The Rights of Detained Child Migrants

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When an unaccompanied child migrant first arrives in the United States, they are taken into custody by the federal government. The child typically then remains in the government's care until they are released to an adult sponsor. Many such children spend no more than a few days or weeks in custody. But others stay for months—even years—in federally funded facilities.

In this Article, I present empirical analysis of new data relating to the detention of more than 500,000 child migrants between 2015 and 2022. This analysis explores temporal variations in the mean number of days spent by child migrants in ORR custody, as well as the effect of sex, country of origin, sponsor category, and year of entry into custody on the mean duration of detention.

Next, I outline a novel, data-informed approach for determining the point at which the continued detention of child migrants becomes presumptively unconstitutional as a violation of due process. I conclude that a sixty-day limit on childhood detention best balances children's liberty interests against the government's interest in adequately vetting potential sponsors.

Lastly, I argue that, even if the time spent by child migrants in government custody remains within presumptively acceptable due process limits, the government nonetheless violates the equal protection component of the Due Process Clause of the Fifth Amendment when it delays the release of children with non-immediate-relative sponsors compared to children with immediate-relative sponsors.

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INTRODUCTION

Each month, U.S. Border Patrol agents report thousands of encounters with migrants crossing the southern border between the United States and Mexico.[1] Some of these migrants are "Unaccompanied Children" ("UCs")—that is, minors without a parent or legal guardian to care for them in the United States.[2] In fiscal year 2024, more than 100,000 UCs entered the United States through the southern border.[3] Because UCs are both unaccompanied and underage, their custody initially is the responsibility of the United States government—specifically, the Office of Refugee Resettlement ("ORR").[4] And, in most cases, ORR will maintain custody of UCs unless and until such minors are eligible for release to a "sponsor" living in the United States.[5]

The nature and duration of ORR custody can vary significantly between individual UCs. Some UCs are placed in foster care or group homes for no more than a day or two before they are released to their sponsors.[6] Others spend months—even years—in secure facilities or residential treatment centers.[7] In all cases, however, UCs in ORR facilities experience—to a greater or lesser extent—a curtailment of their liberty to associate with their sponsors and to be free from physical restraint.[8]

This Article explores the constitutional protections afforded to UCs in ORR custody under the Due Process Clause of the Fifth Amendment. To that end, it offers three distinct contributions. First, this Article provides detailed analysis of new data from *The New York Times* ("NYT") relating to the detention of more than 500,000 UCs who entered ORR custody between

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1. *See Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. [hereinafter *CBP Encounters*], https://www.cbp.gov/document/stats/southwest-land-border-encounters [https://perma.cc/JE49-5XHR].

2. *See* 6 U.S.C. § 279(g)(2). Note that "Unaccompanied Children" ("UCs") sometimes are referred to as "Unaccompanied Alien Children" ("UACs"). *See, e.g.*, John Burnett, *What 'Unaccompanied Alien Child' Means*, NPR (Dec. 23, 2018), https://www.npr.org/2018/12/23/679592522/what-unaccompanied-alien-children-means [https://perma.cc/J6SE-C7L9].

3. *CBP Encounters*, *supra* note 1.

4. *See ORR Unaccompanied Children Program Policy Guide*, OFF. REFUGEE RESETTLEMENT § 1.1 (Jan. 30, 2015) (rev. 2024) [hereinafter *ORR Policy Guide*], https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide [https://perma.cc/848A-B4S9] (describing the role of ORR with respect to the custody of UCs).

5. *Id.*

6. *Id.*

7. *Id.*; *see also id.* § 1.4.3 (describing the treatment of UCs requiring "extended stays").

8. *See* Emily Bartholomew et al., *Learning from Youth: Envisioning Freedom for Unaccompanied Children*, VERA INST. JUST. 16 (Sept. 2022), https://www.vera.org/downloads/publications/learning-from-youth-envisioning-freedom-for-unaccompanied-children.pdf [https://perma.cc/BNY9-8XEL] ("Regimented rules and constant surveillance made children and youth [in ORR facilities] feel 'locked up' even in the formally less restrictive settings.").

January 2015 and December 2022. This analysis explores temporal variations in the mean number of days spent by UCs in ORR custody, as well as the effect of sex, country of origin, sponsor category, and year of entry into custody on the mean duration of detention. Second, this Article explains how a data-informed approach can be used to pinpoint the time at which the continued detention of UCs presumptively violates the Due Process Clause of the Fifth Amendment. Third, and most importantly, this Article outlines legal arguments for children's-rights advocates seeking to challenge the prolonged detention of UCs in government custody as a violation of both due process and equal protection.

This Article proceeds as follows. In Part I, I describe current ORR policies with respect to the detention of children arriving unaccompanied in the United States and provide in-depth analysis of the newly released NYT data. In Part II, I analyze the rights of detained UCs under the Due Process Clause of the Fifth Amendment and adopt a data-informed approach to argue that detention of UCs beyond sixty days is presumptively unconstitutional. In Part III, I first detail the discriminatory treatment of a particular subset of child migrants—UCs with Category 3 sponsors. I then posit that the government violates equal protection when it prolongs the detention of these UCs relative to that of their peers with Category 1 and Category 2 sponsors. Finally, in Part IV, I summarize the key takeaways from Parts I, II, and III.

I. UNACCOMPANIED CHILDREN ARRIVING AT THE BORDER

This Part summarizes the current treatment of unaccompanied child migrants entering the United States. To that end, it outlines ORR policies regarding the detention of UCs and their subsequent release to sponsors. It then provides in-depth analysis of new data released by the NYT in December 2023 relating to the detention of more than 500,000 UCs who entered ORR custody between January 1, 2015 and December 31, 2022.

In this Part, I first present analysis of the mean number of days UCs spent in ORR custody in each calendar year between 2015 and 2022 as a function of the UC's sex, the UC's country of origin, and the UC's sponsor category. I then provide a linear model that accounts for each of these factors as well as the UCs' year of entry into ORR custody. The linear model reveals that a UC's sponsor category has a strong association with the time a UC spends in

ORR custody, whereas the UC's sex and the UC's country of origin have weaker—though sometimes still significant—associations.[9]

A. Entering ORR Custody

This Section briefly describes the current treatment of UCs held in federal custody. Under current law, a UC is a person who has no lawful immigration status in the United States; who has not yet attained 18 years of age; and, with respect to whom, there is no parent or legal guardian present in the United States or no parent or legal guardian present in the United States who is able to provide the minor with care and physical custody.[10]

Many UCs arriving at the United States border are apprehended at or near the border by U.S. Customs and Border Protection ("CBP").[11] Then, Immigration and Customs Enforcement ("ICE") transfers the UCs from CBP custody to ORR custody.[12] ORR is a subordinate agency within the federal Department of Health and Human Services ("HHS").[13] Most UCs remain in ORR custody until they are released to a qualified custodian—that is, a sponsor[14]—for ongoing removal proceedings.[15]

The ORR Unaccompanied Children Program Policy Guide ("ORR Policy Guide") explains, in § 1.1, that ORR must place UCs in care-provider facilities based on "child welfare best practices in order to provide a safe environment."[16] ORR may place UCs in a shelter facility, a foster-care or group home (which may be therapeutic), a staff-secure or secure-care facility, a residential treatment center ("RTC"), or another special-needs care facility.[17] According to § 1.1, ORR uses the same child-welfare principles both to initially place the child within the ORR network and to transfer the

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9. Note that, while causality cannot formally be established using these data, it is hard to imagine a reversal of the causal direction or the existence of a latent variable that otherwise could explain these associations.

10. 6 U.S.C. § 279(g)(2).

11. Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INST. JUST. 10 (Mar. 2012), https://www.vera.org/downloads/publications/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf [https://perma.cc/CZ2R-SLFB].

12. *Id.*

13. *See id.* at 7.

14. *Id.* at 17.

15. *See* 8 U.S.C. § 1229a (describing removal proceedings); *see also* Byrne & Miller, *supra* note 11, at 24–28 (describing possible avenues for relief from removal from the United States, including asylum and Special Immigrant Juvenile Status ("SIJS")).

16. *ORR Policy Guide*, *supra* note 4, § 1.1.

17. *Id.* (listing the various options available to ORR when placing UCs in its care).

child between placements.[18] However, as explained in § 1.4.1, ORR must, at all times, make every effort to place and keep children and youth in a least restrictive setting.[19]

According to § 2.2 of the ORR Policy Guide, ORR begins to assess potential sponsors as soon as a UC enters custody.[20] The ORR-funded facility that is caring for the child will interview the UC, as well as their parents, legal guardians, and other family members, to identify qualified sponsors. Pursuant to § 2.2.1, ORR seeks to release UCs in its care to sponsors in the following order of preference:[21]

Table 1. Categories of Sponsors

Sponsor Type[22]	**Relation to UC**
Category 1	Parent or legal guardian, including qualifying stepparents that have legal or joint custody of the UC
Category 2A	Brother, sister, grandparent, or other immediate relative (*e.g.*, aunt, uncle, or first cousin), including biological relatives, relatives through legal marriage, and half-siblings, who has previously served as the UC's primary caregiver
Category 2B	Immediate relative (*e.g.*, aunt, uncle, or first cousin), including biological relatives and relatives through legal marriage, who has not previously served as the UC's primary caregiver
Category 3	Other sponsor, such as distant relatives and unrelated adult individuals

Within 24 hours of a potential sponsor being identified, ORR will send the potential sponsor a Family Reunification Packet ("FRP") to complete.[23] This packet includes a Family Reunification Application ("FRA").[24] The FRA

18. *Id.*
19. *Id.* § 1.4.1.
20. *Id.* § 2.2.
21. *Id.* § 2.2.1.
22. Note that "Category 2A" and "Category 2B" are often referred to together as "Category 2."
23. *ORR Policy Guide*, *supra* note 4, § 2.2.3 (detailing the contents of the "Family Reunification Application").
24. *Id.*

requests various details about the potential sponsor, including biographic information and information about the sponsor's immigration status and household composition.[25] ORR case managers then review the completed FRA and conduct further interviews with the UC and the potential sponsor.[26] Once the case manager has completed their review, ORR makes a recommendation for or against the release of the UC to the sponsor.[27]

Multiple sources of law and policy influence the treatment of UCs while they are in the custody of the federal government. The *Flores* Settlement Agreement ("FSA"),[28] which resulted from a 1985 lawsuit challenging the mistreatment of UCs in government custody, sets "national standards for the detention, release, and treatment of immigrant children."[29] It provides, in relevant part, that the government "shall release a minor from its custody *without unnecessary delay*."[30] And the FSA further requires the government to "make and record the *prompt and continuous efforts* . . . toward family reunification and the release of the minor."[31]

Federal law and policy, too, put conditions on the detention and release of UCs. Since 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") has required ORR to ensure that UCs are "promptly placed in the least restrictive setting that is in the best interest of the child."[32] And ORR policies mirror the language of both the FSA and the TVPRA. Pursuant to § 2.1 of the ORR Policy Guide, ORR must have "policies and procedures in place to ensure unaccompanied . . . children in ORR care are released in a *safe, efficient, manner without unnecessary delay*."[33]

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25. *Id.*; *see also* Byrne & Miller, *supra* note 11, at 18.

26. *ORR Policy Guide*, *supra* note 4, § 2.1 (describing that "[t]he process for the safe and timely release of an unaccompanied child from ORR custody involves several steps, including: the identification of sponsors; sponsor application; interviews; the assessment (evaluation) of sponsor suitability, including verification of the sponsor's identity and relationship to the child (if any), background checks, and in some cases home studies; and post-release planning").

27. *Id.* § 2.3 (explaining the release decision-making process).

28. Stipulated Settlement Agreement, Flores v. Reno, No. 85-CV-4544 (C.D. Cal. 1997) [hereinafter *FSA*], https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [https://perma.cc/V6GL-UUXE].

29. Complaint at 5, Duchitanga v. Lloyd, No. 1:18-cv-10332 (S.D.N.Y. 2018) [hereinafter *Duchitanga* Complaint], https://www.nyclu.org/sites/default/files/field_documents/20181106_ecf_1_class_complaint_and_petition_for_habeas_corpus_2018.pdf [https://perma.cc/J687-FUM8].

30. *FSA*, *supra* note 28, at 10 (emphasis added).

31. *Id.* at 12 (emphasis added).

32. 8 U.S.C. § 1232(c)(2)(A).

33. *ORR Policy Guide*, *supra* note 4, § 2.1 (emphasis added).

B. Analysis of The New York Times *Data*

On December 28, 2023, the NYT published a dataset relating to the ORR custody of UCs who entered the United States between January 1, 2015 and May 23, 2023.[34] The data include each UC's country of origin, sex, date of entry into the United States, and date of release from ORR custody, as well as the zip code of the sponsor to which the UC was released, the category of sponsor to which the UC was released, and the relationship between the UC and the sponsor. In this Part, I present novel analysis of information pertaining to 517,496 individuals in the NYT dataset.[35]

The data reveal that the mean time spent in ORR custody by UCs who entered the United States between January 1, 2015 and December 31, 2022 was 36.7 (36.6–36.8) days.[36] The median time spent by all UCs in ORR custody was twenty-five days, with one quarter of UCs spending sixteen or fewer days in custody, and one quarter spending forty-four or more days in custody.

Figure 1A below shows the mean time spent in ORR custody between January 2015 and December 2022 as a function of the month and year in

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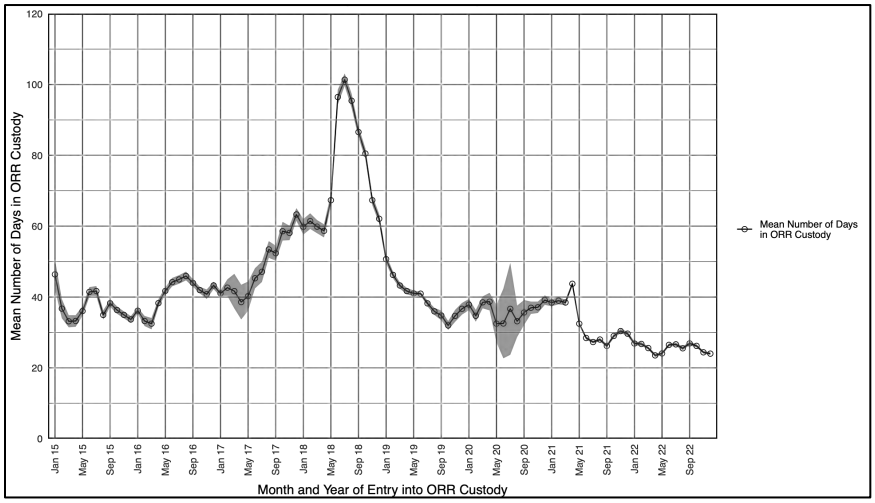
34. Eli Murray et al., *Where Migrant Children Are Living, and Often Working, in the U.S.*, N.Y. TIMES (Dec. 28, 2023), https://www.nytimes.com/interactive/2023/12/28/us/migrants-children-data.html.

35. Several changes were made to the original dataset before it was subjected to statistical analysis. First, 650 entries in the original dataset that had been assigned a sponsor type (*e.g.*, "First Cousin") but not a sponsor category (*e.g.*, "2") were reviewed and assigned sponsor categories based on the criteria outlined in Table 1 above. Undesignated-Sponsor-Category entries included the following Sponsor Types: "First Cousin" (assigned to Category 2), "Niece" (assigned to Category 2), "Nephew" (assigned to Category 2), and "Family Friend" (assigned to Category 3). Second, nine entries were removed from the original dataset for the reasons given in parentheticals in the list that follows: ID 1905 (duplicate entry); ID 3787 (duplicate entry); ID 5942 (sponsor type ambiguous); ID 7774 (sponsor type unknown); ID 11163 (sponsor type unknown); ID 35240 (sponsor type unknown); ID 35402 (sponsor type unknown); ID 41865 (sponsor type unknown); ID 507284 (sponsor type unknown). Third, all data for UCs who entered ORR custody on or after January 1, 2023 were removed because UCs who entered ORR custody closer to the latest release date captured by the data (May 26, 2023) were less likely to have completed their time in custody before the release-date cut-off. By comparison, more than 99.5% of the UCs with entry-into-custody dates from December 1–31, 2022—the last calendar month included in the final dataset—had been released by May 26, 2023. As a result, the reported total number of days spent in ORR custody for UCs with 2023 entry-into-custody dates risked being artificially low. The decision was therefore made to remove all data with 2023 entry-into-custody dates.

36. The numbers in parentheses—here and throughout this Article—represent the 95% confidence interval. Though the dataset analyzed herein is considered a comprehensive census of the near-total population (rather than a representative random sample) of UCs in ORR custody in 2015–2022, this Article nevertheless provides confidence intervals on summary statistics to reflect any possible volatility in the data due to small cohort numbers. For means, the confidence intervals are computed from a *t* distribution. For proportions, the confidence intervals are computed from a binomial distribution.

which the UC entered the United States.[37] Figure 1B presents the number of UCs processed (apprehended or expelled) by CBP and the number of UCs entering ORR custody as a function of the month and year of entry into the United States in the same time period.[38] Note that, while the NYT data relating to ORR custody cover the full 2015–2022 period, the CBP data on border processing were available only from January 2019.[39]

Figure 1A. Mean Days in Custody Over Time

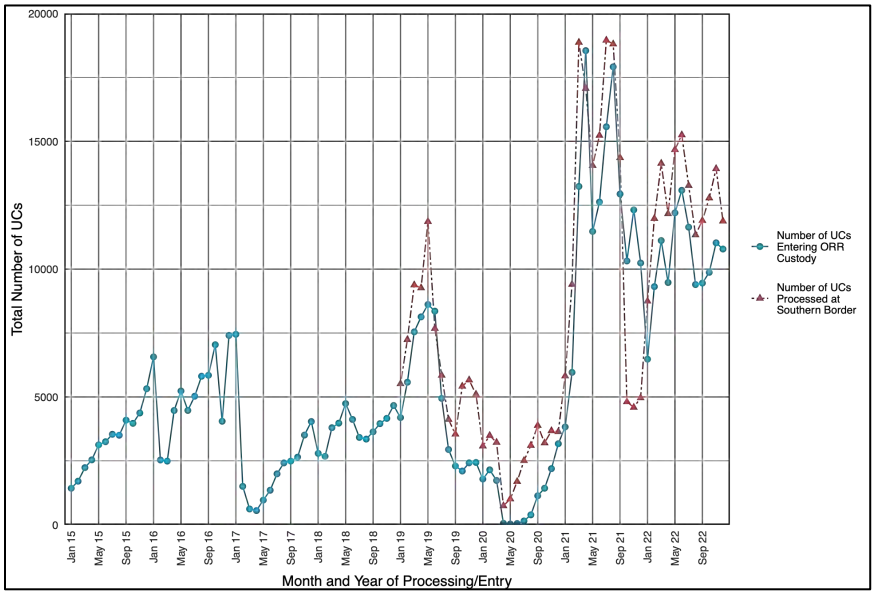


37. The grey shaded area in Figure 1A represents the 95% confidence interval.

38. *See CBP Encounters*, *supra* note 1. The data in Figure 1B include all noncitizens who were processed by CBP at the Southern Border under Title 8 (apprehensions) and Title 42 (expulsions). *See also* Camilo Montoya-Galvez, *What Is Title 8, and What Has Changed Along the U.S.-Mexico Border After Title 42's Expiration?*, CBS NEWS (May 15, 2023), https://www.cbsnews.com/news/what-is-title-8-immigration-law-vs-title-42-border-policy/ [https://perma.cc/4594-TFHN].

39. *See CBP Encounters*, *supra* note 1.

Figure 1B. Total Number of UC Arrivals Over Time



Taken together, the data in Figure 1A and Figure 1B reveal that the mean time spent by UCs in ORR custody, the number of UCs entering ORR custody, and the number of UCs processed by CBP at the border all varied considerably in the timeframe shown. Figure 1B further reveals a strong positive correlation ($r = 0.90$) between the number of UCs apprehended by CBP at the border and the number of UCs entering ORR custody. That is to be expected: as explained above, most UCs who arrive in the United States without a parent or legal guardian are apprehended by CBP, and federal law generally requires the transfer of custody of those UCs to ORR.[40]

Figures 2–4 below show the mean number of days spent in ORR custody by UCs in the 2015–2022 period as a function of the sex[41] of the UC (Figure 2), the country of origin[42] of the UC (Figure 3), and the category of sponsor to which the UC was ultimately released (Figure 4).

40. *See* 6 U.S.C. § 279(g)(2).

41. Note that, in the NYT data, "sex" is a binary variable (Male or Female only).

42. For the sake of clarity, Figure 3 includes only data pertaining to UCs from Mexico, Guatemala, Honduras, El Salvador, and Nicaragua. Together, UCs from these countries account for 95.5% of all entries in the NYT dataset.

Figure 2. Mean Days in Custody Over Time by UC Sex

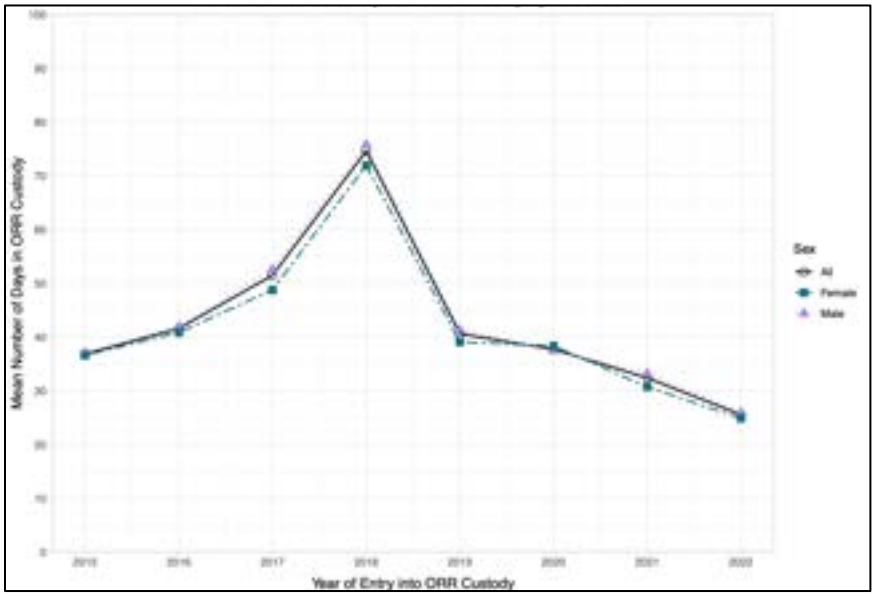


Figure 3. Mean Days in Custody Over Time by UC Country of Origin

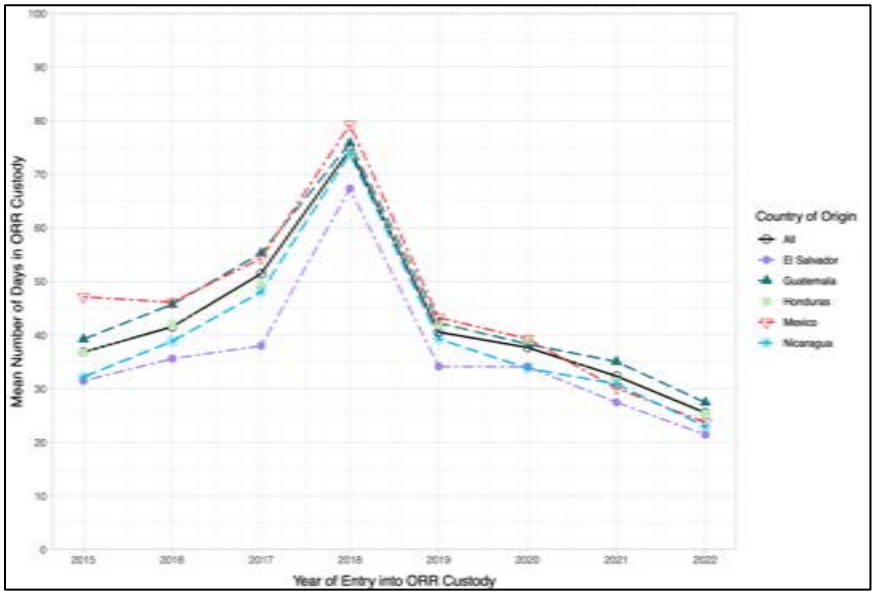
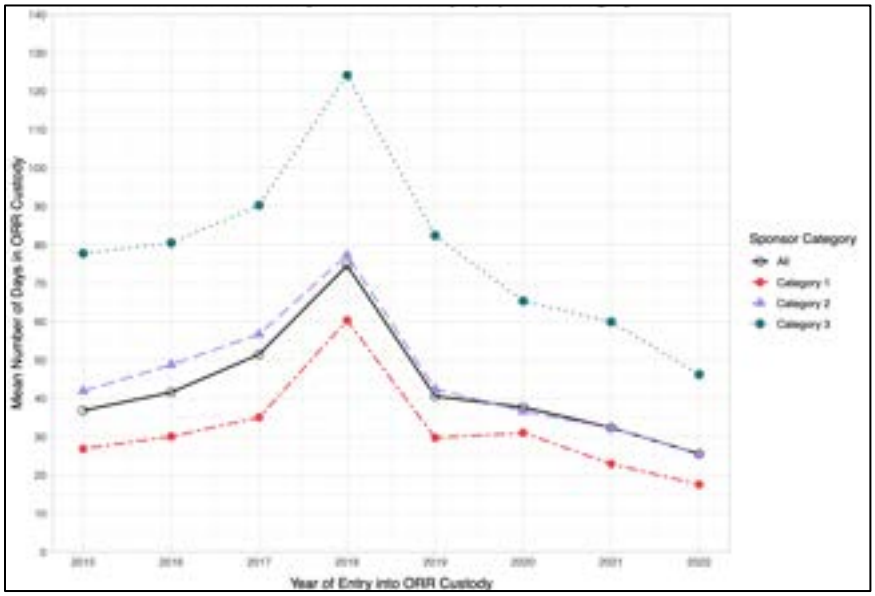


Figure 4. Mean Days in Custody Over Time by Sponsor Category



The data in Figures 2–4 broadly reflect the trend shown in Figure 1: within the range of years shown, the mean number of days spent by UCs in ORR custody was highest in 2018 and lowest in 2022. But Figures 2–4 also reveal that certain characteristics of an individual UC may play a more significant role than others in predicting how long that UC is likely to spend in ORR custody. Figure 2, for example, shows that the sex of the UC was not a particularly important factor in predicting the duration of government custody in 2015–2022. Figure 3, in turn, reveals that the UC's country of origin proved more influential in predicting the amount of time a UC spent in government custody: a UC arriving from Mexico in 2015–2022, for instance, could expect to spend on average 6.5 (5.6–7.4) days longer in ORR custody than her counterpart from El Salvador.

