UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

J.S.R., by and through his next friend, Joshua Perry,

Plaintiff-Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, et al.,

Defendants-Respondents.

Case No. 3:18-cv-01106-VAB

Case No. 3:18-cv-01110-VAB

Dated: July 5, 2018

V.F.B., by and through her next friend, Joshua Perry,

Plaintiff-Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, et al.,

Defendants-Respondents.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR WRITS OF HABEAS CORPUS *AD TESTIFICANDUM*

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INTRODUCTION[1]

Plaintiff J.S.R. is a nine-year old boy who escaped from Honduras after family and friends were killed, traveling for two months with his father to reach safety in the United States. Plaintiff V.F.B. is a fourteen-year-old girl who fled with her mother from El Salvador after her step-father was murdered by a gang. There is no relationship between the two families, except that the Defendant Department of Homeland Security arrested them soon after they entered the United States, detained them all in Texas, forcibly separated J.S.R. from his father and V.F.B. from her mother, and then transferred both children to Connecticut, where they remain in custody of Defendant Office of Refugee Resettlement. As best undersigned counsel has been able to determine, Defendants are detaining the father of J.S.R. in Port Isabel, Texas and the mother of V.F.B. in Lasalle County, Texas.

By this motion, Plaintiffs J.S.R. and V.F.B., through their next friend Joshua Perry, request writs of habeas corpus *ad testificandum* commanding the in-person appearance at the hearings scheduled for July 11, 2018 of (1) J.S.R.'s father and V.F.B.'s mother, to testify before this Court, offer advice and guidance to their children before and during the hearing, and communicate their wishes for their children to undersigned counsel; and (2) J.S.R. and V.F.B., the parties in interest, to communicate their instructions to counsel and their next friend during proceedings.

Defendants have needlessly and unlawfully deprived J.S.R. and V.F.B. of their most precious sources of counsel: their parents. J.S.R. has not seen his father in over three weeks and, before the filing of this action, Defendants had allowed J.S.R. to speak to his father by telephone

[1] These two related cases have not been consolidated, but Petitioners J.S.R. and V.F.B., both appearing through next friend Joshua Perry and represented by identical counsel, submit this single brief in support of their respective applications for writs of habeas corpus *ad testificandum*. The identical brief is filed in both dockets for the convenience of the Court.

only twice; V.F.B. has not seen her mother in over seven weeks, and Defendants similarly permitted her to speak to her mother only once by phone before the filing of this her suit. Both children are suffering serious harm, including post-traumatic stress disorder (PTSD), as a direct result of Defendants' forced separations. Because of Defendants' actions, these two children may soon face the unimaginable choice between vindicating their right to freedom from physical restraint (via release to an aunt or other suitable relative) or their right to family unity (via continued detention together with a parent). In order to ensure the just adjudication of the children's motion for preliminary injunction and assure J.S.R. and V.F.B.'s long-term safety and recovery, this Court must hear from, and afford the children an opportunity to confer with, their parents.

The writ of habeas corpus *ad testificandum* is an administrative writ, by which a court arranges for testimony by a necessary party or witness who is not otherwise at liberty to attend court. Unlike the writ of habeas corpus *ad subjiciendum*, commonly known as the "Great Writ," the *ad testificandum* writ does not terminate custody, as the party or witness remains in custody before, during, and after any hearing. To ensure that this Court receives the testimony of each parent, that such testimony is based on a meaningful conferral with J.S.R. and V.F.B., and that each child may be present and meaningfully participate in the hearings on July 11 through their counsel and "next friend," the *ad testificandum* writs should issue.

FACTS AND PROCEEDINGS[2]

J.S.R. fled persecution and violence in Honduras and after a two-month journey arrived with his father in the United States on or about June 10, 2018. Declaration of Massiel Zucco-Himmelstein dated July 5, 2018, ¶¶ 9, 11 ("Zucco-Himmelstein Decl."). V.F.B. also fled terrible

[2] The factual and procedural history regarding J.S.R. and V.F.B. are more fully set forth in their brief in support of motion for preliminary injunction, filed simultaneously with this application and incorporated herein.

