No. 20-55951

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.
Plaintiffs-Appellees,

v.

WILLIAM P. BARR,
Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General
WILLIAM C. PEACHEY
Director
WILLIAM C. SILVIS
Assistant Director

SARAH B. FABIAN
NICOLE N. MURLEY
Senior Litigation Counsel
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties

Counsel for Appellants William P. Barr, et al.

Jeffrey Bossert Clark (JBC2@usdoj.gov)
Scott G. Stewart (scott.g.stewart@usdoj.gov)
August E. Flentje (august.flentje@usdoj.gov)
William C. Peachey (william.peachey@usdoj.gov)
William C. Silvis (william.silvis@usdoj.gov)
Sarah B. Fabian (sarah.b.fabian@usdoj.gov)
Nicole N. Murley (nicole.murley@usdoj.gov)
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4824

Counsel for Appellees Jenny L. Flores, et al.

Carlos Holguin (crholguin@centerforhumanrights.org)
Peter Schey (pschey@centerforhumanrights.org)
256 South Occidental Boulevard
Los Angeles, CA 90057
Telephone: (213) 388-8693

Leecia Welch (lwelch@youthlaw.org)
Neha Desai
Poonam Juneja
Freya Pitts
Melissa Adamson
1212 Broadway, Suite 600
Oakland, CA 94612
Telephone: (510) 835-8098

(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, on September 4, 2020, the district court entered an order prohibiting the government from placing minors in hotels while they are in the process of being expelled from the United States in accordance with an order issued by the U.S. Centers for Disease Control and Prevention (CDC) in response to the COVID-19 pandemic. The district court stayed its order until September 8, and directed the government to stop placing minors in hotels under the CDC order by September 15. An immediate stay is needed to prevent heightened risk of spread of COVID-19 in congregate care facilities where the government will now be forced to place minors subject to the district court's order.

(3) When and how counsel notified

The undersigned counsel notified counsel for Plaintiffs by email on September 10, 2020, of Defendants' intention to file this motion. Plaintiffs oppose the relief requested in this motion. Service will be effected by electronic service through the CM/ECF system.

(4) Submissions to the district court

Defendants orally requested a stay from the district court on September 4, 2020. The district court granted Defendants' request for a stay until midnight on September 8, 2020, to allow them to pursue a stay from this Court.

(5) Decision requested by

A decision on the motion for an administrative stay is requested immediately, and a request on the motion for a stay pending appeal is requested as soon as possible, but (unless an administrative stay is in place) no later than September 14, 2020.

Dated: September 11, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General
WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation

By: Sarah B. Fabian
SARAH B. FABIAN
NICOLE N. MURLEY
Senior Litigation Counsel
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Email: sarah.b.fabian@usdoj.gov

Counsel to Defendants-Appellants

INTRODUCTION

This Court should expedite this appeal and stay, pending appeal, the district court's order (Dkt. 976, Ex. A) undermining critical public-health measures adopted by the U.S. Centers for Disease Control and Prevention (CDC) in response to the COVID-19 pandemic. The order rests on serious errors and, if not stayed, will irreparably harm the United States and public safety during the pandemic. The order is irreconcilable with the Supreme Court's unmistakable message that "[w]hen ... officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad'" because the courts "lack[] the background, competence, and expertise to assess public health" or to "respon[d] to changing facts on the ground." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J.). The government respectfully requests an immediate administrative stay and (unless an administrative stay is in place) a decision on this motion by September 14, 2020.

Acting under authority granted in Title 42 of the United States Code, in March the CDC Director issued a public-health order "suspen[ding]" the introduction of certain aliens into the United States because such a suspension was "required in the interest of the public health." 42 U.S.C. § 265. In effectuating that suspension, the government sometimes briefly houses alien minors in hotels before their expulsion, so that they are not introduced into congregate settings in the United States where they risk introducing COVID-19 throughout facilities and communities. While in these hotels, the government provides minors with supervision by specialists, recreation, amenities, and protective measures against COVID-19.

