PART 1: HABEAS CORPUS FOR UNACCOMPANIED CHILDREN: LEGAL FRAMEWORK

The central question for a writ of habeas corpus action under 28 U.S.C. § 2241 is whether the petitioner has been detained in violation of U.S. law. This inquiry requires the petitioner to understand the laws that govern the treatment of UCs. Under federal law, a UC is defined as a child who “(a) has no lawful immigration status in the United States; (b) has not attained 18 years of age; and (c) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” Current laws governing the treatment of UCs include the following: (a) the Flores Settlement Agreement, (b) the Homeland Security Act (“HSA”), (c) the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”), and (d) the Due Process Clause of the Fifth Amendment. An analysis of each law is set forth below.

The Flores Settlement

In 1997, the United States government entered into the Flores Settlement Agreement (the “FSA”), which, once executed, set forth the national policy governing the detention, release, and treatment of minors in the custody of the U.S. government. When the FSA was established, the Immigration and Naturalization Service (“INS”) administered these functions relating to the care and custody of UCs; however, Congress passed the Homeland Security Act (“HSA”) in 2002, which abolished the INS and transferred these functions to ORR, a sub-department of the Department of Health and Human Services (“HHS”). The FSA establishes minimum standards that must be followed by ORR related to the detention, housing, and release of UCs and “oblige[s] the government to pursue a ‘general policy favoring release’ of such juveniles.” Section 462 of the HSA extends the key terms of the FSA to all unaccompanied immigrant children. To wit, the FSA states the following:

Whenever the [U.S. Government] takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing….Following arrest the [U.S. Government] shall hold minors in facilities that are safe and sanitary and that are consistent with the [U.S. Government’s] concern for the particular vulnerability of minors. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect the

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1 6 U.S.C. § 279(g)(2).
3 See id. ¶¶ 9-10. The FSA names “[a]ll minors who are detailed in the legal custody of the INS.” See also Flores, 862 F.3d at 869.
5 Flores, 862 F.3d at 866.
6 HSA, supra note 13, §462.
minors from others, and contact with family members who were arrested with the minor.\(^7\)

The FSA requires that ORR “release a minor from its custody without unnecessary delay, in the following order of preference, to:

1. a parent;
2. a legal guardian;
3. an adult relative (brother, sister, aunt, uncle, or grandparent);
4. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor’s well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant’s paternity or guardianship;
5. a licensed program willing to accept legal custody; or
6. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.”\(^8\)

Before a minor is released from government custody, the custodian seeking custody must execute an Affidavit of Support (Form I-134), under which the custodian agrees, among other things, to provide for the child and ensure that the minor is present at all future immigration proceedings.\(^9\)

ORR may only retain custody of a UC for longer periods of time if the ORR determines that the UC meets one of the following criteria:

a. with certain exceptions, that the UC has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act;
b. that the UC has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in the custody of the U.S. government;
c. that the UC has engaged in conduct that is disruptive of the program in which he or she has been placed and removal is necessary to ensure the welfare of other minors;
d. that the UC is an escape-risk; or
e. that the UC must be held in a secure facility for his or her own safety.\(^10\)

The FSA and the TVPRA each require that the UC be promptly placed in the “least restrictive setting that is in the best interest of the child”\(^11\) and, in order to permit judicial review of the placement decision made, a UC has a right to be notified of the reasons for their placement in a

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\(^7\) FSA, supra note 11, ¶ 12.A.
\(^8\) Id. ¶ 14.
\(^9\) Id. ¶ 15.
\(^10\) Id. ¶ 21.
more restrictive setting.\textsuperscript{12} Further, the UC has a right to a bond redetermination hearing before an immigration judge in every case, unless such hearing is refused by the UC.\textsuperscript{13} Additionally, if a UC disagrees with the type of facility he or she is placed in or alleges that the program does not comply with legal standards, then the UC may assert such claims in United States District Court.\textsuperscript{14} The FSA also includes restrictions on how a UC can be transferred from one placement to another, including the requirement that a UC’s counsel be provided advance notice of the transfer, except in unusual cases.\textsuperscript{15}

Under its terms, the FSA was to remain in effect only until 45 days after the U.S. government adopted regulations that permanently implemented its substantive terms.\textsuperscript{16} To date, however, the government has not met that requirement.\textsuperscript{17} As a result, the Central District of California continues to maintain jurisdiction over the FDA, which continues to govern the agencies that carry out the functions of the former INS.\textsuperscript{18}