violence and persecution, arriving in this country from El Salvador with her mother in May of 2018. *Id*. ¶ 31. Defendants arrested both parents and both children after they had entered this country and detained them in Texas in deplorable conditions. *Id*. ¶¶ 11-13, 33-34. In Texas, Defendants snatched J.S.R.'s father from him while the boy slept, and they took V.F.B.'s mother from her after the girl was lured away to a shower. *Id*. ¶¶ 14, 34. Without telling the children what they had done with each parent, Defendant Department of Homeland Security ("DHS") transferred the children to the custody of Defendant Department of Health and Human Services, Office of Refugee Resettlement ("ORR"), and shipped J.S.R. and V.F.B. to Connecticut, where ORR has denied them any meaningful opportunity to communicate with their parents, and confined them in a shelter from which they are not permitted to leave. *Id*. ¶¶ 15-18, 22, 35-37. A team of child psychiatrists evaluated each child on July 1, 2018 and concluded that J.S.R. and V.F.B. each is suffering PTSD as a direct result of separation from their father and mother, respectively. Declaration of Dr. Andres Martin regarding J.S.R. dated July 3, 2018 ("Martin Decl. A") ¶ 19; Declaration of Dr. Andres Martin regarding V.F.B. dated July 3, 2018 ("Martin Decl. B") ¶ 12.

The Court has scheduled a hearing on the motion of each child for a preliminary injunction on July 11, 2018 ("July 11 Hearings"). On July 3, 2018, after a telephonic status conference with this Court, undersigned counsel wrote to attorneys John Hughes and Michelle McConaghy of the U.S. Attorney's Office for the District of Connecticut, who had appeared at the teleconference for Defendants, to request that Defendants arrange to produce each parent to testify at the July 11 hearing, as well as to ensure regular, private phone contact between each child and each parent; provide information about the status of criminal or immigration proceedings against either parent; and enable phone communication between undersigned

counsel and each parent. Declaration of Marisol Orihuela dated July 5, 2018 ("Orihuela Decl."), Ex. C. Counsel for all parties then conferred by telephone, but failed to reach any agreements. Orihuela Decl. Ex. D.

On July 4, undersigned counsel wrote to propose that if Defendants granted parole to each parent, permitting them to travel to Connecticut and testify on July 11 at no expense to the government, Petitioners would withdraw their request for *ad testificandum* writs to the parents. *Id*. Counsel also observed that such a resolution would be consistent with a preliminary injunction and provisional class certification order just entered, concluding that Defendants had unlawfully denied parole to asylum-seekers like the parents of J.S.R. and V.F.B. held in the El Paso district. *Id*. (citing *Damus v. Nielsen*, ___F.Supp.3d ___, 2018 WL 3232515 (D.D.C. July 2, 2018)). As of this filing, opposing counsel has not responded.

Undersigned counsel has made extensive efforts to contact the father of J.S.R. and the mother of V.F.B., all unsuccessful. These efforts have included outreach through counsel for other lawsuits challenging unlawful family separation at the border, lawyers and advocates coordinating efforts on the ground in Texas, and other networks. Orihuela Decl. ¶ 4. These efforts have also included a request for the assistance of U.S. Senator Richard Blumenthal, who wrote personally to Defendant Secretary of Homeland Security Kirstjen Nielsen on July 2 regarding these cases. Orihuela Decl. Ex. B. Defendants also declined to provide information to Senator Blumenthal's staff regarding the status of immigration or criminal proceedings against the parents, if any. *Id*. ¶ 8.

Counsel has located and spoken with the mother of J.S.R., who separated from J.S.R.'s father, shares joint legal custody of J.S.R, and remains in Honduras. Zucco-Himmelstein Decl. ¶ 21. J.S.R.'s mother was firm in her view that no decision could be made as to whether J.S.R.

should be reunited with his father in detention or released to another relative without consultation with J.S.R.'s father, who is J.S.R.'s primary caregiver. *Id.*

ARGUMENT

I. The Court May Issue Writs to Procure the Testimony and Presence of Plaintiffs' Parents, and the Presence of J.S.R. and V.F.B., at the July 11 Hearings.

This Court has the power to compel the in-person appearance of the father of J.S.R. and the mother of V.F.B. to testify at the July 11 Hearings, confer with their children, and advise the children and their lawyers. 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . (5) It is necessary to bring him into court to testify or for trial."). This Court also has the authority to compel the in-person attendance of J.S.R. and V.F.B. themselves, both of whom are currently confined in the custody of ORR in Connecticut. *Id.*

A. This Court is authorized to issue writs of habeas corpus *ad testificandum* by federal statute and common law.

Both federal statute and the common law authorize this Court to issue a writ of habeas corpus *ad testificandum*, a "lesser writ" that directs a witness's custodian to permit or bring that witness to appear at a proceeding and give testimony. 28 U.S.C. §§ 2241(c)(1), (c)(5); *Barber v. Page*, 390 U.S. 719, 724 (1968) (noting that "federal courts [have] the power to issue writs of habeas corpus *ad testificandum*" in "case of a prospective witness currently in federal custody" where testimony is necessary); *Rivera v. Santirocco*, 814 F.2d 859, 860, 864 (2d Cir. 1987) (recognizing authority of federal courts to issue *testificandum* writ). Issuance of a writ of habeas corpus *ad testificandum* does not challenge or disturb the underlying custodial order, but merely facilitates testimony from or the presence of a person who remains in custody.