In any case, however, Figure 4 demonstrates that the category of sponsor to which a UC ultimately is released is a much stronger factor than either sex or country of origin in predicting how long a UC spends in ORR custody. In the 2015–2022 period, UCs with Category 3 sponsors spent on average 39.0 (38.6–39.2) days longer in ORR custody than their counterparts with Category 1 sponsors and 28.2 (27.7–28.7) days longer in ORR custody than their counterparts with Category 2 sponsors.

To better understand the relative predictive strength of different UC characteristics, consider Table 2, which presents a linear model that accounts for the effect of the UC's sex, the UC's country of origin, the UC's sponsor's

category, and the UC's year of entry into ORR custody on the number of days the UC likely spent in ORR custody in the 2015–2022 period. The intercept value (30.5 days) gives the predicted number of days in ORR custody for a *female* UC who entered ORR custody in *2015* before ultimately being released to a *Category 1* sponsor. The values in the column labeled "Coefficient" then give the number of days by which the time in ORR custody should be increased or decreased to account for different UC characteristics.[43] These coefficients are visually presented in Figure 5.[44]

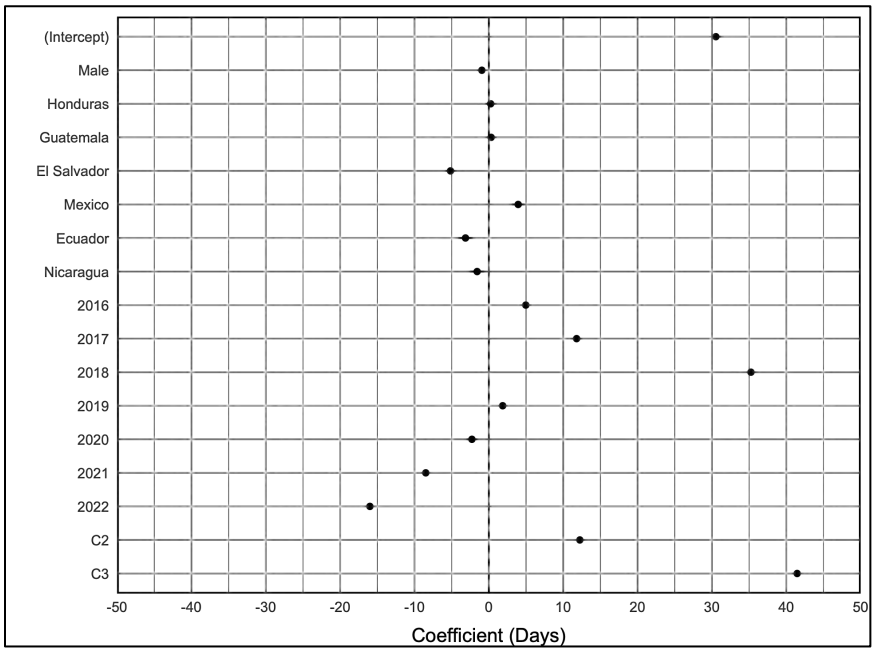
Table 2. Relative Predictive Strength of UC Characteristics on the Duration of Detention

			Coefficient (Days)	**Standard Error**	***t* value**	**P(> | *t* |)**
		N	*Intercept* = 30.5	0.3	89.3	$< 2.0 \times 10^{-16}$
Sex	Male	342,070	-0.9	0.1	-9.1	$< 2.0 \times 10^{-16}$
Country of Origin	Honduras	142,201	+0.2	0.3	0.8	0.4
	Guatemala	239,177	+0.3	0.3	1.0	0.2
	El Salvador	92,455	-5.2	0.3	-16.8	$< 2.0 \times 10^{-16}$
	Mexico	12,372	+3.9	0.4	9.3	$< 2.0 \times 10^{-16}$
	Ecuador	7,779	-3.1	0.5	-6.4	1.4×10^{-10}
	Nicaragua	7,942	-1.6	0.5	-3.3	1.1×10^{-3}
Year of Entry	2016	61,286	+5.0	0.2	22.4	$< 2.0 \times 10^{-16}$
	2017	26,130	+11.8	0.3	42.6	$< 2.0 \times 10^{-16}$
	2018	45,285	+35.2	0.2	147.5	$< 2.0 \times 10^{-16}$
	2019	59,567	+1.9	0.2	8.3	$< 2.0 \times 10^{-16}$
	2020	14,273	-2.3	0.3	-6.7	2.5×10^{-11}
	2021	144,965	-8.5	0.2	-43.1	$< 2.0 \times 10^{-16}$
	2022	123,850	-16.0	0.2	-79.5	$< 2.0 \times 10^{-16}$
Sponsor Category	Category 2	240,781	+12.2	0.1	114.6	$< 2.0 \times 10^{-16}$
	Category 3	60,096	+41.5	0.2	252.1	$< 2.0 \times 10^{-16}$

43. For example: a UC who is male (-0.9 days) and from Mexico (+3.9 days), and who entered ORR custody in 2021 (-8.5 days) before being released to a Category 2 sponsor (+12.2 days), would be predicted to have spent 30.5 – 0.9 + 3.9 – 8.5 + 12.2 = 37.2 days in ORR custody. By comparison, the empirical mean from the NYT data for the 439 UCs with these same characteristics is 34.7 (31.9–37.6) days.

44. The error bars in Figure 5 represent two standard errors below and above the coefficient.

Figure 5. Comparison of Linear Model Coefficients



As can be seen in Table 2 and Figure 5, the year of entry is strongly predictive of the time that a UC would have spent in ORR custody in the 2015–2022 period. Further, the relative magnitudes of the coefficients relating to the UC's sex, the UC's country of origin, and the UC's sponsor's category reveal that the latter of these three factors is the most strongly predictive of the duration of UC custody.

II. DUE PROCESS

In this Part, I argue that all UCs detained in ORR custody have a fundamental right under the Due Process Clause of the Fifth Amendment to associate with their sponsors—whatever their category—and to be free from physical restraint.[45] To that end, I first discuss *Reno v. Flores* before positing that, in light of the Court's contemporaneous and subsequent opinions, as well as the realities of how modern Americans organize their family lives, *Reno* no longer should be considered good law.[46]

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45. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

46. *See* Reno v. Flores, 507 U.S. 292 (1993).

I then propose a data-informed approach for determining the presumptively reasonable time limit under due process for maintaining UCs in ORR custody. I initially consider two potential limits on the time spent by UCs in federal custody—thirty days and ninety days—each of which finds support in the TVPRA, current ORR policy, or both. By first comparing a thirty-day limit and a ninety-day limit to the mean time spent by UCs in ORR custody between 2015 and 2022, I ultimately conclude that a sixty-day limit correctly balances UCs' "liberty interests and the well-documented deleterious effects of prolonged detention on minors against ORR's interest in conducting thorough investigations of potential sponsors."[47]

A. Reno v. Flores

In 1988, the Immigration and Nationality Service ("INS")[48] promulgated a final rule regarding the detention and release of juveniles in its custody.[49] The Rule provided that juveniles should be released from government custody, in order of preference, to parents, legal guardians, or other adult relatives who were not themselves in INS detention.[50] Failing that, a parent or legal guardian could "designate another person as capable and willing to care for the child."[51] Alternatively, the INS could exercise its discretion and order the child "released to other adults."[52] If, however, the juvenile was not released from government custody under these provisions, the INS would place the child "in a facility designated for the occupancy of juveniles."[53]

A class of noncitizen children who had been detained and held in INS custody under suspicion of being deportable brought suit challenging the Rule in the Central District of California.[54] The plaintiffs claimed that the INS's detention policy infringed their fundamental right to freedom from physical restraint as protected under the substantive due process component of the Fifth Amendment.[55] The district court granted summary judgment to the children and invalidated the rule in pertinent part, ordering the INS "to

47. *See* Lucas R. v. Becerra, No. CV-18-5741-DMG (PLAx), 2022 WL 2177454, at *27 (C.D. Cal. Mar. 11, 2022).

48. The INS was dissolved by the Homeland Security Act of 2002. It was replaced by three subagencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), ICE, and CBP. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

49. *Reno*, 507 U.S. at 297.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 294.

55. *Id.* at 299–300.

release any minor otherwise eligible for release . . . to his parents, guardian, custodian, conservator, *or other responsible adult party*."[56] The Ninth Circuit affirmed the district court's order.[57]

At the Supreme Court, Justice Scalia rejected the notion that the INS policy in fact implicated a fundamental right to be free from physical restraint.[58] Noting that "[s]ubstantive due process analysis must begin with a careful description of the asserted right," Justice Scalia found that the "alleged right" at issue was best characterized as the "right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."[59] Because this "alleged right" was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," it was in fact a "lesser interest" that did not trigger heightened scrutiny.[60] Thus, in Justice Scalia's view, rational basis review applied, and the INS was "not compelled to ignore the costs and difficulty of alternative means" of protecting children when designing its detention program.[61] As a result, Scalia found, the government's detention program did not violate due process.[62]

B. The Right to Intimate Association

In this Section, I argue that the Court should, at the soonest opportunity, reconsider its holding in *Reno* and find that all UCs have a fundamental right to associate with their sponsor—whatever the sponsor's category. By narrowly construing the substantive right at issue, the *Reno* majority sidestepped the proper demands of constitutional due process to hold that UCs have no Fifth Amendment right to be released from ORR custody to non-immediate-relative (*i.e.*, Category 3) sponsors.[63] Even if *Reno* were correct when it was handed down, recent changes in the Court's substantive

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56. *Id.* at 299 (internal quotations omitted).

57. *Id.*

58. *Id.* at 302 ("The freedom from physical restraint invoked by respondents is not at issue in this case.").

59. *Id.*

60. *Id.* at 305.

61. *Id.* at 311.

62. *Id.* at 315.

63. Specifically, the *Reno* Court found that UCs have no fundamental right to associate with sponsors who are not parents, legal guardians, or close relatives. *Id.* at 303. "Category 3" sponsors are not within any of those three groups. *See supra* Table 1.

due process jurisprudence suggest a willingness on behalf of the Court to recognize the constitutional protection of relationships outside of the traditional nuclear family.

The Court long has been protective of the "integrity of the family unit."[64] In particular, the Court has defended the right of parents to the "custody, care and nurture" of their children.[65] Indeed, over 100 years ago, in *Meyer v. Nebraska*, the Court found that the Due Process Clause of the Fourteenth Amendment protects "the right of the individual to . . . establish a home and bring up children."[66] And, shortly thereafter, in *Pierce v. Society of Sisters*, the Court upheld the "liberty of parents and guardians to direct the upbringing and education of children under their control."[67]

More than a half-century later, in *Moore v. City of East Cleveland*, the Court expanded the notion of the "constitutional family" by explaining that nonnuclear family living arrangements—those comprising not just parents and their children, but also uncles, aunts, cousins, and grandparents—are "equally deserving of constitutional recognition."[68] But in the nearly 50 years since *Moore*, the Court has not—at least in any explicit sense—further broadened the definition of the constitutional family to include other members who are less closely related by blood or in law.

Accordingly, Justice Scalia, writing for the *Reno* Court nearly two decades after *Moore*, held that UCs in government custody have no due process right to associate with sponsors who are neither parents, legal guardians, nor close relatives.[69] Since such sponsors shared, at most, an attenuated biological or legal relationship with the UCs they sought to sponsor, the UCs' interest in associating with those sponsors was, according to the *Reno* majority, not of a type protected under *Moore*.[70]

But much has changed since *Moore* and *Reno* were handed down. For one thing, between 1971 and 2021, the number of Americans living in multigenerational families—the type contemplated by the *Moore* Court—more than quadrupled to include some 59.7 million people.[71] Recent data

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64. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).
65. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
66. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
67. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
68. Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977).
69. *See* Reno v. Flores, 507 U.S. 292, 302 (1993).
70. *See id.* at 303.
71. *See* D'Vera Cohn et al., *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, PEW RSCH. CTR. (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/#:~:text=From%201971%20to%202021%2C%20the,1971%20to%2018%25%20in%202021 [https://perma.cc/R6TP-B2GH].

from the United States Census Bureau also reveal that, between 1990 and 2020, the number of married-couple households fell from 55.2% to 46.3%.[72] And, between 1990 and 2022, the number of U.S. children living with neither of their parents increased from 1.8 million to 2.6 million.[73] Indeed, in 2020, 7.1% of American households comprised two or more unrelated individuals—an increase of more than one-third since 1990.[74] As these data demonstrate, the lived experiences of many modern-day Americans have little in common with notions of the traditional nuclear—or, in some cases, even the multigenerational—family. But that should not mean that the lived experiences of those Americans are anything other than "equally deserving of constitutional recognition."[75]

Recent changes in the Court's substantive due process jurisprudence support such a conclusion. Of particular significance was the Court's decision to expand the constitutional definition of marriage. In the landmark case of *Obergefell v. Hodges*, decided in 2015, the Court held that state prohibitions on same-sex marriage violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[76] The *Obergefell* Court, in reaching its holding, explained that decisions about whom and when to marry are "among the most intimate an individual can make."[77] In other words, those choices, like many other decisions concerning family relationships, are "central to individual dignity and autonomy."[78] And, as a result, they enjoy protection from state interference under due process.[79]

Obergefell, to be sure, does not speak directly to the types of relationships that Category 3 sponsors share with UCs. The Court in that case primarily was concerned with the ability of consenting adults to marry and, by extension, to create families—families presumably of the type contemplated

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72. *Id.* That decrease is arguably even more remarkable in view of the fact that, by 2020, the nationwide availability of same-sex marriage had increased the number of relationships eligible to count as "married couple households." *See id.*

73. Veera Korhonen, *U.S. Child's Living Arrangements from 1970–2022*, STATISTA (June 2, 2023), https://www.statista.com/statistics/252833/number-of-children-in-the-us-living-with-their-parents-or-not/ [https://perma.cc/263J-RNG9].

74. Thomas Gryn et al., *Fam. Households Still the Majority*, U.S. CENSUS BUREAU (May 25, 2023), https://www.census.gov/library/stories/2023/05/family-households-still-the-majority.html [https://perma.cc/KYH2-JH5L].

75. Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977).

76. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

77. *Id.* at 666.

78. *Id.*

79. *See id.* at 675.

in earlier cases like *Meyer*, *Pierce*, and *Moore*.[80] Yet, by reshaping the definition of marriage to embrace same-sex couples, the *Obergefell* Court showed a marked willingness to recognize the constitutional importance of different types of interpersonal relationships—including those outside the scope of the traditional nuclear family.

Indeed, the Court has said explicitly that the existence of a biological link between two individuals is not itself sufficient to characterize a relationship as worthy of constitutional protection. Consider, by way of illustration, two cases. In *Stanley v. Illinois*, a case from 1972, the Court considered the custody claim of Peter Stanley, a biological but unmarried father whose children had been removed from his custody and declared wards of the state following the death of their mother.[81] The Court found that Illinois violated due process when it removed Stanley's children from his care without an individualized hearing.[82]

But just eleven years later, the Court in *Lehr v. Robertson* found that New York *could* terminate the parental rights of Jonathan Lehr, another biological but unmarried father, without providing him a notice or hearing.[83] The Court first noted that Lehr had not played an active role in his child's life.[84] The Court then explained that "the mere existence of a biological link does not merit . . . constitutional protection" when personal contact between the parent and child is lacking.[85] Thus, the Court found, the termination of Lehr's custody without a notice or hearing was constitutional.[86]

I argue that a biological link is not just insufficient to establish a constitutionally protected interpersonal relationship—it is also unnecessary. The *Stanley* Court explained that "familial bonds" in nontraditional settings are "often as warm, enduring, and important as those arising within a more formally organized family unit."[87] And the Court expounded this notion in *Lehr*, declaring that, when an unwed father "com[es] forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause."[88] Yet, the *Lehr*

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80. *See id.* at 646 ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.").

81. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

82. *Id.* at 657–58.

83. Lehr v. Robertson, 463 U.S. 248, 262–63 (1983).

84. *Id.* at 261–62.

85. *Id.* at 261.

86. *Id.* at 262–63.

87. 405 U.S. at 652.

88. 463 U.S. at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)).

Court also found that, because Jonathan Lehr, unlike Peter Stanley, had not "act[ed] as a father" toward his daughter, the relationship Lehr shared with his child did not "merit equivalent constitutional protection."[89]

Taken together, *Stanley* and *Lehr* thus suggest that the level of intimacy that characterizes a relationship between two individuals is perhaps the most significant factor in determining whether that relationship is protected under due process. To be sure, neither *Stanley* nor *Lehr* explicitly held that a biological (or legal) link is superfluous to triggering due process protection of different parent-child relationships.[90] But, as the *Lehr* Court explained: the "importance of the familial relationship[] to the individuals involved . . . stems [in part] from the emotional attachments that derive from the intimacy of daily association."[91] Further, recent cases like *Obergefell* suggest that the Court over time has become more willing to endorse the notion that the Constitution protects different interpersonal relationships that are intimate in nature. And that is true even if those relationships fall outside traditional notions of the family.[92]

Applied in the immigration context, then, it should be the case that all UC-sponsor relationships—whether the sponsor belongs to Category 1, 2, or 3—are presumptively eligible for constitutional protection. To hold otherwise would perpetuate a categorical approach that improperly substitutes intimacy with mere biological or legal affinity. Compare, for instance, the relationships UCs share with their grandparents, aunts, uncles, and first cousins (Category 2 sponsors) to the relationships UCs share with their godparents (Category 3 sponsors).[93] Many UCs undoubtedly enjoy relationships with their godparents that are at least as "warm, enduring, and important" as those they share with "closer" relatives such as grandparents, aunts, uncles, and first cousins.[94] But because the warmth, endurance, and importance that define many intimate UC-godparent relationships result neither from biology nor the operation of law, those relationships are not protected under due process.[95]

That distinction makes little sense. Instead of using a strict categorical approach to determine whether a particular UC-sponsor relationship qualifies for due process protection, the Court thus should look—as it has done

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89. *Id.* (quoting *Caban*, 441 U.S. at 389).

90. *Id.*

91. *Id.* (quoting Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 844 (1977)).

92. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

93. *See ORR Policy Guide*, *see supra* note 4 (describing, in § 2.2.1, sponsor categories).

94. *See* Stanley v. Illinois, 405 U.S. 645, 646 (1972).

95. Reno v. Flores, 507 U.S. 292, 302–03 (1993) (explaining that due process protects the relationships UCs share with "close relative[s]" rather than "private custodian[s]").

before—at the level of intimacy that characterizes the relationship. When the Court does so, it will see that, in most cases, ORR-approved sponsors (of any category) *already* share a "warm, enduring, and important" relationship with the child they seek to sponsor.[96]

Indeed, current ORR policy already requires sponsors to prove that they share a close relationship with the UC they wish to sponsor before ORR will make a decision in favor of release. Per § 2.2.4 of the ORR Policy Guide, Category 1 and Category 2 potential sponsors must prove the existence of a relevant biological, legal, or caregiver relationship with the UC they seek to sponsor.[97] And § 2.2.4 further provides that ORR will recommend the release of a UC to a Category 3 sponsor only when the potential sponsor can provide evidence either of a "pre-existing bona fide social relationship" between the sponsor and the UC.[98] In that sense, ORR's own policies ensure that, in practice, UCs are released only to sponsors with whom they already share an intimate relationship. And, as a result, the Court should have little difficulty in revising its holding in *Reno* and declaring that all UC-sponsor relationships are presumptively eligible for due process protection.[99]

As a final matter, it is worth noting that a self-styled "strict originalist" may point to the two-part framework outlined in *Washington v. Glucksberg* and posit that the right of UCs to associate with Category 3 sponsors is not worthy of due process protection because such a right is not "*deeply rooted* in this Nation's history and tradition."[100] That argument certainly has some teeth to it—at least at first blush.

On the one hand, the Court's holdings in *Meyer* and *Pierce* suggest that, 100 years ago, understandings of the family reached no further than married opposite-sex couples and their children.[101] And Justice Scalia, writing for the

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96. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

97. *ORR Policy Guide*, *supra* note 4.

98. *Id.*

99. I suggest that all sponsor-UC relationships should be *presumptively eligible for*, rather than absolutely entitled to, the same level of constitutional protection under due process. That is because the Court has shown a propensity to deviate from a model of absolute due process protection in cases such as *Lehr* (discussed above) where the individual relationship in question shows a notable lack of intimacy. *See* Lehr v. Robertson, 463 U.S. 248, 261–62 (1983).

100. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (emphasis added); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (applying the *Glucksberg* standard to find that the Constitution does not protect a fundamental right to abortion); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1126, 1181 (2023) ("The [*Dobbs*] Court employed a remarkably broad and polarizing history-and-tradition standard that calls into question the continuing legitimacy of a wide range of other constitutional rights.").

101. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

Reno majority, certainly credited the argument that, in that case, history and tradition were on the government's side. Scalia found that the "mere novelty" of the plaintiffs' claim that UCs have a right to associate with Category 3 sponsors was "reason enough to doubt that substantive due process sustains it."[102] And that was the case in part because such a right was "not so rooted in the traditions of our people as to be ranked as fundamental."[103]

On the other hand, this Section has outlined several major changes that have taken place in the American family—both within and without the law—since the 1970s. Indeed, the Court's own jurisprudence suggests that not all Justices view history and tradition through the same lens as Scalia. To borrow the language of Justice Powell, writing for the Court in *Moore*: "Ours is by no means a *tradition* limited to respect for the bonds uniting the members of the nuclear family."[104] Cases like *Moore* and *Obergefell* thus suggest, as outlined above, that the Constitution's due process protections long have been capacious enough to shield all sorts of interpersonal relationships—even those outside the traditional nuclear family—from state interference. As a result, when a UC asserts a fundamental right to associate with a Category 3 sponsor, it is no answer to say that such a right is not deeply rooted in the Nation's history and tradition.

Even if that were not the case, the *Obergefell* Court found the universal application of the *Glucksberg* formula to be "inconsistent"[105] with its own substantive due process jurisprudence, including landmark cases like *Loving*,[106] *Zablocki*,[107] and *Turner*.[108] As Justice Kennedy, writing for the *Obergefell* majority, explained: "If rights were defined by who exercised them in the past, then . . . new groups could not invoke rights once denied."[109] The *Obergefell* Court thus rejected the use of the *Glucksberg* formula in the context of same-sex marriage, noting that "rights come not from ancient

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102. Reno v. Flores, 507 U.S. 292, 303 (1993).

103. *Id.*

104. Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977) (emphasis added).

105. *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

106. Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding that state prohibitions on interracial marriage violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment).

107. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (holding that the fundamental right to marry was infringed by a law prohibiting fathers who were behind on their child-support payments from marrying).

108. Turner v. Safley, 482 U.S. 78, 95–96 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)) (holding that incarcerated persons have a fundamental right to marry unless such a right is "inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the prison system").

109. *Obergefell*, 576 U.S. at 671.

sources alone."[110] In a similar way, then, the fundamental right to UC-sponsor association arises not only from history and tradition, but also from "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[111]

I thus conclude that *Reno* should no longer be considered good law. Prior and subsequent decisions from the Court—as well as profound changes in the ways in which millions of Americans choose to order their family lives—caution against limiting the associational rights of UCs to Category 1 and Category 2 sponsors. The Court should instead embrace a more capacious understanding of the fundamental right to associate and thereby recognize the interests of all UCs in being released to their sponsors.

