dental
26 x-ray to assess age. The decisions therefore should also be set aside under the
27 APA, based on this separate and independent basis. 5 U.S.C. § 706(2)(A).

COUNT THREE

Defendants' Detention of N.B. Violates 8 C.F.R. § 1236.3(d)

92. N.B. re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

93. N.B. is unlawfully detained by ICE at an adult detention facility that does not provide separate accommodations for juveniles.

94. Controlling regulation requires that if a juvenile must be temporarily detained by DHS "for such interim period of time as is required to locate suitable placement for the juvenile, . . . the juvenile may be temporarily held by Service authorities or placed in any Service detention facility *having separate accommodations for juveniles.*" 8 C.F.R. § 1236.3(d) (emphasis added).

95. The government's detention of N.B. therefore violates 8 C.F.R. § 1236.3(d). Because the government's detention of N.B. fails to comply with its own regulations, the government's detention is "not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT FOUR

Defendants' Detention of N.B. Violates the *Flores* Settlement Agreement

96. N.B. re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

Violations of Paragraph 11

97. Paragraph 11 of the *Flores* Settlement Agreement requires that the government treat N.B., a minor, "with dignity, respect and special concern for [his] particular vulnerability" as a minor, and therefore the government must place him 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" *Flores* Settlement Agmt. ¶ 11.

1 98. Placement in Otay Mesa Detention Center, an adult detention facility
2 with no separate accommodations for minors, is not the least restrictive setting
3 appropriate to N.B., a minor and *Flores* class-member. Placement in Otay Mesa
4 Detention Center also does not protect his well-being, given that he is forced to eat,
5 sleep, and share bathroom facilities with adult men.

6 **Violations of Paragraphs 12 and 14**

7 99. In addition, and alleged herein as an independent basis for relief,
8 N.B.'s continued detention violates ¶ 12 of the *Flores* Settlement Agreement.
9 Paragraph 12 requires the prompt segregation and separation of unaccompanied
10 minors from unrelated adults upon taking the minor into custody, and mandates that
11 the minor may only be placed in a detention facility that has "separate
12 accommodations for minors," if the minor is to remain in the government's
13 custody. *Flores* Settlement Agreement ¶ 12. It further states that if segregation is
14 not "immediately possible, an unaccompanied minor will not be detained with an
15 unrelated adult for more than 24 hours." *Id.* If the child is not detained in a facility
16 that has separate accommodations for minors, the child must be released pursuant to
17 ¶ 14, to a sponsor.

18 100. N.B., a minor, has been detained with adults for nearly ninety (90)
19 days. N.B. provided CBP with conclusive evidence of his exact birthdate by
20 providing them his birth certificate upon entry, on or about May 22, 2019. Yet,
21 N.B. has been detained with adult detainees at all times since CBP released him
22 from solitary confinement, on or about May 26, 2019, in violation of ¶ 12 of the
23 *Flores* Agreement.

24 101. On August 5, 2019, N.B.'s undersigned counsel and his adult cousin
25 and sponsor Ms. Tounkara, formally requested his release pursuant to ¶ 14 of the
26 *Flores* Settlement Agreement. ICE denied that request for release on the sole basis
27 that ICE has decided, arbitrarily and capriciously, to treat N.B. as an adult for
28 purposes of his detention. But N.B. is a minor entitled to full rights under the

1 *Flores* Settlement Agreement, including but not limited to the right to reunification
2 with his family-member-sponsor, Ms. Tounkara, pursuant to ¶ 14. And, because he
3 has not yet been reunified, he is entitled to detention in a facility with separate
4 accommodations for minors. Otay Mesa Detention Center does not have separate
5 accommodations for minors.

6 102. Defendants therefore continue to violate both ¶ 12 and ¶ 14 of the
7 *Flores* Settlement Agreement by continuing to detain N.B. at Otay Mesa Detention
8 Center, which does not have separate accommodations for minors, while refusing to
9 reunify N.B. with his family-member-sponsor.