This Court's power to issue the writ of habeas corpus *ad testificandum* is also derived from the common law, for this writ is a "common law writ of ancient origin." *Gilmore v. United States*, 129 F.2d 199, 202 (10th Cir. 1942). The Supreme Court has indicated that federal courts

today must look to the historic usage of habeas corpus writs when defining their authority to issue such writs. *See, e.g., Carbo v. United States,* 364 U.S. 611, 617-620 (1961) (tracing common law and subsequent history of writ of habeas corpus *ad prosequendum*).

Writs of habeas corpus *ad testificandum* are rooted in "early English law" and "'steeped in history.'" *Carmona v. Warden of Ossining Corr. Facility,* 549 F. Supp. 621, 622 (S.D.N.Y. 1982) (quoting *Ballard,* 447 F.2d at 479); *see also* 3 William Blackstone, COMMENTARIES *129-30 (listing habeas corpus *ad testificandum* as writ issued "by the courts at Westminster"). As a result, federal courts have "recognized [the writ of habeas corpus *ad testificandum,*] at least since *Ex parte Bollman* . . . [in 1807,] as [a writ] within a federal court's power to grant." *In re Grand Jury Proceedings,* 654 F.2d 268, 278 (3d Cir. 1981) (internal citation omitted).

B. The Court has jurisdiction to require Defendants to produce the parents for the July 11 Hearings.

Federal courts are empowered with jurisdiction to require the custodians of individuals in federal custody anywhere in the United States to produce those individuals pursuant to a writ of habeas corpus *ad testificandum*. J.S.R and V.F.B.'s parents are currently in DHS custody in Texas. Zucco-Himmelstein Decl. ¶ 20; Orihuela Decl. ¶ 2. This Court may exercise its legal authority to ensure their appearances at the July 11 Hearings.

First, the father of J.S.R. and the mother of V.F.B. are in federal custody, as they are in DHS custody in Port Isabel, Texas and Lasalle County, Texas, respectively. Zucco-Himmelstein Decl. ¶ 20; Orihuela Decl. ¶ 2. A federal court may issue a writ of habeas corpus *ad testificandum* to bring a witness in state or federal custody into court. *U.S. v. Cruz-Jiminez,* 977 F.2d 95 (3d Cir. 1992); *Sampley v. Duckworth,* 72 F.3d 528 (7th Cir. 1995); *Bistram v. U.S.*, 248 F.2d 343 (8th Cir. 1957). Defendant Nielsen, Secretary of DHS, is the custodian of both parents. *See Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 38-39 (1985).

Second, the reach of the writ of habeas corpus *ad testificandum* is not subject to geographical constraints in the same manner as is the writ of habeas corpus *ad subjiciendum*, the more familiar "Great Writ" that inquires into the lawfulness of the underlying custody itself. Because the *ad testificandum* writ is an administrative writ that does not contest the lawfulness of custody, it is more flexible and is not dependent on the geographic location of the physical custodian. As the Fourth Circuit explained in *United States v. Moussaoui*, "[i]t is . . . clear that a district court can reach beyond the boundaries of its own district in order to issue a testimonial writ." 382 F.3d 453, 466 (4th Cir. 2004); *see also Barnes v. Black*, 544 F.3d 807, 809 (7th Cir. 2008) ("Section 2241(c)(5) of the Judicial Code authorizes the district court to issue a writ of habeas corpus commanding that the prisoner be delivered to the court 'to testify or for trial.' The section codifies the common law authority of federal courts to issue writs of habeas corpus *ad testificandum* and *ad prosequendum*. . . These writs can be used to get a prisoner into the district court from anywhere in the country."). The writ enables the Court to obtain an individual in the State's custody from both state and federal facilities. *Barnes*, 544 F.3d at 809 (collecting cases). This Court therefore has jurisdiction to reach all of the Defendants here, and to compel Defendants to produce the father of J.S.R. and the mother of V.F.B.[3]

The Supreme Court has similarly explained that the usual "the territorial limitation" on habeas petitions "refers *solely* to issuance of the Great Writ." *Carbo*, 364 U.S. at 619 (emphasis