C. The Right to Freedom from Physical Restraint

In this subsection, I argue that the *Reno* Court further erred in holding that the right to freedom from physical restraint is "not at issue" when UCs are detained in "decent and humane" government custody that is not intended to punish the child.[112] Indeed, several members of the *Reno* Court seemingly shared this same view. Justice O'Connor wrote a concurring opinion, joined by Justice Souter, in which she stressed that keeping UCs in ORR custody implicates the UCs' "constitutionally protected interest in freedom from institutional confinement."[113] And Justices Stevens and Blackmun likewise argued in their dissent that "[t]he right at stake in this case is not the right of detained juveniles to be *released* to one particular custodian rather than another, but the right not to be *detained* in the first place."[114]

The Court's own precedents certainly support the notion that children have a fundamental right to be free from physical restraint. In *In re Gault*, the Court held that, when a child is subject to delinquency proceedings, the government must provide the child with various procedural due process protections before it may restrain the child's liberty.[115] Indeed, the Court found that it was of "no constitutional consequence" that, in that particular case, the child risked commitment to an "Industrial School" rather than a prison.[116] Because the

110. *Id.*
111. *See id.* at 671–72.
112. *See* Reno v. Flores, 507 U.S. 292, 302–03 (1993).
113. *Id.* at 315 (O'Connor, J., concurring).
114. *Id.* at 341 (Stevens, J., dissenting).
115. *In re* Gault, 387 U.S. 1, 33–34, 41, 55–58 (1967).
116. *Id.* at 27.

school was, in effect, "an institution of confinement," detaining the child in such a school was permissible only after due process had been satisfied.[117]

Similarly, in *Schall v. Martin*, the Court upheld a New York law that authorized pretrial detention of dangerous juveniles only after ensuring that the law complied with the Constitution's substantive and procedural due process requirements.[118] The Court explained that children have a liberty interest in "freedom from institutional restraints."[119] New York's policy, to be sure, permitted the government only to detain certain dangerous juveniles in "open facilit[ies] in the community . . . without locks, bars, or security officers where the child receive[d] schooling and counseling and ha[d] access to recreational facilities."[120] Even so, the Court held, if the government wished to detain a juvenile in such a "controlled environment," it could do so only if it satisfied the "'fundamental fairness' required by due process."[121]

Due process likewise protects UCs in ORR custody. Indeed, Justice O'Connor expounded this very notion in her concurrence in *Reno.* There, she explained that the placement of noncitizen children in institutional settings implicates due process even where "conditions are decent and humane and where the child has no less authority to make personal choices than she would have in a family setting."[122]

At first blush, such an assertion admittedly might "seem odd."[123] Few would argue, for instance, that an institutional setting in which a child is afforded a level of autonomy akin to that which she can enjoy in the home is as restrictive as the typical prison in which an adult is incarcerated in the United States.[124] But, as O'Connor explained in *Reno*, "in our society, children normally grow up in families, not in governmental institutions."[125]

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117. *Id.*

118. Schall v. Martin, 467 U.S. 253, 274 (1984) ("Given the legitimacy of the State's interest in preventive detention . . . the remaining question is whether the procedures afforded juveniles detained prior to fact-finding provide sufficient protection against erroneous and unnecessary deprivations of liberty.").

119. *Id.* at 265.

120. *Id.* at 271.

121. *Id.* at 263, 271.

122. Reno v. Flores, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring).

123. *Id.*

124. *See, e.g.*, Jamiles Lartey, *How 'Cruel and Not Unusual' Conditions Persist in Many Lockups*, MARSHALL PROJECT (Feb. 18, 2023), https://www.themarshallproject.org/2023/02/18/texas-arizona-alabama-rikers-prison-conditions [https://perma.cc/DK37-RM5H] ("From endemic violence and inescapable heat, to demeaning labor conditions and inedible food, many jails and prisons across the U.S. exist in a state of near-permanent crisis and inhumanity."); VERA INST. JUST., REIMAGINING PRISON 19 (2018) ("The prison experience in America today is harsh, restrictive, and dehumanizing.").

125. *Reno*, 507 U.S. at 318 (O'Connor, J., concurring).

In that sense, institutionalization is, for any child, "a decisive and unusual event" that must satisfy constitutional due process demands.[126] And that is partly the case because "[t]he consequences of an erroneous commitment decision are more tragic where children are involved."[127]

I endorse Justice O'Connor's reasoning and adopt the conclusion that "a child's constitutional '[f]reedom from bodily restraint' is no narrower than an adult's."[128] If that is the case, then one way of identifying the limit beyond which the continued detention of a noncitizen *child* becomes presumptively unconstitutional as a violation of due process is to first determine the limit beyond which the continued detention of a noncitizen *adult* becomes presumptively unconstitutional. To probe that limit, it is best to start with *Zadvydas v. Davis*.[129]

D. Zadvydas v. Davis

In *Zadvydas*, a landmark decision from 2001, the Court considered the constitutionality of detaining noncitizen adults with final orders of removal.[130] In this subsection, I argue that *Zadvydas* likewise has important implications for the government's ability to detain noncitizen children. To that end, I first review the *Zadvydas* opinion in detail. I then argue that the canon of constitutional avoidance, which was key to the Court's interpretation of the post-removal detention statute at issue in *Zadvydas*, is ill-suited to probing the constitutionality of the TVPRA, which governs federal custody of UCs. Lastly, I demonstrate how *Zadvydas* nonetheless remains useful for understanding why a reading of the TVPRA that permits prolonged detention of UCs would fail to pass constitutional muster.

When reading this subsection, it is important to bear in mind that *Zadvydas* dealt exclusively with the right to freedom from physical restraint—not the right to intimate association.[131] However, I contend that, if the continued detention of UCs presumptively infringes the due process right to freedom

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126. *Id.* One might query whether institutionalization of an adult individual is any less a "decisive and unusual" event for that individual. But that is a different question for a different day.

127. *Id.* (quoting Parham v. J.R., 442 U.S. 584, 627–28 (1979) (Brennan, J., concurring in part and dissenting in part)).

128. *Id.* at 316 (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

129. *See* 533 U.S. 678 (2001) (holding that the Immigration and Nationality Act does not permit the indefinite detention of noncitizens who have been ordered removed but whose removal is not reasonably foreseeable).

130. *Id.*

131. *See id.* at 690 (explaining the constitutionally protected interest in freedom from imprisonment, custody, detention, and physical restraint).

from physical restraint, then it also presumptively infringes the due process right to intimate association. After all, neither right is more important than the other, and both are implicated whenever the government maintains custody of UCs. In that sense, prolonged detention that violates one constitutional right necessarily violates the other.

It is also important to recognize from the outset that *Zadvydas* does not speak directly to the existence or extent of any due process limitations on the custody of children. That is the true for two reasons. First, *Zadvydas* considered the detention of adult noncitizens with final orders of removal, a population with different characteristics—and, as argued below, different constitutional rights—than children in ORR custody.[132] Second, *Zadvydas* did not address the constitutionality of noncitizen detention head-on; rather, the *Zadvydas* Court used the canon of constitutional avoidance to circumvent the need to reach a constitutional due process holding.[133] Nonetheless, as this subsection demonstrates, *Zadvydas* remains helpful for pinpointing precisely when the nature and duration of noncitizen detention—including the detention of UCs—give rise to "serious constitutional problem[s]."[134]

Kestutis Zadvydas was born in 1948 in a displaced-persons camp in Germany.[135] When Zadvydas was eight years old, he immigrated to the United States.[136] Years later, Zadvydas was convicted of possessing, with intent to distribute, cocaine.[137] He was ultimately taken into INS custody and, in 1994, he was ordered deported to Germany.[138] However, Germany would not agree to accept Zadvydas if he were deported from the United States.[139]

The section of the Immigration and Nationality Act ("INA") codified at 8 U.S.C. § 1231(a)(2) provided that, during the ninety-day "removal period" that followed the issuance of a final order of removal, a noncitizen with such an order was to be held in government custody.[140] Ordinarily, the ninety-day removal period was sufficient to secure the deportation of the noncitizen.[141] But in those instances when deportation could not be secured within the ninety-day window, § 1231(a)(6)—the "post-removal-period detention

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132. *See id.* (discussing the constitutional limits on immigration-related detention for adult noncitizens).

133. *See id.* at 699.

134. *See id.* at 690.

135. *Id.* at 684.

136. *Id.* at 684.

137. *Id.*

138. *Id.*

139. *Id.*

140. 8 U.S.C. § 1231(a)(1)–(2) (Supp. V 1994).

141. *Zadvydas*, 533 U.S. at 682.

statute"—permitted the government to continue to detain the noncitizen.[142] In Zadvydas's case, because no other nation would agree to accept him if he were removed from the United States, the INS continued to detain Zadvydas pursuant to § 1231(a)(6) long after the expiration of the ninety-day removal period.[143]

In September 1995, Zadvydas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 to challenge his ongoing detention.[144] In October 1997, the District Court for the Eastern District of Louisiana granted that writ and ordered that Zadvydas be released under supervision.[145] The district court explained that because the government never would succeed in removing Zadvydas from the United States, his indefinite detention in anticipation of removal would violate the Constitution.[146] But the Fifth Circuit reversed the district court's holding, concluding that Zadvydas's detention remained constitutional because deportation was not impossible, good-faith efforts to remove him from the United States continued, and Zadvydas's detention was subject to periodic review.[147]

At the Supreme Court, Justice Breyer, writing for the majority, explained that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[148] Thus, the Court invoked the canon of constitutional avoidance to place a reasonable limit on the duration of the post-removal-detention period.[149] The government, for its part, had argued that the ability to indefinitely detain a noncitizen was necessary for two reasons: reducing flight risk and preventing danger to the community.[150] But the Court found these arguments unpersuasive.

First, the Court determined that flight risk is "weak or nonexistent where removal seems a remote possibility at best."[151] Second, the Court explained that, while the need to protect the community does not diminish over time, previous decisions had "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."[152] And, in cases such as this where the preventive

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142. 8 U.S.C. § 1231(a)(6) (Supp. V 1994).
143. *Zadvydas*, 533 U.S. at 684.
144. *Id.* at 684–85.
145. *Id.* at 685.
146. *Id.*
147. *Id.*
148. *Id.* at 690.
149. *Id.* at 689.
150. *Id.* at 690.
151. *Id.*
152. *Id.* at 690–91.

detention was potentially permanent, the Court had further required "special circumstances . . . that help[ed] to create the danger."[153] But in Zadvydas's case, the only "special circumstance" present was Zadvydas's removal status itself, which bore no relation to his dangerousness.[154] Further, the only procedural protections available to Zadvydas were administrative proceedings that, by the government's own admission, were not subject to "significant later judicial review."[155] Thus, the Court concluded, any reading of the post-removal-detention statute that permitted indefinite custody indeed would raise a "serious constitutional problem."[156]

The Court further explained that it found insufficient evidence in the language and legislative history of the post-removal detention statute to support the claim that Congress had intended to grant the Attorney General the power to detain noncitizens indefinitely.[157] The Court acknowledged that, while constitutional avoidance is a "cardinal principle" of statutory interpretation, it must give way to indicia of clear congressional intent.[158] But the Court also reasoned that, in this case, "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."[159] Likewise, the Court found that there was "nothing in the history of these statutes that clearly demonstrate[d] a congressional intent to authorize indefinite, perhaps permanent, detention."[160] It was thus permissible for the Court to invoke constitutional avoidance to conclude that the post-removal-detention statute did not authorize continued confinement once removal was no longer reasonably foreseeable.[161]

Finally, the Court found that it was "practically necessary," in light of its statutory interpretation, to quantify a presumptively reasonable period of post-removal detention.[162] The Court accepted that there was an argument to be made for setting the limit at ninety days to match the duration of the current removal period.[163] But the Court explained that it doubted that Congress, in setting the duration of the removal period, had questioned the constitutionality of *any* detention beyond ninety days.[164] In contrast, the Court

153. *Id.* at 691.
154. *Id.* at 691–92.
155. *Id.* at 692.
156. *Id.*
157. *Id.* at 697–99.
158. *Id.* at 689 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
159. *Id.* at 697.
160. *Id.* at 699.
161. *Id.* at 699.
162. *Id.* at 701.
163. *Id.*
164. *Id.*

concluded, there *was* reason to believe that Congress had "previously doubted the constitutionality of detention for more than six months."[165] Thus, the Court ultimately held: if, after six months of confinement, a noncitizen could provide good reason to believe that there was no significant likelihood of their removal in the foreseeable future, the burden fell on the government to rebut that showing to justify continued detention.[166]

1. Analogizing to *Jennings v. Rodriguez*

In *Zadvydas*, the Court invoked the canon of constitutional avoidance to read into the post-removal-detention statute a presumptively reasonable limit on detention.[167] But nearly 20 years later, in *Jennings v. Rodriguez*, the Court, tasked with interpreting different provisions of the INA, found the canon of constitutional avoidance to be inapplicable.[168] In this Section, I argue that the canon of constitutional avoidance likewise is ill-suited to assessing the constitutionality of the TVPRA's UC-detention provisions.

One of the statutes at issue in *Jennings*, 8 U.S.C. § 1225(b), authorized the detention of certain noncitizens seeking admission to the United States.[169] Specifically, § 1225(b)(1) permitted the detention of noncitizens in asylum proceedings.[170] Section 1225(b)(2), in contrast, authorized the detention of noncitizens awaiting removal proceedings after an immigration officer had determined they were not "clearly and beyond a doubt entitled to be admitted" to the United States.[171]

A class of plaintiffs brought suit in the District Court for the Central District of California, arguing that § 1225(b) did not authorize "prolonged detention in the absence of an individualized bond hearing."[172] Indeed, the plaintiffs contended, without such a bond hearing, § 1225(b) violated the Due Process Clause of the Fifth Amendment.[173] The District Court, agreeing with the plaintiffs, entered a permanent injunction against the enforcement of § 1225(b).[174] The Court of Appeals for the Ninth Circuit, "[r]elying heavily on

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165. *Id.*
166. *Id.*
167. *Id.* at 699.
168. Jennings v. Rodriguez, 583 U.S. 281, 300–01 (2018).
169. *Id.* at 287.
170. *Id.*
171. *Id.* at 288.
172. *Id.* at 282 (internal quotation omitted).
173. *Id.* at 291.
174. *Id.* at 291.

the canon of constitutional avoidance," affirmed.[175] In particular, the Ninth Circuit construed § 1225(b) "as imposing an implicit 6-month time limit" on the detention of a noncitizen under § 1225(b).[176]

At the Supreme Court, Justice Alito, writing for the Court, explained that the Ninth Circuit had erred in using constitutional avoidance to "rewrite a statute as it please[d]."[177] The Court found that "[n]othing in the text of § 1225(b)(1) or § 1225(b)(2) even hint[ed] that those provisions restrict[ed] detention after six months."[178] Thus, the Court refused to read a "six-month reasonableness limitation" into § 1225(b) because, as the Court explained, "[t]hat is not how the canon of constitutional avoidance works."[179] Justice Alito cautioned that constitutional avoidance merely "permits a court to choose between competing *plausible* interpretations of a statutory text."[180] Thus, to be successful, the plaintiffs in *Jennings* were required to show that § 1225(b) could "plausibly be read to contain an implicit 6-month limit."[181] And that, the Court held, the plaintiffs could not do.[182]

The *Jennings* Court found that "a series of textual signals" distinguished § 1226(c) from 8 U.S.C. § 1231(a)(6), the statute at issue in *Zadvydas*.[183] In particular, the Court explained, because the language of § 1231(a)(6)—that noncitizens "*may* be detained" without reference to "any explicit statutory limit" on the duration of that detention—was ambiguous, it was permissible for the *Zadvydas* Court to read into the statute a reasonable period of post-removal detention to avoid constitutional defect.[184] In contrast, the language of § 1225(b)—that noncitizens "*shall* be detained" while they await further proceedings—"preclude[d] a court from finding ambiguity [in § 1225(b)] in the way that *Zadvydas* found ambiguity in § 1231(a)(6)."[185] Thus, the *Jennings* Court held, "neither provision [of § 1226(b) could] reasonably be read to limit detention to six months," meaning the canon of constitutional avoidance was a nonstarter.[186]

In the context of UC custody, the TVPRA provides in pertinent part that, while UCs "shall be promptly placed in the least restrictive setting that is in

175. *Id.* at 291–92.
176. *Id.* at 292.
177. *Id.* at 298.
178. *Id.*
179. *Id.*
180. *Id.* at 298. (citation omitted).
181. *Id.*
182. *Id.*
183. *Id.* at 300.
184. *Id.* at 283 (emphasis added).
185. *Id.* at 300 (emphasis added).
186. *Id.* at 301.

the best interest of the child," UCs "*may not* be placed with a person or entity [absent] a determination that the proposed custodian is capable of providing for the child's physical and mental well-being."[187] In that sense, the language of the TVPRA is unambiguous: UCs *shall* be held in government custody unless and until they safely can be placed in a less restrictive setting.[188] Or, put another way, the TVPRA is analogous to the statute at issue in *Jennings* and distinguishable from the statute at issue in *Zadvydas* because the TVPRA cannot "plausibly be read to contain an implicit" limit on the duration of UC detention.[189] Thus, because the canon of constitutional avoidance must give way to indicia of clear congressional intent, it can do nothing to cure any constitutional infirmity that is found in the TVPRA's UC-detention provisions.[190]

2. Distinguishing *Demore v. Kim*

Demore, a case concerning pre-removal detention decided just two years after *Zadvydas*, is helpful for understanding the due process limitations on noncitizen detention when, as for the TVPRA, constitutional avoidance is not in play.[191] However, as this Section demonstrates, UC custody ultimately is more analogous to the post-removal detention at issue in *Zadvydas* than to the pre-removal detention at issue in *Demore*. And, in that sense, any reading of the TVPRA that would permit indefinite detention of UCs "would raise a serious constitutional problem."[192]

Hyung Joon Kim was a Korean national who had been a Lawful Permanent Resident ("LPR") of the United States since 1986.[193] In July 1996, Kim was convicted of first-degree burglary in California.[194] Then, in April 1997, he was convicted of a second crime, namely, "petty theft with priors."[195] The INS determined that Kim was deportable from the United States and detained him pending a removal hearing pursuant to 8 U.S.C. § 1226(c).[196]

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187. 8 U.S.C. §§ 1232(c)(2)(A), 1232(c)(3)(A) (emphasis added).

188. 8 U.S.C. § 1232(c)(2)(A).

189. *See Jennings*, 583 U.S. at 298.

190. *See* Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

191. *See* Demore v. Kim, 538 U.S. 510 (2003) (sustaining brief mandatory detention of certain noncitizens during removal proceedings as consistent with due process).

192. *See Zadvydas*, 533 U.S. at 690.

193. *Demore*, 538 U.S. at 513.

194. *Id.*

195. *Id.*

196. *Id.*

Kim brought a habeas corpus action in the District Court for the Northern District of California under 28 U.S.C. § 2241.[197] Kim challenged the constitutionality of § 1226(c) itself, arguing that his detention violated due process because the INS had failed to determine that Kim posed a flight risk or that he was dangerous.[198] The district court agreed that the detention of noncitizens who had committed certain crimes, as mandated by § 1226(c), was unconstitutional.[199]

The Court of Appeals for the Ninth Circuit affirmed, holding that Kim's detention—which had lasted six months by the time the district court granted habeas relief—violated his due process rights as an LPR.[200] In reaching its conclusion, the Ninth Circuit analogized to *Zadvydas*, finding that "the INS had not provided a justification for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest."[201] The Third, Fourth, and Tenth Circuits had reached the same conclusion in similar cases; the Seventh Circuit, in contrast, had rejected a constitutional challenge to § 1226(c).[202] The Supreme Court granted certiorari to resolve the split.[203]

Chief Justice Rehnquist, writing for the majority, acknowledged that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[204] But Rehnquist rejected Kim's reliance on *Zadvydas* by distinguishing Zadvydas's detention and Kim's detention in two ways.[205] First, in *Zadvydas*, the fact that deportation was not "practically attainable" meant that "detention no longer [bore] a reasonable relation to the purpose for which the individual was committed."[206] Kim's detention under § 1226(c), in contrast, "necessarily serve[d] the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings."[207] Second, while the period of detention at issue in *Zadvydas* was "indefinite and potentially permanent," in Kim's case, the detention was "of a much shorter duration."[208] For these reasons, Rehnquist found that

197. *Id.* at 514.
198. *Id.*
199. *Id.* at 514.
200. *Id.* at 515, 530–31.
201. *Id.* at 515.
202. *Id.* at 516.
203. *Id.*
204. *Id.* at 523 (citation omitted).
205. *Id.* at 527.
206. *Id.*
207. *Id.* at 528.
208. *Id.* (citation omitted).

Kim's detention under § 1226(c), unlike Zadvydas's detention under § 1231(a)(6), did not violate the Due Process Clause.[209]

I contend that ORR custody of UCs is more analogous to the post-removal detention in *Zadvydas* than to the pre-removal detention in *Demore* in two ways. First, with respect to ORR's sponsor-vetting procedures, the uncertainty of a successful outcome and the variability in the speed of review risk prolonged custody of UCs that lacks any "reasonable relation" to diligent sponsor vetting.[210] The *Demore* Court, to be sure, explained that a determination of removability was "the obvious termination point" to pre-removal detention under § 1226(c).[211] And, similarly, the completion of ORR's sponsor review provides an obvious endpoint to the sponsorship application process.[212] But a decision *against* release of a UC to a sponsor means that the UC remains in ORR custody.[213] And, in that sense, ORR custody that in general ends only when there has been a favorable release decision is akin to the post-removal detention at issue in *Zadvydas* (which ended only when another nation agreed to accept the deportee)[214] and distinguishable from the pre-removal detention at issue in *Demore* (which typically ended with the determination of removability, regardless of the outcome).[215]

Second, even if the time during which UCs are held in ORR custody generally is shorter than the time adult noncitizens like Kim spend in pre-removal detention, the detention of minors runs afoul of the Constitution more quickly than it does for adults.[216] The *Demore* Court was satisfied that the time spent by the majority of adult noncitizens in pre-removal detention (a median of thirty days for the 85% of noncitizens who did not appeal their removability) was sufficiently short to avoid constitutional infirmity.[217] The NYT data, in turn, reveal that the median time spent by all UCs entering ORR

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209. *Id.* at 531.

210. *See id.* at 527.

211. *See id.* at 529 (citation omitted).

212. *See ORR Policy Guide*, *supra* note 4 (explaining, in § 2.3, the release decision-making process).

213. *See id*.

214. *See* Zadvydas v. Davis, 533 U.S. 678, 684 (2001).

215. *See Demore*, 538 U.S. at 529 (explaining that only 15% of removability determinations are appealed).

216. *See Demore*, 538 U.S. at 512.

217. *Id.* The government later admitted that it made "serious errors" in the data analysis that it provided to the Court in this case. Letter from Ian Heath Gershengorn, Acting Solic. Gen., to Scott S. Harris, Clerk, Sup. Ct. U.S. (Aug. 26, 2016), https://www.justsecurity.org/wp-content/uploads/2018/05/SG_Letter-Demore.pdf [https://perma.cc/55QA-RE3B]. However, the Court's holdings based on the cited—albeit incorrect—data remain relevant.

custody in the 2015–2022 period was twenty-five days.[218] At first blush, then, it might be tempting to infer that, if UC detention in general ends *within* what the *Demore* Court found to be a constitutionally acceptable period during which to detain an adult facing removal, then UC detention in general must be constitutional, too. But such a conclusion rests on the assumption that the Constitution makes no distinction between the detention of adults and children. I explain, in the following subsection, why that assumption is incorrect.

E. Durational Limits on the Constitutionality of UC Custody

In *Zadvydas*, Justice Breyer, writing for the Court, declared: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause of the Fifth Amendment.[219] And, in *Reno*, Justice O'Connor, writing in concurrence, found that "a child's constitutional [f]reedom from bodily restraint is no narrower than an adult's."[220] I endorse Justice O'Connor's conclusion for the reasons outlined in Section II.C.

Mapping O'Connor's proposition onto *Zadvydas* suggests that restraining children's liberty by keeping them in government custody, just like restraining adults' liberty by holding them in removal detention, may become presumptively unconstitutional after a certain period of time.[221] It follows that, if a child's due process right to be free from bodily restraint is *no narrower* than an adult's, it is possible that a presumption of unconstitutionality does not arise until six months after the child is taken into custody.[222] But Justice O'Connor's assessment of children's and adults' rights does not, of course, foreclose the possibility that children's constitutional freedom from bodily restraint is *broader* than that of adults. And, if that is

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218. *See supra* Section I.B.

219. *Zadvydas*, 533 U.S. at 690.

220. Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) (internal quotations omitted).

221. *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

222. *See id.* at 701 ("After [a] 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing."); *Reno*, 507 U.S. at 316 (O'Connor, J., concurring) ("[A] child's constitutional freedom from bodily restraint is no narrower than an adult's.") (internal quotations omitted). The fact that the doctrine of constitutional avoidance allowed the *Zadvydas* Court to read a six-month presumptively reasonable limit into 8 U.S.C. § 1231(a)(6) implies that the detention of adults under § 1231(a)(6) prior to the six-month limit is not presumptively unconstitutional.

the case, then the presumption of unconstitutionality with respect to the detention of minors could begin *before* six months have lapsed.[223]

Precedent certainly supports the notion that the Constitution is protective of children's liberty interests. In *Bellotti v. Baird*, a 1979 decision in which the Court overturned a Massachusetts law that curtailed a minor's ability to procure an abortion, a plurality of the Court explained that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[224] Indeed, under *Bellotti*, children's rights and adults' rights are "virtually coextensive" with respect to many state-sanctioned deprivations of liberty.[225]

Yet, Justice Powell, writing for the *Bellotti* plurality, cautioned that the constitutional rights of children are not always commensurate in scope with the rights of adults.[226] Powell outlined three reasons why the rights of minors may be characterized differently than—though not necessarily inferior to—those of adults: children's vulnerability, children's immaturity, and the importance of parental control.[227] The Court subsequently has found that these factors have implications for government custody of children.