This case has nothing to do with the Title 42 public-health regime. *Flores v. Barr* is a case filed 35 years ago that produced a settlement, executed nearly a quarter-century ago, governing the "the detention, release, and treatment of minors in the custody of [the former Immigration and Naturalization Service (INS)]" during their immigration proceedings under Title 8 of the U.S. Code. *Flores* Settlement Agreement ¶ 9 (Ex. B). The Agreement provides that, after alien minors are apprehended and held in immigration custody under Title 8, they are entitled to "safe and sanitary" conditions, *id.* ¶ 12, and must be transferred "as expeditiously as possible" to a "licensed program" for custody during immigration proceedings, *id.* ¶ 12.A. Although the Title 42 public-health authorities were enacted decades before the Agreement was executed, the Agreement says nothing of public-health concerns and does not purport to govern the entities that exercise this public-health authority. Nor does the Agreement govern custody outside of immigration custody or in the context of a public-health emergency. The Agreement applies only to a class of "all minors who are detained in the legal custody of the INS"—the former agency that was responsible for immigration proceedings and custody—and now to agencies that are enforcing the former INS's immigration authorities under Title 8. *Id.* ¶ 10. Here, the authority for legal custody derives from 42 U.S.C. § 265, a public-health authority of the CDC that has nothing to do with the INS or its functions.

Although the Agreement does not apply to alien minors who are not in immigration custody, and although the CDC order concerns public-health measures rather than immigration custody, the district court ruled that the Agreement applies to alien minors who are held in hotels under the CDC's Title 42 measures and that

the government's use of hotels for temporary sequestered custody in a non-congregate setting violates the Agreement. Dkt. 976 (Order). The court reasoned that the Agreement applies because the Department of Homeland Security (DHS), a successor to the INS, exercises current "legal custody" over minors who are held in hotels under Title 42. Order 5-11. On the merits, the court reasoned that the use of hotels is not sufficiently "safe" to satisfy the Agreement and that the Agreement should be read to require that minors in custody under Title 42 must be transferred to "licensed programs" within 72 hours of apprehension. Order 11-16. The court prohibited the government from using hotels to hold minors pending expulsion under the CDC order, even though this custody is necessary to allow the government to meet the public-health aims of the CDC order—to prevent the introduction or spread of COVID-19. Order 16-18.

The district court's order rests on manifest errors and irreparably harms the United States and the public. It should be stayed pending appeal.

The district court is wrong that the Agreement applies to minors in custody under the authority of Title 42. Order 5-11. The Agreement applies only to "all minors who are detained in the legal custody of the INS." Agreement ¶ 10. That provision requires looking to the source of legal authority giving the INS authority to detain. For the custody here, the source of legal authority is a CDC order issued under Title 42, and so, under the Agreement, minors are in the legal custody of the CDC, not the INS's successors. The Agreement's focus on the "legal custody of the INS" also makes clear that the Agreement concerns *immigration custody* under Title 8—that is, after all, the type of custody that the former INS exercised in 1997.

"Legal custody" in this context must be evaluated by the *legal* authority that governs that custody, which at the time the Agreement was signed was Title 8, not Title 42. By its plain terms, the Agreement does not govern non-immigration, Title 42 custody in hotels during a public-health emergency.

Even if the district court were correct that the Agreement governs custody under Title 42, the court erred on the merits when it held that the government's temporary housing of minors in hotels under the CDC order fails to comply with the Agreement. Order 11-16. The Agreement requires that minors be held in "safe and sanitary" conditions and transferred or released from custody "as expeditiously as possible." Agreement ¶ 12. The hotels are sanitary and can safely house minors for the brief period pending expulsion under the CDC order. The government is taking precautions to prevent transmission of COVID-19 to—or by—these minors. Minors enjoy recreation and are cared for by trained professionals. And the government is processing minors under Title 42 as "expeditiously as possible"—most very promptly, with those who stay in hotels remaining there less than 5 days on average. The district court's contrary view is wrong and simply does not account for the context here: a public-health emergency where a key component of the government's response is to limit the introduction of aliens into the United States, and particularly into the types of congregate facilities ordinarily used for immigration custody at the border.