[3] In 2016, Judge Bryant of this district concluded she lacked jurisdiction to grant a petition for habeas corpus *ad testificandum* on behalf of an individual who had been deported and sought to return to the United States to testify at a state legislative hearing. Judge Bryant construed the petition as an indirect challenge to a discretionary administrative procedure over which the Court lacked jurisdiction. *Milardo v. Kerlikowske*, 2016 WL 1305120, at *9 (D.Conn. Apr. 1, 2016), *aff'd sub nom Giammarco v. Kerlikowske* 665 Fed. App'x. 24 (2d Cir. Oct. 31, 2016). On this motion, J.S.R. and V.F.B. do not seek review on behalf of their parents of any discretionary administrative decision made by Defendants; nor, of course, do these applications seek to compel the entry from abroad of a previously deported person living at physical liberty; nor did *Giammarco* involve the need of minor children for the benefit of their parents' testimony. Rather, V.F.B. and J.S.R. request issuance of the *ad testificandum* writ in traditional, routine circumstances: a witness whose testimony and presence is necessary to a hearing but who is detained in federal custody and not otherwise able to attend.

added) (finding no geographical limit for habeas corpus *ad prosequendum*). "A consensus among the courts [thus] indicates support for the extraterritorial issuance of writs *of habeas corpus ad testificandum.*" *Williams v. Beauregard Par.*, No. 2:08-CV-355, 2014 WL 1030042, at *3 (W.D. La. Mar. 17, 2014); *see also ITEL Capital Corp. v. Dennis Mining Supply and Equip., Inc.*, 651 F.2d 405, 406–07 (5th Cir. 1981); *Roe v. Operation Rescue*, 920 F.2d 213, 218 n. 4 (3d Cir. 1990); *Atkins v. City of New York*, 856 F. Supp. 755, 758-59 (E.D.N.Y. 1994); *Greene v. Prunty*, 938 F. Supp. 637, 638-39 (S.D. Cal. 1996). Defendant Nielsen, as well as the physical custodians of the father of J.S.R. and mother of V.F.B. in Texas, are thus within the *ad testificandum* writ jurisdiction of this Court.

C. The Court has jurisdiction to require Defendants to produce the children for the July 11 Hearings.

This Court also has jurisdiction to issue a writ of habeas corpus *ad testificandum* as to Plaintiffs J.S.R. and V.F.B. themselves. Defendant ORR is the legal custodian of both children and presently confines them under contract at a secure children's shelter, Noank Community Support Services. Zucco-Himmelstein Decl. ¶¶ 18, 36. It is undisputed that the children are in federal custody within this district. As such, this Court has jurisdiction to bring them into court to testify. 28 U.S.C. § 2241(c)(5); *U.S. v. Cruz-Jiminez*, 977 F.2d 95 (3d Cir. 1992); *Sampley v. Duckworth*, 72 F.3d 528 (7th Cir. 1995); *Bistram v. U.S.*, 248 F.2d 343 (8th Cir. 1957).

Despite having brought this action, by necessity, through a next friend, J.S.R. and V.F.B. are the real parties in interest and must be allowed to attend their own proceedings, so as to advise their next friend and counsel, and through them the Court, of their own wishes. Moreover, the nature of the underlying action is itself both a complaint for declaratory and injunctive relief and a petition for writ of habeas corpus *ad subjiciendum.* There is little question that this Court has the authority to direct Defendants to produce J.S.R. and V.F.B. themselves for the July 11

Hearings. 28 U.S.C. §§ 2241(c)(1), (5); *Carbo*, 364 U.S. at 618 (district judges can issue writ of habeas corpus within their jurisdiction).

II. This Court Should Grant the Writs.

Courts considering the issuance of writs of habeas corpus *ad testificandum* use their broad discretion to balance "the interest of the plaintiff in presenting his testimony in person" with "the interest of the state in maintaining the confinement of the plaintiff-prisoner." *Twitty v. Ashcroft*, 712 F.Supp.2d 30, 31-32 (D. Conn. 2009) (quoting *Thornton v. Snyder*, 528 F.3d 690, 697 (7th Cir. 2005)). To assess these interests, courts examine: (1) whether the person's presence will substantially further the resolution of the case; (2) whether there are reasonable alternatives to the person's presence; (3) whether the person's presence may pose a security risk; (4) the expense of transportation and safekeeping; and (5) whether the case can be stayed. *Id.* at 32.