In *McKeiver v. Pennsylvania*, for instance, the Court held that children in delinquency adjudications are not constitutionally entitled to trial by jury.[228] The most natural reading of *McKeiver* thus suggests that children's rights may be curtailed in ways that would be unconstitutional for an adult. After all, *McKeiver* on its face permits the government to deny to a juvenile defendant the right to have their case decided by a jury of their peers—a type of state action that undeniably would be a violation of an adult defendant's Sixth Amendment rights.[229] But a closer inspection of *McKeiver* reveals that the justification for the existence of a separate and distinct juvenile court system arises from the need for "concern, . . . sympathy, and . . . paternal attention" in dealing with child offenders.[230] To otherwise ignore that need and equate the rights of child and adult defendants would, in the Court's view, "remake the juvenile proceeding into a fully adversary process," a far cry

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223. Again, I argue that this proposition applies equally to the fundamental right of all UCs to associate with their sponsors.

224. Bellotti v. Baird, 443 U.S. 622, 633 (1979).

225. *Id.* at 634.

226. *Id.*

227. *Id.*

228. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

229. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

230. *McKeiver*, 403 U.S. at 550.

from the type of "intimate, informal protective proceeding" that ought to characterize juvenile adjudications.[231]

The same need for "concern" and "sympathy" that supports the existence of separate adult and juvenile court systems also justifies the use of different judicial-review standards with respect to the detention of adult and juvenile noncitizens in immigration-related custody.[232] Indeed, as Justice O'Connor, writing in her concurrence in *Reno*, explained: judicial review of government custody of unaccompanied children "ensures that government acts in this sensitive area with the requisite care."[233] And cases like *McKeiver* establish that the government, by acting with the requisite care, may choose to prioritize protecting children's interests over insisting on the identical treatment of children and adults. Thus, in much the same way as the Constitution permits the government to adopt different legal systems for delinquency adjudications, it likewise permits judicial oversight of government custody of children at some time before six months have lapsed.[234] The question then, of course, is: *when*?

To answer that question, I propose a novel, data-informed approach for establishing the time beyond which keeping a UC in ORR custody becomes presumptively unconstitutional as a violation of due process. The upshot of setting such a limit is that, if the government wishes to avoid time-consuming and costly litigation, it cannot make release to sponsors more burdensome for UCs (for example, by introducing more stringent vetting procedures for sponsors) without simultaneously increasing the resources it allocates to processing release requests such that the time spent by UCs in ORR custody remains below the presumptively reasonable limit.

In *Zadvydas*, the Court looked to the legislative history of the INA's post-removal-detention provision to determine the presumptive limit to a reasonable duration of post-removal detention.[235] As noted above, the *Zadvydas* majority was skeptical that, "when Congress shortened the removal period to ninety days in 1996, it believed that all reasonably foreseeable removals could be accomplished in that time."[236] But the Court, by examining the legislative history of the INA, did find "reason to believe . . . that Congress previously doubted the constitutionality of detention for more than six months."[237]

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231. *Id.* at 545.
232. *See id.* at 550.
233. Reno v. Flores, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring).
234. *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979).
235. Zadvydas v. Davis, 533 U.S. 678, 701 (2001).
236. *Id.*
237. *Id.*

I adopt a similar approach that, while not based in constitutional avoidance, looks to the TVPRA, current ORR policy, and the NYT data to help determine the limit to a presumptively reasonable duration of UC custody.[238] I initially consider two potential limits—thirty days and ninety days—which find support in the TVPRA, current ORR policy, or both. By comparing the thirty-day and ninety-day proposals to the mean time spent by UCs in ORR custody between 2015 and 2022, I conclude that a sixty-day limit best balances UCs' "liberty interests and the well-documented deleterious effects of prolonged detention on minors against ORR's interest in conducting thorough investigations of potential sponsors."[239]

Before probing the constitutional limit on UC detention, it is helpful to first specify the remedy available to plaintiffs whose time in ORR custody exceeds any presumptively reasonable limit. That is because the nature of the remedy that accompanies a successful claim of unconstitutionally prolonged detention may inform the point in time at which it becomes prudent to make such a remedy available.[240] To determine the appropriate remedy, I recommend looking again to *Zadvydas*. There, the Court explained that an adult with a final order of removal who had been detained for more than six months could file a writ of habeas corpus under 28 U.S.C. § 2241 to challenge their ongoing detention.[241] And, once the detainee provided good reason to believe that there was no significant likelihood of their removal in the foreseeable future, the burden fell on the government to rebut that showing.[242] If the government ultimately failed in that endeavor, the detainee was to be ordered released.[243]

I suggest that, by analogy, when a suitable sponsor has submitted a completed FRA and the UC's time in ORR custody has surpassed a presumptively reasonable limit, the UC must be permitted to file a writ of

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238. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (explaining, in the Fourth Amendment context, that, while the Court "hesitate[s] to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds").

239. *See* Lucas R. v. Becerra, No. CV 18-5741-DMG (PLAx), 2022 WL 2177454, at *27 (C.D. Cal. Mar. 11, 2022).

240. *See, e.g.*, *Zadvydas*, 533 U.S. at 700–01 ("In order to limit the occasions when courts will need to make [difficult judgments], we think it practically necessary to recognize some presumptively reasonable period of detention."); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (emphasizing the need for "[e]ffective administration" of the courts in crafting a rule that required a jury trial in all criminal cases in which a sentence of six months or more was imposed).

241. *Zadvydas*, 533 U.S. at 699–700.

242. *Id.* at 701.

243. *Id.* at 699–700.

habeas corpus under 28 U.S.C. § 2241.[244] Importantly, within the framework provided herein, the completed-FRA requirement is necessary to trigger the UC's eligibility to challenge their continued detention in federal court. After all, it would make little sense to demand release of a UC when *no* suitable sponsor had yet applied for custody. And, just as for their adult counterparts, the burden rests on the UC to first demonstrate that delays on the part of the government mean there is no significant likelihood of the UC being released from ORR custody in the foreseeable future.[245] But, once the UC does so, the burden shifts to the government to rebut the UC's showing.[246] And, if the government is unable to satisfy its burden, the UC must be released to a suitable sponsor.[247]

I further posit that the presumptively reasonable limit must be measured from the date of entry by the UC into government custody. Advocating such an approach necessarily involves dismissing the alternative: starting the clock only when the potential sponsor has submitted a completed FRA.[248] Indeed, this second approach is not entirely without merit. For one thing, it would avoid the significant disadvantage to the government that accompanies tethering the maximum reasonable duration of UC custody to the UC's entry date when, for at least some of the resultant time period, the sponsor—rather

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244. *See* 28 U.S.C. § 2241(c)(3) (granting federal courts the authority to determine whether detention is "in violation of the Constitution or laws or treaties of the United States"). The government also could choose to create a process for administrative review of UC detention exceeding sixty days (or some shorter duration threshold) to mitigate the risk of litigation. Such a process likely would be analogous to Post-Order Custody Reviews (POCRs) for adult noncitizens with final orders of removal (like Zadvydas). *See generally* DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., OIG-07-28, ICE'S COMPLIANCE WITH DETENTION LIMITS FOR ALIENS WITH A FINAL ORDER OF REMOVAL FROM THE UNITED STATES (2007) (describing detention procedures for adult noncitizens with a final order of removal). But such a process may not supplant the right of a UC in prolonged detention to file a writ of habeas corpus.

245. The government is, of course, prohibited from releasing a UC to a sponsor who is deemed unsuitable. *See* 8 U.S.C. § 1232(c)(3)(A). Thus, a UC seeking to challenge prolonged detention in ORR custody must demonstrate either (1) that a *suitable* sponsor has submitted a completed FRA, but a release decision has not yet been reached; or (2) that the UC's prolonged detention in ORR custody is the result of an *improper* decision against release.

246. *See Zadvydas*, 533 U.S. at 701. When government action infringes one or more fundamental rights, the government typically must satisfy strict scrutiny to overcome the presumption of unconstitutionality. *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997); Reno v. Flores, 507 U.S. 292, 301–02 (1993).

247. *See id.* at 699–700 (holding that when the government cannot show that release is reasonably foreseeable, detention is no longer authorized, and release may and should be conditioned on appropriate supervision upon release).

248. *See ORR Policy Guide*, *supra* note 4, § 2.2.3 (detailing the components of a Family Reunification Packet).

than the government—is the only party capable of advancing the UC's release.

On balance, however, I propose a UC-entry-date starting point for three reasons. First, starting the clock on the UC's entry date incentivizes the government to identify and locate suitable sponsors as soon as possible. Not only will this early identification of sponsors benefit UCs by hastening their reunification with sponsors, but it will also help the government comply with any presumptive limit on reasonable detention. Second, existing ORR policy already provides that FRPs (which contain blank FRAs) are sent to potential sponsors within twenty-four hours of their identification.[249] In that sense, a diligent potential sponsor is unlikely to delay UC release by failing to timely submit a completed FRA. Third, and most importantly, in those cases where the potential sponsor does create an unreasonable delay in providing a completed FRA, the habeas court could factor the sponsor's tardiness into its determination of whether the UC's release is likely to occur in the foreseeable future. In that way, the habeas court fairly could deny immediate release of a UC whose custody is likely to end in the foreseeable future given that the government recently has received a completed FRA.

1. Option 1: Thirty-Day Limit

In this Section, I consider the merits and drawbacks of establishing a thirty-day limit on the presumptively reasonable detention of UCs in ORR custody. I ultimately conclude that a thirty-day limit is an unrealistically strict constitutional limit to impose because it fails to give adequate consideration to the government's interest in vetting potential sponsors and it risks overwhelming federal habeas courts tasked with reviewing UCs' challenges to ongoing detention.

In a 2022 decision, *Lucas R. v. Becerra*, the District Court for the Central District of California granted in part the plaintiffs' Motion for Partial Summary Judgment in a class-action suit brought by a group of UCs in ORR custody.[250] The UC plaintiffs alleged, among other claims, that certain ORR policies relating to the detention of UCs violated the FSA, the TVPRA, and the Due Process Clause of the Fifth Amendment.[251]

One of the classes certified in *Lucas R.* comprised all minors who had spent (or would spend) longer than thirty days in ORR custody on the basis

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249. *Id.*

250. Lucas R. v. Becerra, No. CV 18-5741-DMG (PLAx), 2022 WL 2177454, at *28 (C.D. Cal. Mar. 11, 2022).

251. *Id.* at *1.

that ORR determined their sponsor to be unfit.[252] The court acknowledged that at least some UCs in the ORR population possessed liberty interests that were implicated by detention exceeding thirty days. For example, the court noted that UCs placed in restrictive facilities had a liberty interest in being "free from unnecessary physical restraint and confinement."[253] Likewise, the court found, UCs with close-relative sponsors had an associational interest in family unity.[254]

The court thus held that ORR infringed at least those UCs' liberty interests by permitting—if not always causing—"significant" and "unexplained" delays in responding to family unification requests.[255] But the court also stressed that, if it were to set a new mandatory review period for *all* UCs, it would need to "balance Class Members' liberty interests and the well-documented deleterious effects of prolonged detention on minors against ORR's interest in conducting thorough investigations of potential sponsors."[256] Here, too, the appropriate constitutional limit on the reasonable duration of UC detention ought to carefully balance the liberty interests of UCs against the government's interests in vetting potential sponsors.

As outlined in § 1.4.2 of the ORR Policy Guide, ORR is charged with determining the initial placement of UCs with a juvenile or criminal background, violent offenses, serious behavioral concerns, or potential for escape.[257] In some cases, UCs in this category will be assigned a "restrictive placement," which often involves detention in a secure facility or an RTC.[258] In all cases, however, § 1.4.2 of the ORR Policy Guide stipulates that ORR may only assign UCs to a restrictive placement "if clear and convincing evidence supports the placement."[259]

The TVPRA provides in part that "[t]he placement of a child in a secure facility shall be reviewed, *at a minimum, on a monthly basis* . . . to determine if such placement remains warranted."[260] And ORR's Policy Guide mirrors this statutory mandate. Per § 1.4.2 of the ORR Policy Guide, ORR must review placements in secure facilities at minimum every thirty days.[261] In fact, the ORR Policy Guide provides that the government may even choose to

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252. *Id.* at *2.
253. *Id.* at *14–15.
254. *Id.*
255. *Id.* at *27–28.
256. *Lucas R.*, 2022 WL 2177454, at *27.
257. *ORR Policy Guide*, *supra* note 4, § 1.4.2.
258. *Id.*
259. *Id.*
260. 8 U.S.C. § 1232(c)(2)(A) (emphasis added).
261. *ORR Policy Guide*, *supra* note 4, § 1.4.2.

review the placement *before* thirty days, "particularly if new information indicates an alternative placement is more appropriate."[262] In these ways, the TVPRA—and the ORR policies that help enforce it—could be read to suggest that Congress questioned the constitutionality of placing children in secure facilities for more than thirty days.

But recall that the *Zadvydas* Court "doubt[ed] that when Congress shortened the removal period [for adults with final orders of removal] . . . it believed that *all* reasonably foreseeable removals could be accomplished in that time."[263] Here, too, there are reasons to doubt that Congress, in enacting the thirty-day review period for secure placements, reasonably believed that ORR could release *all* UCs to sponsors within thirty days of detainment.

First, the thirty-day limit referenced in the TVPRA applies only to UCs in restrictive facilities, some of which are "jail-like, with a secure perimeter, major restraining construction inside the facility, and procedures typically associated with correctional facilities."[264] As a result, it is likely that Congress felt a sense of urgency in enacting oversight of the detention of children in restrictive facilities that it did not associate with UCs in nonrestrictive facilities.

Second, and relatedly, only a very small proportion of minors in ORR custody are assigned to restrictive placements.[265] In *Lucas R.*, for example, the district court noted that, as of March 13, 2020, only 2.0% of the total ORR population was in secure or medium-secure facilities.[266] Assuming that the proportion of UCs in restrictive placements is relatively constant over time, it is doubtful that Congress intended a thirty-day limit linked explicitly to only a small proportion of UCs to extend to the entire population.[267]

Third, according to both the TVPRA and the ORR Policy Guide, UCs who spend longer than thirty days in a restrictive facility are entitled only to *review* of their cases—not outright release to a sponsor.[268] It is entirely possible, for

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262. *Id.*

263. Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (emphasis added).

264. *See* Lucas R. v. Becerra, No. CV 18-5741-DMG (PLAx), 2022 WL 2177454, at *5 (C.D. Cal. Mar. 11, 2022) (internal quotation marks omitted).

265. *Id.* at *6.

266. *Id.*

267. By way of rough comparison: to date, in fiscal year 2025, no tender-age (0-12 years) children have been detained in a residential-treatment, staff-secure, secure, or therapeutic staff-secure center. *See Unaccompanied Children Information*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 12, 2025), https://www.hhs.gov/programs/social-services/unaccompanied-children/index.html [https://perma.cc/HPD8-AXBU].

268. 8 U.S.C. § 1232(c)(2)(A) ("The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis . . . to determine if such placement remains

example, that, following the thirty-day review, a UC merely could be "stepped-down" to continued detainment in a nonsecure facility which, though less restrictive than its secure counterparts, is still very much a form of government custody.[269] In that sense, there is reason to doubt that Congress questioned the constitutionality of maintaining UCs in government custody—even less restrictive government custody—beyond thirty days.

It is also worth considering the practical realities of setting a thirty-day limit. The NYT data reveal that only 58.9% of all UCs who entered ORR care (in any facility—restrictive or otherwise) between January 1, 2015 and December 31, 2022 spent thirty days or less in government custody. That, of course, also means that 41.1% of UCs spent thirty-one days or more in ORR custody. Put differently, if a thirty-day reasonable limit on the duration of ORR custody had been in place between January 1, 2015 and December 31, 2022, more than 212,000 UCs would have been able to claim that their time in ORR custody was presumptively unconstitutional. Broken down by year, the data are as follows:

Table 3. Number of UCs in ORR Custody for 30 Days or Less

Calendar Year	*N* (total)	Percent (30 days or less)	*N* (30 days or less)
2015	42,140	61.6	25,958
2016	61,286	51.4	31,501
2017	26,130	42.8	11,184
2018	45,285	15.4	6,974
2019	59,567	51.3	30,558
2020	14,273	57.1	8,150
2021	144,965	65.3	94,662
2022	123,850	76.9	95,241

The data thus reveal that imposing a thirty-day limit on UC custody likely would render an enormous number of UCs—more than 28,000 in 2022 alone—presumptively eligible for release. And while it would perhaps be improper to use the logistical fallout of a thirty-day limit as the sole basis for

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warranted."); *ORR Policy Guide*, *supra* note 4, § 1.4.2 (explaining that once a UC is placed in a restrictive facility, ORR must review the placement at minimum every thirty days).

269. *See Lucas R.*, 2022 WL 2177454, at *4; *see also* Reno v. Flores, 507 U.S. 292, 317–18 (1993) (O'Connor, J., concurring) ("A child's placement in [an open facility] is hardly the same as handcuffing her, or confining her to a cell, yet it must still satisfy heightened constitutional scrutiny.").

disregarding the constitutional suitability of that limit, it is appropriate to consider it as a factor. Indeed, the *Zadvydas* Court, in setting the six-month presumption for adult detainees with final orders of removal, explained that it was doing so "to limit the occasions" when courts would need to make difficult judgments calls.[270] In the case of UCs, a thirty-day limit would mean that the detention of more than 40% of the UC population in ORR custody between 2015 and 2022 presumptively violated the Constitution. And, if that standard were to be imposed in the near future, it likely would risk overwhelming the courts with the number of lawsuits that would result.[271]

Moreover, the imposition of an especially short time limit on the government's sponsor-vetting procedures surely would undervalue the government's interest in comprehensively screening the guardians to which it will release vulnerable minors. Few would contest the notion that the government should transfer custody of a UC only after "ORR has determined that it is safe to do so."[272] And, while not dispositive, the fact that close to a majority of UCs likely would surpass a thirty-day constitutional limit on detention under ORR's current sponsor-vetting procedures suggests that enforcing such a limit would risk jeopardizing the rigor of ORR's review.[273] For this reason, as well as those outlined above, I conclude that a thirty-day limit is likely an intolerably strict constitutional standard to impose.

2. Option 2: Ninety-Day Limit

In this Section, I consider the appropriateness of imposing a ninety-day limit on the presumptively reasonable duration of ORR custody. I ultimately conclude that a ninety-day limit is not the correct constitutional standard because such a limit fails to give sufficient weight to UCs' interests in being free from government custody and in associating with their sponsors.

In *Lucas R.*, the district court ultimately imposed a "90-day review of all pending family reunification applications."[274] Specifically, the court required that the ORR case management team consult with supervisory staff about pending sponsor applications every ninety days "to determine what steps are

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270. Zadvydas v. Davis, 533 U.S. 678, 680 (2001).

271. This assumes that the number of UCs entering ORR custody remains high. This assumption seems well founded. *See CBP Encounters*, *supra* note 1.

272. *ORR Policy Guide*, *supra* note 4, § 2.5.3 (describing what happens if an adult household member refuses to cooperate with ORR's background-check requirements).

273. For a discussion of how ORR could expedite its sponsor-vetting procedures without curtailing their comprehensiveness, see *infra* Part II.F.

274. *See Lucas R.*, 2022 WL 2177454, at *28; *ORR Policy Guide*, *supra* note 4, § 2.5.3.

needed to accelerate [minors'] safe release."[275] The court offered a three-part rationale for setting the review period at ninety days. First, ninety-day limits have precedent in other ORR policies.[276] Second, imposing a relatively lenient time limit on the government's release policy would allow ORR "to maintain some flexibility over [a] complex process."[277] And, third, individual minors who experienced particularly egregious delays beyond ninety days would retain the ability to challenge their continued detention in federal habeas courts.[278]

With respect to the first of these rationales, the *Lucas R.* court relied, for example, on § 1.4.2 of the ORR Policy Guide, which requires that an ORR Federal Field Specialist ("FFS") consult with Supervisory ORR Staff regarding the custody of any UC who had resided in a secure facility or RTC for more than ninety days.[279] The court also cited § 2.5.3 of the ORR Policy Guide, which explains that public records and sex offender registry checks—both of which may be required as part of a potential sponsor's screening—expire ninety days after ORR receives the results.[280]

Yet, there are reasons to doubt that the sections of the ORR Policy Guide relied on by the *Lucas R.* court should inform the constitutional limit on the presumptively reasonable duration of UC detention. First, § 1.4.2 applies only to UCs in secure or RTC facilities rather than to the entire UC population.[281] Further, the ninety-day FFS-Supervisory Staff consultation prescribed by § 1.4.2 mandates nothing more than a review of the UC's case; it provides no guarantee of outright release to a sponsor.[282] And, in any case, the ninety-day FFS-Supervisory Staff consultation is intended to supplement—not replace—the thirty-day review already required under § 1.4.2.[283]

Likewise, § 2.5.3 of the Policy Guide, which describes in part the temporal validity of different sponsor background checks, is hardly an indication of the government's mindset with respect to the reasonableness of the duration of detention.[284] There is nothing in § 2.5.3 that indicates that the expiration of a background check triggers even a cursory review of the constitutionality of

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275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id. See also ORR Policy Guide*, *supra* note 4, § 1.4.2.
280. *Lucas R.*, 2022 WL 2177454, at *28. *See also ORR Policy Guide*, *supra* note 4, § 2.5.3.
281. *See ORR Policy Guide*, *supra* note 4, § 1.4.2.
282. *See id.*
283. *See id.*
284. *See ORR Policy Guide*, *supra* note 4, § 2.5.3.

the minor's continued detention.[285] It seemingly would be consistent with § 2.5.3, for instance, for a UC to remain in custody for an indefinite period after their proposed sponsor's background checks expire—so long as the sponsor completed renewed checks within the ninety days prior to the UC's eventual release date.[286] In that sense, it is doubtful that the two examples of ninety-day limits cited by the *Lucas R.* court can, for present purposes, provide any meaningful insight into the government's interpretation of the constitutional limits of UC detention.

Further, *Lucas R.*'s due process analysis suggests that, at least in this district court's view, the detention of some UCs beyond ninety days does not presumptively violate those UCs' fundamental liberty interests. First, the district court, when discussing *Reno*, explained that "the right of a [UC] to associate with a sponsor does not extend beyond the family."[287] Consequently, the court determined, UCs with Category 3 sponsors possess no constitutional interest in associating with their sponsors.[288] Second, the court found that UCs' interest in freedom from physical restraint, while "well-established and substantial when [they are] detained in medium-secure and secure facilities . . . is not implicated" for UCs in "non-secure shelters."[289]

Thus, the *Lucas R.* court concluded, "the interests of minors with Category 3 sponsors . . . who are not detained in medium-secure and secure facilities[] require little or no additional procedural protection" beyond that already provided by the government when it denies these UCs' release petitions.[290] And since, under current law, there is no presumptively reasonable limit on the amount of time UCs can spend in government custody, the *Lucas R.* court did not see the need to impose one. If anything, the court's decision to add nothing more than a ninety-day *review* for only *some* UCs (those with pending FRAs) could infer that the court saw no wide-reaching constitutional infirmity in the detention of UCs beyond ninety days.

Yet, *Lucas R.* rests in large part on *Reno*'s holding that UCs have no interest in being released from "decent and humane" government custody to Category 3 sponsors.[291] I have argued, in contrast, that *Reno* should be overturned.[292] As a result, it is unclear whether *Lucas R.* meaningfully can inform the presumptively reasonable limit on UC detention within a

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285. *See id.*
286. *See id.*
287. *Lucas R.*, 2022 WL 2177454, at *14.
288. *Id.*
289. *Id.* at *25.
290. *Id.*
291. *See id.* at *14, 23; Reno v. Flores, 507 U.S. 292, 303 (1993).
292. *See supra* Section II.B.

framework that incorporates the basic assumption that all ORR custody implicates UCs' fundamental rights.

In any event, there is also reason to doubt that a ninety-day limit correctly balances the government's interest in vetting potential sponsors against UCs' interest in being free of government custody. Such a limit likely would overvalue the government's oversight interest at the expense of UCs' liberty interest. Indeed, scholars and government agencies alike have expressed great concern over the deleterious effects of prolonged immigration-related detention on children's health and well-being. In one study published in 2019, a team led by Dr. Sarah MacLean assessed the mental health of children held with their mothers in ICE custody in mid-2018.[293] After interviewing 425 mothers over a two-month period, MacLean found that the detained children "showed higher rates of emotional and behavioral difficulties, as well as PTSD, compared to children in the general U.S. population."[294]

Around the same time, Dr. Martha von Werthern and co-workers conducted a systematic review of research into the mental-health consequences of detention for adult, adolescent, and child immigration detainees.[295] The team surveyed ten studies that reported on 629 children who had spent time in various types of immigration-related custody around the world, concluding that "profound and far-reaching mental health difficulties are found amongst detained children and young people."[296] In fact, in those studies that also included clinical assessments, "[a]ll children evidenced at least one psychiatric disorder, most frequently depression, anxiety, PTSD [or] somatization," as a result of their detention.[297]

Further, in September 2019, the Office of the Inspector General ("OIG") within HHS conducted a review into the mental-health challenges experienced by UCs in forty-five ORR-funded facilities across the United States.[298] OIG interviewed approximately 100 mental-health clinicians who had regular interactions with UCs, as well as medical coordinators, facility leadership, and field specialists.[299] OIG's review revealed that many mental-

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293. Sarah A. MacLean et al., *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI. & MED. 303, 304–08 (2019).

