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Broken Bones and Pepper Spray: The State-Sanctioned Abuse of Immigrant Juveniles in Custody

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BROKEN BONES AND PEPPER SPRAY: THE STATE-SANCTIONED ABUSE OF IMMIGRANT JUVENILES IN CUSTODY

ALIX BRUCE*

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INTRODUCTION

On June 29, 2018, four unaccompanied alien children (“UACs”) filed a complaint for injunctive relief in the state of California against Alex Azar, the Secretary of the Department of Health and Human Services (“HHS”), and Scott Lloyd, the Director of the Office of Refugee Resettlement (“ORR”).¹ One of those children is seventeen year old Miguel Angel S., a Mexican citizen detained at Yolo County Juvenile Detention Center.² The ORR took custody of Miguel Angel after his arrival at the U.S.-Mexico border on or around May 16, 2017, and told him he would be released to his father within three months.³

Since the ORR took custody of Miguel Angel, the ORR has transferred him to another facility in Texas without providing Miguel Angel notice or a right to appeal.⁴ ORR staff have repeatedly physically assaulted him.⁵ During one incident, an employee tore Miguel Angel’s earring from his

1. See Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1 (C.D. Cal. filed June 29, 2018) (providing an overview of unreasonable force used on a UAC in ORR custody).

2. See *id.* at ¶ 13 (confirming that Miguel is a UAC under the federal definition).

3. See *id.* at ¶ 40 (stating he was initially housed at the Southwest Kay shelter in southern California).

4. See *id.* at ¶ 41 (stating Miguel Angel fears never being released).

5. See *id.* at ¶ 41-46 (detailing incidents at multiple facilities).

earlobe.⁶ Shiloh staff held Miguel Angel against the wall while one employee pressed his forearm across Miguel Angel's throat to make it difficult to breathe.⁷ There was no disciplinary action; the ORR transferred him again, without notice, to the Yolo Juvenile Detention Center soon after.⁸ Staffers at Yolo used pepper spray on his eyes and ears; to clean his eyes out, Miguel Angel had no choice but to use water from the toilet in his cell because staffers had cut off water to his sink.⁹ Miguel Angel is still waiting to be reunited with his father; ORR has never given him a reason for why they have not released his son.¹⁰

Over 60,000 children crossed the U.S.-Mexico border in 2014.¹¹ With the humanitarian crisis of family separation on the U.S.-Mexico border dominating headlines, over 2,500 children were separated from their families.¹² As of August 16, 2018, over 500 children are still waiting to be reunited with their parents in violation of a court order.¹³ As of February 3, 2019, the Trump administration is unsure how many children were actually separated from their families; the number could be in the thousands.¹⁴

6. *See id.* at ¶ 44 (stating that a physician's assistant watched the attack and did nothing).

7. *See id.* (describing how Miguel Angel was physically lifted off the floor by his arms).

8. *See id.* at ¶ 45 (stating that other plaintiffs have been frequently transferred with no notice to them or their families).

9. *See id.* at ¶ 46 (stating that Miguel Angel lost all hearing in one ear for several days due to the pepper spray).

10. *See id.* at ¶ 48 (stating that a home investigator has cleared the apartment and all appropriate documents submitted).

11. *See* Associated Press, *Obama Calls Child Migrants an 'Urgent Humanitarian Issue,'* AL JAZEERA AMERICA (June 2, 2014), <http://america.aljazeera.com/articles/2014/6/2/obama-child-immigrantsalone.html> (emphasizing the need for further aid after an uptick in child migrants crossing the U.S. southern border in 2014).

12. *See* All Things Considered, *Family Reunification Deadline Approaches*, NPR, <https://www.npr.org/2018/07/22/631349973/reunification-deadline-approaches> (last visited Jul. 22, 2018) (stating there are more than 2,000 immigrant juveniles still waiting to be reunited with their parents).

13. *See* Tal Kopan, *Hundreds of Separated Children Not Reunited By Court-Ordered Deadline*, CNN <https://www.cnn.com/2018/07/26/politics/family-separations-deadline/index.html> (last visited Nov. 13, 2018) (stating that the Department of Homeland Security declared the deadline had been met, while the American Civil Liberties Union contested its completion).

14. *See* Lauren Pearle, *Trump Administration Unsure if Thousands more Migrant Families were Separated than Originally Estimated, Legal Filing Shows*, ABC NEWS (Feb. 2, 2019), <https://abcnews.go.com/beta-story-container/US/trump-administration->

This Comment argues that the physical, emotional, and sexual abuse endured by immigrant juveniles in ORR custody is unmonitored, state-sanctioned abuse that violates both the Fifth and Eighth Amendments of the U.S. Constitution as well as federal law.¹⁵ Part II describes the ORR, federal laws which impact it, and ORR policies for handling unaccompanied immigrant children, including prevention of abuse and assault in containment centers.¹⁶ Part III investigates the role of the ORR as the primary actor in state-sanctioned abuse and asserts through Fifth and Eighth Amendment analyses that the physical and sexual abuse of immigrant juveniles in ORR custody violates the juveniles' constitutional rights, the Refugee Act, PREA, and the *Flores* settlement.¹⁷ Part IV recommends that the ORR be held accountable for the actions of its contracted containment facilities and that the U.S. government must provide immigrant juveniles with proper constitutional protections.¹⁸ Part V concludes by reiterating that immigrant juveniles experience state-sanctioned abuse by the ORR, which amounts to both an unconstitutional lack of due process as required by the Fifth Amendment and cruel and unusual punishment under the Eighth Amendment.¹⁹

unsure-thousands-migrant-families-separated-originally/story?id=60797633 (last visited Feb. 3, 2019).

15. See U.S. CONST. amend. V (stating that no person shall be deprived of life, liberty, or property without due process); see also U.S. CONST. amend. VIII (declaring that inflicting cruel and unusual punishments is unconstitutional); *infra* Part III (discussing the frequent violations of the Refugee Act, PREA, and the *Flores* Settlement).

16. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100, 13117 (Mar. 7, 2014) (to be codified at 6 C.F.R. pt. 115) (calling the centers where the ORR house UACs "containment centers"); see also Prison Rape Elimination Act, 34 U.S.C. § 30302 (2017) (describing the purposes of PREA). See generally Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77768 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt. 411) (detailing specific strategies to prevent sexual abuse of UACs).

17. See *infra* Part III (establishing that the treatment of immigrant juveniles in detention is state-sanctioned abuse).

18. See *infra* Part IV (pushing for stronger judicial action to protect the rights of immigrant juveniles).

19. See *infra* Part V (concluding that the ORR is participating in the state-sanctioned abuse of immigrant juveniles).

I. BACKGROUND

A. *The Office of Refugee Resettlement*1. *History*

Congress's Refugee Act explicitly provided for the creation of the ORR.²⁰ The ORR, run by a Director, creates programs to aid refugees in the U.S., including UACs, who are under the supervision of the Division of Unaccompanied Children's Services ("DUCS").²¹ DUCS places UACs in care, supervises the reunification process with qualified sponsors or family, and oversees ORR-funded care facilities, as the ORR itself does not have the capacity to house UACs alone.²² The Director assesses the needs of the refugees in the ORR's care.²³ The ORR Director assumes legal and financial responsibility for UACs; the Director is authorized to commit to contracts with public or private agencies to provide childcare for UACs if he determines agency conditions to be "appropriate."²⁴ The term "appropriate" is undefined in the Refugee Act; however, as shown in *D.B. v. Poston*, the ORR internally defines "appropriate" as a safe, stable environment without threat of abuse, domestic violence, or unsafe behavior.²⁵

2. *Immigrant Juveniles Are Only Protected Through a Patchwork of Policies*

After Congress passed the Prison Rape Elimination Act ("PREA") in 2003, President Obama issued a Presidential Memorandum declaring that PREA applied to all federal confinement facilities, not just facilities overseen by the Department of Justice ("DOJ").²⁶ ORR confinement facilities were

20. See Refugee Act of 1980, 8 U.S.C. § 1521(a) (1980) (establishing the ORR, which is headed by a Director appointed by the HHS Secretary).

21. See *id.* (stating that the ORR's function is to both fund and administer programs for refugees); see also Office of Refugee Resettlement, *Divisions – Unaccompanied Children's Services* (Oct. 3, 2012), <https://www.acf.hhs.gov/orr/resource/divisions-unaccompanied-childrens-services> (describing DCS, also known as DUCS).

22. See Office of Refugee Resettlement, *Divisions – Unaccompanied Children's Services* (Oct. 3, 2012), <https://www.acf.hhs.gov/orr/resource/divisions-unaccompanied-childrens-services> (describing the full extent of DUCS obligations).

23. See 8 U.S.C. § 1522(a)(3) (stating that the ORR must conduct periodic assessments to determine the needs of refugees).

24. See *id.* § 1522(d)(2)(B)(ii)-(iii) (neglecting to define "appropriate" in-statute).

25. See *D.B. v. Poston*, 119 F. Supp. 3d 472, 484 (E.D. Va. 2015) (describing conditions of a rejected rehousing situation in an ORR custody case and listing reasons why the home was not "appropriate").

26. See Prison Rape Elimination Act, 34 U.S.C. § 30302 (2017) (defining the

directed to modify or create new sets of rules and procedures which would satisfy PREA's requirements.²⁷ PREA has nine overall purposes, including the establishment of a zero-tolerance standard for prison rape; increasing the accountability of prison officials; and protecting the Eighth Amendment rights of prisoners, including, according to the memorandum, UACs in ORR custody.²⁸ To comply with President Obama's memorandum, the ORR produced operating procedures "appropriate for its care provider facilities."²⁹ The ORR Director may contract with public and private agencies to house UACs; as such, the ORR also drafted supplemental procedures for these agencies which complied with the National Prison Rape Elimination Commission's ("NPREC") recommended standards.³⁰

When the ORR takes custody of a UAC, the ORR's Division of Unaccompanied Children's Services ("DUCS") undertakes oversight of the child to place them in shelter care.³¹ As the ORR is a government agency, it cannot house children on its own and instead must contract out to these agencies to provide the care stipulated in its mandate.³² The ORR requires that licensed programs and facilities comply with child welfare laws of the states in which they are situated and provide physical and mental health services as necessary.³³ While there are different levels of ORR facilities for UACs, depending on their categorization, all programs must comply with child welfare laws.³⁴

purposes of PREA).

27. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77770 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt. 411) (establishing administrative tactics for containment centers to handle sexual abuse and assault).

28. See 34 U.S.C. § 30302 (listing the purposes of PREA).

29. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. at 77770 (defining care provider facilities as shelters, group homes, and residential treatment centers, among others).

30. See *id.* (describing further types of detainment centers).

31. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100, 13117 (Mar. 7, 2014) (to be codified at 6 C.F.R. 115) (stating that detained immigrant juveniles must be quickly placed within ORR custody).

32. See Refugee Act of 1980, 8 U.S.C. § 1522(d)(2)(B)(ii)-(iii) (1980) (enabling the Director to contract with facilities to house UACs, as the ORR is a government agency).

33. See Services to Unaccompanied Alien Children, 69 Fed. Reg. 40950, 40950-51 (Jul. 7, 2004) (listing all services which must be offered by the ORR to UACs).

34. See *id.*; see also Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states->

B. Constitutional Rights and Wrongs: The Fifth and Eighth Amendment as Applied (Or Not) in Juvenile Detention

1. Reno v. Flores

In 1993, four immigrant juvenile detainees filed a class action on behalf of immigrant juveniles in the District Court for the Central District of California.³⁵ The government detained each juvenile on suspicion of being deportable; the plaintiffs claimed that even as immigrant juveniles, they had a fundamental right to be free from physical restraint, and to detain them indefinitely violated their substantive due process rights.³⁶ The Supreme Court found that their detention was not unconstitutional as long as conditions of custody were both decent and humane.³⁷ The ruling in *Flores* stated that the regulation which permitted the federal government to hold UACs would have a time limit based on the deportation hearings; in practice, it effectively means a child can remain in ORR custody indefinitely if no relative or legal guardian comes forward to take custody.³⁸ The ruling is explicitly qualified by decent and humane custody for the detained child.³⁹ The Flores Settlement, entered into a few years later, emphasizes that unaccompanied minors must be held in safe, sanitary facilities.⁴⁰

2. R.G. v. Koller and Agency Liability Under the Constitution

The plaintiffs in *R.G. v. Koller* were three LGBTQ delinquents held at the Hawaii Youth Correctional Facility (“HYCF”) who filed against the state for violations of their due process rights.⁴¹ Plaintiffs experienced a myriad of

unaccompanied-guide-to-terms (last visited Jan. 19, 2019) (detailing the difference between group homes, extended care group homes, influx care facilities, long term foster care, shelters, and residential treatment centers).

35. See *Reno v. Flores*, 507 U.S. 292, 292 (1993) (ruling that regulations regarding the release of immigrant juveniles to only their parents, close relatives, or legal guardians do not violate substantive due process).

36. See *id.* at 300 (claiming that further detention of the immigrant juveniles was a denial of their substantive due process rights).

37. See *id.* at 303 (stating that preserving a child’s welfare has a rational connection to a government interest).

38. See *id.* at 322 (Stevens, J., dissenting) (stating that the INS rule did not pose a time limit and that the only tool UACs have to appeal their custody is seeking a writ of habeas corpus).

39. See *id.* at 303 (stating that the conditions must be humane).

40. See Stipulated Settlement Agreement at 4, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997) (describing the safety and sanitary standard of housing for unaccompanied minors in INS custody).

41. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1133 (D. Haw. 2006) (holding that the

homophobic attacks, including pervasive verbal abuse, physical assault, and sexual assault; staffers also placed the plaintiffs into solitary confinement without cause.⁴² The court in *R.G. v. Koller* declined to examine the Eighth Amendment claims of the juveniles confined at HYCF because the Eighth Amendment applies only to people convicted of crimes.⁴³ Instead, the court examined the abuse, isolation, harassment, neglect, and assault that plaintiffs experienced under the Due Process principle of the Fourteenth Amendment.⁴⁴ The court concluded that isolation in particular had violated the due process rights of the plaintiffs detained in HYCF.⁴⁵ The court also concluded that the staff's negligence at HYCF was deliberate and allowed for extensive abuse of the plaintiffs.⁴⁶

In contrast to *R.G. v. Koller*, the District Court of Texas in *Walding v. United States* declined to decide the due process rights of immigrant juveniles abused at an ORR-contracted detention center in Nixon, Texas because plaintiffs had failed to demonstrate that employees of the ORR acted with deliberate indifference to the abusive conditions at the center.⁴⁷ The ORR contracts with public and private institutions on behalf of the federal government, so all claims of deliberate negligence fall under the Fifth Amendment's Due Process Clause, and the case was analyzed as such.⁴⁸ While being held at the Away From Home, Inc. ("AFH") facility, plaintiffs claimed that employees of the facility repeatedly physically and sexually

juveniles had the standing to file a due process claim under the Fourteenth Amendment).

42. See *id.* at 1143-50 (describing the full extent of the many months of abuse and assault).

43. Compare *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1152 (D. Haw. 2006) (stating that the wards of HYCF are delinquent and have not yet been convicted of a crime), with César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014) (analyzing the intersection of criminal law and immigration law silos and claiming the current system essentially condenses immigration offenses into criminal offenses).

44. See *R.G. v. Koller*, 415 F. Supp. 2d at 1152 (applying the *Bell* test to determine whether conditions or restrictions in pre-trial detention are punitively intended by determining whether they have any purpose outside of punishment).

45. See *id.* at 1155 (stating that the use of isolation in HYCF constituted punishment and was a blatant violation of the plaintiffs' due process rights).

46. See *id.* at 1156 (holding that the plaintiffs' evidence showed HYCF conditions amounted to cruel and unusual punishment).

47. See *Walding v. United States*, 955 F. Supp. 2d 759, 788 (W.D. Tex. 2013) (stating that while the ORR did not act promptly, it also was not deliberately indifferent).

48. See Refugee Act of 1980, 8 U.S.C. § 1522(d)(2)(A) (Mar. 17, 1980) (granting the ORR Director the ability to contract with public and private agencies for housing UACs).

assaulted them.⁴⁹ Employees yanked plaintiffs from their beds and threw them to the floor; intoxicated and sober staff beat the plaintiffs and threw them against walls and doors.⁵⁰ Eight of the plaintiffs alleged that a female staffer sexually abused them recurrently; another plaintiff claimed a female supervisor sexually assaulted him in the shower.⁵¹ In September 2006, the Texas Department of Family and Protective Services (“TDFPS”) informed the ORR of the allegations; AFH, despite knowing of the incident since that past April, had not reported it to the ORR, and the agency further kept its contract with the ORR until 2007.⁵² An independent monitor from the International Catholic Migration Commission submitted a deposition detailing the violent nature of physical restraint protocols at AFH, including unjustified force, such as dragging a runaway back to the facility with his arms behind his back.⁵³

After the court dismissed the plaintiffs’ first suit in *Walding*, the plaintiffs filed a second suit, *E.A.F.F. v. Gonzalez*, against ORR employees in their individual capacities.⁵⁴ Agency discretion determined the extent of ORR supervision over the juvenile holding facilities: the court ruled that the ORR’s response to the abuse allegations from children who lived in AFH was reasonable due to the discretionary function exception of the Federal Tort Claims Act (“FTCA”).⁵⁵ The discretionary function exception means that claims founded on the exercise of or failure to exercise a discretionary function by a federal agency do not allow for liability claims against agency employees or the agency itself.⁵⁶ To apply the exception, a court must first

49. *See Walding*, 955 F. Supp. 2d at 767-68 (detailing the assaults which took place between September 2006 and March 2007).

50. *See id.* (naming multiple AFH staff members who abused the plaintiffs at the facility).

51. *See id.* (stating that the female staffer immediately resigned).

52. *See id.* at 767-68 (stating that as AFH had not reported the incident to TDFPS, TDFPS had cited AFH; the ORR decided that it could further oversee AFH to prevent sexual assault from occurring again in future).

53. *See E.A.F.F. v. Gonzalez*, 600 Fed. App’x 205, 212 (5th Cir. 2015) (stating the monitor informed the ORR of these incidents in the summer and fall of 2005).

54. *Compare Walding v. United States*, 955 F. Supp. 2d 759, 788 (W.D. Tex. 2013) (dismissing the plaintiffs’ claims against the AFH facility and the U.S. under the discretionary function exception), *with E.A.F.F. v. Gonzalez*, 600 Fed. App’x 205, 215 (5th Cir. 2015) (denying the plaintiffs’ *Bivens* claim because the ORR did not meet the standard of deliberate indifference).

55. *See Walding v. United States*, 955 F. Supp. 2d 759, 791 (W.D. Tex. 2013) (stating the definition of “employee of the government” excludes contracting agencies).

56. *See Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, at *25 (W.D. Tex. 2009) (stating that Congress intended the exception to prevent second-

determine whether the legally challenged actions of federal officers were discretionary or controlled by some mandatory regulation; if the actions were discretionary, the court must then decide if it was the kind of judgment the exception protects.⁵⁷

The court also ruled that the ORR could not be held accountable for the actions of its contracted employees through the FTCA's independent contractor exception.⁵⁸ An independent contractor, as described by the Internal Revenue Service ("IRS") is the payer (in this case, the ORR) can direct only the result of the work they have paid the contractor to do, not what or how that work will be done.⁵⁹ The independent contractor exception waives all immunity for the government and government employees if they commit negligent or wrongful acts or omissions while acting in the scope of their employment; government employee is defined only as officers or employees of federal agencies, which AFH staff were not.⁶⁰

3. *The Use of Bivens Claims to Overrule Fifth Amendment Due Process Complaints by Immigrant Juveniles*

In 1972, the Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* that federal officers have no immunity to protect themselves from damages in suits claiming violations of the constitutional rights of prisoners or detainees.⁶¹ The *Bivens* claims theoretically enforce accountability among federal officers and agencies, but courts often rely on the discretionary function exception of the FTCA to decide these cases.⁶²

In *Fabian v. Dunn*, a group of immigrant juveniles, held at the Abraxas detention center in Texas, contended that facility staff were physically

guessing judicial, legislative, or administrative intentions in policy).