10 **Violations of Paragraph 24.B.**

11 103. In addition, and alleged herein as an independent basis for relief, ¶
12 24.B. of the *Flores* Settlement Agreement provides any minor (1) the right to seek
13 judicial review of the minor's detention placement, and (2) the right to allege
14 noncompliance with the minimum standards for minor detention.

15 104. "Minor" for purposes of the *Flores* Settlement Agreement "shall apply
16 to any person under the age of eighteen (18) years who is detained in the legal
17 custody of the INS." *Flores* Settlement Agmt. ¶ 4.

18 105. However, by refusing to recognize N.B. as a minor and denying him
19 any and all *Flores* rights, Defendants have attempted to and continue to deprive
20 N.B. of his rights (1) to seek judicial review of his placement as a minor, and (2) to
21 allege noncompliance with the minimum standards for minor detention, as he is
22 being detained in conditions suitable only for adult detention.

23 106. Each of the above-alleged actions violates the *Flores* Settlement
24 Agreement, which is binding on Defendants.

25 **COUNT FIVE**

26 **Defendants' Detention of N.B. Violates Due Process**

27 107. N.B. re-alleges and incorporates by reference each and every
28 allegation contained in the preceding paragraphs as if set forth fully herein.

1 108. As a person within the United States, N.B. is protected by every clause
2 of the United States Constitution that is not expressly reserved to citizens. This
3 protection includes the Due Process Clause of the Fifth Amendment. The Due
4 Process Clause provides that “no person shall be . . . deprived of life, liberty, or
5 property without due process of law.” U.S. Const. Amend V.

6 **Procedural Due Process Rights**

7 109. Under the Due Process Clause of the Fifth Amendment, an individual
8 is entitled to the procedural due process right of a timely and meaningful
9 opportunity to demonstrate that he should not be detained. In the case of civil, non-
10 punitive immigration detention, the Supreme Court has held that such detention
11 requires “a special justification . . . [that] outweighs the individual’s constitutionally
12 protected interest in avoiding physical restraint.” *Zadvydas v. Davis*, 533 U.S. 678,
13 690 (2001). For that reason, it is the government’s burden to establish whether
14 detention is justified. *Tijani v. Willis*, 430 F.3d 1241, 1246–47 (9th Cir. 2005)
15 (Tashima, J., concurring).

16 110. Defendants have yet to justify N.B.’s nearly ninety (90) day detention.
17 And any interest they have in effectuating N.B.’s potential removal does not
18 outweigh N.B.’s right, under the Constitution and the federal statutes and
19 regulations governing his custody, to fair and meaningful review of his detention,
20 including his release to his cousin.

21 111. Defendants’ detention of N.B. without a hearing before a neutral
22 decisionmaker to determine whether his detention is necessary, especially as a
23 minor, violates N.B.’s procedural due process rights under the Due Process Clause.
24 *See Padilla v. US Immigration & Customs Enf’t*, No. 18-cv-928, 2019 WL 1506754
25 at *4 (W.D. Wash. Apr. 5, 2019).

26 **Substantive Due Process Right to Family Integrity**

27 112. In addition, and alleged herein as an independent basis, N.B. has a
28 fundamental right to family integrity under the Due Process Clause, to be reunified

1 with his family-member-sponsor. The right to family integrity found in the Fifth
2 Amendment extends to all persons within the territory of the United States,
3 including non-citizens. *Ms. L. v. U.S Immigration & Customs Enf't*, 302 F. Supp.
4 3d 1149, 1161 (S.D. Cal. 2018) (Sabraw, J.)

5 113. N.B. and his cousin, Ms. Tounkara, spent much of their youth
6 growing up in the same house. See **Exhibit 8** (Sponsor Letter). N.B. has requested
7 reunification with his cousin, who “will personally care for him if given the
8 chance” via reunification. *Id.* The Supreme Court holds that the right to familial
9 integrity under the Fifth Amendment extends to include cousins:

10 Ours is by no means a tradition limited to respect for the
11 bonds uniting the members of the nuclear family. The
12 tradition of uncles, aunts, cousins, and especially
13 grandparents sharing a household along with parents and
14 children has roots equally venerable and equally
15 deserving of constitutional recognition. Over the years[,]
16 millions of our citizens have grown up in just such an
17 environment, and most, surely, have profited from it.
18 Even if conditions of modern society have brought about
19 a decline in extended family households, they have not
20 erased the accumulated wisdom of civilization, gained
21 over the centuries and honored throughout our history,
22 that supports a larger conception of the family.