A stay is warranted because the order here will irreparably harm the United States and the public. *See* Ortiz Declaration (Ex. C); Sualog Declaration (Ex. D); Hott Declaration (Ex. E). The order requires the government to place minors into

congregate facilities in direct contravention of the CDC order's aims, and obstructs a critical public-health order that the CDC Director has determined to be necessary because "there remains a serious risk to the public health that COVID-19 will continue to spread to unaffected communities within the United States, or further burden already affected areas." 85 Fed. Reg. 31503, 31505 (May 26, 2020).

The Court should stay the district court's order pending appeal.

BACKGROUND

A. This Case, the 1997 Settlement Agreement, and Later Legislation

This Case. *Flores* began in 1985. Plaintiffs brought suit on behalf of a class of alien minors detained by the INS because "a parent or legal guardian fails to personally appear to take custody of them." *Reno v. Flores*, 507 U.S. 292, 296 (1993). After the Supreme Court upheld the government's regulations governing the detention and release of alien minors and remanded the case, the parties entered into the Agreement.

The Agreement. The Agreement applies to "all minors who are detained in the legal custody of the INS." Agreement ¶ 10. It establishes a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS." *Id.* ¶ 9. Under the Agreement, INS must hold minors in facilities that are "safe and sanitary." *Id.* ¶ 12. As a default, INS must place a minor in a licensed program within 72 hours of apprehension. *Id.* ¶ 12.A. In an "influx"—that is, when, as now, more than 130 minors are in INS custody awaiting placement—that 72-hour requirement does not apply, and minors must instead be placed into a licensed

program "as expeditiously as possible." *Id.* A licensed program is "any program ... that is licensed by an appropriate State agency to provide ... services for dependent children." *Id.* ¶ 6.

Later Legislation. In 2002, Congress enacted the Homeland Security Act (HSA), Pub. L. No. 107-296, 116 Stat. 2135, creating DHS and abolishing the INS. The HSA transferred most of INS's immigration functions to DHS, and transferred to HHS responsibility for the care of "unaccompanied alien children" (UACs) "who are in Federal custody by reason of their immigration status." 6 U.S.C. § 279(a), (b)(1)(A). The Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008), later affirmed that "the care and custody of all [UACs], including responsibility for their detention, where appropriate, shall be the responsibility of" HHS. 8 U.S.C. § 1232(b)(1).

The successors of INS that carry out its immigration functions today—including immigration custody—are U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS), all of which are part of DHS, and, for unaccompanied alien children, HHS's Office of Refugee Resettlement (ORR). *See* HSA §§ 402, 462, 1512, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 202, 279, 552); TVPRA, 8 U.S.C. § 1232. The authority for immigration proceedings, and t to hold alien minors in immigration custody, is found in Title 8. *See* 8 U.S.C. §§ 1225, 1226, 1231, 1232.

B. CDC Statutory Authority and the Government's 2020 Response to the COVID-19 Pandemic

Nearly a quarter century after the Agreement was executed, the United States was called upon to respond to the COVID-19 pandemic. As part of that response, in March the CDC issued an order under 42 U.S.C. § 265. Order, 85 Fed. Reg. 17060; Extension of Order, 85 Fed. Reg. 22424; Amendment and Extension of Order, 85 Fed. Reg. 31503. Enacted in 1944 as part of the Public Health Service Act, section 265 authorizes the CDC Director, in response to a "serious danger of the introduction of [a communicable disease in a foreign country] into the United States," to "prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose." 42 U.S.C. § 265. The CDC order "applies to persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico." 85 Fed. Reg. at 17061. The order explains that "[t]he introduction into congregate settings in land POEs and Border Patrol stations of persons from Canada or Mexico increases the already serious danger to the public health to the point of requiring a temporary suspension of the introduction of such persons into the United States." *Id.* The CDC Director has extended the order on the ground that "there remains a serious risk to the public health that COVID-19 will continue to spread to unaffected communities within the United States, or further burden already affected areas." 85 Fed. Reg. at 31505. The