In this case, each factor weighs in favor of granting J.S.R. and V.F.B.'s petition as to the parents of each and as to themselves. Indeed, the interest of the government is not in excluding J.S.R. and V.F.B.'s parents from counseling their children. Rather, the government's authentic interest is in ending the immediate and ongoing harm to J.S.R. and V.F.B., which can only be achieved with the counsel, assistance, and testimony of their parents.

A. The testimony and presence of the parents and petitioners will substantially further the July 11 Hearings.

Most obviously, testimony from the father of J.S.R. and the mother of V.F.B. is likely to be directly relevant to some of the claims for which Petitioners now seek a preliminary injunction and which will be the subject of the July 11 Hearings. These include the substantive due process and Rehabilitation Act claims, for which parental testimony as to the parent-child relationship before separation; the health and well-being of each child before separation, including each child's ability to engage in major life activities such as concentrating, sleeping,

and communication; the impact of separation; and the efficacy of the reasonable accommodation (whether reunification with a parent or release to a suitable relative), are relevant. J.S.R and V.F.B's parents must be able to see and confer with their children in-person in order to observe and subsequently share with the Court how Defendants' forced separation has affected their children. The testimony of each parent is also likely to be relevant to the showing of irreparable injury that each child must make as an element of requesting a preliminary injunction.[4]

The presence of each parent and of the minor children J.S.R. and V.F.B. will also substantially advance the adjudication of the pending motions for preliminary injunctions because all are necessary to determine the most appropriate relief for each child, in the event this Court agrees that relief is warranted. Both children, acting through a next friend, have requested an order to gain immediate relief from the ongoing trauma they are experiencing. Evaluation by a team of child psychiatrists confirms that each child suffers from acute PTSD as a direct result of separation from their parent. Martin Decl. A ¶ 19, 21; Martin Decl. B ¶ 12-13. Each child is disabled, as that term is defined in the Rehabilitation Act of 1973. And each is already at grave risk of long-term psychological harm.

At the July 11 Hearings, the Court will consider whether Defendants have violated the constitutional and statutory rights of J.S.R. and V.F.B. by forcibly separating them from their parents and detaining the children in Connecticut. As set forth in Petitioners' memorandum in support of their motions for a preliminary injunction, filed simultaneously with this application, Defendants have violated the substantive and procedural due process and equal protection rights of both children, as well as their rights under Section 504 of the Rehabilitation Act of 1973 and

[4] Because undersigned counsel have not been able to communicate directly with either parent, despite significant effort, the relevance of testimony must be describe as "likely."

the Administrative Procedure Act. If the Court agrees on one or more of these grounds, then the Court will have to fashion appropriate relief.

Courts have long recognized that families have a fundamental liberty interest in a parent's ability to care for, protect and manage the choices of their children. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (there is "a fundamental liberty interest" in children being under the care, custody, and management of their natural parents); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) ("The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.") (internal citations omitted); *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999) (choices about family life are "'of basic importance in our society,' ... rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.").

The presence of Petitioners and their parents at the July 11 Hearings is also necessary to facilitate communications between the children, their next friend, and counsel, even if the children themselves do not testify. Traumatized, frightened, and suffering from acute PTSD, both children struggle to manage their emotions and communicate with adults. Martin Decl. A ¶ 15; Martin Decl. B ¶ 7. No other adult has the close relationship with J.S.R. and V.F.B. that allow both parents to relate to, and communicate with, their children in an almost impossibly stressful situation for the children. No other adult can communicate key information to the children, or elicit meaningful choices from them. No other adult can counsel the children on such a sensitive, significant, and highly personal choice. By reducing the stress of the event through their presence, advising their children on the litigation choices they face now and may face upon adjudication of the pending motions for emergency relief, and helping the minor children

communicate with counsel and the Court, the presence of both parents and children will further the orderly conduct of the July 11 Hearings and adjudication of the underlying motions for emergency relief.

B. Conferral Between Each Child and Parent is Necessary to Protect the Children's Due Process Rights.

Courts have long recognized the importance of allowing children to consult with their parents regarding significant decisions. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors"); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (stating that "most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their needs for medical care or treatment. Parents can and must make these judgments."). In addition to the need for direct testimony from each parent, and for the parents' assistance in facilitating communication among the children, their next friend, counsel, and the Court, there is thus a further due process right at stake on this application: the due process rights of each child to consult with his or her parent regarding the conduct of their underlying suits.