294. *Id.* at 305.

295. Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382 (2018).

296. *Id.* at 393, 396.

297. *Id.* at 394.

298. OFF. INSPECTOR GEN., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 5 (Sept. 3, 2019) [hereinafter OIG Review], https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf [https://perma.cc/BNU4-YBVP].

299. *Id.* at 6.

health clinicians harbored "concerns about feeling unprepared to handle the level of trauma that some children presented."[300] Moreover, several facilities reported that "children with longer stays experienced more stress, anxiety, and behavior issues."[301] Indeed, the facilities' staff explained, "longer stays resulted in higher levels of defiance, hopelessness, and frustration among children, along with more instances of self-harm and suicidal ideation."[302]

When the OIG report was prepared in 2019, the mean time spent by UCs in ORR custody was, according to the NYT data listed in Table 4 below, just 40.6 (40.2–40.9) days. In that sense, a stint of ninety or more days in government custody likely would fall within the range of "longer stays" referenced in the OIG report. Assuming that is the case, a ninety-day stay certainly could trigger the profoundly negative consequences observed by OIG in UCs experiencing prolonged detention. The severity of those consequences thus bolsters the UCs' interest in being free from government custody such that it outweighs the government's interest in securing even more time to vet potential sponsors—especially when the government has already had three months to do so.

Lastly, a ninety-day limit on the reasonable detention of UCs in government custody would not, in practical terms, be a very meaningful one. The NYT data show that 93.0% of all UCs who entered ORR custody (in any facility) between January 1, 2015, and December 31, 2022, spent ninety days or less in government custody. In contrast, only 7.0% of UCs spent ninety-one days or more in ORR custody—as few as 799 minors in 2020. Put another way, if a ninety-day reasonable limit on the duration of ORR custody had been instituted between January 1, 2015, and December 31, 2022, just over 36,000 UCs would have been able to claim that their time in ORR custody was presumptively unconstitutional. That population is almost six times lower than the total number of similarly situated UCs under a thirty-day limit. Year-on-year, the data are as follows:

Table 4. Number of UCs in ORR Custody for 90 Days or Less

Calendar Year	*N* (total)	Percent (90 days or less)	*N* (90 days or less)
2015	42,140	93.6	39,443
2016	61,286	92.1	56,444

300. *Id.* at 10.
301. *Id.* at 12.
302. *Id.*

2017	26,130	87.8	22,942
2018	45,285	74.2	33,601
2019	59,567	93.3	55,576
2020	14,273	94.4	13,474
2021	144,965	95.6	138,587
2022	123,850	97.6	120,878

The data thus suggest that, even if courts were to impose a ninety-day limit on the presumptive reasonableness of UC detention, such a limit likely would do nothing to protect the interests of the vast majority of UCs in government custody. As explained in the preceding Section, it would perhaps be improper to impose a particular constitutional limit on the reasonable duration of UC detention based solely on the practical outcomes of choosing that limit. But the fact that a ninety-day limit would fail to provide meaningful recourse for almost any UCs in ORR custody is evidence that such a limit fails to strike the correct balance between UCs' interests and the government's interests. For these reasons, I do not endorse the view that a ninety-day limit on reasonable detention of UCs is the correct constitutional one.

3. Option 3: Sixty-Day Limit

In this Section, I argue that the presumptively reasonable limit on the time spent by UCs in ORR custody should be set at sixty days. Such a limit best balances UCs' "liberty interests and the well-documented deleterious effects of prolonged detention on minors against ORR's interest in conducting thorough investigations of potential sponsors."[303]

There is, admittedly, little legislative support for imposing a sixty-day limit on the presumptively reasonable duration of UC detention. The TVPRA, for its part, contains no mention of a sixty-day limit in any context. But in *Lucas R.*, the district court referenced an ORR memo from December 2018, which stated that "best practice, where discharge presents no risk to the health or safety of the child, is discharge within thirty days of admission, and keeping a minor in ORR custody for no longer than sixty days."[304] To be sure, this December 2018 memo lacks the force of law.[305] But the language of the December 2018 memo likely is the strongest available indication of ORR's

303. *See* Lucas R. v. Becerra, No. CV185741DMGPLAX, 2022 WL 2177454, at *27 (C.D. Cal. Mar. 11, 2022).

304. *Id.* at *17.

305. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law.").

mindset with respect to the constitutionality of UC detention. Indeed, ORR hardly could have been clearer: stays of less than thirty days certainly are preferable, but those exceeding sixty days are to be avoided at all costs.[306]

Further, a sixty-day limit, unlike shorter—and longer—duration proposals, correctly balances the government's interest in vetting potential sponsors against UCs' interests in being free from ORR custody and associating with their sponsors. On the one hand, a sixty-day limit gives the government sufficient time to satisfy its interest in adequately vetting potential guardians. Indeed, the government's own language from the December 2018 memo suggests as much. If the government is willing to assert that best practice constitutes releasing the child from ORR custody within thirty—and, at the very least, within sixty—days, then the government must also be sure that it can adequately vet potential sponsors within that same timeframe.[307]

On the other hand, a sixty-day limit gives proper weight to UCs' liberty interest in freedom from restraint and association with their sponsors. As explained in the preceding Section, the deleterious effects of extended stays in immigration custody are well documented, including in the OIG's 2019 report on the detention of UCs in ORR custody. Perhaps most interestingly for present purposes, one mental-health clinician who participated in the OIG review explained that "even children who were outgoing and personable started getting more frustrated and concerned about their cases *around the 70th day in care*."[308] And while it is important not to overvalue the significance of the anecdotal comments of one mental-health clinician, it is nonetheless noteworthy that imposing a sixty-day limit would help undercut the type of deleterious effects that, in this clinician's firsthand experience, would set in shortly thereafter.

Lastly, the practical realities of a sixty-day limit are appealing. The NYT data reveal that 84.5% of all UCs who entered ORR custody (in any facility) between January 1, 2015, and December 31, 2022, spent sixty days or less in government custody. In contrast, 15.5% of UCs spent sixty-one days or more in ORR custody. Put another way, if a sixty-day reasonable limit on the

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306. Letter to Toby Biswas, Director of Policy, Unaccompanied Children Program, Nat'l Immigrant Just. Ctr. n.50 (Dec. 4, 2023) (citing J.E.C.M. v. Lloyd, 352 F. Supp. 3d 559, 573 (E.D. Va. 2018)), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2023-12/Comment%2011_%20High-Level.pdf?utm_source=chatgpt.com [https://perma.cc/A6TV-WYRL] ("The best practice in child welfare would be to discharge the UAC within 30 days of admission. In ordinary cases, ORR generally does not recommend keeping UAC in care for longer than 60 days.").

307. *See Lucas R.*, 2022 WL 2177454, at *17.

308. *See* OFF. INSPECTOR GEN., *supra* note 298, at 12 (emphasis added).

duration of ORR custody had been instituted between January 1, 2015, and December 31, 2022, just over 80,000 UCs would have been able to argue that their time in ORR custody was presumptively unconstitutional. That population is around 2.6 times lower than the total number of similarly situated UCs under a thirty-day limit, and around 2.2 times larger than the total number of similarly situated UCs under a ninety-day limit. Year-on-year, the data are as follows:

Table 5. Number of UCs in ORR Custody for 60 Days or Less

Calendar Year	*N* (total)	Percent (60 days or less)	*N* (60 days or less)
2015	42,140	86.2	36,325
2016	61,286	82.7	50,684
2017	26,130	76.1	19,885
2018	45,285	50.5	22,869
2019	59,567	84.2	50,155
2020	14,273	85.4	12,189
2021	144,965	89.1	129,164
2022	123,850	93.8	116,171

Had a sixty-day limit been in place between 2015 and 2022, around 80,000 UCs would have surpassed the presumptively reasonable limit of detention. That total is, to be sure, significant—it represents a mean of 10,000 UCs per year, ranging from a high of 22,416 in 2018 to a low of 2,084 in 2020. But it is a far cry from the more than 26,000 UCs per year who would have exceeded a thirty-day limit had it been in place. And, in that sense, a sixty-day limit is much less likely to produce the same strain on judicial resources that could result from stricter durational limits.

I thus advocate imposing a sixty-day presumptively reasonable limit on the duration of ORR custody. A sixty-day limit, unlike its thirty-day and ninety-day counterparts, correctly balances the interests of the government in conducting comprehensive checks on potential sponsors and of UCs in being free from ORR custody and associating with their sponsors. Further, a sixty-day limit achieves this balance while preserving judicial resources in federal courts tasked with reviewing habeas petitions from UCs challenging their ongoing detention. For these reasons, I conclude that a sixty-day presumptively reasonable limit on the duration of UC custody is the correct constitutional standard.

F. Case Study: ORR's 2018 Fingerprinting Policy

The upshot of imposing a sixty-day constitutional limit on reasonable UC detention is that the government cannot make the procedural requirements for release to sponsors more burdensome without simultaneously increasing the resources it allocates to processing release requests such that the time spent by UCs in ORR custody remains below the presumptively reasonable limit. Otherwise, the government's more demanding procedural checks likely would increase the number of UCs able to claim that the time they spent in ORR custody had become presumptively unconstitutional. To see how, consider the following case study.

In 2018, the Trump Administration updated the fingerprinting-based background checks that were required for certain potential sponsors.[309] ORR had, in the past, carefully vetted all potential sponsors. For instance, prior to the changes in 2018, all potential sponsors and their household members were required to undergo criminal-records and sex-offender-registry checks.[310] And ORR also conducted immigration-related background checks for all sponsors using government databases.[311] But none of the pre-2018 checks involved fingerprinting.[312] In fact, neither Category 1 sponsors (parents and legal guardians) nor *any* household member of *any* sponsor (whatever the sponsor's category) was required to undergo fingerprinting at all unless there was a documented risk to the child, the child was "especially vulnerable," or the child's case had been referred for a home study.[313]

On June 7, 2018, ORR drastically increased the background-check requirements of all sponsors.[314] Most significantly, ORR added new fingerprinting requirements that applied to *all* sponsors and *all* the members of the sponsor's household.[315] ORR claimed that, under its new policies, it would work with other subagencies within HHS to complete various immigration-related and criminal-background checks.[316] It also explained that it would share the fingerprinting information it obtained with ICE, ostensibly for the purpose of DHS criminal and immigration-related checks.[317] Perhaps

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309. *Duchitanga* Complaint, *supra* note 29, at 8.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 7. In 2017, fewer than 10% of UCs required a home study prior to release.
314. *See id.* at 8.
315. *Duchitanga* Complaint, *supra* note 29, at 8.
316. *Id.*
317. *Id.* at 9.

unsurprisingly, the 2018 fingerprinting policy proved deeply controversial.[318] But in the end, the policy—at least in its initial form—was short-lived: ORR ended the fingerprinting requirements with respect to household members after just six months of enforcement.[319]

Despite its brief existence, ORR's 2018 fingerprinting policy significantly increased the time UCs spent in ORR custody. To illustrate this point, Figure 6 depicts the mean number of days spent in ORR custody by UCs who *entered* custody between January 1, 2018, and December 31, 2018 (inclusive).[320] The dashed vertical line denotes June 7, 2018—the day the fingerprinting policy went into effect. Three features of the data in Figure 6 are worth mentioning. First, there is a gradual increase in the mean number of days in ORR custody between April 2018 and June 2018. Second, there is a sharp increase in the mean number of days in custody immediately after the fingerprinting policy was enacted on June 7, 2018. Third, the mean number of days in custody declines gradually between late June 2018 and December 2018.

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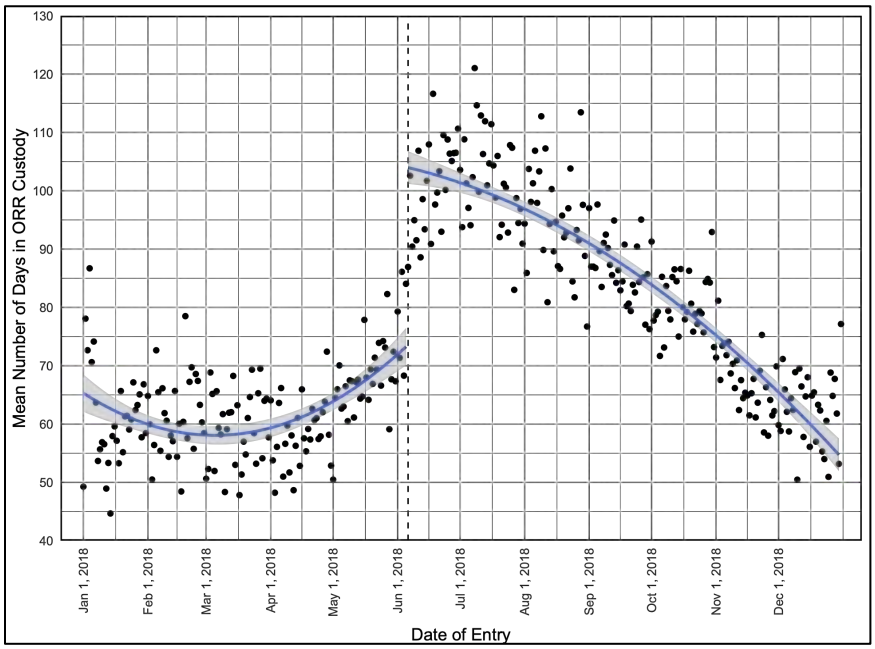
318. *See* Ted Hesson, *New Fingerprint Checks Could Exacerbate Shelter Crunch for Migrant Kids*, POLITICO (June 19, 2018), https://www.politico.com/story/2018/06/19/fingerprints-separated-families-border-children-636478 [https://perma.cc/6DXK-LREP] ("Separating children from their parents at the border is creating havoc—but a new Trump administration fingerprinting policy may create even more."); Dianne Gallagher et al., *Feds Reverse Fingerprint Policy in Move Expected to Speed Release of Unaccompanied Children in HHS Custody*, CNN (Dec. 18, 2018), https://www.cnn.com/2018/12/18/politics/hhs-fingerprint-policy/index.html [https://perma.cc/8DST-FDRJ] ("The Trump administration is reversing a controversial policy implemented this summer.").

319. OFF. REFUGEE RESETTLEMENT, ORR FACT SHEET ON UNACCOMPANIED CHILDREN'S SERVICES 2 (Mar. 2019), https://www.acf.hhs.gov/archive/orr/fact-sheet/orr-fact-sheet-unaccompanied-childrens-services [https://perma.cc/M7NK-UTLK] ("As of December 18, 2018 HHS no longer requires household members to submit to fingerprint background checks.").

320. Each black data point represents the mean number of days in custody for UCs who entered on a given date. The solid blue line represents a second-order polynomial smooth. The grey shaded area above and below the blue line represents the 95% confidence interval. The *y*-axis begins at forty days.

Figure 6. Mean Number of Days in Custody for UCs Entering Custody in 2018



The trends depicted in Figure 6 are consistent with the notion that the initial 2018 fingerprinting policy was both enacted and repealed with immediate effect. That is to say, though the precise nature of the implementation and recission of the policy is not clear from the record, the data support the conclusion that, when the fingerprinting policy was introduced on June 7, 2018, the policy applied to all UCs—including those already in ORR custody—and, when the initial fingerprinting policy was rescinded on December 18, 2018, the rescission affected all UCs—including those already in ORR custody. As a result, the impact of the initial fingerprinting policy was most significant for those UCs who were in ORR custody on June 7, 2018—which includes many UCs who entered custody in the weeks prior to that date—and least significant for those UCs who entered just prior to the recission of the policy.

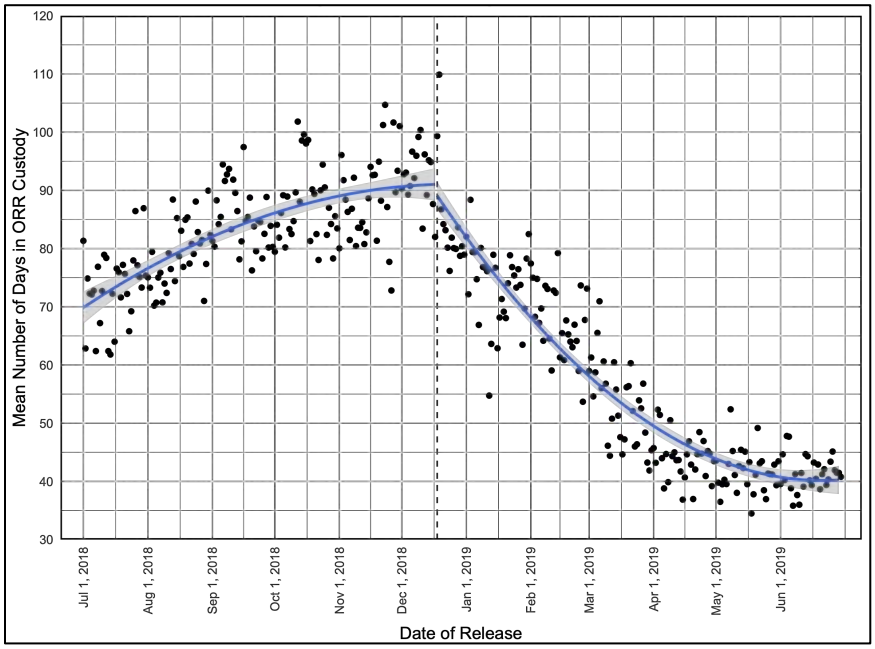
Figure 7 depicts the mean number of days spent in ORR custody by UCs who were *released from* custody between July 1, 2018, and June 30, 2019 (inclusive).[321] The dashed vertical line marks December 18, 2018, the day on

321. Each black data point represents the mean number of days in custody for UCs who entered on a given date. The solid blue line represents a second-order polynomial smooth. The

which the original fingerprinting policy was rescinded. Two features of Figure 7 are particularly noteworthy. First, the mean number of days in custody increases gradually between July 2018 and December 2018. Second, the mean number of days in custody falls off quickly following the rescission of the policy on December 18, 2018.

As for Figure 6, the trends in the data in Figure 7 are consistent with the idea that the fingerprinting policy was enacted universally on June 7, 2018, and rescinded universally on December 18, 2018. Consequently, the effect of the policy on the duration of custody is most marked for UCs who were released shortly before the policy's endpoint since the policy likely was in effect for most, if not all, of the time those UCs spent in custody. Likewise, the mean number of days in custody falls off steadily from December 18, 2018, after which time the heightened background checks no longer delayed the release of any UCs.

Figure 7. Mean Number of Days in Custody for UCs Released in 2018 and 2019



The abruptness and magnitude of the changes brought about by the fingerprinting policy after it was introduced in June 2018 led to considerable

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grey shaded area above and below the blue line represents the 95% confidence interval. The *y*-axis begins at thirty days.

backlash.[322] Perhaps most notably, in November 2018, the American Civil Liberties Union, together with other plaintiffs, brought suit in the district court for the Southern District of New York on behalf of a class of UCs whose release allegedly had been delayed by the 2018 fingerprinting policy.[323] In that case, *Duchitanga v. Lloyd*, the plaintiffs asserted that "egregious delays" in releasing UCs from ORR custody violated due process.[324]

Yet, the *Duchitanga* plaintiffs, bound by the due process jurisprudence of the time, did not have available to them a quantifiable constitutional handle by which to measure the extent of the government's alleged due process violation. That impediment, to be sure, did not prove fatal to the plaintiffs' case: they secured a settlement agreement, after nearly four years of protracted litigation, that "establishe[d] a set of presumptive deadlines for the government to schedule fingerprinting appointments and complete fingerprint processing."[325] But it does not discredit the *Duchitanga* plaintiffs' success to also recognize that advocating for a sixty-day constitutional limit on the reasonable duration of UC detention is a worthwhile endeavor. That is because imposing a sixty-day limit would provide both the government and UC plaintiffs with a precise constitutional standard by which to litigate future due process claims related to vetting requirements.

Both the government and UCs would benefit from such a standard. On the one hand, the government would be on notice that, whenever a vetting policy causes UCs in ORR custody to surpass the sixty-day limit, it will face considerable pressure to take at least one of two steps: (1) end the policy with immediate effect, or (2) increase the financial and personnel resources allocated to processing completed FRAs. In that sense, should the government wish to avoid assigning increased resources to sponsor vetting, it need only tailor its policies to ensure that the time spent by UCs in its custody stays below the constitutional limit.

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322. *See, e.g.*, Press Release, Rep. Rosa DeLauro, DeLauro Statement on HHS Fingerprinting Policy Change (Dec. 19, 2018), https://iptp-production.s3.amazonaws.com/media/documents/DeLauro_Statement_on_HHS_Fingerprinting_Policy_Change.pdf [https://perma.cc/T88R-84J5]; Robert Moore, *Thousands of Migrant Children Could Be Released with Trump's Major Policy Reversal*, TEX. MONTHLY (Dec. 18, 2018), https://www.texasmonthly.com/news-politics/trump-fingerprint-policy-change-reduce-migrant-children-detention-tornillo/ [https://perma.cc/8PEC-AHRM] (quoting Representative Rosa DeLauro calling on HHS "to unravel its misguided fingerprinting policy, which has prolonged the trauma thousands of children in its custody face.").

323. *See Duchitanga* Complaint, *supra* note 29, at 2.

324. *Id.* at 10, 21.

325. *See New Settlement Ends Delays That Kept Immigrant Children in Detention*, NAT. CTR. YOUTH L. (July 28, 2022), https://youthlaw.org/news/new-settlement-ends-delays-kept-immigrant-children-detention [https://perma.cc/KTG4-M9RB].

That is not to say, of course, that the government necessarily could discontinue *any* vetting procedure it chose in an effort to steer clear of constitutional issues. If the government believed that a certain vetting procedure was a necessary precursor to the safe placement of a UC with a sponsor, then the government would be required to enforce that procedure (or a functional equivalent) under the TVPRA.[326] In that sense, the risk of litigation that surely would arise from inadequate sponsor vetting would deter the government from cutting corners when it ought not to. But the government would be able to set aside vetting policies—like the 2018 fingerprinting policy—that truly were surplus to safe release requirements. And, if the government indeed chose to end such policies, it would reduce the likelihood that it would be sued in the first place or increase the likelihood that an existing case would be dismissed in the government's favor.[327]

Plaintiffs, too, stand to benefit from the fact that the sixty-day limit likely will perform a checking function on the government: whenever the sixty-day limit forces the government to change its policies or invest additional resources, costly and time-consuming litigation becomes unnecessary. But plaintiffs also will gain the assurance that, if the government instead pursues policies that consistently fail to comply with the constitutional limit, plaintiffs will have available to them a more forceful legal argument that the duration of ORR custody violates a well-defined constitutional standard, rather than having to resort to a general assertion that the release of UCs to the sponsors has been "unreasonably delayed."[328]

For these reasons, I conclude that a sixty-day constitutional limit on the presumptively reasonable duration of UC detention best balances the interests of all parties and helps streamline—if not avoid—litigation in this area by providing a quantifiable constitutional standard by which to adjudicate claims of unreasonably prolonged detention.

III. EQUAL PROTECTION

In this Part, I present legal arguments for challenging the prolonged detention of UCs that sound in equal protection rather than due process.[329] I

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326. *See* 8 U.S.C. § 1232(c)(3)(A) ("[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being.").

327. Even if litigation has already begun, the case may be dismissed as moot if the government ends its detention-prolonging policy.

328. *See Duchitanga* Complaint, *supra* note 29, at 3.

329. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (explaining that the

argue that, even if the time spent in detention by UCs is within the sixty-day presumptively reasonable limit proposed above, the government nonetheless violates the equal protection component of the Due Process Clause of the Fifth Amendment when it delays the release of UCs with Category 3 sponsors relative to UCs with Category 1 and Category 2 sponsors.[330]

I posit that discrimination against UCs with Category 3 sponsors should trigger strict scrutiny because it implicates the fundamental rights to intimate association and freedom from physical restraint. But even if the detention of UCs with Category 3 sponsors does not infringe those fundamental rights, the unequal treatment of these UCs must nonetheless satisfy "rational basis review with bite"[331] because such treatment inflicts "hardship on a discrete class of children not accountable for their disabling status."[332] Thus, I conclude, since the desire to evade economic or administrative burdens is insufficient to satisfy even this lower level of scrutiny, the government's discriminatory treatment of UCs with Category 3 sponsors always violates equal protection.

A. Prolonged Detention of UCs with Category 3 Sponsors

The NYT data reveal that UCs with Category 3 sponsors can expect to spend much longer in ORR custody than their counterparts with Category 1 and Category 2 sponsors.[333] Indeed, when viewed in the aggregate for the 2015–2022 period, the mean number of days spent in ORR custody by UCs with Category 1 sponsors was 28.3 (28.2–28.5) days, whereas that for UCs with Category 2 sponsors was 39.2 (39.0–39.3) days, and that for UCs with Category 3 sponsors was 67.4 (66.9–67.8) days.[334] Figure 8 below presents

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Equal Protection Clause of the Fourteenth Amendment applies to the federal government through reverse incorporation).

330. This Part focuses on UCs with Category 3 sponsors since those minors are most likely to experience prolonged detention. *See supra* Part I. However, that the legal arguments presented in this Part are equally available to UCs with Category 2 sponsors who face prolonged detention relative to UCs with Category 1 sponsors.