CDC has determined that the CDC order "significantly mitigated the specific public health risk identified in the initial Order." *Id.*

Title 42 also provides that "[i]t shall be the duty of the customs officers[1] and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations." 42 U.S.C. § 268. In line with that provision, and given the CDC's limited resources, in issuing its order the CDC directed customs officers of DHS to assist in implementing the order 85 Fed. Reg. at 17067.

The CDC order directs that covered aliens should be expelled to their country of last transit or their country of origin "as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances." 85 Fed. Reg. at 17067. On a case-by-case basis, CBP may, based on humanitarian concerns, except a minor from the CDC order and transfer the minor to immigration custody under Title 8. Testimony of Mark A. Morgan, CBP, June 25, 2020, at 3, https://www.hsgac.senate.gov/imo/media/doc/Testimony-Morgan-2020-06-25-REVISED.pdf.

When they cannot be expelled immediately to their country of last transit, minors and families slated for expulsion to their country of origin under the CDC order may be housed in hotels. Harper Decl. ¶ 2, Dkt. 925-1. These hotels provide amenities and help implement the CDC's orders directive "that covered aliens spend as little time in congregate settings as practicable under the circumstances." 85 Fed.

[1] The term "customs officer" means an "officer of the United States Customs Service of the Treasury Department." 19 U.S.C. § 1401(i). The HSA transferred the relevant Treasury Department functions to DHS. 6 U.S.C. §203(1).

Reg. at 17067. Custody in hotels is accomplished through a contract with MVM Inc., which specializes in the transportation and care of this vulnerable population. Harper Decl. ¶¶ 2, 3; Hott Decl. ¶ 12. MVM hires specialists who interact with and care for minors and family groups/units while they are in the hotel. *Id.*. At the hotels, minors are provided amenities, medical care and daily medical screenings by a medical professional, and protections against COVID-19. *Id.* ¶¶ 13-20.

C. The District-Court Order

On August 14, the plaintiffs filed a motion purportedly to enforce the Agreement, arguing that the government's use of hotels to house minors under the CDC's order violates the Agreement. Dkt. 920, 920-1. On September 4, the district court granted the motion. Order, Dkt. 976.

On jurisdiction, the court ruled that the Agreement applies to alien minors who are in government custody under the CDC's Title 42 order. Order 5-11. The court ruled that "custody," as used in the Agreement's phrase "all minors in the legal custody of the INS," means "the right and responsibility to care for the well-being of the child and make decisions on the child's behalf." Order 5-6. The court emphasized that DHS is a legal successor to the INS, and concluded that DHS has legal custody over minors being excluded under Title 42 and housed in hotels because DHS exercises control over whether minors are processed under Title 42, where they are held during processing, and when and how minors are released from custody. Order 6-11.

On the merits, the court concluded that housing alien minors in hotels under Title 42 does not comply with the Agreement. Order 11-16. To start, the court

concluded that housing minors in hotels is inconsistent with the Agreement's requirement (¶¶ 12, 19) for expeditious placement in licensed programs. Order 12-13. The court noted that ORR licensed facilities have a significant number of available beds, and concluded that, given that availability, "as expeditiously as possible" requires transfer within a three-day window. *Id.* Next, the court acknowledged that the hotels' conditions "are generally sanitary under normal circumstances," but concluded that hotels did not satisfy the Agreement's requirement (¶ 12.A) to provide "safe" conditions. Order 13-15. The court concluded that MVM personnel are not providing adequate supervision to minors in hotels, and therefore ruled that "the hotel program is not safe with respect to preventing minors from contracting COVID-19 or providing the type of care and supervision suitable for unaccompanied minors." Order 15. Finally, the court acknowledged that minors have access to phone calls, but deemed this process inadequate to satisfy the Agreement's requirement that class counsel have access to conduct attorney-client visits. Order 15-16 (discussing Agreement ¶ 32).