The child should be permitted to consult with a parent because "[t]he child is not the mere creature of the State. . ."; as the Supreme Court has long recognized, the child exists in relation to the parents, who "have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see also Parham v. J.R*, 442 U.S. at 602 (endorsing a family "unit with broad parental authority over minor children"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

Parents are uniquely qualified to serve as guides for children because both parents and children share a concern with maintaining the integrity of the family unit. *Rivera v. Marcus*, 696 F.2d 1016, 1030 (2d Cir. 1982) (Kaufman, J., concurring) (noting that the failure to allow a relative to participate in hearing prevented them from asserting concern that the family relationship would be severed by the "awesome power of the state."). Parents and children also share "natural bonds of affection" which "lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602.

Ideally, there will eventually be a permanent solution for J.S.R. and V.F.B.: reunification and release of themselves and their parents from federal custody. It is possible, though, that in seeking immediate relief from their daily trauma in this action, both children will be faced with a excruciating choice: will they better recover in detention with their parents or by release from physical confinement to the care of an aunt or other family member in the United States, who might sponsor them? The stakes of this choice for J.S.R. and V.F.B could not be higher. If they choose to reunite with their parents in detention, they will be subjected to further, indefinite institutionalization and the constant threat of deportation. If they choose to be released to another family member who will sponsor them, there is no horizon in sight in which they will see their parents again.

The government has forced J.S.R. and V.F.B. into this harrowing dilemma. Other courts have recognized that the factors and the consequences implicated in this choice bear especially strongly on the fundamental liberty of children, thus requiring protection and support for children in the position to make such a choice. Neither child should be compelled to make this decision without advice and guidance from their parent. *See Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (due process requires a meaningful opportunity for a hearing, particularly in cases involving the

best interest of a child where the court must decide the child's placement). "[C]hildhood is a particularly vulnerable time of life, and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives." *Parham v. J.R.*, 442 U.S. 584, 628 (1979) (Brennan, J., concurring in part and dissenting in part). Immigration "detention" and "institutional custody" present as real a threat to a child's liberty interest, and as acute a harm to their long-term development, as incarceration does in the criminal context. *See In re Gault*, 387 U.S. 1, 27 (1967) ("[H]owever euphemistic the title . . . an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated...").

Moreover, the immediate threat of deportation that accompanies J.S.R. and V.F.B.'s prospective choice to reunite with their parents in the confines of a detention center implicates the children's liberty interests both to "stay and live . . . in this land of freedom," and also to "rejoin . . . immediate family;" the Supreme Court has recognized that such a choice is a "weighty one." *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (noting the federal government must comply with due process when it seeks to exclude a legal permanent resident) (citation omitted); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (noting that a liberty interest includes not only the freedom from bodily restraint, but also freedom of action and freedom of choice). The U.S. Supreme Court has repeatedly taught that, given its potentially dire consequences, deportation itself threatens an immigrant's most fundamental liberty interests. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (observing that deportation may result "in loss of both property and life, or of all that makes life worth living") .

In addition to the weighty stakes of the potential choices before J.S.R. and V.F.B, courts have recognized that greater due process protections are required when government proceeds against a child, making the presence of their parents especially important to counsel and guide

them. "Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The constitutional rights of children cannot be equated to those of adults and legal theories in cases involving adults should not be "uncritically transferred to determin[e] . . . a State's duty towards children." *May*, 345 U.S. at 536 (Frankfurter, J., concurring). Unlike adults, children are unable to represent themselves. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011) (the "legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal"); *Wade*, 334 U.S. at 684 (1948) (referring to youth as an "incapacity"). Children "possess only an incomplete ability to understand the world around them," *J.D.B.*, 564 U.S. at 273, are "peculiar[ly] vulnerabl[e]," and lack the ability "to make critical decisions in an informed, mature manner." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality op.).

Thus, J.S.R. and V.F.B. need their parents to attend the July 11 Hearings not only for the relevant testimony each parent may offer, but also because they need counsel from their parents to make what may amount to the most consequential decision of their young lives. J.S.R and V.F.B. are reliant on the advice and care of their parents to navigate these legal proceedings. J.S.R.'s father and V.F.B.'s mother are loving parents. Each parent is the primary caregiver for their child, and each has risked extraordinary dangers to try to seek asylum and safety for their child. Zucco-Himmelstein Decl. ¶¶ 10, 32. Each parent has played a vital role in helping their children cope with the trauma they have faced in the past. Martin Decl. A ¶ 21.; Martin Decl. B ¶ 13.