**The Trafficking Victims Protection Reauthorization Act ("TVPRA")\textsuperscript{19}**

While the TVPRA codifies some—but not all—of the substantive terms in the FSA, the Ninth Circuit Court of Appeals has held that the TVPRA did not completely supersede the FSA, and the FSA still remains in effect.\textsuperscript{20} Thus the TVPRA, which was signed into law on December 23, 2008, preserves the FSA. The TVPRA has separate requirements for UCs who are residents of Mexico or Canada.\textsuperscript{21} But for those children from a country not contiguous to the U.S., or from Mexico or Canada but who are exempted under 8 U.S.C. § 1232(a)(2)(A)(i)-(iii), the TVPRA requires that “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,” under whose purview the ORR operates.\textsuperscript{22} The TVPRA further requires that:

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer

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\textsuperscript{12} Id. ¶ 24C.
\textsuperscript{13} FSA, supra note 11, ¶ 24A. See also Flores, 862 F.3d at 881 (holding that the FSA bond-hearing requirement has not been terminated by the HSA or the TVPRA).
\textsuperscript{14} FSA, supra note 11, ¶ 24B. If such an action is brought, the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action.
\textsuperscript{15} Id. ¶ 27 (noting exceptions to advanced notice requirement in circumstances “such as where the safety of the minor or others is threatened”).
\textsuperscript{16} Flores, 862 F.3d at 869.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{20} Flores, 862 F.3d at 875-76.
\textsuperscript{21} 8 U.S.C. § 1232(a)(2)(B) (stating that such children that are inadmissible under the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) return such child to their country of residence).
the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.23

Under the TVPRA, HHS is responsible for all placement decisions for a UC in its custody, and for conducting suitability assessments pertaining to those placements.24 ORR has indicated that a child may be placed in any of the following placements, depending on the outcome of a child’s assessment: (i) a shelter facility, (ii) foster care or a group home, (iii) a staff-secure or secure care facility, (iv) a residential treatment center, or (v) other special needs care facility.25 As noted above, the TVPRA requires that any UC in the custody of HHS be “promptly placed in the least restrictive setting that is in the best interest of the child,” subject to considerations of danger to self, danger to community, and risk of flight.26 The TVPRA also requires that: “a child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense,”27 and that such placement decisions be reviewed at a minimum, on a monthly basis, to determine if such placement remains warranted.28 UCs who have been determined to pose a danger to themselves or others or have been charged with crimes must be placed in a secure facility.29 The TVPRA also prohibits the HHS from placing a UC “with a person or entity” that it has not determined “is capable of providing for the child’s physical and mental well-being.”30 Such a determination may require a home study.31 The TVPRA affords UCs the right to counsel,32 requiring that the Department of Homeland Security (“DHS”) ensure “to the greatest extent practicable and consistent with…the Immigration and Nationality Act”33 that UCs are represented by counsel and that the counsel be “provided access to materials necessary to effectively advocate for the best interest of the child.”34

Details surrounding actions available under the TVPRA came to light in Lopez v. Sessions, in which a former UC who was arrested by ICE after being released by ORR to his mother filed a habeas petition challenging his lengthy detention in an ICE facility.35 As noted under Lopez, while

27 Id.
28 Id.
29 Id.
30 8 U.S.C. § 1232(c)(3)(A); see also 8 U.S.C. § 1232(c)(3)(B) (requiring, in some instances, that a home study be conducted before a UC is placed with an individual).
31 8 U.S.C. § 1232(c)(3)(B) (requiring a home study “for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability… a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child’s health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.”).
32 154 Cong. Rec. S10886 (2008) (In her remarks on the Senate floor, Senator Feinstein stated that the TVPRA provides for pro bono legal representation for UCs in their immigration matters at no expense to the government).
35 Lopez, 2018 WL 2932726.
the TVPRA does not create a private cause of action, actions alleging violations of its terms may be brought under the Administrative Procedures Act (“APA”). The APA provides a means by which a “final agency action for which there is no other adequate remedy in a court” may be subject to “judicial review.” Under the APA, the reviewing court has the authority to “hold unlawful and set aside agency action, findings, and conclusions” that the reviewing court finds are “arbitrary, capricious, an abuse of discretion…[or are] otherwise not in accordance with law,” or “unsupported by substantial evidence.” Notably, before an agency action can be reviewed before a court, the APA requires that the person challenging the agency action must exhaust any available administrative remedies first, such as an appeal or review process by the agency itself. The central question in bringing a claim under the APA is to determine “whether the agency has completed its decision making process, and whether the result of that process will directly affect the parties.” For an agency action to be final, “First, the action must mark the consummation of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which the rights or obligations have been determined or from which legal consequences will flow.” Under Lopez v. Sessions, the district court granted the writ of habeas corpus because, among other things, it found that the APA had been violated. The court held that DHS’s arrest of the petitioner without proper procedure and failure “to take a discrete agency action that it is required to take” under the TVPRA (by failing to consider the least restrictive setting for the petitioner ) constituted final agency actions reviewable by the court. Ultimately, the district court found such actions violated the APA and that the proper remedy was to hold “unlawful and set aside” the DHS’s actions.