57. See *id.* (providing no examples of administrative intent that should be protected by the exception).

58. See *Walding*, 955 F. Supp. 2d at 791 (detailing the independent contractor exception).

59. See *Understanding Employee vs. Contractor Designation*, INTERNAL REVENUE SERVICE (July 20, 2017), <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation> (last visited Jan. 30, 2019) (describing the legal difference between an employee and a contractor).

60. See *id.* (clarifying the definition of "government employee").

61. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1341 (1972) (involving an unreasonable search and seizure, *Bivens* can apply to violations of all constitutional amendments).

62. See *id.*; see also *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (declining to examine the *Bivens* claim).

abusing them.⁶³ They also claimed that the ORR was purposefully indifferent regarding the standards of monitoring, supervision, and selection of housing facilities for UACs.⁶⁴ Facility staff beat the plaintiffs with fists, feet, and chairs; the staff also dragged the plaintiffs out of their beds and threw them to the floor.⁶⁵ The verbal abuse was so horrific that one plaintiff attempted suicide.⁶⁶ The plaintiffs in *Fabian* claimed that they informed Abraxas staff of the assaults and notified both visiting ORR employees and TDFPS.⁶⁷ Their *Bivens* claim stated that the ORR took no action to prevent the abuse and instead allowed it to continue.⁶⁸ The court in *Fabian* dismissed the plaintiffs' *Bivens* claim by concluding the plaintiffs failed to show that the ORR defendants caused plaintiffs deprivation of their constitutional rights.⁶⁹ Similarly, in *E.A.F.F. v. Gonzalez*, the court declined to decide whether the due process rights of the UACs who were sexually, physically, and emotionally abused at the AFH facility in Nixon, Texas had been violated.⁷⁰ The plaintiffs in *E.A.F.F.* alleged that it was the ORR officials' deliberate indifference in their individual capacities that violated the plaintiffs' Fifth Amendment due process rights, but the Fifth Circuit dismissed these claims.⁷¹

4. *The Bell Test, Farmer v. Brennan, and Pre-Trial Detention*

In 1977, *Ingraham v. Wright* established that Eighth Amendment scrutiny applies only to people convicted of a crime.⁷² Two years later, *Bell v. Wolfish*

63. See *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, at *11 (W.D. Tex. 2009) (detailing the abuse).

64. See *id.* at *15 (claiming the ORR's purposeful indifference resulted in the abuse at the Abraxas facility).

65. See *id.* at *5-6 (clarifying that on one occasion intoxicated staff arrived at the facility and assaulted detainees).

66. See *id.* at *6-7 (stating that the Abraxas staff denied him medical care and placed him in solitary confinement).

67. See *id.* at *9 (claiming that the defendants had informed other federal authorities of the abuse, yet no government agency took any measures to prevent it from continuing).

68. See *id.* at *11 (detailing plaintiffs' *Bivens* claim).

69. See *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *28 (W.D. Tex. 2009) (stating that the claim was dismissed through the discretionary function exception).

70. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (detailing the claims made by the plaintiffs).

71. See *id.* (dismissing the plaintiffs' *Bivens* claim and stating ORR staff in their individual capacities could not be held accountable for the abuse at the facility).

72. See U.S. CONST. amend. VIII (declaring that cruel and unusual punishment shall not be inflicted on any person in the U.S.); see also *Ingraham v. Wright*, 430 U.S. 651,

established the *Bell* test to determine whether the conditions of a pre-trial detainee's confinement amounted to punishment.⁷³ For pre-trial detention to be unconstitutional under the Fifth Amendment, plaintiffs must show that detention centers applied certain conditions or restrictions with an intent to punish.⁷⁴ The court in *Bell* also held that if a condition or restriction is arbitrary or purposeless, it can reasonably be inferred to be meant punitively.⁷⁵ Detention centers can have restrictions and conditions of confinement so long as the conditions are not punitive.⁷⁶

The Supreme Court's decision in *Kingsley v. Hendrickson* functioned along the same lines; pre-trial detainees must show that the use of force by officers was objectively unreasonable for a court to declare the force excessive.⁷⁷ What is objectively unreasonable depends on the facts of the case: courts must decide based on both the perspective of a reasonable officer and the government's legitimate interest in managing the facility.⁷⁸ The use of objectively unreasonable force violates detainees' Fifth Amendment rights to due process.⁷⁹

Finally, in *Farmer v. Brennan*, a transgender woman brought a successful *Bivens* suit against prison officials for displaying deliberate indifference to the dangers she faced when officials placed her in the general population of an all-male prison.⁸⁰ As a result, the plaintiff was repeatedly physically and sexually assaulted.⁸¹ In deciding *Farmer*, the Supreme Court declared that prison officers can be liable under the Eighth Amendment if they are aware that prisoners face a substantial risk of being harmed and fail to take

671-72 (1977) (declaring that the Fifth Amendment protects pre-trial detainees and the Eighth Amendment protects convicted felons).

73. *See Bell v. Wolfish*, 441 U.S. 520, 520 (1979) (determining that pre-trial detainees are not punished by regular practice).

74. *See id.* (holding if a condition or restriction is so arbitrary that a court may "reasonably infer" the intent behind the action is punishment, it is unconstitutional).

75. *See id.* (neglecting to explain how to determine whether something is arbitrary).

76. *See id.* (holding that confinement conditions do not amount to punishment if they are not intentional or actionably punitive).

77. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2466 (2015) (holding that the applicable test is objective and not subjective unreasonableness).

78. *See id.* at 2473 (mandating the consideration of jail administration policies).

79. *See id.* (referencing *Bell* in its decision to defer to jail officials' policy judgements).

80. *See Farmer v. Brennan*, 511 U.S. 825, 825 (1994) (stating that prison officials may be held liable under the Eighth Amendment for deliberate indifference to health or safety of inmates).

81. *See id.* at 830 (stating that plaintiff did not voice an objection to officials about the initial transfer).

reasonable measures to prevent or abate that harm.⁸² While prison conditions sometimes mean that inmates may suffer severe harm, it is the deliberate indifference to that harm on the part of prison officials which may result in liability under the Eighth Amendment.⁸³

II. ANALYSIS

A. The Contracted Agencies of the ORR are State Actors Whose State-Sanctioned Abuses Violate the Refugee Act, the Prison Rape Elimination Act, and the Constitutional Rights of Immigrant Juveniles

Through the application of the discretionary function and independent contractor exceptions of the FTCA, courts have excused the ORR from liability for the abuse heaped upon immigrant juveniles by its contracting agencies.⁸⁴ Under the discretionary function exception, claims based on the exercise or failure to exercise a discretionary function by a federal agency do not allow for liability claims against the agency or its employees.⁸⁵ Even though the ORR constructed PREA-mandated regulations to prevent physical and sexual assault from occurring in the facilities contracted to house UACs, incidents still occur in the ORR's contracted facilities.⁸⁶ The independent contractor exception states that the government and government employees acting within the scope of their employment waive all immunity by committing negligent or wrongful acts or omissions.⁸⁷ The FTCA limits the definition of "employee of the government" only to officers or employees of federal agencies, excluding any contractors regardless of the focus or

82. *See id.* at 825-26 (elaborating further that deliberate indifference is more than negligence, but less than acts or omissions intentionally causing harm).

83. *See id.* at 834 (clarifying that prison officials cannot be deliberately indifferent to severe potential harm of prisoners, but do not have to ensure prisoners never injure each other).

84. *See* *Walding v. United States*, 955 F. Supp. 2d 759, 791 (W.D. Tex. 2013) (excusing the ORR from liability under the independent contractor exception).

85. *See id.* (crafting the definition to exclude independent contractors even in cases where the agency cannot perform its duties alone).

86. *See* *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, at *25 (W.D. Tex. Aug. 14, 2009) (explaining Congress' intent to prevent second-guessing judicial intentions); *see also* Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77770 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt. 411) (describing administrative tactics to handle sexual abuse allegations in confinement).

87. *See* *Walding*, 955 F. Supp. 2d at 759, 791 (describing the independent contractor exception as applied in the AFH case).

purpose of the federal agency that contracts them.⁸⁸ By definition, this removes the ORR from liability when constitutional violations occur in public and private agencies or companies contracted by the ORR.⁸⁹ To hold the United States accountable for the actions of contractors, the employees at fault must be government employees as defined by the FTCA.⁹⁰

At first glance, the issues presented by cases such as *E.A.F.F. v. Gonzalez* and *Fabian v. Dunn* appear to be solely constitutional; however, the actions undertaken by the courts violate two federal laws and the ORR's own standards of practice.⁹¹ Cases such as *Walding v. United States* and the charges levied against the ORR in *Lucas R. v. Alex Azar* state that continued use of discretionary function and independent contractor exceptions to dismiss suits against the ORR excuse the agency from responsibility for the actions of its contracted agencies.⁹² Similarly, continued use of these exceptions ensure that the ORR, through its contracted agencies, continues to violate the Refugee Act and PREA standards.⁹³

The usage of the discretionary function and independent contractor exceptions by the courts prevent the plaintiffs in each case from holding the people who made the initial decisions to house the plaintiffs in inappropriate facilities or dangerous conditions accountable.⁹⁴ When an agency like the ORR has no ability to house UACs, the agency is obligated to make contracts with public and private agencies to provide beds, physical and mental health care, and food to UACs coming into the United States.⁹⁵ These agencies are,

88. *See id.* (describing the independent contractor exception).

89. *See E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (establishing a *Bivens* claim against the U.S. government for the actions of the AFH staffers); *see also Fabian*, 2009 U.S. Dist. LEXIS 72348, at *5-11, (describing the ORR's lack of reaction to allegations of abuse at the Abraxas facility despite its internal protocols).

90. *See Walding v. United States*, 955 F. Supp. 2d 759, 791 (W.D. Tex. 2013) (stating that the definition includes but is not limited to "officers and employees of any federal agency" of the United States).

91. *See id.* (defining "federal agency" as excluding "any contractor with the United States").

92. *See id.* at 767-68 (describing assaults which took place without interference from either the ORR or an independent monitor); *see also Complaint, Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 41-46 (C.D. Cal. filed Jun. 29, 2018) (describing one of the assaults against Miguel Angel without ORR retribution).