The court barred the government from holding minors in hotels under the Title 42 processes. Order 16-18. Among other things, the court ordered that "DHS shall cease placing minors at hotels by no later than September 15, 2020," and that "DHS shall transfer all minors ... currently held in hotels to [ORR licensed shelters or ICE family residential centers] as expeditiously as possible." Order 17.

ARGUMENT

A stay is warranted. The government is likely to prevail on appeal, it will be irreparably harmed without a stay, a stay will not substantially harm the plaintiffs,

and the public interest supports a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Court should grant an administrative stay while it considers this stay request.

I. A Stay Is Warranted Because the District Court's Order Rests on Serious Errors of Law.

A stay pending appeal is warranted because the district court's order rests on significant and clear errors of law.

First, the district court erred in holding that the Agreement applies here. Order 5-11. The Agreement applies only to minors who are in the "legal custody of the INS" as that term was used by the parties in 1997. Agreement ¶¶ 4, 10. To start, the term "legal custody" refers to the source of law that gives rise to the custody of the child. In 1997, INS would have "legal custody" over minors based on the Title 8 immigration laws in effect at that time that gave it authority to hold aliens pending removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 298 (1993). The source of detention authority for the custody at issue here is 42 U.S.C. § 265, and the CDC order issued under that provision. Thus, under the term "legal custody" in the Agreement, minors are in the legal custody of the CDC, not the INS's successors.

The phrase "legal custody of the INS" is also significant because, although the Agreement does not expressly define "legal custody," it does recognize a distinction between *legal custody* and *physical custody*. The Agreement provides for the INS in some instances to place a minor in the *physical custody* of a licensed program (and thus outside the physical custody of the INS), but the Agreement specifies that the minor remains in the *legal custody* of the INS. Agreement ¶ 19.

Thus, under the Agreement, "legal custody of the INS" means custody at the direction of the INS under the immigration laws in Title 8, which granted the INS the authority to detain the minor. *Id*.

That the Agreement governs immigration custody under Title 8 is further evident from its context. The Agreement settled specific issues related to custody by the INS incident to immigration proceedings, under the law governing that custody. *See, e.g.*, Agreement ¶¶ 11, 14, 24.A. When the Agreement was signed in 1997, the INS's legal authority to detain minors was found within Title 8. *See* 8 U.S.C. §§ 1225, 1252 (1995). Such detention was incident to immigration deportation and exclusion proceedings, the authority for which was also detailed in Title 8. *See* 8 U.S.C. §§ 1225, 1226, 1231, 1252(b) (1995). The authority for immigration proceedings, and the authority to hold alien minors in immigration custody pending those proceedings, remains in Title 8 today. *See* 8 U.S.C. §§ 1225, 1226, 1231, 1232. Thus, the Agreement by its terms applies to minors in immigration custody under Title 8. The INS's successors that carry out these immigration functions under Title 8 today—including immigration custody—are CBP, ICE, and USCIS, all in DHS, and ORR for UACs.

The Agreement does not encompass custody incident to the implementation of this present-day CDC order issued under 42 U.S.C. § 265. The sections of Title 42 at issue here are not immigration statutes and are not limited to aliens. And persons processed under Title 42 are not processed for immigration enforcement actions. Rather, 42 U.S.C. § 265 provides broad authority to CDC to take action to respond to public-health emergencies, and thus authorize the custody at issue that is

a necessary part of the CDC's response. While components of DHS play a role in today's Title 42 process, that role is not based in any Title 8 immigration authority, but rather is authorized by 42 U.S.C. § 268, which provides that "[i]t shall be the duty of the *customs officers* and of *Coast Guard officers* to aid in the enforcement of quarantine rules and regulations." (Emphases added.) Notably, while today DHS assists HHS in implementing the CDC's order in accordance with section 268 because customs officers and the Coast Guard are now a part of DHS, 6 U.S.C. § 203, when the Agreement was executed in 1997, section 268 would not have applied to INS because at that time the Coast Guard and customs officers were part of the Treasury Department.