331. *See* Gerald Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 30–31 (1972).

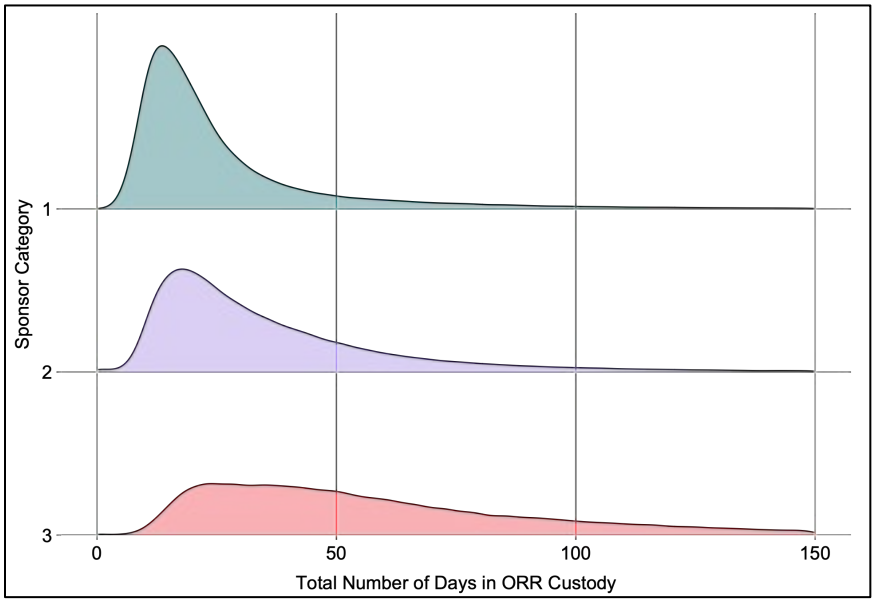
332. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982). Importantly, the *Reno* Court seemed to suggest that UCs with Category 2 potential sponsors *do* have a fundamental interest in associating with their sponsors. *See* Reno v. Flores, 507 U.S. 292, 303 (1993) ("Where a juvenile has no available parent, *close relative*, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.") (emphasis added).

333. *See supra* Figure 4.

334. The linear model presented in Table 2 likewise demonstrated that Category 3 sponsorship is unique amongst sponsor categories in terms of the extent to which it increases the

ridgeline plots showing the distribution of the total number of days spent in ORR custody by UCs as a function of sponsor category in the same 2015–2022 period.[335]

Figure 8. Distribution of Total Number of Days in Custody by Sponsor Category



Sponsor Category	*N*	25th Percentile (Days)	50th Percentile (Days)	75th Percentile (Days)
Category 1	216,619	13	19	30
Category 2	240,781	19	29	47
Category 3	60,096	32	52	84

Taken together, the data relating to the detention of UCs as a function of sponsor category consistently suggest that UCs with Category 3 sponsors are more likely to experience protracted delays in being released from ORR custody in comparison to their peers with Category 1 and Category 2 sponsors. Indeed, as can be seen in Figure 8, the median number of days UCs

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time a UC would have been expected to spend in ORR custody (relative to the intercept value) in the 2015–2022 period.

335. For the sake of clarity, the *x*-axis was truncated at 150 days. Doing so still captures 99.0% of UCs with Category 1 sponsors, 98.3% of UCs with Category 2 sponsors, and 93.5% of UCs with Category 3 sponsors.

with Category 1 sponsors (nineteen days) and Category 2 sponsors (twenty-nine days) spent in ORR custody in the 2015–2022 period was less than half of the presumptively reasonable limit of sixty days proposed in Part II.E.3. In contrast, the median time spent in ORR custody in the same period by UCs with Category 3 sponsors was fifty-two days—just eight days short of the proposed constitutional limit.

B. Standard of Review

In this Section, I argue that the government's unequal treatment of UCs with Category 3 sponsors triggers strict scrutiny—or, at the very least, "rational basis review with bite."[336] That is because UCs' interests in intimate association and freedom from physical restraint are sufficiently important to invoke some form of heightened scrutiny.

In *Reno*, Justice Scalia, in a single paragraph, dismissed the plaintiffs' claim that the INS's release policy—which resulted in prolonged detention for UCs with Category 3 sponsors—violated equal protection.[337] The plaintiffs had argued (albeit in a footnote) that the release policy infringed the equal protection component of the Due Process Clause of the Fifth Amendment because of the "disparate treatment [in] releasing alien juveniles with close relatives or legal guardians but detaining those without."[338] Justice Scalia, however, was unconvinced by the plaintiffs' argument. In Scalia's view, the "tradition of reposing custody in close relatives and legal guardians" was sufficient to justify the discriminatory treatment of UCs without sponsors in either of those categories.[339]

I take issue with *Reno*'s equal protection analysis for two reasons. First, the logic of *Reno* is premised on the faulty notion that the disparate treatment of UCs with Category 3 sponsors does not infringe any fundamental rights.[340] But second, even if no fundamental rights were implicated in the disparate treatment of UCs with Category 3 sponsors, the government nonetheless would violate equal protection when it subjects those UCs to prolonged detention because doing so inflicts "hardship on a discrete class of children

336. *See* Gunther, *supra* note 331, at 18–19.
337. Reno, 507 U.S. at 306.
338. *Id.*
339. *Id.*
340. *See supra* Part II.

not accountable for their disabling status."[341] Each of these reasons is discussed in turn below.

The Court's equal protection jurisprudence makes clear that classifications that "disadvantage a suspect class" or "impinge upon the exercise of a fundamental right" are "presumptively invidious."[342] Consequently, when the government pursues such classifications, it must satisfy strict scrutiny—that is, the government must demonstrate that its discriminatory action is "precisely tailored to serve a compelling governmental interest."[343]

In *Plyler v. Doe*, a landmark case from 1982, the Court found that "[u]ndocumented aliens cannot be treated as a suspect class."[344] Then, in 1993, the *Reno* Court expressly rejected the notion that keeping UCs with Category 3 sponsors in government custody violates either the fundamental right to freedom from physical restraint or the fundamental right to intimate association.[345] The *Reno* Court thus concluded that, in that case, the INS's release policy did not need to meet strict scrutiny.[346] The Court instead applied rational basis review—the least demanding standard of constitutional scrutiny—to the INS's release policy.[347] Accordingly, the *Reno* Court held, the government was required to show only that its policy "rationally advance[d] some legitimate governmental purpose"—a condition the government easily satisfied.[348]

In Part II of this Article, in contrast, I proposed that detaining all UCs—including those with Category 3 sponsors—*does* implicate UCs' fundamental rights to associate with their sponsors and to be free from physical restraint.[349] For equal protection purposes, then, adopting this broader construction of the liberty interests at stake when UCs are held in ORR custody means that, when UCs with Category 3 sponsors are detained significantly longer than their

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341. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982). Importantly, the *Reno* Court seemed to suggest that UCs with Category 2 sponsors *do* have a fundamental interest in associating with their sponsors. *See Reno*, 507 U.S. at 303 ("Where a juvenile has no available parent, *close relative*, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.") (emphasis added).

342. *See Plyler*, 457 U.S. at 216–17 (internal quotation marks omitted).

343. *Id.* at 217.

344. *See id.* at 223.

345. *Reno*, 507 U.S. at 302–03.

346. *See id.* at 305 ("The impairment of a lesser interest (here, the alleged interest in being released to the custody of strangers) demands no more than a 'reasonable fit' between governmental purpose (here, protecting the welfare of the juveniles who have come into the Government's custody) and the means chosen to advance that purpose.").

347. *Id.* at 306.

348. *Id.*

349. *See supra* Part II.

peers with Category 1 or Category 2 sponsors, the government discriminates between UCs with respect to one or more fundamental rights. And, in that scenario, the government's discriminatory action is subject to strict scrutiny.[350]

But even if that were not the case, and no fundamental rights were implicated by the prolonged detention of UCs, *Plyler* suggests that government policies that delay releasing UCs with Category 3 sponsors relative to their peers with Category 1 and Category 2 sponsors nonetheless trigger some form of heightened scrutiny. That is because such policies inflict "hardship on a discrete class of children not accountable for their disabling status."[351]

There are important parallels to be drawn between ORR's current policies relating to sponsor preference and the law at issue in *Plyler*.[352] There, the Court found that Texas's denial of free public education to undocumented minors violated equal protection.[353] The Court recognized that the Texas law did not, on its face, trigger strict scrutiny because undocumented children are not a suspect class and the Constitution harbors no fundamental right to a public education.[354] But the Court explained that certain classifications, "while not facially invidious, nonetheless give rise to recurring constitutional difficulties."[355] Thus, the Court found, "the importance of education" distinguished *Plyler* from cases involving the deprivation of other government benefits.[356]

Because, in *Plyler*, Texas's denial of free public education "impose[d] a lifetime hardship on a discrete class of children," the state's law could "hardly be considered rational unless it further[ed] some *substantial* goal of the State."[357] In so holding, the Court deviated from traditional rational basis review—which requires only that the government's goal be *legitimate*—and invoked language commonly associated with more rigorous intermediate scrutiny.[358] The Court thus employed a heightened form of rational basis

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350. *See Plyler*, 457 U.S. at 216–17 (explaining that classifications that "impinge upon the exercise of a 'fundamental right'" trigger strict scrutiny).

351. *See id.* at 223.

352. *See generally* 457 U.S. 202 (discussing standards of review for circumstances implicating equal protection).

353. *Id.* at 230.

354. *Id.* at 223.

355. *Id.* at 217.

356. *Id.* at 221.

357. 457 U.S. at 223–24 (emphasis added).

358. *Compare* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("[Rational basis review] requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."), *with* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand

review, which scholars have referred to as "rational basis review with bite."[359] Applying this standard, the *Plyler* Court found that Texas's "concern for the preservation of resources standing alone [could] hardly justify the classification used in allocating the resources."[360]

With respect to ORR custody, the rights of UCs to associate with their Category 3 sponsors and to be free from physical restraint likewise are sufficiently important to trigger some form of heightened scrutiny. The *Plyler* Court explained that the importance of public education originated in part from the fact that depriving children of a public education had "a lasting impact . . . on the life of the child."[361] In a similar way, the importance of associating with sponsors and of being released from ORR custody, especially when that custody is protracted, derives in part from the risk of substantial harm to the physical and mental well-being of UCs that correlates with time spent in government custody.[362] And, as a result, the prolonged detention of certain groups of UCs by the government must be subject at least to "rational basis review with bite."[363]

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constitutional challenge [under intermediate scrutiny], previous cases establish that classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.").

359. *See* Gunther, *supra* note 331, at 18–19.

360. *Plyler*, 457 U.S. at 227.

361. *Id.* at 221.

362. *See supra* Section II.D.; Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1, 6 (2017) ("[E]xpert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."); Jessica Chicco et al., *Policy Statement on the Incarceration of Undocumented Migrant Families*, 57 AM. J. CMTY. PSYCH. 255, 257 (2016) ("[I]mprisonment harms children's health. Their physical and psychological development suffers during detention, and such harms can be long-lasting."); Janine Young et al., *Health Risks of Unaccompanied Immigrant Children in Federal Custody and in US Communities*, 114 AM. J. PUB. HEALTH 340, 343 (2024) ("Unaccompanied immigrant children and their sponsors face significant barriers to accessing ongoing health and mental health care.").

363. It is important to acknowledge that the Court, in recent equal protection cases, has shown a willingness to find creative—and perhaps questionable—ways of avoiding heightened scrutiny. For example, in *United States v. Skrmetti*, the plaintiffs argued that a Tennessee law prohibiting the use of puberty blockers and hormones to treat gender dysphoria, gender incongruence, and gender identity disorder triggered at least intermediate scrutiny because the law discriminated on the basis of sex. 145 S. Ct. 1816, 1827 (2025). But the Court instead found that the law discriminated only on the basis of age and medical use, neither of which is a suspect or *quasi*-suspect classification that merits heightened scrutiny. *Id.* at 1829. In the context of UC detention, then, it is possible that the Court could hold that the United States government's unequal treatment of UCs in its custody merely triggers rational basis review because, for example, the federal government is entitled to deference in immigration-related matters that the states are not. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). However,

C. The Usefulness of Equal Protection Arguments

Arguments sounding in equal protection are most likely to prove useful to UC plaintiffs in two scenarios. Consider first a future in which a court finds that the prolonged detention of UCs *does* implicate fundamental due process rights.[364] In that case, UCs challenging prolonged detention may have available to them arguments sounding in equal protection that require the government to satisfy strict scrutiny.[365] However, almost all efforts by the government to bring the time UCs spend in custody within acceptable *due process* limits already will involve curtailing the discriminatory treatment of UCs with Category 3 sponsors (since those UCs most often experience prolonged detention).[366] As a result, arguments sounding in equal protection largely may be superfluous to those based in due process—except perhaps in those limited instances where the government, even while operating within constitutionally permissible due process limits, continues to discriminate between groups of UCs with respect to one or more fundamental rights.[367]

Consider next the scenario in which the prolonged detention of UCs with Category 3 sponsors does *not* implicate any fundamental rights. In that case, the value of an equal protection claim is more immediately clear: since UCs facing prolonged detention can raise no due process claim, they instead may argue only that the government's discriminatory release policies deny them equal protection using a *Plyler*-style "rational basis review with bite" framework. The subsequent discussion primarily assumes this latter scenario for two reasons: first, because *Reno*, which held that the detention of UCs with Category 3 sponsors does not infringe UCs' fundamental rights, remains good law; second, because, in any event, a government policy that fails to satisfy "rational basis review with bite" necessarily would fail to satisfy strict scrutiny.

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for at least the reasons provided in this Part, I posit that UCs challenging their prolonged detention should be entitled to *Plyler*-style rational basis review with bite.

364. This is, of course, the future advocated for in Part II.

365. *See Plyler*, 457 U.S. at 216–17 (explaining that classifications that "impinge upon the exercise of a 'fundamental right'" for certain groups trigger strict scrutiny).

366. *See supra* Figure 8.

367. Then again, it is possible, even if a court were to find that the prolonged detention of UCs with Category 3 sponsors does implicate one or more fundamental rights, that same court could also conclude that the unequal treatment of those UCs does not trigger strict scrutiny in the absence of a due process violation.

D. Constitutional Analysis

Analyzing the constitutionality of ORR's discriminatory release policy under a "rational basis review with bite" standard first demands an assessment of the government's interests in creating the policy.[368] The prolonged detention of UCs with Category 3 sponsors likely stems from the relatively burdensome release requirements for these UCs. Pursuant to § 2.2.4 of the ORR Policy Guide, all potential sponsors "must provide documentation of [their] relationship to the child they seek to sponsor."[369]

For Category 1 and Category 2 sponsors, that step likely is straightforward: the sponsor can provide, for example, copies of one or more marriage or birth certificates that together explain the biological or legal relationship between the sponsor and the UC.[370] But that same requirement may prove considerably more difficult for Category 3 sponsors (for example, family friends) who often have no biological or legal link to the UC they seek to sponsor. When that is the case, § 2.2.4 of the ORR Policy Guide provides that Category 3 sponsors instead must submit evidence that "demonstrates a bona fide social relationship with the child and/or the child's family that existed before the child migrated to the United States."[371] ORR care providers, in turn, must be confident that they have received "sufficient corroboration" to credit that bona fide relationship.[372]

ORR's background-check requirements are also more stringent for non-Category-1 sponsors. First, public criminal-records checks, though mandatory for all potential sponsors, generally are also required for all household members of Category 2 and Category 3 sponsors.[373] In contrast, criminal background checks for the household members of Category 1 sponsors are required only when there is documented risk to the safety of the UC, the UC is especially vulnerable, or the case is referred for a home study.[374] Second, FBI criminal background checks, which involve

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368. *See* Cruzan by Cruzan v. Dir., Mo. Dep't Health, 497 U.S. 261, 279 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'") (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

369. *ORR Policy Guide*, *supra* note 4.

370. *Id.* (providing in § 2.2.4 a list of acceptable documents for proving sponsor-child relationship).

371. *Id.*

372. *Id.*

373. *Id.* (providing, in § 2.5.1, a summary of sponsor-category-specific background-check requirements).

374. *Id.*

fingerprinting, are mandatory for all Category 2B and Category 3 sponsors, but are required for Category 1 and Category 2A sponsors only in limited circumstances.[375] In these ways, the release of UCs with Category 3 sponsors often is delayed relative to their peers with Category 1 and Category 2 sponsors.

That the heightened screening protocols for Category 3 sponsors result in prolonged detention of certain UCs is ultimately a question of cost. The government, to be sure, presumably could argue in good faith that its procedures for Category 3 sponsors are more burdensome because the government has a substantial interest in protecting children's welfare. Indeed, ORR, in compliance with the TVPRA, "does not release any child to a sponsor until ORR has determined that it is safe to do so."[376] And so, the argument goes, because the government has a substantial interest in ensuring that UCs are released only to sponsors who can adequately care for them, it is reasonable for the government to require additional assurance that that condition is satisfied when the relationship between the UC and their potential sponsor lacks a foundation in biology or law.

Yet, even if it is true that the government has a substantial interest in enforcing more burdensome vetting procedures for Category 3 sponsors, it does not follow that those procedures necessarily must be more time-consuming. The *Reno* Court, to be clear, held that "a detention program justified by the need to protect juveniles is not constitutionally required to give custody to strangers if that entails the expenditure of administrative effort and resources" the government is unwilling to commit.[377] But the *Reno* Court reached its holding only after employing a rational basis review framework that, this Part argues, is inappropriate for assessing the government's discriminatory treatment of UCs with Category 3 sponsors.[378] If, instead, the Court were to use a "rational basis review with bite" standard, then the Court likely would find that "a concern for the preservation of resources standing alone [could] hardly justify the classification used in allocating those resources."[379] And, as a result, the government's

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375. *Id.*

376. *Id.* (describing, in § 2.5.3, what happens if an adult household member refuses to cooperate with ORR's background-check requirements); *see* 8 U.S.C. § 1232(c)(3)(A) ("[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being.").

377. Reno v. Flores, 507 U.S. 292, 312 (1993).

378. *See id.* at 306.

379. *See* Plyler v. Doe, 457 U.S. 202, 227 (1982).

discriminatory treatment of UCs with Category 3 sponsors would violate equal protection.[380]

Since the government could not, therefore, justify its discriminatory treatment of UCs with Category 3 sponsors on economic grounds, it would face a binary choice similar to that discussed in Part II: the government either could make the vetting requirements for Category 3 sponsors less burdensome—and, therefore, less time-consuming—or it could increase the resources it allocates to reviewing Category 3 FRAs such that the vetting process becomes more efficient for UCs with Category 3 sponsors.

At first blush, both approaches may seem equally appealing—assuming that they both remedy any sponsor-type-based disparities in the duration of UC detention. In Part II.F of this Article, I explained that the government may well be able to streamline its sponsor-vetting procedures in such a way that the duration of UCs' detention generally falls within a presumptively reasonable sixty-day due process limit without compromising the government's interest in the comprehensive vetting of sponsors.[381] In this Part, in contrast, I posit that, once the government already is operating *within* the sixty-day due process limit, it is more likely that further curtailment of sponsor-vetting procedures in order to ensure equal treatment of all UCs will jeopardize the integrity of *necessary* sponsor-vetting requirements.[382] And, as explained in Part II.F, the government's obligations under the TVPRA prohibit such curtailment. For that reason, I propose that, if the government's vetting requirements are deemed to implicate only equal protection—and not due process—then the government generally should prioritize investing additional resources in reviewing release petitions for UCs with Category 3 sponsors such that it can avoid constitutional infirmity without diluting the comprehensiveness of its vetting requirements.

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380. As explained above, if a court were to hold that the detention of UCs with Category 3 sponsors does implicate one or more fundamental rights, then the government's discriminatory detention of UCs still would violate equal protection since any policy that fails to satisfy rational basis review with bite necessarily fails to satisfy strict scrutiny.

381. Consider, for example, the 2018 fingerprinting policy discussed in Part II.F. The Trump Administration chose to end its original fingerprinting policy after only six months of enforcement because the policy was "not adding anything to the protection or the safety of the children." John Burnett, *Several Thousand Migrant Children In U.S. Custody Could Be Released Before Christmas*, NPR (Dec. 18, 2018), https://www.npr.org/2018/12/18/677894942/several-thousand-migrant-children-in-u-s-custody-could-be-released-before-christ[https://perma.cc/G7JS-Q86T] (quoting Lynn Johnson, then-Assistant Secretary at HHS's Administration for Children and Families).

382. This assumes, of course, that, whenever the government enforces more stringent release requirements for UCs with Category 3 sponsors, its choices are based in good-faith policy rationales that prioritize the best interests of the child. When that is not the case, amending the vetting procedures may be the more appropriate remedy. *See id*.

I thus conclude that, to the extent that heightened vetting requirements for Category 3 sponsors otherwise would prolong the time some UCs spend in custody, the government generally must dedicate additional resources to counteract the delay. Important as it may be that all potential sponsors are sufficiently vetted before a UC is released to their care, the government always should prioritize the expeditious release of UCs from federal custody. After all, "[t]he government makes lousy parents."[383] And such an approach benefits not just UCs; it benefits the government, too. It helps the government satisfy its obligations under the *Flores* Settlement Agreement—and advance its interests in promoting child welfare—by ensuring that all UCs, whatever their sponsor's category, are released from government custody to suitable sponsors "without unnecessary delay."[384]

IV. CONCLUSION

UCs arriving in the United States have a fundamental right to intimate association with their sponsors and to freedom from physical restraint. When the government prolongs the detention of UCs beyond sixty days, the continued detention of UCs becomes presumptively unconstitutional as a violation of due process. Further, when the government delays the release of UCs with Category 3 sponsors relative to UCs with Category 1 or Category 2 sponsors, it violates equal protection.

When the government's policies unconstitutionally delay the release of UCs, the government either must make the vetting requirements for potential sponsors less burdensome or it must increase the resources it allocates to reviewing reunification applications. However, in so doing, the government always must act with the requisite care to ensure the safe, efficient, and timely reunification of UCs with their sponsors.[385]

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383. *See* Miriam Jordan, *Thousands of Migrant Children Could Be Released After Sponsor Policy Change*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html (quoting Lynn Johnson, former Assistant Secretary at HHS's Administration for Children and Families).

384. *See FSA*, *supra* note 28, at 10 (emphasis added).

385. *ORR Policy Guide*, *supra* note 4 (detailing, in § 2.1, ORR's policy goals with respect to UC-sponsor reunification).