93. *See Walding*, 955 F. Supp. 2d at 762 (excusing the agency under the exceptions); *see also Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, at *15 (W.D. Tex. Aug. 14, 2009) (further detailing the plaintiffs' *Bivens* claim).

94. *See Walding*, 955 F. Supp. 2d at 759 (immunizing the ORR under the discretionary function exception).

95. *See Refugee Act of 1980*, 8 U.S.C. § 1522(d)(2)(B)(ii)-(iii) (1980) (neglecting

effectively, ORR employees, as the ORR cannot possibly house the UACs by itself.⁹⁶ Public and private agencies contracted by the ORR therefore perform the ORR's duties on a day-to-day basis.⁹⁷ According to the FTCA, the contracted facilities do not count as employees since the facilities are contracting with a federal agency rather than operating as employees of the government.⁹⁸ However, the contracting of public and private organizations to perform the ORR's own functions makes those contracted agencies employees of the ORR and, thus, of the federal government because the ORR's very existence as a government agency makes the ORR functionally incapable of housing immigrant juveniles.⁹⁹

Similarly, rather than transferring custody of the UACs from the ORR Director to the contracted facilities, the UACs remain in the fiscal, legal guardianship of the ORR Director; the Director is responsible for UACs in the United States and deliberately places them in the care of the "appropriate" contracted facilities it employs.¹⁰⁰ The agency staff care for UACs on behalf of the ORR where the ORR cannot functionally do so; the staff act in the ORR's stead, are fiscally rewarded by the ORR's contract, and are susceptible to ORR's denial of further employment if required.¹⁰¹ The contracted agencies are the ORR's responsibility.¹⁰² Thus, when the ORR contracts with an agency that it later discovers is violating the constitutional rights of the immigrant juveniles the ORR placed there, and the ORR does not rectify the situation, then the ORR not only breaks the law

to define "appropriate" within the statute).

96. *See id.* § 1522(d)(2)(A) (endowing the Director with the ability to contract with appropriate agencies since the ORR cannot house UACs and thus could not perform its function without the contractors).

97. *See id.* (at § 1522(c)(1)(establishing the ORR's contracted agencies as its functioning employees).

98. *See Walding v. United States*, 955 F. Supp. 2d 759, 791 (W.D. Tex. 2013) (determining that only direct employees of a federal agency count as government employees under the FTCA).

99. *See* 8 U.S.C. § 1522(d)(2)(A) (ensuring the ORR Director may contract with public and private agencies to ensure that UACs have housing).

100. *See id.* (enabling the Director to contract with agencies to house UACs due to the Director's custody of those UACs); *see also* 8 U.S.C. § 1522(d)(2)(B)(ii)-(iii) (establishing the ORR Director as the fiscal and legal caretaker of UACs while the "appropriate" contracted detention centers hold the UACs).

101. *See Walding*, 955 F. Supp. 2d at 811 (holding that the ORR is in the business of contracting with appropriate care facilities, not providing childcare).

102. *See* 8 U.S.C. § 1522(d)(2)(B)(ii)-(iii) (declaring the ORR Director is responsible for the care of UACs in the United States, including UACs confined at contracted housing facilities).

regarding appropriate housing but also violates the constitutional rights of those juveniles by continuing to house them in an allegedly abusive and inappropriate facility.¹⁰³ The ORR has the power and responsibility to decide whether to continue or terminate these contracts; by knowingly enabling abuse to persist, the agency is countermanding the Refugee Act and violating the UACs' constitutional rights.¹⁰⁴ The courts' use of both the discretionary function exception and the independent contractor exception of the FTCA effectively negate the ORR's responsibility in cases of abuse and enable the ORR to violate constitutional law.¹⁰⁵

The ORR's continued employment of agencies that repeatedly violate the constitutional rights of the UACs they are supposed to shelter is not merely a constitutional problem; it also results in the ORR directly violating the Refugee Act.¹⁰⁶ The ORR can only contract with public or private agencies regarded as "appropriate" under the Act; this term is not defined in statute.¹⁰⁷ Rather, as indicated in a footnote in *D.B. v. Poston*, the ORR's definition of "appropriate" — at least when it comes to house checks for sponsors or relatives of immigrant juveniles — require the home to be safe, stable, and lacking threats of abuse, domestic violence, or other forms of unsafe behavior.¹⁰⁸ The standard for ORR-contracted facilities appear to be lower, as shown in *Walding v. United States*, where the definition of "appropriate" housing sometimes amounts to "available and not stricken with chicken pox."¹⁰⁹ The same standard regarding "appropriate" housing for relatives

103. See *id.* (stating that UACs brought to the ORR to be cared for are in the direct fiscal and legal supervision of the ORR Director and no one else). See generally *Walding*, 955 F. Supp. 2d at 773, 781 (maintaining that the ORR is not obligated to provide care without contracting with agencies, but must fulfill its function of serving refugees in the United States).

104. See U.S. CONST. amend. V (establishing protections for liberty and property rights); see also 8 U.S.C. § 1522(d)(2)(B)(ii)-(iii) (declaring the ORR as the sole caretaker of UACs).

105. See *Walding*, 955 F. Supp. 2d at 762 (applying both the discretionary function exception and independent contractor exception and excusing the ORR from liability).

106. See 8 U.S.C. § 1522(d)(2)(A) (establishing that the Director may only make housing contracts with agencies he deems appropriate).

107. See *id.* § 1522(d)(2)(B)(ii)-(iii) (establishing the duties of the Director and providing no definitions).

108. See *D.B. v. Poston*, 119 F. Supp. 3d 472, 484 (E.D. Va. 2015) (listing domestic violence and substance abuse as reasons that prevented the release of an immigrant juvenile to his mother).

109. See *Walding*, 955 F. Supp. 2d at 765 (describing DUCS as facing a crisis and potentially violating the *Flores* settlement due to a chicken pox outbreak at other facilities and rising apprehension numbers on the border).

and immigrant sponsors should apply to agencies and facilities the ORR contracts as mass housing units.¹¹⁰

The conditions at the AFH facility in Nixon, Texas were clearly anything but appropriate according to the standard set forward in *D.B. v. Poston*.¹¹¹ The *Walding* case involved negligent investigations of physical and sexual abuse allegations, negligent supervision, and negligent oversight.¹¹² Rather than hold the ORR, a federal agency, accountable for its behavior regarding the AFH facility, the court dismissed the charges.¹¹³ Similarly, the Shiloh, Yolo, and Abraxas facilities - all of which have repeated allegations from immigrant juveniles confined inside of physical, emotional, or sexual assault - could not be described as appropriate under the ORR's own definition.¹¹⁴ Being thrown or held against the wall, sprayed in the eyes and ears with pepper spray, or beaten by drunk staff members does not fulfill the ORR's standard in *D.B. v. Poston*, or the colloquial definition of "appropriate."¹¹⁵ The ORR continues to contract with these facilities despite allegations of physical and sexual abuse that would clearly label outside institutions and living situations unacceptable.¹¹⁶

The District Court of Hawaii determined that the abuse, isolation, and rape

110. See *D.B.*, 119 F. Supp. 3d at 484 (holding that the immigrant juvenile could not be released to his mother due to the conditions of the home and her relationship with the juvenile's stepfather).

111. See *Walding*, 955 F. Supp. 2d at 801 (maintaining that the ORR and its employees were not accountable for the actions of those fired from the AFH facility); see also *D.B.* 119 F. Supp. 3d at 484 (determining that physical abuse would not make a home or living situation "appropriate" by ORR standards).

112. See generally *Walding*, 955 F. Supp. 2d at 781-782 (reviewing the ORR's actions upon learning of incidents at the AFH facility).

113. See *id.* at 775-76 (declaring the acquisition of the AFH facility as an acceptable decision).

114. See *D.B. v. Poston*, 119 F. Supp. 3d 472, 484 (E.D. Va. 2015) (describing conditions of a rejected rehousing situation in an ORR custody case and listing reasons why the home was not "appropriate"); see also Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 44 (C.D. Cal. filed June 29, 2018) (stating that Miguel Angel was held off the floor by his arms while being choked by center employees).

115. See *D.B. v. Poston*, 119 F. Supp. 3d at 483 (noting that the ORR believed it could not release the UAC due to an inappropriate environment). Compare Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 44 (C.D. Cal. filed June 29, 2018) (noting that no abusive member of staff had been punished), with *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, *1, *11 (W.D. Tex. 2009) (describing the abuse allegations at the facility and the ORR's indifference).

116. See Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 44 (C.D. Cal. filed June 29, 2018) (stating that Miguel Angel was transferred to a new facility after the incident without notice or appeal).

of the minor plaintiffs in *R.G. v. Koller* were the result of the neglect and inadequate supervision of the HYCF staff, and held that staff accountable.¹¹⁷ The similar circumstances of negligence, abuse, and sexual assault in *Walding v. United States* is likewise treated.¹¹⁸ Such abuses indicate inadequate supervision of containment centers contracted by the ORR: in 2003, the ORR awarded the contract to AFH, and in August 2006, TDFPS informed the ORR of sexual abuse allegations in the center.¹¹⁹ AFH retained its contract with the ORR until more sexual abuse allegations emerged in 2007 when the ORR suspended placements at the facility.¹²⁰ The ORR agreed to contract with AFH to house children at the facility, and preserved the contract when the first of these incidents took place rather than terminating its contract or more actively supervising AFH and its policies.¹²¹ The ORR did this despite being told that AFH actively covered up sexual abuse allegations in 2006, requiring TDFPS to inform the ORR in AFH's place.¹²² In many ways, this directly parallels the experiences of the LGBTQ juveniles in HYCF; in *Koller*, however, the court held the staff who perpetuated similar standards of deliberate neglect and inadequate supervision in HYCF directly accountable.¹²³ By continuing to contract with these facilities, despite the clear violation of the ORR's own definition of "appropriate," the ORR is in violation of its mandate under the Refugee Act to properly house, care for, and be the legal and fiscal guardian of UACs held in its custody.¹²⁴

117. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006) (holding that the treatment of the children was directly caused by the inaction of the center staff).