23 . . . Especially in times of adversity . . . the broader
24 family has tended to come together for mutual sustenance
25 and to maintain or rebuild a secure home life.

19 *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 504–05 (1977); see also
20 *Osborne v. Cty. of Riverside*, 385 F. Supp. 2d 1048, 1054–55 (C.D. Cal. 2005)
21 (Timlin, J.) (citing *Moore*, 431 U.S. at 504–05) (holding due process right to
22 familial integrity extends to close relatives, such as aunts, in custodial relationships
23 with related children).

24 114. Defendants’ separation of N.B. from his cousin on the sole basis of the
25 dental x-ray assessment and denial of any meaningful re-determination of his age
26 for purposes of immigration detention, violates N.B.’s substantive due process right
27 to family integrity because it furthers no legitimate purpose, nor any compelling
28 governmental interest, and is not even rationally related to the facts of N.B.’s case

1 given that he has demonstrated through several forms of proof that he is a minor.
2 *See Ms. L.*, 302 F. Supp. 3d at 1166 (“[S]ubstantive due process protects against
3 government power arbitrarily and oppressively exercised.” (citing *Daniels v.*
4 *Williams*, 474 U.S. 327, 331 (1986))); *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164,
5 187–90 (D.D.C. 2015) (assessing prong relating to government’s justification for
6 detention in immigration context and finding that generic government interests in
7 immigration enforcement do not justify arbitrary detention of children).

8 **Substantive Due Process Right to be Free From Physical Restraint**

9 115. In addition, and alleged herein as an independent basis, N.B. has a
10 fundamental right to be free from physical restraint. *Id.* at 187–189.

11 116. For each of the above-alleged reasons, Defendants’ conduct has and
12 continues to violate N.B.’s right to be free from physical restraint.

13 117. For each of the above-alleged reasons, Defendants have and continue
14 to violate N.B.’s procedural and substantive due process rights under the Due
15 Process Clause of the Fifth Amendment.

16 **COUNT SIX**

17 **Defendants’ Detention of N.B. Violates the Administrative Procedure Act**
18 **Because it Violates N.B.’s Due Process Rights, 5 U.S.C. § 706(2)(B)**

19 118. N.B. re-alleges and incorporates by reference each and every
20 allegation contained in the preceding paragraphs as if set forth fully herein.

21 119. The APA provides that courts “shall . . . hold unlawful and set aside
22 agency action, findings, and conclusions found to be . . . contrary to constitutional
23 right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

24 120. For each of the reasons alleged in Count Five above, the Court should
25 hold unlawful and set aside Defendants’ finding and/or conclusion that N.B. shall
26 be treated as an adult for purposes of his immigration detention and proceedings.
27 Specifically, Defendants’ conduct has and continues to violate N.B.’s procedural
28 and substantive Due Process rights.

1 121. For each of the reasons alleged in Count Five above, the Court should
2 hold unlawful and set aside Defendants' continuing detention of N.B. as an adult
3 rather than as a child.

4 122. For each of the reasons alleged in Count Five above, the Court should
5 hold unlawful and set aside Defendants' continuing detention of N.B. without
6 reunifying him with his cousin, Ms. Tounkara.

7 **COUNT SEVEN**

8 **Declaratory Relief, 28 U.S.C. §§ 2201, 2202**

9 123. N.B. re-alleges and incorporates by reference each and every
10 allegation contained in the preceding paragraphs as if set forth fully herein.

11 124. This Court has jurisdiction and authority to issue a declaration of
12 N.B.'s rights, and any such declaration shall have the force and effect of a final
13 judgment or decree. 28 U.S.C. § 2201.