The Due Process Clause of the Fifth Amendment

The Due Process Clause of the Fifth Amendment “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Fifth Amendment.” The Due Process Clause applies to all persons in the U.S., even those persons here unlawfully. It is “well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”

The Fifth Amendment Due Process Clause includes both procedural and substantive protections. The Fifth Amendment grants a petitioner the right to have “a neutral forum in which to contest his detention;” the substantive right is the right “to be free from unjustified

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36 Id. at *7.
41 Id. (quoting Bennett v. Speer, 520 U.S. 154, 177-178 (1997)).
42 Id. at *10.
44 Id.
deprivations of liberty.”

Due process requires “‘adequate procedural protections’ to ensure that the government’s asserted justification for physical confinement ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint.’” The Lopez court went on to say that “[i]n the immigration context, the Supreme Court has recognized only two valid purposes for civil detention: to mitigate the risks of danger to the community and to prevent flight.”

**Procedural Due Process**

There are three elements to a procedural due process claim: “(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process.” A constitutionally protected substantive interest may arise from the federal constitution itself, a statute, or a contract. A consent decree can give rise to a constitutionally protected interest.

“A statute may create a substantive interest protected by the Due Process Clause by using ‘mandatory language’ that imposes an obligation on government officials.” A contractual provision may be of sufficient importance if it can be ‘easily characterized as a civil right.” Consent decrees such as the FSA are interpreted as contracts, and one federal district court recently concluded that certain provisions in the FSA give rise to constitutionally protected interests that can form the basis of a due process claim.

A procedural due process claim is analyzed under the standard articulated by the Supreme Court under *Mathews v. Eldridge* which considers: “(1) the nature of the private interest that will be affected; (2) the comparative risk of an erroneous deprivation of that interest with and without additional and substitute procedural safeguards; and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.” With regard to the first *Mathews* factor, the Second Circuit has recognized that “[c]hildren have a ‘constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association’” and that parents “‘have a constitutionally protected liberty interest in the care, custody and management of their children.’”

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48 Id.
49 Id. (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (internal quotation marks omitted)).
50 Id.; see also Demore, 538 U.S. at 528.
52 Id. (citing Zadvydas, 533 U.S. at 690).
53 Id. (citing Carver v. Lehman, 558 F.3d 869, 874-75 (9th Cir. 2009)).
54 Id. (citing San Bernardino Physicians’ Servs. Med. Grp. v. Cty. of San Bernardino, 825 F.2d 1404, 1407-08 (9th Cir. 1987)).
55 Id. (citing Smith v. Sumner, 994 F.2d 1401, 1406 (9th Cir. 1993)).
56 Id. (citing Carver, 558 F.3d at 872-73).
58 Id. (“These protections are secured by a consent decree and constitute civil rights because they are akin to the constitutional and statutory rights discussed above.”)
59 Mathews, 424 U.S. at 335.
60 Maldonado, 2018 WL 2089348, at *7 (quoting Kia P. v. McIntyre, 235 F.3d 749, 759 (2d Cir. 2000) (internal quotation marks and alterations omitted)).
61 Id. (quoting Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999)).
The court in *Santos v. Smith*, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017), illustrates the application of the *Mathews* factors in a procedural due process claim. The *Santos* court found that the petitioner, an unaccompanied minor’s, due process rights had been violated based on several deficiencies in the ORR’s consideration of petitioner’s reunification application.\(^6\) Examining the first *Mathews* factor, the court recognized that “the interest in family reunification remains fundamental … and deserving of significant due process protections,” and that petitioner’s fundamental right was impacted for a significant period of time.\(^6\) Turning to the second *Mathews* factor, the court examined several deficiencies in ORR’s process of evaluating the petitioner and his mother’s reunification application, including extensive delay in making an initial determination and placing an improper burden on the parent to disprove ORR’s initial determination and justify reunification. The court emphasized that “when a parent is requesting reunification, the burden should be on ORR to show why its continued custody of a UC is appropriate, rather than placing that burden on the parent.”\(^6\) Finally, as to the third *Mathews* factor, the Court found that the government had not sufficiently identified “what burden it would impose on ORR to provide more process,” such as permitting a hearing or “making more expeditious decisions.”\(^6\) Accordingly, the court granted the habeas petition and ordered petitioner’s immediate release to his mother.\(^6\)