C. <u>There is no reasonable alternative to Plaintiffs' in-person conferral and parents' live testimony.</u>

Even were Defendants to facilitate extended, private phone calls between the children and their parents, and between the parents and counsel – which Defendants have not done –

telephonic communication would not be a reasonable substitute for the testimony, guidance, and presence of each parent in court on July 11. V.F.B. and J.S.R. are deeply traumatized by the separation from their parents. Martin Decl. B ¶ 13; Martin Decl. A ¶ 21. This trauma continues to manifest through symptoms consistent with PTSD. V.F.B. is experiencing significant PTSD symptoms, including vacillating between tears and emotional distance as well as avoiding questions. Martin Decl. B ¶ 8. Similarly, J.S.R. experiences significant PTSD symptoms: he is depressed, tearful, sleepless, and distrustful of adults to the extent that he actually flees from them. Martin Decl. A ¶¶ 15, 20. Phone calls cannot permit the comfort needed for communication when a child is enduring ongoing trauma; when V.F.B. was able to speak with her mother, she was barely able to talk due to the emotion and pain of separation, let alone express her thoughts coherently and rationally. Martin Decl. B ¶ 11. Only the physical presence of both parents and both children at the courthouse on July 11 can allow for the provision of necessary testimony and the parent-child conferrals required for J.S.R. and V.F.B. to guide this litigation. Martin Decl. A ¶ 24; Martin Decl. B ¶ 16.

Further, children are entitled to meaningful counsel from their parents, which parents can only make after seeing their children firsthand. By July 11, V.F.B. will have been separated from her mother for nearly two months, and J.S.R. from his father for nearly a month. These are significant periods of time in each child's life due to the compounding impact on them of the current stressors to their trauma-related disabilities. Martin Decl. A ¶ 24; Martin. Decl. B ¶ 16. Their parents will need to evaluate whether the children have physically changed; the ways that their emotional health have been impacted; and how separation has impacted the child's connection with their parent. This in-depth analysis of a child with a disability by their parent cannot be done over the phone.

Even to the extent phone calls could be useful, J.S.R. and V.F.B.'s recent experiences indicate substantial limitations on this method that would defeat the purpose of the call. Each child had been allowed to talk to their parent on the phone only one time before these actions were filed. Zucco-Himmelstein Decl. ¶¶ 22, 37; Martin Decl. B ¶ 11. Any phone calls that the children have had with their parents have been for short time periods. For example, V.F.B. was allowed to talk to her mother for only ten minutes. Martin Decl. B ¶ 11. Additionally, these calls have been monitored by officials. When J.S.R. was finally able to call his father on June 27, 2018, an ICE officer was present for the conversation. Zucco-Himmelstein Decl. ¶¶ 22-23.

J.S.R. and V.F.B. cannot reasonably confer with their parents other than in person, nor can Petitioners and their parents decide on a plan and testify without in-person conferral. Meaningful child-parent consultation during the July 11 Hearings can happen only in real time, and in light of changing events and testimony in the courtroom. There is no reasonable alternative to issuance of *ad testificandum* writs.

D. The July 11 Hearings cannot be stayed until Plaintiffs' parents are released, given the ongoing and irreparable injury that they suffer on a daily basis

J.S.R. and V.F.B. are suffering from trauma every day, compounding their likelihood of long-term and possibly irreversible damage. Martin Decl. A ¶ 24; Martin Decl. B ¶ 16.

First, the trauma of family separation causes especially severe and irreparable injuries, particularly when inflicted upon vulnerable children like these. Thus, for example, the American Academy of Pediatrics has denounced Defendants' practice of separating children like Petitioners from their parents, explaining that the "[s]eparation of a parent or primary caregiver from his or her children should never occur, unless there are concerns for [the] safety of the child

at the hand of [the] parent."[5] Indeed, J.S.R. currently suffers acute PTSD as a result of his forcible separation from his father, whom he views "as his protector and his hero." Martin Decl. A ¶ 16. With his father detained thousands of miles away, J.S.R. does not sleep well, distrusts adults, and is depressed and tearful. *Id.* ¶¶ 17, 20. V.F.B., too, developed PTSD after Defendants separated her from her mother. Martin Decl. B ¶ 13.