14 125. In addition, this Court has jurisdiction and authority to issue any
15 further necessary or proper relief based on a declaratory judgment or decree against
16 any adverse party whose rights may be determined by such judgment, after
17 reasonable notice and hearing. 28 U.S.C. § 2202.

18 126. N.B. accordingly seeks a declaration that he is a minor for purposes of
19 his immigration detention and proceedings, until his eighteenth (18th) birthday, on
20 [REDACTED]/2019.

21 **COUNT EIGHT**

22 **Writ of Habeas Corpus, 28 U.S.C. § 2241**

23 127. N.B. re-alleges and incorporates by reference each and every
24 allegation contained in the preceding paragraphs as if set forth fully herein.

25 128. As set forth above, Defendants are currently holding N.B., a minor, in
26 ICE custody in violation of the *Flores* Settlement Agreement (which is binding
27 law), federal statutes and regulations, and the U.S. Constitution.

28 129. N.B. thus seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

PRAYER FOR RELIEF

130. WHEREFORE, N.B. prays for the following relief:

- a. Assume jurisdiction over this matter;
- b. A declaration that N.B. is a minor for purposes of his immigration detention and immigration proceedings, until his eighteenth (18th) birthday, on [REDACTED]/2019;
- c. A declaration that Defendants' age determination of N.B. based solely on the dental x-ray assessment violated the TVPRA, 8 U.S.C. § 1232(b);
- d. Enter preliminary and injunctive relief enjoining Defendants from further unlawfully detaining N.B. in custody with unrelated adults;
- e. Grant N.B. a writ of habeas corpus directing Defendants to release N.B. to his sponsor, Ms. Mariama Tounkara, within 48-hours, *see Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016) (recognizing "Federal courts have 'broad discretion in conditioning a judgment granting habeas relief.'" (citing *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); granting unconditional "outright" habeas relief to unaccompanied minor "rapidly approaching adulthood" where minor had already been detained for substantial time and additional ORR hearings and process would "be of marginal benefit," ordering that the government may refer the matter to appropriate state and local authorities should it believe minor's family-member-sponsor unable to care for the minor);
- f. A declaration that Ms. Tounkara is a qualified family-member-sponsor pursuant to ¶ 14 of the *Flores* Settlement Agreement pending her submission to the Court of her Affidavit of Support (Form I-134) and agreement pursuant to ¶ 15 of the *Flores* Settlement Agreement, *see id.*;

- 1 g. Or, in the alternative, the setting of an evidentiary hearing to
2 establish that Ms. Tounkara is a qualified family-member-sponsor
3 pursuant to ¶ 14 of the *Flores* Settlement Agreement, which hearing
4 should take place not longer than five (5) days from the return
5 under 28 U.S.C. § 2243;
- 6 h. Award N.B. costs and expenses under the Equal Access to Justice
7 Act (“EAJA”), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412,
8 and any other basis justified under law;
- 9 i. And any such other and/or further relief this Court may deem
10 appropriate.

11
12 Dated: August 15, 2019

ARENT FOX LLP

13
14 *s/ Douglas E. Hewlett, Jr.*
15 Douglas E. Hewlett, Jr.

16 **Al Otro Lado, Inc.**

17
18 *s/ Hugo Ivan Salazar*
19 Hugo Ivan Salazar
20 Erika D. Pinheiro

21 Attorneys for Petitioner
22 N.B.

Verification by Attorney Acting on Petitioner's Behalf
Pursuant to 28 U.S.C. § 2242

I am submitting this verification on behalf of the Petitioner because I am Petitioner's attorney. As Petitioner's attorney, I hereby verify that the factual statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: August 15, 2019

s/ Hugo Ivan Salazar
Hugo Ivan Salazar
Attorney for the Petitioner
N.B.

Attestation of Authority to Include Electronic Signature

I hereby certify that the contents of this document and all attachments are acceptable to all persons whose electronic signatures appear on this document. I hereby certify that am authorized by all signing parties to file this document and all attachments on their behalf.

Dated: August 15, 2019

ARENT FOX LLP

s/ Douglas E. Hewlett, Jr.
Douglas E. Hewlett, Jr.