APPENDIX

Table A.1. Total Number of UCs Entering ORR Custody, Total Number of UCs Apprehended by CBP at Southern Border, and Mean Number of Days in ORR Custody Over Time (Figure 1A & Figure 1B)

Month & Year	Total Number of UCs Entering ORR Custody	Total Number of UCs Apprehended by CBP at Southern Border	Mean Number of Days in ORR Custody
January 2015	1,427	–	46.4 (42.1-50.7)
February 2015	1,704	–	36.7 (34.0-39.4)
March 2015	2,236	–	33.2 (31.4-34.9)
April 2015	2,539	–	33.2 (31.6-34.9)
May 2015	3,127	–	36.0 (34.7-37.4)
June 2015	3,248	–	41.4 (40.1-42.8)
July 2015	3,540	–	41.7 (40.3-43.1)
August 2015	3,502	–	34.9 (33.6-36.2)
September 2015	4,091	–	38.3 (37.2-39.3)
October 2015	3,968	–	36.3 (35.3-37.4)
November 2015	4,372	–	35.0 (34.0-35.9)
December 2015	5,321	–	33.7 (32.7-34.6)
January 2016	6,567	–	36.1 (35.2-37.0)
February 2016	2,534	–	33.2 (31.8-34.7)
March 2016	2,490	–	32.5 (30.9-34.1)
April 2016	4,470	–	38.3 (37.1-39.4)
May 2016	5,233	–	41.7 (40.7-42.8)
June 2016	4,473	–	44.2 (43.0-45.4)
July 2016	5,028	–	45.0 (43.8-46.2)
August 2016	5,810	–	45.9 (44.7-47.2)
September 2016	5,847	–	44.0 (42.9-45.1)
October 2016	7,043	–	42.0 (41.0-42.9)
November 2016	4,049	–	40.8 (39.5-42.1)
December 2016	7,406	–	43.3 (42.2-44.3)
January 2017	7,450	–	41.0 (40.1-41.9)
February 2017	1,503	–	42.6 (40.3-45.0)
March 2017	618	–	41.7 (36.8-46.5)
April 2017	554	–	38.6 (33.7-43.5)
May 2017	964	–	40.3 (36.1-44.4)
June 2017	1,350	–	45.3 (42.4-48.1)
July 2017	1,992	–	47.1 (44.2-50.0)
August 2017	2,419	–	53.4 (51.1-55.8)
September 2017	2,490	–	52.4 (50.2-54.5)
October 2017	2,645	–	58.6 (55.9-61.2)
November 2017	3,508	–	58.1 (56.1-60.1)
December 2017	4,038	–	63.3 (61.5-65.1)
January 2018	2,793	–	59.8 (57.6-62.1)
February 2018	2,675	–	61.4 (59.2-63.6)

March 2018	3,797	–	59.9 (58.0-61.7)
April 2018	3,975	–	58.7 (56.8-60.5)
May 2018	4,742	–	67.3 (65.6-69.1)
June 2018	4,120	–	96.5 (94.4-98.5)
July 2018	3,417	–	101.4 (99.6-103.1)
August 2018	3,351	–	95.4 (93.4-97.4)
September 2018	3,635	–	86.6 (85.0-88.1)
October 2018	3,954	–	80.5 (79.0-82.0)
November 2018	4,162	–	67.3 (66.0-68.7)
December 2018	4,664	–	62.1 (60.7-63.4)
January 2019	4,192	5,515	50.7 (49.4-51.9)
February 2019	5,576	7,243	46.2 (45.3-47.2)
March 2019	7,546	9,380	43.3 (42.4-44.1)
April 2019	8,133	9,265	41.7 (40.8-42.6)
May 2019	8,617	11,861	41.0 (40.2-41.8)
June 2019	8,357	7,678	40.9 (40.5-41.4)
July 2019	4,943	5,846	38.2 (37.4-39.0)
August 2019	2,943	4,119	35.9 (34.9-36.9)
September 2019	2,299	3,543	34.8 (33.4-36.2)
October 2019	2,102	5,418	32.0 (30.7-33.2)
November 2019	2,422	5,662	34.7 (33.0-36.4)
December 2019	2,437	5,104	36.7 (35.0-38.3)
January 2020	1,787	3,076	37.9 (36.3-39.5)
February 2020	2,148	3,490	34.7 (33.0-36.4)
March 2020	1,733	3,221	38.5 (36.8-40.2)
April 2020	58	741	38.7 (36.2-41.2)
May 2020	32	1,008	32.5 (27.2-37.8)
June 2020	50	1,691	32.5 (22.7-42.4)
July 2020	149	2,509	36.7 (23.7-49.6)
August 2020	388	3,103	33.2 (28.7-37.6)
September 2020	1,134	3,883	35.6 (32.1-39.1)
October 2020	1,429	3,201	37.0 (35.2-38.7)
November 2020	2,195	3,677	37.1 (35.5-38.7)
December 2020	3,170	3,639	39.1 (37.8-40.5)
January 2021	3,827	5,820	38.4 (37.4-39.4)
February 2021	5,960	9,402	39.0 (37.9-40.0)
March 2021	13,235	18,870	38.5 (37.7-39.2)
April 2021	18,547	17,067	43.7 (43.2-44.3)
May 2021	11,474	14,052	32.5 (32.0-32.9)
June 2021	12,624	15,230	28.4 (28.0-28.9)
July 2021	15,569	18,954	27.3 (26.9-27.7)
August 2021	17,912	18,806	28.0 (27.6-28.4)
September 2021	12,938	14,358	26.2 (25.7-26.7)
October 2021	10,320	4,810	29.0 (28.4-29.5)
November 2021	12,320	4,591	30.4 (29.8-31.0)
December 2021	10,239	4,965	29.7 (29.1-30.2)
January 2022	6,476	8,748	26.9 (26.3-27.5)

February 2022	9,315	11,979	26.7 (26.2-27.2)
March 2022	11,117	14,137	25.6 (25.2-26.0)
April 2022	9,476	12,169	23.5 (23.1-24.0)
May 2022	12,202	14,675	24.1 (23.7-24.5)
June 2022	13,084	15,250	26.5 (26.1-26.9)
July 2022	11,642	13,268	26.6 (26.2-27.1)
August 2022	9,396	11,341	25.5 (25.0-26.0)
September 2022	9,454	11,900	26.9 (26.4-27.4)
October 2022	9,874	12,783	26.2 (25.8-26.6)
November 2022	11,028	13,929	24.4 (24.0-24.8)
December 2022	10,786	11,878	24.0 (23.7-24.4)

Table A.2. Mean Number of Days in ORR Custody by UC Sex (Figure 2)

Year	*N* (All)	Mean (All)	*N* (M)	Mean (M)	*N* (F)	Mean (F)
2015	42,140	36.8 (36.4-37.2)	28,144	36.9 (36.5-37.4)	13,996	36.5 (35.9-37.3)
2016	61,286	41.5 (41.2-41.9)	40,937	41.9 (41.5-42.3)	20,349	40.8 (40.2-41.4)
2017	26,130	51.4 (50.7-52.1)	18,437	52.6 (51.7-53.4)	7,693	48.7 (47.5-50.0)
2018	45,285	74.6 (74.1-75.1)	31,676	75.7 (75.1-76.4)	13,609	71.8 (70.9-72.8)
2019	59,567	40.6 (40.2-40.9)	39,452	41.3 (40.9-41.7)	20,115	39.1 (38.5-39.6)
2020	14,273	37.7 (37.1-38.3)	9,754	37.4 (36.7-38.1)	4,519	38.3 (37.1-39.5)
2021	144,965	32.4 (32.2-32.5)	95,360	33.2 (33.0-33.4)	49,605	30.7 (30.4-31.0)
2022	123,850	25.5 (25.4-25.7)	78,310	25.9 (25.7-26.1)	45,540	24.8 (24.7-25.1)
* M = Male; F = Female						

Table A.3. Mean Number of Days in ORR Custody by Country of Origin (Figure 3)

Year	*N* (All)	Mean (All)	*N* (G)	Mean (G)	*N* (H)	Mean (H)
2015	42,140	36.8 (36.4-37.2)	18,808	39.2 (38.7-39.8)	7,726	36.7 (35.7-37.7)
2016	61,286	41.5 (41.2-41.9)	23,683	45.7 (45.2-46.3)	13,567	42.0 (41.3-42.8)
2017	26,130	51.4 (50.7-52.1)	14,032	55.3 (54.2-56.3)	5,280	49.5 (47.9-51.1)
2018	45,285	74.6 (74.1-75.1)	23,789	75.8 (75.1-76.5)	12,535	73.6 (72.6-74.6)
2019	59,567	40.6 (40.2-40.9)	25,929	42.3 (41.9-42.8)	17,903	41.9 (41.3-42.6)
2020	14,273	37.7 (37.1-38.3)	6,732	38.3 (37.5-39.1)	3,929	39.1 (37.8-40.4)
2021	144,965	32.4 (32.2-32.5)	69,069	35.0 (34.8-35.3)	45,510	31.3 (31.1-31.6)
2022	123,850	25.5 (25.4-25.7)	57,135	27.4 (27.2-27.7)	35,751	25.3 (25.0-25.5)
Year	***N* (E)**	**Mean (E)**	***N* (Mx)**	**Mean (Mx)**	***N* (Nic)**	**Mean (Nic)**
2015	13,447	31.5 (30.9-31.5)	1,250	47.1 (43.1-51.1)	119	32.2 (26.4-38.0)
2016	21,400	35.6 (35.2-36.0)	1,372	46.1 (43.3-49.0)	242	38.9 (34.6-43.2)
2017	4,946	38.0 (36.9-39.1)	724	54.3 (49.9-58.8)	115	48.0 (35.9-60.1)
2018	5,995	67.3 (66.1-68.5)	1,225	79.2 (74.8-83.7)	433	73.8 (69.8-77.8)
2019	11,216	34.1 (33.6-34.7)	1,258	43.3 (41.2-45.4)	624	39.3 (36.6-41.9)
2020	1,904	34.1 (32.9-35.4)	486	39.3 (34.7-44.0)	125	33.8 (29.1-38.5)
2021	18,907	27.5 (27.2-27.8)	2,084	30.1 (28.9-31.3)	2,614	30.9 (29.9-31.9)
2022	14,640	21.4 (21.2-21.7)	3,973	23.7 (23.1-24.4)	3,670	23.0 (22.4-23.6)
* G = Guatemala; H = Honduras; E = El Salvador; Mx = Mexico; Nic = Nicaragua						

Table A.4. Mean Number of Days in ORR Custody by Sponsor Category (Figure 4)

Year	*N* (All)	Mean (All)	*N* (C1)	Mean (C1)	*N* (C2)	Mean (C2)
2015	42,140	36.8 (36.4-37.2)	23,088	26.8 (26.4-27.3)	15,051	41.8 (41.2-42.4)
2016	61,286	41.5 (41.2-41.9)	32,659	30.1 (29.7-30.4)	23,315	48.8 (48.3-49.3)
2017	26,130	51.4 (50.7-52.1)	11,040	35.0 (34.2-35.8)	12,059	56.7 (55.7-57.7)
2018	45,285	74.6 (74.1-75.1)	19,468	60.3 (59.7-60.9)	21,362	77.3 (76.5-78.0)
2019	59,567	40.6 (40.2-40.9)	26,377	29.7 (29.4-30.1)	27,564	42.4 (42.0-42.8)
2020	14,273	37.7 (37.1-38.3)	5,936	31.0 (30.2-31.9)	6,643	36.6 (35.9-37.3)
2021	144,965	32.4 (32.2-32.5)	53,973	22.9 (22.7-23.1)	72,354	32.3 (32.1-32.5)
2022	123,850	25.5 (25.4-25.7)	44,078	17.6 (17.4-17.7)	62,433	25.4 (25.3-25.6)

Year	*N* (C3)	Mean (C3)
2015	4,001	75.7 (73.8-77.5)
2016	5,312	80.5 (79.1-82.0)
2017	3,031	90.4 (87.3-93.5)
2018	4,455	124.2 (121.7-126.7)
2019	5,626	82.4 (80.7-84.2)
2020	1,694	65.3 (62.8-67.8)
2021	18,638	59.9 (59.3-60.5)
2022	17,339	46.2 (45.7-46.7)

* C1 = Category 1; C2 = Category 2; C3 = Category 3

Table A.5. Mean Number of Days in ORR Custody for UCs Entering Custody Between January 1, 2018 and December 31, 2018 (Figure 6)

Date of Entry	*N*	Mean Number of Days in ORR Custody	Date of Entry	*N*	Mean Number of Days in ORR Custody
1/1/2018	38	49.3 (38.2-60.3)	7/1/2018	127	103.6 (93-114.1)
1/2/2018	28	78.1 (51.6-104.5)	7/2/2018	54	93.8 (82.7-104.8)
1/3/2018	26	72.7 (48.8-96.5)	7/3/2018	94	108.8 (96.9-120.7)
1/4/2018	57	86.7 (55.3-118.1)	7/4/2018	150	101.3 (91.8-110.7)
1/5/2018	56	70.6 (46.5-94.7)	7/5/2018	110	97.1 (89.1-105.0)
1/6/2018	34	74.2 (57.2-91.1)	7/6/2018	91	94.1 (85.6-102.6)
1/7/2018	38	63.7 (42.7-84.6)	7/7/2018	117	102.3 (93.8-110.9)
1/8/2018	36	53.7 (41.9-65.4)	7/8/2018	65	121 (103.7-138.4)
1/9/2018	87	55.7 (47.1-64.2)	7/9/2018	69	114.7 (102.2-127.1)
1/10/2018	75	56.9 (43.8-70.0)	7/10/2018	95	99.8 (89.3-110.4)
1/11/2018	72	56.5 (45.7-67.4)	7/11/2018	143	112.9 (104.1-121.7)
1/12/2018	130	48.9 (41.2-56.6)	7/12/2018	131	106.3 (97.6-115.0)
1/13/2018	95	53.3 (43.8-62.8)	7/13/2018	98	111.9 (100.2-123.7)
1/14/2018	110	44.7 (39.4-49.9)	7/14/2018	128	100.9 (92.7-109.2)
1/15/2018	116	57.9 (49.1-66.7)	7/15/2018	84	104.7 (93.0-116.3)
1/16/2018	114	59.6 (49.9-69.3)	7/16/2018	82	111.4 (99.1-123.7)
1/17/2018	108	57.1 (45.9-68.3)	7/17/2018	134	104.3 (95.7-113.0)
1/18/2018	141	53.3 (44.5-62.0)	7/18/2018	108	98.8 (90.2-107.4)
1/19/2018	139	65.7 (55.2-76.1)	7/19/2018	112	106.0 (97.2-114.7)

1/20/2018	91	55.2 (44.4-65.9)	7/20/2018	169	92.0 (84.7-99.4)
1/21/2018	112	61.3 (48.5-74.2)	7/21/2018	127	94.2 (86.6-101.8)
1/22/2018	100	61.4 (50.8-72.0)	7/22/2018	127	101.2 (92.8-109.7)
1/23/2018	141	59.1 (49.7-68.4)	7/23/2018	125	100.6 (89.3-111.8)
1/24/2018	112	60.8 (51.5-70.0)	7/24/2018	135	92.8 (85.4-100.3)
1/25/2018	97	67.1 (51.3-83.0)	7/25/2018	97	107.8 (95.6-120.1)
1/26/2018	90	62.4 (49.9-74.9)	7/26/2018	140	107.4 (95.9-118.8)
1/27/2018	116	63.3 (53.9-72.7)	7/27/2018	100	83.0 (75.1-91)
1/28/2018	122	65.1 (53.4-76.8)	7/28/2018	111	98.7 (89.6-107.8)
1/29/2018	105	57.7 (46.2-69.2)	7/29/2018	115	94.5 (85.8-103.2)
1/30/2018	100	66.8 (51.1-82.5)	7/30/2018	80	96.9 (86.0-107.8)
1/31/2018	107	58.5 (42.6-74.2)	7/31/2018	99	90.9 (80.5-101.4)
2/1/2018	74	64.8 (49.3-80.3)	8/1/2018	114	94.4 (84.2-104.5)
2/2/2018	83	60.0 (45.5-74.4)	8/2/2018	112	85.9 (78.4-93.4)
2/3/2018	109	50.5 (43.3-57.7)	8/3/2018	106	103.8 (92.0-115.5)
2/4/2018	99	56.4 (48.0-64.8)	8/4/2018	125	98.1 (88.5-107.7)
2/5/2018	99	72.7 (58.6-86.7)	8/5/2018	86	101.3 (87.5-115.1)
2/6/2018	113	65.4 (52.7-78.2)	8/6/2018	106	106.9 (94.8-118.9)
2/7/2018	88	55.4 (47.4-63.4)	8/7/2018	102	97.9 (87.5-108.3)
2/8/2018	83	66.1 (52.7-79.6)	8/8/2018	81	103.3 (90.3-116.4)
2/9/2018	90	61.9 (47.1-76.6)	8/9/2018	144	112.8 (100.1-125.4)
2/10/2018	80	60.6 (48.0-73.1)	8/10/2018	123	89.8 (82.5-97.2)
2/11/2018	79	54.4 (42.8-66.0)	8/11/2018	91	107.2 (89.2-125.3)
2/12/2018	76	58.0 (44.7-71.3)	8/12/2018	77	80.9 (72.2-89.6)
2/13/2018	88	57.1 (47.4-66.8)	8/13/2018	56	94.3 (81.4-107.2)
2/14/2018	122	65.7 (55.0-76.4)	8/14/2018	193	100.3 (92.1-108.5)
2/15/2018	96	54.4 (46.0-62.8)	8/15/2018	85	89.6 (80.0-99.2)
2/16/2018	97	60.0 (48.4-71.7)	8/16/2018	121	94.7 (82.8-106.6)
2/17/2018	69	48.4 (39.3-57.6)	8/17/2018	77	87.1 (76.7-97.5)
2/18/2018	72	60.4 (47.0-73.7)	8/18/2018	73	86.6 (73.8-99.4)
2/19/2018	78	78.5 (60.9-96.1)	8/19/2018	114	95.7 (81.5-110.0)
2/20/2018	138	57.6 (49.3-65.8)	8/20/2018	109	92.0 (82.1-102.0)
2/21/2018	112	67.2 (54.0-80.4)	8/21/2018	133	92.8 (80.6-105.0)
2/22/2018	124	69.7 (57.6-81.8)	8/22/2018	142	97.0 (87.3-106.7)
2/23/2018	119	55.7 (47.5-64.0)	8/23/2018	97	103.8 (88.8-118.9)
2/24/2018	79	68.6 (52.4-84.8)	8/24/2018	113	84.4 (76.9-92.0)
2/25/2018	96	67.4 (53.5-81.3)	8/25/2018	120	81.7 (74.6-88.9)
2/26/2018	81	63.3 (49.5-77.1)	8/26/2018	137	93.3 (83.7-102.8)
2/27/2018	116	60.3 (50.2-70.3)	8/27/2018	100	91.5 (81.2-101.8)
2/28/2018	115	58.5 (50.5-66.4)	8/28/2018	84	113.4 (90.4-136.5)
3/1/2018	80	50.6 (41.4-59.9)	8/29/2018	159	97.6 (89.1-106.0)
3/2/2018	114	52.3 (43.6-61.0)	8/30/2018	93	88.8 (81.0-96.7)
3/3/2018	69	68.8 (50.4-87.2)	8/31/2018	78	76.7 (67.1-86.3)
3/4/2018	75	65.2 (47.3-83.0)	9/1/2018	125	97.0 (85.4-108.7)
3/5/2018	92	52.0 (42.3-61.6)	9/2/2018	79	87.0 (77.0-97.0)
3/6/2018	131	65.6 (56.2-75.0)	9/3/2018	116	87.0 (77.6-96.3)
3/7/2018	118	59.3 (51.9-66.7)	9/4/2018	51	86.8 (74.8-98.7)

3/8/2018	128	58.2 (49.5-66.9)	9/5/2018	87	97.6 (85.3-110.0)
3/9/2018	116	61.7 (49.9-73.5)	9/6/2018	145	89.6 (83.1-96.2)
3/10/2018	111	48.3 (42.7-54.0)	9/7/2018	51	83.5 (68.6-98.4)
3/11/2018	131	59.1 (50.0-68.2)	9/8/2018	172	91.0 (84.3-97.8)
3/12/2018	132	61.9 (52.1-71.7)	9/9/2018	199	92.5 (86.8-98.2)
3/13/2018	85	62.0 (50.6-73.5)	9/10/2018	56	90.2 (76.4-103.9)
3/14/2018	131	68.2 (55.6-80.9)	9/11/2018	60	87.3 (76.7-97.9)
3/15/2018	91	53.0 (42.5-63.5)	9/12/2018	56	85.5 (74.5-96.6)
3/16/2018	117	63.2 (51.1-75.4)	9/13/2018	164	94.9 (86.8-103.0)
3/17/2018	122	47.8 (41.4-54.2)	9/14/2018	202	84.2 (78.1-90.4)
3/18/2018	90	51.3 (44.0-58.7)	9/15/2018	103	86.4 (77.2-95.5)
3/19/2018	101	57.0 (47.3-66.6)	9/16/2018	109	82.9 (76.7-89.2)
3/20/2018	100	54.8 (43.4-66.2)	9/17/2018	215	84.5 (78.3-90.6)
3/21/2018	172	61.0 (51.9-70.2)	9/18/2018	103	90.8 (80.9-100.7)
3/22/2018	143	64.6 (54.5-74.7)	9/19/2018	129	80.2 (71.1-89.3)
3/23/2018	149	69.3 (56.0-82.6)	9/20/2018	151	80.7 (71.6-89.7)
3/24/2018	105	58.4 (47.9-69.0)	9/21/2018	131	79.4 (70.9-87.9)
3/25/2018	78	53.2 (41.7-64.7)	9/22/2018	126	83.9 (76.5-91.3)
3/26/2018	144	65.3 (55.1-75.5)	9/23/2018	69	82.6 (73.1-92.0)
3/27/2018	167	69.5 (58.3-80.7)	9/24/2018	96	90.4 (81.7-99.2)
3/28/2018	215	54.1 (47.7-60.6)	9/25/2018	115	84.3 (74.5-94.2)
3/29/2018	182	64.0 (54.1-73.9)	9/26/2018	146	95.0 (87.2-103)
3/30/2018	129	64.4 (53.7-75.0)	9/27/2018	142	85.2 (77.5-92.9)
3/31/2018	179	57.7 (48.7-66.8)	9/28/2018	199	77.0 (71.6-82.5)
4/1/2018	119	64.1 (52.2-76.0)	9/29/2018	134	85.7 (76.4-95.0)
4/2/2018	57	53.8 (37.7-69.8)	9/30/2018	104	76.3 (68.7-83.8)
4/3/2018	95	48.2 (39.3-57.2)	10/1/2018	109	91.3 (82.5-100.1)
4/4/2018	111	56.1 (46.7-65.5)	10/2/2018	111	77.7 (71.0-84.5)
4/5/2018	107	63.6 (47.3-79.9)	10/3/2018	157	78.7 (70.1-87.3)
4/6/2018	94	66.2 (50.6-81.8)	10/4/2018	104	79.3 (70.2-88.4)
4/7/2018	117	51.0 (42.3-59.6)	10/5/2018	89	71.7 (65.0-78.3)
4/8/2018	96	56.6 (36.4-76.8)	10/6/2018	123	85.2 (77.3-93.2)
4/9/2018	101	59.7 (49.9-69.6)	10/7/2018	111	73.1 (65.5-80.7)
4/10/2018	118	51.7 (42.9-60.5)	10/8/2018	114	83.7 (75.5-91.8)
4/11/2018	129	58.0 (48.6-67.5)	10/9/2018	126	79.4 (69.9-89.0)
4/12/2018	126	48.6 (40.9-56.4)	10/10/2018	152	77.9 (71.0-84.8)
4/13/2018	142	56.3 (48.9-63.7)	10/11/2018	127	85.2 (77.0-93.4)
4/14/2018	164	61.0 (51.5-70.5)	10/12/2018	126	86.5 (77.6-95.4)
4/15/2018	130	52.8 (45.2-60.4)	10/13/2018	119	84.5 (77.3-91.7)
4/16/2018	144	65.9 (54.9-77.0)	10/14/2018	102	75.0 (69.3-80.7)
4/17/2018	153	57.5 (48.7-66.4)	10/15/2018	117	86.6 (70.3-102.8)
4/18/2018	191	55.3 (47.9-62.7)	10/16/2018	133	80.0 (74.0-86.1)
4/19/2018	177	59.2 (50.7-67.6)	10/17/2018	151	77.9 (72.1-83.8)
4/20/2018	172	57.4 (48.3-66.4)	10/18/2018	123	79.2 (70.0-88.4)
4/21/2018	195	62.6 (53.7-71.5)	10/19/2018	120	86.3 (79.2-93.4)
4/22/2018	137	60.6 (47.4-73.9)	10/20/2018	144	80.6 (73.7-87.6)
4/23/2018	98	61.0 (50.0-72.1)	10/21/2018	99	75.8 (68.5-83.1)

4/24/2018	148	57.4 (48.7-66.2)	10/22/2018	161	78.9 (73.5-84.3)
4/25/2018	152	57.9 (50.3-65.5)	10/23/2018	130	77.2 (69.9-84.4)
4/26/2018	175	62.0 (54.0-70.1)	10/24/2018	121	79.4 (70.4-88.3)
4/27/2018	126	63.8 (52.1-75.5)	10/25/2018	137	79.0 (72.2-85.8)
4/28/2018	154	72.4 (60.8-84.0)	10/26/2018	127	75.7 (68.2-83.3)
4/29/2018	115	58.2 (47.0-69.3)	10/27/2018	128	84.4 (75.7-93.0)
4/30/2018	132	52.9 (45.5-60.3)	10/28/2018	95	84.9 (73.0-96.7)
5/1/2018	185	50.5 (44.7-56.3)	10/29/2018	97	84.3 (74.3-94.3)
5/2/2018	157	64.5 (54.6-74.4)	10/30/2018	123	92.9 (78.5-107.4)
5/3/2018	183	66.0 (55.6-76.3)	10/31/2018	278	73.2 (68.9-77.5)
5/4/2018	126	70.1 (57.0-83.2)	11/1/2018	175	71.4 (65.3-77.5)
5/5/2018	119	62.7 (53.2-72.1)	11/2/2018	129	81.2 (74.1-88.2)
5/6/2018	110	63.0 (50.5-75.5)	11/3/2018	152	67.6 (61.5-73.6)
5/7/2018	138	66.5 (54.8-78.2)	11/4/2018	173	73.4 (67.2-79.6)
5/8/2018	173	60.5 (52.0-69.0)	11/5/2018	130	73.9 (66.3-81.5)
5/9/2018	165	67.5 (55.9-79.0)	11/6/2018	157	71.8 (65.7-77.9)
5/10/2018	160	67.3 (58.2-76.5)	11/7/2018	93	74.1 (67.3-80.9)
5/11/2018	166	61.1 (53.5-68.7)	11/8/2018	148	68.7 (64.0-73.3)
5/12/2018	176	67.2 (57.5-76.9)	11/9/2018	150	70.3 (59.5-81.2)
5/13/2018	133	67.6 (56.7-78.5)	11/10/2018	127	66.2 (60.2-72.2)
5/14/2018	153	64.4 (55.0-73.7)	11/11/2018	182	70.9 (62.7-79.1)
5/15/2018	163	64.7 (55.7-73.7)	11/12/2018	292	62.4 (58.3-66.5)
5/16/2018	142	77.9 (65.9-89.8)	11/13/2018	159	67.5 (61.7-73.3)
5/17/2018	147	68.0 (59.8-76.2)	11/14/2018	195	64.4 (58.8-70.0)
5/18/2018	189	64.2 (56.0-72.3)	11/15/2018	172	65.4 (58.9-71.9)
5/19/2018	180	69.4 (61.1-77.6)	11/16/2018	97	64.9 (57.9-71.9)
5/20/2018	143	66.9 (57.8-75.9)	11/17/2018	118	61.5 (54.6-68.3)
5/21/2018	161	71.4 (61.8-80.9)	11/18/2018	302	65.3 (58.8-71.8)
5/22/2018	159	69.4 (60.7-78.0)	11/19/2018	94	67.7 (59.1-76.4)
5/23/2018	187	73.9 (64.8-83.0)	11/20/2018	113	61.1 (55.5-66.8)
5/24/2018	194	66.6 (58.5-74.7)	11/21/2018	114	63.7 (57.1-70.2)
5/25/2018	179	74.2 (65.3-83.2)	11/22/2018	93	69.1 (58.1-80.2)
5/26/2018	185	73.1 (64.3-81.9)	11/23/2018	82	75.3 (58.0-92.5)
5/27/2018	161	82.3 (68.7-95.8)	11/24/2018	93	58.6 (52.4-64.7)
5/28/2018	105	59.1 (51.0-67.2)	11/25/2018	208	66.3 (58.3-74.3)
5/29/2018	115	67.7 (58.2-77.2)	11/26/2018	87	58.0 (51.3-64.7)
5/30/2018	79	72.4 (53.3-91.5)	11/27/2018	108	64.1 (55.8-72.5)
5/31/2018	109	67.3 (56.1-78.6)	11/28/2018	65	61.5 (51.1-71.8)
6/1/2018	256	79.3 (71.2-87.3)	11/29/2018	81	62.2 (54.0-70.5)
6/2/2018	177	71.3 (61.8-80.9)	11/30/2018	73	69.9 (58.1-81.7)
6/3/2018	229	86.1 (76.6-95.6)	12/1/2018	119	59.8 (53.9-65.7)
6/4/2018	72	68.3 (51.7-84.9)	12/2/2018	139	58.8 (51.2-66.4)
6/5/2018	90	84.0 (70.5-97.6)	12/3/2018	274	71.2 (66.5-75.8)
6/6/2018	65	86.9 (73.3-100.6)	12/4/2018	221	65.9 (58.7-73.1)
6/7/2018	141	102.6 (91.2-114.0)	12/5/2018	136	62.1 (49.5-74.7)
6/8/2018	123	90.4 (80.2-100.6)	12/6/2018	98	58.7 (51.0-66.5)
6/9/2018	197	95.0 (85.7-104.2)	12/7/2018	321	64.4 (60.1-68.8)