J.S.R. and V.F.B. suffer from family separation, and the harms that they experience from prolonged detention are magnified by the other traumatic events that each has experienced, including exposure to extraordinary violence and flight from their homes. Asylum-seekers and refugees are disproportionately likely to experience trauma-related conditions, even setting aside their treatment upon arrival.[6] J.S.R. and V.F.B. are no exception. In his short life thus far, J.S.R. has survived the murder of his grandparents, and he has seen his grandmother floating on a river with her throat slit. Zucco-Himmelstein Decl. ¶ 9; Martin Decl. A ¶ 16. Similarly, V.F.B. lost her beloved stepfather to a murder in 2017. Zucco-Himmelstein Decl. ¶ 31; Martin Decl. B ¶ 10. J.S.R. and V.F.B. have already experienced irreparable harm from their unlawful detention, and this harm worsens every minute they spend in Defendants' custody.[7]

[5] Orihuela Decl. Ex. DD.

[6] *E.g.*, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 465 (4th ed. 2000) (noting that those who "have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of [PTSD]"); Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. HEALTH & BIOMED. L. 37, 50 (2010) ("Refugees are prone to particularly high levels of trauma and subsequent PTSD development by the very nature of their experiences.").

[7] The decisions by Judge Boasberg in *Damus v. Nielsen*, ___F.Supp.3d ___, 2018 WL 3232515 (D.D.C. July 2, 2018), requiring that individual parole requests be reviewed on a case-by-case basis in *inter alia* the El Paso sector, and Judge Sabraw in *Ms. L v. U.S. Immigration and Customs Enforcement*, ___F.Supp.3d. ___, 2018 WL 3129486 (S.D.Cal. June 26, 2018), also do not militate against issuance of *ad testificandum* writs in this case. The parents of J.S.R. and V.F.B. may be members of the *Damus* and *Ms. L* classes, but to counsel's knowledge, the government has not indicated how or when it will comply with either injunction, and there is no indication that Defendants will conduct the lawful parole hearings required by *Damus* and grant release to each parent before July 11.

E. Plaintiffs and their parents present no security risk

Granting this writ of habeas *ad testificandum* will not create any security risk. J.S.R. and V.F.B. are traumatized children; a nine-year-old and a fourteen-year-old do not pose a danger to anyone. Their parents are asylum seekers who fled threats to their lives in their home countries. At no time have Defendants alleged that the parents of J.S.R. and V.F.B. pose any security risk. Defendants never made any finding that either parent was dangerous before snatching them away from J.S.R. and V.F.B. Instead, Petitioners and their parents have every incentive to cooperate with the laws and processes of the United States as asylum-seekers searching for safe refuge. Indeed, both children have colorable asylum claims and are therefore heavily incentivized to cooperate and attend all legal proceedings. Zucco-Himmelstein Decl. ¶¶ 19, 30.

F. The limited cost to the government is justified.

The cost of transporting the father of J.S.R. from Port Isabel, Texas and the mother of V.F.B. from Lasalle County, Texas to Bridgeport, Connecticut for the July 11 Hearings is merited given the extraordinary harms that Plaintiffs have suffered in this case. The presence of their parents will accommodate the children's trauma-related disabilities, both helping to prevent long-term damage and facilitating the conduct of the July 11 Hearings. Both parents also are likely to have important testimony to offer. These benefits to the children, to this Court, and to justice far outweigh the limited cost to the government. In fact, the government has demonstrated its ability and willingness to transport large numbers of immigrant detainees to serve its stated interests in administering justice. *See* Eli Rosenberg, *ICE is going to transfer 1,600 immigrants to federal prisons*, Washington Post (June 7, 2018), https://tinyurl.com/ydernsmk. And the cost of transporting J.S.R. and V.F.B. themselves to Bridgeport is negligible.

CONCLUSION

For the reasons set forth above, Petitioners J.S.R. and V.F.B., through their next friend Joshua Perry, respectfully request that this Court issue writs of habeas corpus *ad testificandum* to Defendants to produce (1) the father of J.S.R. and the mother of V.B.F., both now detained by Defendants in Texas, in person at the U.S. Courthouse in Bridgeport, Connecticut, for the July 11 Hearings, and (2) J.S.R. and V.B.F. themselves, both now detained by Defendants in Connecticut, in person for the July 11 Hearings.

Dated: July 5, 2018

New Haven, Connecticut

Respectfully submitted,

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* Motion for law student appearance forthcoming.
** Motion for admission pending.

[†] Application for admission forthcoming.
[††] This brief has been prepared by a program affiliated with Yale Law School, but does not purport to present the school's institutional views, if any.

CERTIFICATE OF SERVICE

I hereby certify that, on July 5, 2018, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of this court's electronic filing system, by regular mail, postage prepaid, to those parties who have not yet appeared, and by email to:

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who appeared on behalf of all Defendants for the telephonic status conference held July 3, 2018. Parties may also access this filing through the court's CM/ECF system.

Date: July 5, 2018

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