The case *D.B. v. Cardall* provides an additional illustration of the application of the *Mathews* factors, resulting in a district court finding, on remand, that the petitioner’s procedural due process rights had been violated.\(^6\) In *Cardall*, the petitioner, Dora Beltran, filed a writ of habeas corpus to secure the release of her son who was in the custody of ORR.\(^6\) As to whether the petitioner’s procedural due process rights had been violated, the district court found under the first *Mathews* factor that (1) the nature of the right being affected was great\(^6\) and the forced separation, for even a short time, where in this case the separation lasted 3 years, was a serious impingement on that right.\(^6\) As to the second *Mathews* factor, the district court noted that the petitioner was not “made aware of any of the evidence or factual findings upon which ORR relied in withholding [her son] from her care and custody. Indeed, even after ORR made that decision, it explained its reasoning only in exceedingly general terms...[and that this] opaque procedure deprived the petitioner of any opportunity to contest ORR’s findings, and thus any meaningful opportunity to alter its conclusions.”\(^6\) The district court was critical of the unilateral nature of ORR’s process, stating that “[a]t no point was the onus on ORR to justify its deprivation of Petitioner’s fundamental parental rights.”\(^6\) The district court concluded that the petitioner required a hearing and “[t]hat ORR undertook to make such a subjective judgment without any form of hearing further deprived Petitioner of a meaningful opportunity to present her case.”\(^6\)

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\(^6\) Id.
\(^6\) Id. at 613.
\(^6\) *Santos*, 260 F. Supp. 3d at 614.
\(^6\) Id. at 616.
\(^6\) *Beltran*, 222 F. Supp. 3d at 479.
\(^6\) Id. at 482 (“It is clear that the private, fundamental liberty interest involved in retaining the custody of one’s child and the integrity of one’s family is of the greatest importance.”) (quoting *Weller v. Dep’t of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 394 (4th Cir. 1990)).
\(^6\) Id.
\(^6\) Id. at 485.
\(^6\) Id.
\(^6\) Id. at 486.
the third *Mathews* factor, the Court found that providing a hearing would not have imposed the “catastrophic administrative burden Respondents fear” and that “[w]hatever burden it would impose is not sufficient to overcome the first two factors of the *Mathews* test.”74 Having found that the procedural due process afforded the petitioner and her son did not meet the test set forth under *Mathews v. Eldridge*, the district court granted the petitioner’s petition and required that her son be released to her care and custody.75 However, as discussed in the next section, the Fourth Circuit found that the petitioner’s substantive due process rights had not been violated.76

**Substantive Due Process**

As noted above, the Due Process Clause of the Fifth Amendment also protects an individual’s substantive right to be free from unjustified deprivations of liberty.77 The substantive component of due process “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.”78 There are “two strands of the substantive due process doctrine.”79 The first strand protects rights that are “fundamental,” whereas the second “protects against the exercise of governmental power that shocks the conscience.”80

For the fundamental rights strand of substantive due process, the articulation of those rights that implicate substantive due process “has not been reduced to any formula.”81 At minimum, however, they include rights “deeply rooted in this Nation’s history and tradition.”82 In particular, the Supreme Court has acknowledged that “the interest of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by this Court.”83 In 1923, the Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” The Supreme Court consistently has also recognized the fundamental right of parents to make decisions concerning “the care, custody, and management" of their children.84

Conduct that shocks the judicial conscience is deliberate government action that is “arbitrary” and “unrestrained by the established principles of private right and distributive justice.”85 This strand of substantive due process is concerned with preventing government officials from “abusing their power, or employing it as an instrument of oppression.”86

A petition for a writ of habeas corpus is necessarily fact-bound and no precise formula exists for articulating a meritorious petition. Petitioners have successfully argued that their

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74 Beltran, 222 F. Supp. 3d at 489.
75 Id.
76 Cardall, 826 F.3d at 741.
77 Zadvydas, 533 U.S. at 690.
78 Daniels v. Williams, 474 U.S. 327, 331 (1986).
79 Seegmiller v. LaVerkin City, 528 F.3d 762, 767 (10th Cir. 2008).
80 Id.
86 Id. (internal quotation marks omitted).
substantive due process rights had been violated in cases such as *Lopez v. Sessions*\(^87\) and *Saravia v. Sessions*.\(^88\) As referenced above, one case where the court did not recognize that a petitioner’s substantive due process rights had been violated was in the Fourth Circuit’s holding in *D.B. v. Cardall*.\(^89\) In *Cardall*, the Fourth Circuit acknowledged that children enjoy a reciprocal right to be “‘raised and nurtured by their parents,’”\(^90\) adding that “certain intrusions into the parent-child relationship may be so flagrant as to be invalid even if a fair process is afforded,” such as those involving interfering with a fit parent’s interest in the care, custody, and control of their children.\(^91\) Nevertheless, the Fourth Circuit found that “the fundamental right of a parent to control the upbringing of her child, however, is ‘neither absolute nor unqualified.’”\(^92\) ORR in this instance had denied the mother’s request for release upon finding her incapable of providing for her child’s physical and mental well-being.\(^93\) The court explained, “[w]hen a state’s interference with parental control is predicated on a determination that the parent is unable to provide adequate care for a child, such interference does not contravene due process, at least in the absence of governmental action that shocks the conscious.”\(^94\)