118. Compare *Walding*, 955 F. Supp. 2d at 768 (noting the lack of immediate, effective responses from ORR employees), with *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1147 (D. Haw. 2006) (alleging similar allegations of sexual abuse and awareness of supervisory staff).

119. See *Walding*, 955 F. Supp. 2d at 767-68 (stating that after the last incident, all UACs were removed from the AFH facility).

120. See *id.* at 768 (stating that the ORR learned of sexual abuse allegations against AFH worker Belinda Leal on Feb. 10, 2007).

121. See *id.* (stating that after reviewing AFH's files and recalling previous issues, the ORR declined to renew the grant it had previously awarded to AFH).

122. See *id.* at 767 (stating that TDFPS had to inform the ORR in place of AFH since AFH actively disguised the site from TDFPS for its handling of the sexual assault allegation).

123. See *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006) (holding that the staff directly created an atmosphere that was cruel and unusual through deliberate ignorance of the homophobic and transphobic abuse).

124. See Refugee Act of 1980, 8 U.S.C. § 1522(d)(2)(A) (1980) (declaring that the Director may make contracts with "appropriate" facilities to provide care to UACs).

The ORR and its affiliated contractors are also in direct violation of PREA, as extended to cover the facilities, agencies, halfway houses, and care providers contracted by the ORR to provide beds for UACs.¹²⁵ Under the regulations implemented by the ORR after the Presidential Memorandum extended PREA to cover ORR facilities, if an inmate or detainee reports sexual abuse or sexual harassment, the ORR must monitor and evaluate the facility to ensure that it operates according to federal and state guidelines.¹²⁶ The ORR seemed to follow this guideline in *Walding* and *E.A.F.F.*, but preserved the contract with the AFH facility despite the further rise of physical and sexual assault allegations that resulted in more assaults.¹²⁷ This pattern also arises in different cases.¹²⁸ By allowing the staff to remain, and by either re-contracting or preserving the facility's contract, the ORR is actively contradicting its own standards of review.¹²⁹ This creates an atmosphere in which physical and sexual abusers can abuse immigrant juveniles without fear of recrimination in violation of federal law, and where the constitutional rights of UACs are at high risk of routine violation.¹³⁰

Through the repeated violation of both the mandate provided by the Refugee Act and the standards of care required by PREA, the ORR and its affiliates consistently violated the Fifth Amendment due process rights of immigrant juveniles.¹³¹ UACs, like other pre-trial detainees and convicted prisoners, have the right to live in detention without physical, sexual, or

125. See generally Prison Rape Elimination Act, 34 U.S.C. § 30302 (2017) (applying national PREA standards for UAC facilities); see also Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77769-70 (Dec. 24, 2014) (describing the implementation of the Presidential Memorandum and the ORR's development of relevant standards).

126. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77797 (Dec. 24, 2014) (detailing how the ORR must monitor and evaluate facilities after an allegation).

127. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (detailing that one staff member was fired for sexual abuse, but others were not).

128. See Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶¶ 41-46 (C.D. Cal. filed June 29, 2018) (stating that no member of staff has been fired); see also *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *8 (W.D. Tex. 2009) (detailing that one juvenile was verbally abused so horrifically that he attempted suicide).

129. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77797 (Dec. 24, 2014) (outlining that after a sexual abuse allegation has been made, action must be taken to prevent more assaults from occurring).

130. See *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *8 (describing staff isolating a suicidal juvenile rather than providing psychiatric care).

131. See *id.* at *10 (emphasizing that the plaintiffs believed it was the ORR's indifference that resulted in the abuse at Abraxas).

emotional abuse.¹³² By refusing to comply with federal law, the ORR is violating that right.¹³³

B. District Courts Misapply Avenues for Legal Recourse Meant to Protect Immigrant Juveniles from Abuse in ORR Custody

1. Court Applications of the Discretionary Function Exception Violate Both the Flores Settlement and the Fifth Amendment Rights of Immigrant Juveniles in ORR Custody

The repeated dismissal of *Bivens* claims against the ORR explicitly violates the holding of the *Flores* settlement, which was decided to protect the constitutional rights of UACs kept in federal detention.¹³⁴ The *Flores* settlement dictates that the government can hold immigrant juveniles in detention without violating their constitutional rights only if there is no parent, guardian, or care provider to release them to, and so long as they are kept in decent and humane conditions while in federal custody.¹³⁵ If these conditions are not decent and humane, then the ORR, through the agencies it contracts, violates the constitutional rights of immigrant juveniles as described in the *Flores* settlement.¹³⁶

The need for viable outlets for immigrant juveniles to assert violations of their constitutional rights while in pre-trial detention is undeniable.¹³⁷ *Bivens* claims are supposed to provide that outlet, but are subverted by courts through the application of the discretionary function and independent

132. See U.S. CONST. amend. V (declaring liberty and property rights frequently used as protections against prison assault).

133. See Prison Rape Elimination Act, 34 U.S.C. § 30302(7) (2017) (stating that one of the purposes of PREA is to protect the Eighth Amendment rights of prisoners).

134. See *Reno v. Flores*, 507 U.S. 292, 303 (1993) (emphasizing the importance of protecting the constitutional rights of UACs).

135. See *id.* at 303 (Stevens, J., dissenting) (stating that keeping a child in custody is not punitive so long as it is not conducted in excess).

136. See U.S. CONST. amend. V (providing liberty and property rights in conditions which are humane); see also *Flores*, 507 U.S. at 303 (holding that immigrant juveniles held in detention must be kept in a safe, humane environment to prevent the violation of their rights). But see Stipulated Settlement Agreement at 5, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997) (requiring UACs to be kept in safe, sanitary conditions, though not explicitly quantifying a constitutional violation if these conditions are not met).

137. See generally Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 45 (C.D. Cal. filed June 29, 2018) (describing a facility transfer without notice or due process).

contractor exceptions.¹³⁸ The ORR and its contracting organizations are routinely in violation of both its own standards and the standards of the federal government as put forward in the Refugee Act and PREA, resulting in consistent violation of the constitutional rights of immigrant juveniles.¹³⁹

There is a disturbing pattern in how the judiciary treats allegations of abuse and due process violations brought forward by immigrant juveniles filing *Bivens* claims against officials of the ORR and the U.S. government.¹⁴⁰ Despite repeated, verifiable claims by immigrant juveniles of ORR employees knowing of or being informed of abuse occurring at multiple immigrant juvenile detention facilities, halfway homes, and foster care facilities, U.S. courts in multiple districts continually dismiss Fifth Amendment *Bivens* claims against the ORR.¹⁴¹ This directly results in the repeated physical, mental, and sexual abuse of immigrant juveniles in the care of the ORR and its contracted agencies.¹⁴²

Rather than examine these thorny issues, courts use the FTCA loopholes to exculpate the ORR and the U.S. government from responsibility for the multitude of due process rights violations in ORR-contracted foster care facilities.¹⁴³ Despite federal regulation requiring the ORR to supervise its contracted facilities and provide regulations for the conditions of those facilities and the behavior of their associated staff, courts permit the discretionary function exception of the FTCA to negate responsibility for the ORR and its employees.¹⁴⁴ Courts may wish to prevent the government and

138. See *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *16 (W.D. Tex. 2009) (dismissing the plaintiffs' *Bivens* claim through the discretionary function exception).

139. See generally *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (holding that the plaintiffs' *Bivens* claim was unfounded as the ORR had begun monitoring the AFH facility).

140. Compare *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *16 (dismissing the *Bivens* claim against the defendants), with *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (declaring that since the plaintiffs did not initially bring a *Bivens* claim, it could not be discussed on appeal).

141. Compare *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *9 (claiming that ORR employees allowed abusive staff members to remain despite knowing about the abuse), with *E.A.F.F.*, 600 Fed. App'x at 214 (detailing a report made by an independent, unbiased monitor of physical abuse and unnecessary violence in the facility).

142. See *E.A.F.F.*, 600 Fed. App'x at 208 (detailing the abuses at AFH).

143. See *id.* at 9-10 (detailing the abuses at the AFH facility); see also *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *11 (detailing abuses at the Abraxas facility).

144. See Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77769-70 (Dec. 24, 2014) (citing the Presidential Memorandum); see also *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *15 (W.D. Tex. 2009) (dismissing the

its employees from being unduly burdened with claims of abuse, such as those put forward in *Walding v. United States*, but this attitude results in the repeated dismissal of immigrant juveniles' Fifth Amendment claims without due examination or analysis.¹⁴⁵ ORR employees are required not only by federal regulation but also by Presidential Memorandum following the implementation of PREA in 2003 to ensure that all protective laws and regulations for pre-trial detention, both state and federal, are met.¹⁴⁶ As shown in *Walding*, the ORR, despite being the legal and financial guardian of UACs in their care, and employing public and private agencies to perform caretaking duties as described by the Refugee Act, is not interfering with or holding those contracted agencies responsible for violating the constitutional rights of the immigrant juveniles in their facilities.¹⁴⁷

The Supreme Court's decision in *Kingsley*, that pre-trial detainees have the onus to show that official use of force must be objectively unreasonable to be excessive, came down in 2015 after the decision of the Western District Court of Texas in *E.A.F.F. v. Gonzalez* and long after *Fabian v. Dunn* was decided in 2009.¹⁴⁸ Neither the district court nor the attorneys for the plaintiffs could use *Kingsley* as a guiding point for the standard of behavior by guards in the AFH or the Abraxas facilities.¹⁴⁹ The decision in *Kingsley*, had it come earlier, may have resulted in different decisions in cases like *E.A.F.F.*¹⁵⁰ *Kingsley* establishes that objectively unreasonable force violates the Fifth Amendment due process rights of pre-trial detainees, including

Bivens claim).

145. See *Walding*, 955 F. Supp. 2d at 762 (laying out the dismissal of two of three claims against the U.S. government, the ORR, and the ORR's contracting organization through the discretionary function exception); see also *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *15-16 (further detailing the plaintiffs' *Bivens* claim in the wake of staff abuse).

146. See Prison Rape Elimination Act, 34 U.S.C. § 30302 (2017) (listing all of the purposes of PREA); see also Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. at 13100 (establishing administrative tactics for containment centers to handle sexual abuse and assault).

147. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 212 (W.D. Tex. 2015) (showing that despite being informed that the conditions at AFH were disturbing by an independent monitor, the ORR did little to avert them).

148. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015) (holding that the standard of unreasonableness for use of force in pre-trial detention is objective, not subjective).

149. Compare *Walding v. United States*, 955 F. Supp. 2d 759, 768 (W.D. Tex. 2013) (providing an overview of the abuses at the AFH facility), with *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *15-16 (providing an overview of abuse at the Abraxas facility).

150. See generally *E.A.F.F.*, 600 Fed. App'x at 205 (dismissing the plaintiffs' abuse and absolving the ORR of culpability for the constitutional rights violations).

immigrant juveniles.¹⁵¹ Courts using the *Kingsley* standard must decide whether that use of force was unreasonable based on the perspective of a reasonable officer in a similar situation and account for the legitimate interest of the government in facility management.¹⁵² The behavior of the staffers in not only the AFH facility in Nixon, Texas, but also in the Abraxas and Yolo facilities do not and cannot qualify as reasonable force under the standard set out in *Kingsley*.¹⁵³

While it is true that objective reasonability is decided based on the facts and circumstances of each individual case where the term is determined through a two-part analysis by the court, there is no conceivable manner in which a judge or jury might determine that the behavior of the staff at Abraxas or at the AFH facility was reasonable.¹⁵⁴ Physical assaults by staff against plaintiffs held at the facility, not just with fists but with feet and chairs, cannot be declared objectively reasonable by any set of facts or circumstances.¹⁵⁵ Nor can the standard for retrieving runaways, as described by the independent monitor from the International Catholic Migration Commission, be objectively reasonable when an immigrant juvenile is dragged back to the facility with his hands bound.¹⁵⁶ The ORR staff's abuse of plaintiffs in *Lucas R. v. Alex Azar* also exceeds the standard of objectively unreasonable force; deliberately spraying pepper spray into an immigrant juvenile's eyes and ears until he loses his hearing, forcing him to wash his face in toilet water, or ripping his earring out of the lobe cannot be seen as a reasonable use of force, as required by *Kingsley*.¹⁵⁷

151. See *Kingsley*, 135 S. Ct. at 2468 (holding a pre-trial detainee must show that force knowingly used against him was objectively reasonable to be excessive).

152. See *id.* at 2473 (describing the two prongs of the *Kingsley* unreasonable force standard).

153. See *id.* at 2470 (declaring that the standard is objective, not subjective); see also *Walding*, 955 F. Supp. 2d at 768 (listing a myriad of abuses); see also *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *15 (W.D. Tex. Aug. 14, 2009) (listing various incidents of abusive actions by staff); see also Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 13, ¶ 41-46 (C.D. Cal. filed Jun. 29, 2018) (describing abuse of a seventeen-year-old immigrant juvenile in ORR custody).

154. See *Walding*, 955 F. Supp. 2d at 768 (describing the beatings at the facility); see also *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *15 (listing the instances of abuse).

155. See *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *7 (describing the physical assault involving furniture).

156. See *E.A.F.F. v. Gonzalez*, 600 Fed App'x 205, 212 (5th Cir. 2015) (stating that the independent monitor was so disturbed by the action she felt obligated to inform the ORR).

157. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (discussing the objectivity standard); see also Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 11, ¶ 41-46 (C.D. Cal. filed Jun. 29, 2018) (describing unreasonable force used

Nor are there legitimate interests derived from the government's need to manage the detention facility in the repeated beatings of immigrant juveniles in the Abraxas and AFH facilities.¹⁵⁸ While the restraint of some immigrant juveniles in ORR custody may become necessary, depending on circumstances, beating an immigrant juvenile with a chair or verbally abusing him until he attempts suicide cannot be in the government's need for facility management.¹⁵⁹ There is no legitimate government interest in the abuse of immigrant juveniles in its care, nor in the violation of their constitutional rights.¹⁶⁰ By using the discretionary function exception of the FTCA, U.S. courts are not only allowing the ORR to blatantly violate its mandated duties under both the Refugee Act and PREA, but also to expressly violate the Fifth Amendment due process rights of immigrant juveniles in their custody to remain free from physical, emotional, or sexual abuse.¹⁶¹ Even if courts continue to excuse the actions of the ORR and its contracted facilities and staff under *Bivens* claims, the *Kingsley* standard makes it clear: the ORR and its contractors recurrently violate the Fifth Amendment rights of immigrant juveniles at multiple facilities across the United States.¹⁶² The application of the *Kingsley* standard condemning objectively unreasonable force for pre-trial detainees prevents the violation of immigrant juveniles' constitutional rights.¹⁶³

against a seventeen-year-old immigrant juvenile in ORR custody).

158. See *Kingsley*, 135 S. Ct. at 2473 (elaborating on the legitimate interests of the government in conjunction with objectively reasonable or unreasonable behavior).

159. See *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348 *1, *5-8, *15 (W.D. Tex. 2009) (describing further incidents at the facility which are not outlined in the ORR Standards).

160. See *Kingsley*, 135 S. Ct. at 2473 (describing the government's legitimate interest in smoothly running facilities); see also *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *8 (describing a suicidal immigrant juvenile being placed in solitary without mental health assistance).

161. See U.S. CONST. amend. V (declaring no person shall be deprived of life, liberty, or property without the due process of law); see also Prison Rape Elimination Act, 34 U.S.C. § 30302 (2017) (defining the nine-fold purposes of PREA); see also Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77770 (Dec. 24, 2014) (describing the implementation of the regulations following Presidential Memorandum issued by President Obama in 2013).

162. See *Kingsley*, 135 S. Ct. at 2470; see also *Complaint, Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 41-46 (demonstrating that unnecessary force is commonly used in immigrant juvenile detention).

163. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (describing the objectivity standard); see also *Walding v. United States*, 955 F. Supp. 2d 759, 768 (W.D. Tex. 2013) (providing an overview of constitutional rights violations at the AFH facility);

2. Courts Must Apply the Bell Test in Cases Involving Constitutional Rights Violations of Immigrant Juveniles

Since the 1970s and the Supreme Court's decision in *Ingraham v. Wright*, Eighth Amendment protections against cruel and unusual punishment are not afforded to pre-trial detainees.¹⁶⁴ Because immigrant juveniles cannot be protected under the Eighth Amendment, they must be protected under the Fifth – but courts repeatedly deny them that privilege.¹⁶⁵ The *Bell* test was originally meant to apply only to circumstances where the conditions or restrictions of pre-trial detention could amount to punishment.¹⁶⁶ Courts have deprived immigrant juveniles of an opportunity to prove that their constitutional rights have been violated through a *Bivens* claim; as such, courts should instead apply the *Bell* test to preserve the constitutional rights of immigrant juveniles.¹⁶⁷

Courts have disastrously overturned *Bivens* claims through the application of the discretionary function exception in the FTCA to absolve ORR officials of culpability no matter the kind of punitive conditions plaintiffs endure; the application of the discretionary function exception eliminates any kind of power *Bivens* claims may have wielded in years past.¹⁶⁸ The proper application of the *Bell* test to cases such as *Fabian v. Dunn* or *E.A.F.F. v. Gonzalez* would hold ORR officials responsible for their indifference to continued abusive conditions at both the Abraxas and AFH facilities, and would protect the constitutional rights of immigrant juveniles held in these facilities.¹⁶⁹

see also Fabian, 2009 U.S. Dist. LEXIS 72348, at *15 (providing an overview of constitutional rights violations at the Abraxas facility).

164. *See Ingraham v. Wright*, 430 U.S. 651, 671-72 (1977) (stating that pre-trial detainees in the United States are protected by the Fifth Amendment).

165. *See Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, *1, *18 (W.D. Tex. 2009) (noting that the evidence offered by plaintiffs did not allow for a *Bivens* claim); *see also E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208, 216 (W.D. Tex. 2015) (holding that the plaintiffs' *Bivens* claim was untenable).

166. *See Bell v. Wolfish*, 441 U.S. 520, 520 (1979) (establishing the *Bell* test to be used in pre-trial detention centers).

167. *Compare Fabian*, 2009 U.S. Dist. LEXIS 72348, at *11 (applying Fifth Amendment analysis to the *Bivens* claim), *with E.A.F.F.*, 600 Fed. App'x at 208 (stating plaintiffs' claims of deliberate indifference by ORR employees).

168. *Compare Fabian*, 2009 U.S. Dist. LEXIS 72348, at *11 (discussing the application of Fifth Amendment analysis to the case), *with E.A.F.F.*, 600 Fed. App'x at 208 (claiming that it was the deliberate indifference of ORR employees that resulted in a violation of plaintiffs' Fifth Amendment rights).

169. *See Bell*, 441 U.S. at 520-21 (describing the purpose of the *Bell* test alongside its implementation).

The *Bell* test clearly states that conditions which are so arbitrary or purposeless that can only reasonably be inferred to be punitive by a court violate the standards set forth in *Bell*, and qualify as violations of the Fifth Amendment rights of detainees.¹⁷⁰ The conditions at the Abraxas and AFH facilities clearly violate that standard.¹⁷¹ The conditions in the AFH facility, especially policies regarding restraint and physical punishment as recorded by an independent monitor, were applied punitively and thus went against every standard set forth in the *Bell* test.¹⁷² Dragging a runaway back to the AFH facility with his hands tied behind his back reaches a level of arbitrariness that can only be fully justified if the intent is punitive, which would be a clear violation of the *Bell* test.¹⁷³ Similarly, the staff at Abraxas deliberately placed a suicidal immigrant juvenile – an immigrant juvenile who later alleged that his suicide attempt was due to the extensive, horrific verbal abuse at the facility – into solitary confinement without access to psychiatric care or a doctor, even though mental health care is one of many services these contracted facilities are meant to provide.¹⁷⁴ The arbitrary nature of this denial fundamentally has no purpose aside from punishment, and it clearly violates the *Bell* test.¹⁷⁵

The conditions endured by multiple plaintiffs named in *Lucas R. v. Alex Azar* violate the standards put forth in the *Bell* test.¹⁷⁶ The ORR's repeated transfers of immigrant juveniles between facilities without providing notice, opportunity for appeal, or proper reason appears to have no particular purpose, except punishment, in violation of the *Bell* standard.¹⁷⁷ For the

170. See *id.* (clarifying the multiple prongs of the *Bell* test).

171. Compare *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, *1, *11 (W.D. Tex. 2009) (discussing the application of Fifth Amendment analysis to the case), with *E.A.F.F.*, 600 Fed. App'x at 208 (claiming that it was the deliberate indifference of ORR employees that resulted in a violation of plaintiffs' Fifth Amendment rights).

172. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 212 (5th Cir. 2015) (describing the conditions of the facility and its effect on its inhabitants).

173. See *id.* (accounting the experience of the runaway as seen by the independent monitor).

174. See *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *8 (delineating an arbitrary practice of isolating suicidal detainees).

175. See *Bell v. Wolfish*, 441 U.S. 520, 520-21 (1979) (establishing a secondary aspect of the *Bell* test regarding reasonable inference).

176. See generally *Complaint, Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 41-46, ¶ 51 (C.D. Cal. filed Jun. 29, 2018) (detailing the experiences of multiple named immigrant juveniles detained as UACs in custody across a variety of ORR facilities).

177. See *id.* at ¶ 40-46 (describing multiple unexplained transfers after multiple violent incidents).

ORR to keep a child from his father without establishing any kind of reason for maintaining that custody, and to keep that child in purposeless confinement in which he experiences a variety of physical and constitutional rights abuses, is a violation of the *Bell* test.¹⁷⁸

The *Flores* settlement, which ensures immigrant juveniles are kept in detention for months or even years before their hearings, could be declared punitive in and of itself under the *Bell* test.¹⁷⁹ As determined in *Reno v. Flores*, the continued detention of immigrant juveniles without a parent, relative, or guardian is not a violation of those juveniles' constitutional rights so long as the custody is both decent and humane.¹⁸⁰ While the length of confinement is supposedly restricted to the length of time before the juvenile's deportation hearing, it is essentially limitless, restrained only by an immigrant juvenile filing a writ of habeas corpus and showing that the Attorney General is not properly processing the deportation proceeding with all due speed.¹⁸¹ Immigrant juveniles such as Miguel Angel, who have family members or guardians willing and able to care for them in an appropriate environment outside of ORR custody, cannot legally be kept from being released prior to their hearings according to the *Flores* settlement because their constitutional rights are at stake.¹⁸² As seen in Miguel Angel's case, denial of release can result in continuing abuses and due process rights violations; the ORR has already transferred Miguel Angel twice with no

178. See *id.* at ¶ 48 (noting that Miguel Angel's father has passed the ORR's background and home checks); see also *Bell v. Wolfish*, 441 U.S. at 520-21 (describing the use of reasonable inference in the *Bell* test).

179. See *Reno v. Flores*, 507 U.S. 292, 324 (1993) (Stevens, J., dissenting) (declaring that the only limit on the length of confinement of immigrant juveniles is a writ of habeas corpus based on a "conclusive showing" that the Attorney General has not processed the deportation hearing in a reasonable amount of time). See also Stipulated Settlement Agreement at 1, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997) (contradicting the concern in the dissent in *Reno v. Flores* by not categorizing excessive stays in government custody as a constitutional rights violation, despite potential conditions of the housing).

180. *But see id.* at 324 (determining the requirements for ORR custody). *But see generally* Stipulated Settlement Agreement at 1, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997) (describing the requirements of UAC care by the INS, now ORR, in non-constitutional terms).

181. See *id.* at 324 (Stevens, J., dissenting) (stating that the INS rule did not actually impose a time limit for detaining immigrant juveniles).

182. See Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 40-46 (C.D. Cal. filed June 29, 2018) (stating that while the inspection of Miguel Angel's father's apartment indicated no problems, Miguel Angel has not been released, and the ORR has provided no explanation as to why).

notice or chance for appeal.¹⁸³ Immigrant juveniles cannot have their rights guaranteed under the Due Process Clause if they are confined without a time limit, even if willing and able guardians await their safe return.¹⁸⁴

3. *The Standard of Indifference Test Set Forward in Farmer v. Brennan Should Be Used to Provide Protections to Immigrant Juveniles*

Farmer v. Brennan offers a third alternative to rectify the constitutional rights violations immigrant juveniles experience while in the custody of the ORR.¹⁸⁵ Prior to *Ingraham v. Wright*, the Eighth Amendment had only been applied to punishments for post-conviction prisoners, as the Eighth Amendment of the Constitution strictly outlaws cruel and unusual punishment by the *state*.¹⁸⁶ Accordingly, the test refined in *Farmer v. Brennan* has not been applied to immigrant juveniles detained prior to their deportation hearing since they have not yet been convicted of a crime, and therefore in theory cannot be cruelly or unusually punished by the state.¹⁸⁷

However, each alternative presented by the courts for immigrant juveniles to file against the ORR and its affiliated agencies are overturned by the discretionary function exception of the FTCA.¹⁸⁸ The detention of immigrant juveniles becomes entirely punitive through the deliberate indifference to the constitutional rights of the immigrant juveniles by the ORR and its public and private contracted care organizations.¹⁸⁹ The *Farmer*

183. *See id.* (referencing the second of two transfers so far).

184. *See Flores*, 507 U.S. at 310 (detailing that unaccompanied minors should only be released to their parents, relatives, a guardian, or a vetted foster home).

185. *See Farmer v. Brennan*, 511 U.S. 825, 825 (1994) (holding that prison officials may be held liable under the Eighth Amendment if they are found to be deliberately indifferent to a significant danger to the health or safety of a prison inmate).

186. *See id.* (describing the holding in *Farmer*); *see also Ingraham v. Wright*, 430 U.S. 651, 671-72 (1977) (delineating that pre-trial detainees are protected by the Fifth Amendment and post-conviction detainees are protected by the Eighth Amendment).

187. *See Farmer*, 511 U.S. at 825 (outlining the *Farmer* principle); *see also Walding v. United States*, 955 F. Supp. 2d 759, 788 (W.D. Tex. 2013) (stating that the plaintiffs claim that the ORR officials violated their due process rights); *see also Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, *1, *11 (W.D. Tex. 2009) (claiming that defendants violated the plaintiffs' Fifth Amendment rights); *see also Complaint, Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 4 (C.D. Cal. filed Jun. 29, 2018) (claiming the ORR violated the Due Process Clause).

188. *See E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (W.D. Tex. 2015) (affirming the district court's holding that the plaintiffs' *Bivens* claim could not be maintained in the face of the discretionary function exception); *see also Fabian*, 2009 U.S. Dist. LEXIS 72348, at *23-4, 27 (holding that the discretionary function exception provided immunity to ORR employees).

189. *See Complaint, Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 44 (detailing the

test of deliberate indifference offers an alternative to solely relying on *Bivens* claims and the *Bell* test to provide relief to immigrant juveniles subject to abuse while in ORR's custody.¹⁹⁰

This standard of deliberate indifference put forth in *Farmer v. Brennan* has been applied in cases of abuse in ORR facilities, providing a potential source of succor for immigrant juveniles held in pre-trial detention.¹⁹¹ The immigrant juveniles' *Bivens* claim in *E.A.F.F. v. Gonzalez* references *Farmer v. Brennan* when referring to the behavior of ORR officials regarding abusive staff members of the AFH facility, declaring that ORR officials were *deliberately indifferent* to the plight of immigrant juveniles in the facility.¹⁹² The standard of deliberate indifference described in *E.A.F.F. v. Gonzalez* was the same standard enumerated in *Farmer v. Brennan* for prisoners who have been convicted of crimes: officers at prisons or detention centers can be held liable under the Eighth Amendment if they are aware that prisoners or detainees face a substantial risk of harm and fail to take reasonable measures to prevent or abate that harm.¹⁹³ By examining the use of the deliberate indifference language put forward in *Farmer v. Brennan*, the District Court of Texas indicated a willingness to apply Eighth Amendment protection *language* to pre-trial detainees, even though *Ingraham v. Wright* disallowed the use of Eighth Amendment *protections*.¹⁹⁴ Although the court eventually overturned the *Bivens* claim put forward by the plaintiffs, the court's use of *Farmer v. Brennan* and its language of deliberate indifference provides an outlet for restitution and justice for immigrant juveniles.¹⁹⁵

abusive behavior of contracted ORR employees towards immigrant juveniles).

190. Compare *Farmer*, 511 U.S. at 834-35 (explaining the deliberate indifference test as applied to post-conviction prisoners), with *E.A.F.F.*, 600 Fed. App'x at 210 (applying the same deliberate indifference test to pre-trial plaintiffs' *Bivens* claim).

191. See *E.A.F.F.*, 600 Fed. App'x at 210-11 (explaining the deliberate indifference standard set forth in *Farmer v. Brennan*, 511 U.S. at 825).

192. See *id.* at 215 (stating that the behavior of ORR officials did not meet the standard of deliberate indifference laid out in *Farmer*).

193. See *Farmer v. Brennan*, 511 U.S. 825, 825-26 (1994) (elaborating further that deliberate indifference is more than negligence, but less than acts or omissions to intentionally cause harm).

194. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 210 (5th Cir. 2015) (applying Eighth Amendment protective language as written in *Farmer v. Brennan* to pre-trial detainees). Compare *Farmer*, 511 U.S. at 825-26 (defining deliberate indifference as a strategy to apply Eighth Amendment protections to prisoners), with *Ingraham v. Wright*, 430 U.S. 651, 671-72 (1977) (stating that pre-trial detainees are not protected by the Eighth Amendment).