6/10/2018	189	91.5 (83.8-99.3)	12/8/2018	207	62.4 (56.7-68.1)
6/11/2018	152	106.9 (97-116.8)	12/9/2018	131	68.9 (59.4-78.4)
6/12/2018	87	88.6 (77.9-99.2)	12/10/2018	44	50.5 (41.6-59.3)
6/13/2018	154	98.6 (90.3-106.8)	12/11/2018	104	69.5 (57.7-81.3)
6/14/2018	171	93.4 (85.3-101.5)	12/12/2018	119	66.4 (56.6-76.3)
6/15/2018	185	101.7 (93.3-110.1)	12/13/2018	110	57.8 (50.2-65.4)
6/16/2018	184	108.0 (99.9-116.0)	12/14/2018	263	64.7 (59.4-70.1)
6/17/2018	119	90.9 (82.4-99.4)	12/15/2018	105	68.0 (59.2-76.8)
6/18/2018	57	116.6 (75.0-158.2)	12/16/2018	133	56.1 (49.7-62.5)
6/19/2018	91	97.6 (84.0-111.2)	12/17/2018	130	64.9 (56.7-73.0)
6/20/2018	98	99.7 (87.5-111.9)	12/18/2018	76	65.4 (54.3-76.5)
6/21/2018	179	103.4 (96.2-110.6)	12/19/2018	76	57.0 (45.5-68.4)
6/22/2018	93	93.0 (83.1-102.8)	12/20/2018	118	63.3 (52.4-74.2)
6/23/2018	152	109.6 (97.6-121.5)	12/21/2018	182	62.3 (55.1-69.6)
6/24/2018	118	100.2 (91.9-108.4)	12/22/2018	148	55.3 (49.6-61.0)
6/25/2018	152	108.8 (85.8-131.8)	12/23/2018	357	54.0 (50.3-57.7)
6/26/2018	63	106.4 (93.5-119.2)	12/24/2018	247	60.5 (53.8-67.2)
6/27/2018	167	105.1 (96.9-113.3)	12/25/2018	209	50.9 (47.3-54.5)
6/28/2018	115	106.4 (97.2-115.7)	12/26/2018	101	68.8 (56.7-80.9)
6/29/2018	118	106.5 (96.8-116.2)	12/27/2018	142	64.8 (55.8-73.9)
6/30/2018	126	110.6 (100.0-121.3)	12/28/2018	116	67.7 (57.6-77.9)
			12/29/2018	97	61.8 (53.5-70.1)
			12/30/2018	101	53.2 (46.8-59.5)
			12/31/2018	40	77.2 (54.7-99.6)

Table A.6: Mean Number of Days in ORR Custody for UCs Released from ORR Custody Between July 1, 2018 and June 30, 2019 (Figure 7)

Date of Entry	*N*	Mean Number of Days in ORR Custody	Date of Entry	*N*	Mean Number of Days in ORR Custody
7/1/2018	78	81.3 (73.7-89.0)	1/1/2019	211	82.0 (72.2-91.9)
7/2/2018	68	62.8 (56.0-69.7)	1/2/2019	239	72.2 (66.7-77.6)
7/3/2018	50	74.9 (60.7-89.1)	1/3/2019	207	88.4 (79.7-97.1)
7/4/2018	91	72.3 (62.0-82.6)	1/4/2019	339	79.4 (72.1-86.7)
7/5/2018	84	72.1 (60.9-83.3)	1/5/2019	266	79.4 (71.2-87.6)
7/6/2018	77	72.8 (61.5-84.1)	1/6/2019	314	74.7 (69.9-79.6)
7/7/2018	106	62.4 (55.3-69.5)	1/7/2019	180	66.9 (60.5-73.2)
7/8/2018	72	76.9 (64.3-89.4)	1/8/2019	181	80.1 (71.7-88.5)
7/9/2018	57	67.2 (58.8-75.6)	1/9/2019	257	76.8 (70.0-83.7)
7/10/2018	48	72.7 (57.5-87.9)	1/10/2019	257	76.7 (69.5-83.8)
7/11/2018	101	78.9 (69.0-88.8)	1/11/2019	271	76.1 (69.8-82.4)
7/12/2018	94	78.4 (66.7-90.1)	1/12/2019	211	54.7 (49.2-60.3)
7/13/2018	105	62.4 (56.0-68.8)	1/13/2019	164	63.6 (56.8-70.5)
7/14/2018	125	61.8 (55.1-68.5)	1/14/2019	62	78.9 (64.8-93.0)
7/15/2018	62	72.2 (58.8-85.7)	1/15/2019	86	76.7 (62.9-90.5)
7/16/2018	47	64.0 (50.0-78.0)	1/16/2019	171	62.9 (55.3-70.4)

7/17/2018	44	76.6 (61.6-91.6)	1/17/2019	178	68.2 (57.8-78.5)
7/18/2018	82	75.9 (67.0-84.8)	1/18/2019	208	71.3 (62.2-80.5)
7/19/2018	112	71.6 (64.4-78.8)	1/19/2019	230	69.2 (60.1-78.2)
7/20/2018	124	77.2 (68.2-86.2)	1/20/2019	124	68.1 (57.6-78.5)
7/21/2018	137	75.6 (64.3-86.9)	1/21/2019	56	74.0 (57.6-90.5)
7/22/2018	84	72.2 (62.8-81.7)	1/22/2019	60	78.9 (62.5-95.2)
7/23/2018	53	65.8 (59.4-72.2)	1/23/2019	105	76.8 (62.1-91.5)
7/24/2018	66	69.2 (58.3-80.2)	1/24/2019	177	75.4 (66.1-84.7)
7/25/2018	75	78.0 (66.0-89.9)	1/25/2019	166	73.3 (64.5-82.1)
7/26/2018	104	86.4 (76.4-96.4)	1/26/2019	219	76.5 (66.4-86.5)
7/27/2018	106	77.1 (67.3-87.0)	1/27/2019	129	73.8 (63.1-84.5)
7/28/2018	90	75.1 (65.0-85.2)	1/28/2019	81	63.5 (54.1-72.9)
7/29/2018	69	73.3 (62.4-84.2)	1/29/2019	133	69.7 (61.2-78.2)
7/30/2018	30	86.9 (64.8-109.1)	1/30/2019	162	78.3 (68.4-88.2)
7/31/2018	67	75.4 (65.6-85.2)	1/31/2019	157	82.5 (69.6-95.3)
8/1/2018	96	75.1 (67.5-82.6)	2/1/2019	247	77.4 (67.4-87.5)
8/2/2018	97	73.3 (59.8-86.8)	2/2/2019	279	75.0 (66.4-83.6)
8/3/2018	113	79.4 (71.4-87.4)	2/3/2019	189	68.3 (59.9-76.6)
8/4/2018	95	70.2 (61.0-79.4)	2/4/2019	86	74.8 (57.1-92.5)
8/5/2018	56	70.7 (62.2-79.2)	2/5/2019	107	67.2 (59.2-75.3)
8/6/2018	38	75.0 (64.6-85.5)	2/6/2019	185	69.7 (60.4-79.0)
8/7/2018	61	75.9 (60.1-91.6)	2/7/2019	199	64.2 (57.0-71.4)
8/8/2018	75	70.7 (62.3-79.2)	2/8/2019	211	73.6 (63.4-83.9)
8/9/2018	79	74.0 (66.3-81.7)	2/9/2019	91	73.1 (60.3-85.9)
8/10/2018	99	72.4 (66.2-78.6)	2/10/2019	197	64.5 (56.4-72.7)
8/11/2018	115	79.2 (60.7-97.7)	2/11/2019	90	59.1 (50.2-67.9)
8/12/2018	66	76.5 (66.7-86.2)	2/12/2019	82	72.8 (59.5-86.1)
8/13/2018	26	88.4 (66.4-110.4)	2/13/2019	136	72.4 (62.0-82.8)
8/14/2018	53	74.4 (63.7-85.2)	2/14/2019	84	79.2 (56.2-102.2)
8/15/2018	77	85.2 (74.3-96.2)	2/15/2019	160	61.3 (52.4-70.2)
8/16/2018	87	78.7 (70.9-86.5)	2/16/2019	290	65.5 (58.6-72.4)
8/17/2018	80	83.1 (72.5-93.7)	2/17/2019	263	60.8 (53.8-67.8)
8/18/2018	93	76.8 (69.2-84.5)	2/18/2019	133	67.7 (55.2-80.1)
8/19/2018	40	85.0 (69.9-100.0)	2/19/2019	143	65.3 (53.8-76.8)
8/20/2018	20	85.4 (64.2-106.5)	2/20/2019	226	64.0 (56.8-71.3)
8/21/2018	45	77.4 (60.7-94.2)	2/21/2019	243	63.0 (56.4-69.7)
8/22/2018	77	80.8 (70.3-91.3)	2/22/2019	256	66.9 (60.0-73.8)
8/23/2018	77	79.1 (68.7-89.5)	2/23/2019	348	64.1 (58.5-69.8)
8/24/2018	77	88.1 (78.5-97.7)	2/24/2019	240	59.0 (52.8-65.2)
8/25/2018	100	82.8 (73.2-92.4)	2/25/2019	137	73.7 (63.8-83.5)
8/26/2018	69	80.9 (73.6-88.2)	2/26/2019	199	53.7 (46.8-60.6)
8/27/2018	20	81.5 (66.6-96.4)	2/27/2019	215	67.7 (57.6-77.9)
8/28/2018	35	71 (55.7-86.3)	2/28/2019	258	73.1 (65.0-81.3)
8/29/2018	73	77.4 (68.1-86.6)	3/1/2019	284	59.0 (51.9-66.1)
8/30/2018	66	90.0 (78.4-101.5)	3/2/2019	313	61.3 (54.1-68.4)
8/31/2018	82	82.4 (73.1-91.6)	3/3/2019	229	54.6 (47.7-61.5)
9/1/2018	78	81.3 (73.7-89.0)	3/4/2019	157	58.7 (50.5-67.0)

9/2/2018	71	80.3 (72.8-87.9)	3/5/2019	163	65.5 (57.0-74.0)
9/3/2018	14	88.3 (78.4-98.2)	3/6/2019	174	70.9 (61.4-80.4)
9/4/2018	21	84.2 (64.7-103.7)	3/7/2019	235	56.0 (50.0-62.1)
9/5/2018	23	85.4 (55.1-115.8)	3/8/2019	231	60.6 (53.2-68.0)
9/6/2018	53	94.5 (85.1-103.8)	3/9/2019	274	56.8 (50.3-63.3)
9/7/2018	93	91.6 (83.5-99.8)	3/10/2019	214	46.1 (41.2-51.0)
9/8/2018	81	92.7 (80.4-105.0)	3/11/2019	145	44.4 (38.6-50.2)
9/9/2018	71	93.7 (82.0-105.4)	3/12/2019	172	50.8 (44.1-57.4)
9/10/2018	31	83.3 (65.5-101.1)	3/13/2019	182	60.5 (52.4-68.6)
9/11/2018	45	91.8 (77.0-106.7)	3/14/2019	203	55.8 (48.2-63.3)
9/12/2018	59	89.6 (76.4-102.8)	3/15/2019	211	51.3 (43.5-59.1)
9/13/2018	79	86.4 (75.9-97.0)	3/16/2019	233	47.6 (41.6-53.6)
9/14/2018	88	78.1 (69.8-86.5)	3/17/2019	209	44.6 (39.5-49.8)
9/15/2018	96	81.2 (74.2-88.3)	3/18/2019	234	47.2 (40.9-53.5)
9/16/2018	50	97.4 (80.2-114.6)	3/19/2019	175	56.2 (48.2-64.1)
9/17/2018	64	84.8 (75.7-93.8)	3/20/2019	156	56.4 (47.5-65.3)
9/18/2018	111	85.4 (77.4-93.4)	3/21/2019	216	60.3 (53.2-67.4)
9/19/2018	81	88.8 (77.0-100.5)	3/22/2019	264	52.1 (45.4-58.8)
9/20/2018	119	76.3 (70.3-82.2)	3/23/2019	264	46.0 (41.8-50.2)
9/21/2018	125	83.8 (75.5-92.1)	3/24/2019	179	46.4 (39.7-53.0)
9/22/2018	131	79.5 (73.9-85.2)	3/25/2019	189	53.9 (46.2-61.6)
9/23/2018	107	84.8 (76.6-93.0)	3/26/2019	172	52.5 (44.7-60.3)
9/24/2018	82	84.6 (73.6-95.5)	3/27/2019	224	56.8 (48.1-65.5)
9/25/2018	87	78.3 (71.8-84.8)	3/28/2019	270	48.4 (42.6-54.2)
9/26/2018	101	82.5 (74.5-90.6)	3/29/2019	266	43.2 (38.2-48.3)
9/27/2018	174	88.9 (80.8-96.9)	3/30/2019	378	41.9 (38.0-45.8)
9/28/2018	225	80.2 (74.7-85.7)	3/31/2019	293	45.3 (39.3-51.4)
9/29/2018	211	83.9 (78.0-89.8)	4/1/2019	295	45.7 (39.8-51.7)
9/30/2018	148	80.3 (72.7-87.9)	4/2/2019	233	43.2 (37.3-49.1)
10/1/2018	93	79.5 (72.6-86.3)	4/3/2019	175	52.3 (43.6-61.1)
10/2/2018	93	84.1 (75.9-92.3)	4/4/2019	299	51.4 (45.3-57.5)
10/3/2018	123	81.9 (76.4-87.4)	4/5/2019	284	44.0 (39.4-48.5)
10/4/2018	163	86.1 (80.5-91.6)	4/6/2019	317	38.8 (35.0-42.6)
10/5/2018	133	89.2 (81.5-96.8)	4/7/2019	247	44.7 (38.7-50.7)
10/6/2018	173	80.2 (75.2-85.2)	4/8/2019	216	39.9 (35.0-44.7)
10/7/2018	113	88.9 (74.6-103.3)	4/9/2019	171	50.5 (43.2-57.8)
10/8/2018	69	83.3 (75.3-91.4)	4/10/2019	163	44.3 (37.5-51.2)
10/9/2018	62	82.5 (73.5-91.5)	4/11/2019	260	45.0 (39.2-50.8)
10/10/2018	120	84.7 (77.7-91.7)	4/12/2019	297	43.6 (38.2-49.1)
10/11/2018	152	89.7 (81.8-97.6)	4/13/2019	347	43.7 (38.8-48.6)
10/12/2018	144	101.8 (92.6-111.1)	4/14/2019	255	41.7 (35.6-47.8)
10/13/2018	125	88.0 (81.2-94.9)	4/15/2019	198	36.9 (31.0-42.7)
10/14/2018	78	98.6 (87.4-109.7)	4/16/2019	260	40.7 (35.9-45.5)
10/15/2018	59	99.6 (84.8-114.5)	4/17/2019	208	44.6 (38.4-50.9)
10/16/2018	81	98.0 (86.8-109.3)	4/18/2019	283	46.9 (40.2-53.5)
10/17/2018	120	98.7 (87.1-110.2)	4/19/2019	368	42.9 (38.9-46.9)
10/18/2018	119	81.3 (70.8-91.8)	4/20/2019	306	37.0 (33.2-40.7)

10/19/2018	150	90.2 (81.0-99.3)	4/21/2019	225	42.0 (36.3-47.8)
10/20/2018	162	89.4 (81.8-97.0)	4/22/2019	219	44.7 (37.7-51.6)
10/21/2018	86	82.5 (72.0-93.0)	4/23/2019	221	48.5 (40.3-56.7)
10/22/2018	48	78.0 (68.1-88.0)	4/24/2019	211	44.8 (38.5-51.1)
10/23/2018	75	90.0 (75.7-104.3)	4/25/2019	265	46.9 (40.3-53.6)
10/24/2018	137	94.4 (85.0-103.8)	4/26/2019	311	40.9 (36.6-45.2)
10/25/2018	114	90.5 (78.7-102.3)	4/27/2019	394	45.2 (38.1-52.4)
10/26/2018	135	82.4 (75.7-89.0)	4/28/2019	268	44.8 (38.1-51.4)
10/27/2018	176	87.0 (78.5-95.6)	4/29/2019	261	39.2 (32.5-45.8)
10/28/2018	103	84.2 (74.8-93.7)	4/30/2019	212	43.5 (38.9-48.1)
10/29/2018	76	78.3 (69.3-87.3)	5/1/2019	168	43.5 (37.2-49.8)
10/30/2018	67	85.6 (75.1-96.0)	5/2/2019	195	39.8 (33.5-46.0)
10/31/2018	125	83.5 (74.6-92.4)	5/3/2019	337	36.5 (32.8-40.2)
11/1/2018	149	80.0 (72.7-87.4)	5/4/2019	361	39.5 (35.8-43.3)
11/2/2018	158	96.1 (89.1-103.1)	5/5/2019	329	40.3 (36.0-44.6)
11/3/2018	148	91.8 (81.6-101.9)	5/6/2019	249	39.5 (34.9-44.2)
11/4/2018	124	88.4 (76.1-100.7)	5/7/2019	223	43.0 (37.3-48.7)
11/5/2018	97	86.3 (76.9-95.7)	5/8/2019	136	52.4 (42.1-62.7)
11/6/2018	106	81.5 (73.9-89.1)	5/9/2019	280	45.2 (39.5-51.0)
11/7/2018	120	86.8 (77.7-96.0)	5/10/2019	301	41.1 (36.5-45.7)
11/8/2018	153	92.2 (82.8-101.5)	5/11/2019	366	38.0 (34.4-41.6)
11/9/2018	148	80.4 (73.0-87.8)	5/12/2019	330	42.7 (37.1-48.2)
11/10/2018	163	83.6 (76.0-91.2)	5/13/2019	254	45.4 (36.5-54.4)
11/11/2018	135	83.6 (74.8-92.3)	5/14/2019	210	42.3 (36.6-48.0)
11/12/2018	87	84.5 (72.0-97.1)	5/15/2019	149	45.1 (36.9-53.3)
11/13/2018	83	80.8 (71.1-90.4)	5/16/2019	277	39.5 (34.2-44.8)
11/14/2018	91	82.8 (73.8-91.7)	5/17/2019	316	43.3 (38.1-48.5)
11/15/2018	153	88.6 (81.2-96.1)	5/18/2019	354	34.5 (31.3-37.7)
11/16/2018	144	94 (83.7-104.4)	5/19/2019	275	37.8 (33.8-41.7)
11/17/2018	160	92.6 (84.4-100.8)	5/20/2019	228	41.1 (36.2-46.1)
11/18/2018	119	92.7 (83.6-101.7)	5/21/2019	250	49.2 (41.6-56.8)
11/19/2018	75	81.3 (71.4-91.3)	5/22/2019	178	43.1 (36.1-50.1)
11/20/2018	111	94.9 (85.4-104.4)	5/23/2019	283	43.5 (38.3-48.6)
11/21/2018	119	88.2 (79.2-97.3)	5/24/2019	329	38.5 (34.3-42.7)
11/22/2018	97	101.2 (85.8-116.7)	5/25/2019	384	37.0 (33.6-40.3)
11/23/2018	96	104.7 (88.9-120.5)	5/26/2019	330	41.4 (36.7-46.0)
11/24/2018	75	87.1 (76.8-97.5)	5/27/2019	213	41.2 (34.9-47.5)
11/25/2018	53	77.7 (67.1-88.3)	5/28/2019	222	41.2 (36.3-46.1)
11/26/2018	20	72.8 (52.6-93.0)	5/29/2019	97	42.9 (35.8-50.0)
11/27/2018	64	101.7 (86.2-117.1)	5/30/2019	160	39.3 (34.0-44.7)
11/28/2018	104	89.7 (78.1-101.3)	5/31/2019	339	43.5 (38.8-48.1)
11/29/2018	135	93.4 (84.2-102.5)	6/1/2019	381	39.5 (35.4-43.7)
11/30/2018	123	101 (91.2-110.9)	6/2/2019	285	44.7 (37.9-51.4)
12/1/2018	167	90.3 (83.2-97.4)	6/3/2019	238	40.2 (36.5-43.9)
12/2/2018	150	92.7 (85.5-100.0)	6/4/2019	235	47.8 (36.7-58.9)
12/3/2018	44	93 (80.7-105.4)	6/5/2019	150	47.7 (41.0-54.3)
12/4/2018	115	89.3 (78.1-100.5)	6/6/2019	292	38.8 (34.9-42.7)

12/5/2018	132	90.7 (81.1-100.4)	6/7/2019	357	35.8 (32.5-39.2)
12/6/2018	136	96.7 (86.8-106.5)	6/8/2019	378	41.2 (36.0-46.5)
12/7/2018	133	92.1 (83.7-100.5)	6/9/2019	312	37.7 (33.6-41.7)
12/8/2018	143	95.9 (85.6-106.3)	6/10/2019	280	36.0 (32.5-39.5)
12/9/2018	114	99.2 (87.5-110.9)	6/11/2019	219	41.4 (37.3-45.5)
12/10/2018	59	100.4 (85.0-115.8)	6/12/2019	170	39.1 (34.6-43.7)
12/11/2018	113	83.4 (73.7-93.1)	6/13/2019	292	44.7 (40.3-49.1)
12/12/2018	130	96.2 (85.4-107.0)	6/14/2019	356	44.3 (37.9-50.7)
12/13/2018	158	89.2 (80.7-97.7)	6/15/2019	377	40.2 (35.6-44.7)
12/14/2018	200	95.2 (87.4-103.0)	6/16/2019	302	39.3 (35.2-43.5)
12/15/2018	206	94.9 (85.6-104.1)	6/17/2019	214	43.2 (38.0-48.5)
12/16/2018	161	87.7 (78.9-96.4)	6/18/2019	221	40.4 (36.2-44.7)
12/17/2018	69	82.0 (70.9-93.1)	6/19/2019	180	42.9 (33.5-52.3)
12/18/2018	94	99.3 (87.3-111.3)	6/20/2019	270	38.7 (33.9-43.4)
12/19/2018	132	109.9 (96-123.8)	6/21/2019	323	41.2 (35.2-47.2)
12/20/2018	212	86.7 (79.6-93.9)	6/22/2019	371	42.1 (37.5-46.7)
12/21/2018	293	84.2 (78.8-89.6)	6/23/2019	312	39.4 (36.2-42.5)
12/22/2018	328	83.2 (76.9-89.4)	6/24/2019	249	40.3 (35.3-45.4)
12/23/2018	496	80.2 (74.9-85.4)	6/25/2019	248	43.4 (38.1-48.6)
12/24/2018	439	76.2 (71.7-80.6)	6/26/2019	298	45.1 (40.2-50.0)
12/25/2018	314	81.9 (76.4-87.3)	6/27/2019	368	41.9 (37.2-46.7)
12/26/2018	248	80.1 (72.7-87.5)	6/28/2019	372	41.5 (37.4-45.6)
12/27/2018	222	79.9 (73.9-86.0)	6/29/2019	366	41.5 (37.6-45.4)
12/28/2018	206	83.6 (77.1-90.2)	6/30/2019	333	40.8 (36.3-45.3)
12/29/2018	312	78.7 (72.9-84.6)			
12/30/2018	273	80.4 (73.9-86.9)			
12/31/2018	231	79.0 (72.1-85.8)			