**The Rehabilitation Act of 1973**

In the event that a UC has a mental or physical health condition, the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., provides an additional avenue to seek relief. Section 504 of the Rehabilitation Act states:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . .\(^95\)

As federally funded agencies, ICE and ORR are subject to the Rehabilitation Act. An argument may be made that prolonged detention by these agencies constitutes a failure to reasonably accommodate a UC’s disability by not placing the child in the most integrated setting appropriate to his or her needs, as required by 28 CFR § 35.130(d). Further, ICE and ORR have an obligation under the Rehabilitation Act to ensure that a UC with a disability has meaningful access to federal programs including asylum adjudication or other immigration proceedings. While a written order has not yet addressed the availability of relief under the Rehabilitation Act in this scenario, some cases have resulted in a preliminary injunction and ORR’s release of the child under this claim.

**Potential Defendants**

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89 *Cardall*, 826 F.3d at 741.
90 *Beltran*, 222 F. Supp. 3d at 482 (citing *Cardall*, 826 F.3d at 740).
91 *Cardall*, 826 F.3d at 741 (citing *Troxel*, 530 U.S. at 67).
92 *Id.* at 740 (citing *Martin v. Saint Mary’s Dep’t Soc. Servs.*, 346 F. 3d 502, 506 (4th Cir. 2003)).
93 *Id.* at 741.
94 *Id.*
In preparing a habeas petition, the categories of defendants that may be named in the petition depends upon the facility in which the UC is being held. For UCs in ORR custody, the following parties may be named, based on their responsibilities under the legal frameworks described above:

1. Acting Director of ORR
2. Deputy Director of ORR
3. Assistant Secretary for the ORR Administration for Children & Families (“ACF”)
4. Secretary of Department of Health and Human Services (“HHS”)
5. ORR Federal Field Specialist
6. The director of the juvenile facility where the minor is located

Alternatively, a UC in ICE custody may name the following defendants in a habeas petition:

1. ICE Field Office Director
2. Assistant Secretary of the Department of Homeland Security (“DHS”) for ICE
3. Secretary of DHS
4. Warden of the jail or ICE contract facility where the minor is located
5. Attorney General of the United States

**Jurisdiction and Venue**

The venue for an action depends on the issue requiring resolution. For example, the FSA set forth that actions to enforce the terms of the Agreement are required to be brought in the District Court for the Central District of California as part of the pending litigation. This means that an action to modify or challenge the terms of the FSA must be brought in the Central District of California. Not all FSA related cases, however, must be brought in California. Actions brought by a UC to contest ORR’s placement determination or to assert that a licensed program in which the UC has been placed does not comply with the standards set forth in the FSA may be brought in any United States District Court with jurisdiction and venue over the matter. The proper venue in these circumstances would be the district in which the UC is being held or detained.

**CONCLUSION**

Since entering the *Flores Settlement Agreement* in 1997, the federal government, including Congress, has intentionally set up a statutory and policy framework whereby populations considered “at-risk”—including unaccompanied children—apprehended at the United States border could, with limited exceptions, be processed through the immigration system in a timely manner. Further, this statutory and policy framework has established minimum standards of care that federal agencies, such as ORR, have to meet while holding a UC in their custody and procedural requirements designed to protect the due process rights of a UC, as required under the U.S. Constitution. As illustrated by the observations of the OIG in the management alert referenced above, in many cases, these federal agencies do not meet enumerated legal requirements. The result is the prolonged detention of children, some younger than five years old, in conditions that could ultimately cause lifetime physical or emotional damage to a child. While to date the number of

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96 FSA, *supra* note 11, at ¶ 37,
97 *Id.* at ¶ 24(B).
cases wherein a petitioner has pursued a writ of habeas corpus action to secure the release of a UC unlawfully detained is limited, case law has shown that habeas corpus actions can be effective given the right facts.