195. See *E.A.F.F. v. Gonzalez*, 600 Fed. App'x at 210 (quoting *Farmer v. Brennan* to

Courts have already applied the concept of deliberate indifference put forward in *Farmer* to cases involving immigrant juveniles detained by the ORR.¹⁹⁶ Through applying the *Farmer* deliberate indifference test, cases such as *Lucas R. v. Alex Azar* could be decided with the full weight of the deliberate indifference standard rather than dismissed through the discretionary function exception that courts have frequently applied to excuse ORR involvement in abuse.¹⁹⁷ Like prison officials, ORR officials and their affiliated staff can be held accountable to the *Farmer* standard if they are aware that inmates or detainees face a substantial risk of harm and disregard the risk by failing to take reasonable measures to prevent or abate that harm.¹⁹⁸

4. *Conditions in ORR-Contracted Facilities Amount to Cruel and Unusual Punishment and Eighth Amendment Protections Should Be Extended to Detained Immigrant Juveniles*

The application of only Fifth Amendment due process protections to pre-trial detainees, whether through a *Bivens* claim, the *Bell* test, or jury-rigging a *Farmer* deliberate indifference claim to apply to a pre-trial detainee protected by the Due Process Clause, is insufficient to protect immigrant juvenile detainees from state-sanctioned abuse by the ORR and its affiliated agencies.¹⁹⁹ Applying the Eighth Amendment as well as the Fifth in protection of immigrant juveniles' rights in pre-trial detention would rectify the circumstances that cause further violence and abuse in the ORR's contracted housing facilities.²⁰⁰ Through the application of Eighth Amendment protections, such as the deliberate indifference standard set forth in *Farmer* and used in *E.A.F.F.*, imprisoned immigrant juveniles may be provided further protections through an alternative method to defend their

define deliberate indifference as a term of art).

196. *See id.* at 211 (applying the deliberate indifference test to the *Bivens* claim filed by plaintiffs).

197. *See Farmer v. Brennan*, 511 U.S. at 825 (explaining the deliberate indifference standard); *see also* Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 41-46 (C.D. Cal. filed Jun. 29, 2018) (detailing ORR staff abuse towards immigrant juveniles and the indifference of other employees).

198. *See Farmer v. Brennan*, 511 U.S. at 834 (1994) (stating that prison officials must be held accountable for acting with deliberate indifference to the safety of inmates).

199. *See Ingraham*, 430 U.S. at 688-89 (White, J., dissenting) (stating that the Supreme Court recognized that the Eighth Amendment had never before been confined to criminal punishment).

200. *See id.* at 690 (White, J., dissenting) (stating that those who have not been convicted of crimes have other constitutional protections available that have never been determinative of Eighth Amendment protections against cruel and unusual punishment).

constitutional rights should other tactics fail.²⁰¹

Nothing in the text of the Eighth Amendment qualifies its application to post-conviction detention.²⁰² The fact that the Eighth Amendment does not specify between innocent or guilty parties, or pre- or post-conviction detainees, should be enough to show that the Eighth Amendment was intended to protect *all* those detained by the United States government, rather than those convicted of a crime.²⁰³ The majority opinion in *Ingraham* determined that Eighth Amendment protections against cruel and unusual punishment only apply to post-conviction proceedings and confinement, and that no behavior by the state, no matter how indifferent, could qualify as punishment for those not yet convicted of crimes.²⁰⁴ However, as demonstrated in cases against the ORR, cruel and unusual punishment is not restricted solely to post-conviction detention.²⁰⁵ Nor are principles put forward in cases confined to Eighth Amendment scrutiny, such as the deliberate indifference principle, restricted solely to prisoners post-conviction.²⁰⁶ If an ORR official is aware of a substantial risk of harm to an immigrant juvenile held in one of the public or private detainment centers and does not take reasonable steps to attempt to prevent that harm, then the ORR official must be held accountable for the harm done to that detainee under the same standard as *E.A.F.F.*²⁰⁷

Rather than continuing to apply *Bivens* claims based solely on Fifth Amendment protections, which are nullified by courts' consistent applications of the discretionary function exception, courts should instead

201. See *Farmer*, 511 U.S. at 825 (stating that deliberate indifference to severe danger to an inmate violates that inmate's Eighth Amendment rights); see also *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 208 (5th Cir. 2015) (applying the deliberate indifference standard to pre-trial detention).

202. See U.S. CONST. amend. VIII (stating that cruel and unusual punishments shall not be inflicted on those convicted of crimes in the United States).

203. See *Ingraham*, 430 U.S. at 685 (White, J., dissenting) (analyzing the text of the Eighth Amendment to show that it was not intended only to protect those convicted of crimes).

204. See *Ingraham v. Wright*, 430 U.S. 651, 651 (1977) (providing that only convicted criminals could be cruelly and unusually punished).

205. See Complaint, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741, ¶ 1, ¶ 41-46 (C.D. Cal. filed Jun. 29, 2018) (providing an account of a seventeen-year-old male immigrant juvenile being held against the wall with an ORR staff member's elbow pressed to his throat).

206. See *E.A.F.F.*, 600 Fed. App'x at 210-11 (explaining and applying the deliberate indifference standard).

207. See *id.* (describing the standard of deliberate indifference); see also *Bell v. Wolfish*, 441 U.S. 520, 520 (1979) (outlining the steps in the *Bell* test).

allow pre-trial detainees, like immigrant juveniles, to demonstrate through a *Bivens* claim that officers of the federal government working for the ORR violated their Eighth Amendment protection against cruel and unusual punishment.²⁰⁸ While immigrant juveniles in pre-trial detention may not be able to raise a successful claim under the Fifth Amendment's Due Process Clause, the conditions or restrictions of that pre-trial detention which are or were punitively intended constitute cruel and unusual punishment under the Eighth Amendment.²⁰⁹

III. POLICY RECOMMENDATION

Permitting contracted organizations to repeatedly violate the Fifth Amendment through the discretionary function exception and independent contractor exception allows for the perpetuation of a cycle of physical, emotional, and sexual abuse of immigrant juveniles in ORR custody.²¹⁰ Regarding the contracting organizations of the ORR as independent contractors and not government employees is not only illogical, but also continues a cycle of repeated constitutional violations of immigrant juveniles supposedly in the care and custody of the ORR and its Director.²¹¹ As such, the U.S. must re-examine and re-define the term "government employee" to also apply to contractors providing care to UACs on behalf of the ORR, thus providing tangible, actionable recourse to immigrant juveniles whose constitutional rights are violated by staff of contracted agencies.²¹²

The seeming incapability of district courts to hold the ORR and its contracted agencies accountable for employee action directly violates the

208. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1341 (1972) (declaring that federal officers do not hold immunity from damages in suits claiming that they violated someone's constitutional rights). Compare *Ingraham*, 430 U.S. at 684 (White, J., dissenting) (declaring that the Eighth Amendment should not only apply to post-conviction detention), with *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 U.S. Dist. LEXIS 72348, *1, *11 (W.D. Tex. 2009) (providing an overview of the *Bivens* claim made by plaintiffs).

209. See *Ingraham*, 430 U.S. at 684 (White, J., dissenting) (determining that the Eighth Amendment applies to all people, not just those convicted of crimes).

210. See generally *Walding v. United States*, 955 F. Supp. 2d 759, 791 (W.D. Tex. 2013) (dismissing the case after applying the discretionary function and independent contractor exceptions).

211. See generally *E.A.F.F. v. Gonzalez*, 600 Fed. App'x 205, 207-08 (W.D. Tex. 2015) (stating that the plaintiffs continued to suffer abuses at the facility after the initial report and response by the ORR).

212. See *Walding*, 955 F. Supp. 2d at 772 (declaring "government contractors" to not be government employees).

Fifth Amendment rights of immigrant juveniles.²¹³ The ORR should not be excused from the tortious actions of its contracted agencies; through the ORR's continued contracting with agencies and their employees known to violate the constitutional rights of immigrant juveniles, the ORR itself is violating the Fifth Amendment due process rights of UACs.²¹⁴ Both the Director and the ORR must be held responsible for the actions of these contractors under the responsibilities granted to them by the Refugee Act, PREA, the *Flores* settlement, and the U.S. Constitution.²¹⁵ The Fifth Amendment protections already provided to immigrant juveniles in ORR custody must be properly enforced through application of *Bivens* claims, the *Bell* test, *Kingsley* protections, and, upon expanding the Eighth Amendment to apply to ORR detention, the prohibition of cruel and unusual punishment in pre-conviction detention.²¹⁶

CONCLUSION

Immigrant detention has long been held to be pre-trial detention, protected under the Fifth Amendment right to due process.²¹⁷ However, as indicated in *Bell v. Wolfish*, if the conditions of that confinement trespass beyond a legitimate relationship to a governmental purpose, and are purely in place to act as a punitive measure, then those conditions violate the Eighth Amendment rights of the immigrants detained in detention centers and prisons across the nation.²¹⁸

Although the U.S. government's detention of immigrant juveniles is classified as civic, pre-trial detention, the extent of the abuses perpetrated by the ORR and its contracted public and private detention centers are extreme and violate both the Fifth and Eighth Amendment.²¹⁹ Should the courts

213. See generally *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *27 (holding that the ORR was not responsible for the extensive abuses committed at the Abraxas facility despite contracting the agency).

214. See generally E.A.F.F., 600 Fed. App'x at 208 (noting the firing of only a single staff member, rather than all those accused of abuse, making the ORR culpable for further possible instances of abuse in the facility).

215. See *supra* Part III.A (describing the ORR's destruction of federal laws as well as its violation of the constitutional rights of immigrant juveniles).

216. See generally E.A.F.F., 600 Fed. App'x at 210-11 (applying the deliberate indifference standard developed in *Farmer* as well as a *Bivens* claim).

217. See *Bell v. Wolfish*, 441 U.S. at 520 (stating that conditions or restrictions in pretrial detention only violate constitutional rights if they qualify as punishment); see also *supra* Part III (showing how the constitutional rights of juveniles are violated by the ORR).

218. See *Bell v. Wolfish*, 441 U.S. 520, 520 (1979) (describing the *Bell* test).

219. Compare *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D. Haw. 2006) (holding

examine the disproportionately punitive conditions of immigrant juveniles, those conditions clearly would not fulfill the *Bell* test or the standard put forward in *Farmer*, and would violate both the Fifth and Eighth Amendments.²²⁰

that the abusive treatment of LGBTQ juvenile detainees at HYCF violated their due process rights), *with* E.A.F.F. v. Gonzalez, 600 Fed. App'x 205, 207 (W.D. Tex. 2013) (listing abuses inflicted on UACs at the AFH facility in Texas).

220. *See supra* Part III.B (describing how immigrant juveniles are denied due process and are cruelly and unusually punished while in custody).