The Agreement also clearly does not apply here when it is read in broader context and as a whole. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (a contract "should be read to give effect to all of its provisions and to render them consistent with each other"). Section 265 was enacted in 1944, but the Agreement made no mention of that statute, nor do any of the Agreement's terms refer or directly relate to custody for public-health purposes. Section 265 authorizes the CDC Director to "prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose." 42 U.S.C. § 265. That authority is irreconcilable with the Agreement's release obligation (¶ 14). And requiring that the government transfer minors to facilities "licensed by an appropriate State agency," Agreement ¶ 6, contradicts the CDC order's aim to prevent the "danger to the public health that results from the

introduction of such persons into congregate settings at or near the borders [that] is the touchstone of th[e] order." 85 Fed. Reg. at 17061. Had the parties intended the Agreement to apply to the public-health-related custody here, they would have had to address how the Agreement's terms were meant to apply to the type of short-term expulsion processes—focused on averting the danger of transmission of disease—that could be expected to occur under section 265. But they did not. Nothing in the Agreement suggests that the parties intended it to govern—or anticipated that it would govern—procedures under 42 U.S.C. § 265, or brief incidental periods of custody necessary to implement these procedures. The Agreement does not apply here, and the motion to enforce should have been denied.

The district court's reasons for holding otherwise are flawed. The court relied on the fact that DHS is a legal successor to the INS, and on its reading of "legal custody" as used in the Agreement to mean "the ability to provide care and supervision for the child." Order 6. The court ruled that DHS has "legal custody" of minors during the Title 42 expulsion process, and so concluded that "what the parties very much did anticipate is that when the successors to the INS held minors in their legal custody—whether 'by mere coincidence' or not—the Agreement would apply." Order 9. In so concluding, the court failed to construe "legal custody of the INS" as a whole and in keeping with its plain meaning under the Agreement. As explained above, that text refers to immigration custody under Title 8 as carried out by the INS in 1997. Here, the custody at issue is entirely different—it is part of a process that implements a CDC public-health order, subject to legal authority found in Title 42. Nothing in the Agreement supports the district court's view that

the parties anticipated that the Agreement would be applied to custody authorized by a non-immigration statute conferring authority on the CDC, and carried out with the assistance of Treasury Department officers. A plain reading of the Agreement shows that it addresses Title 8 custody incident to removal proceedings by the INS—and nothing in the Agreement is consistent with reading it to govern the incidental custody necessary to implement Title 42.

Second, even if the Agreement does apply to this custody, the district court erred in holding that the government's use of hotels violates the Agreement.

To start, the manner in which the government uses hotels for custody as part of Title 42 exclusion processes satisfies the Agreement's requirement to promptly transfer alien minors out of an unlicensed facility. Agreement ¶ 12; *contra* Order 11-13. In accordance with the Title 42 order, the government is processing minors for expulsion as expeditiously as possible, and the use of hotels provides a safe and sanitary location for custody while also facilitating this quick expulsion process. The district court incorrectly concluded that the Agreement requires that minors be transferred to licensed facilities, ignoring that paragraph 12 of the Agreement allows that in cases of "influx" or "emergency"— including "medical emergencies (e.g., a chicken pox epidemic among a group of minors)"—the requirement for transfer is only that it should occur "as expeditiously as possible." Those exceptions apply here and so any application of a strict three-day transfer rule is incorrect. And, in requiring transfer within three days, the district court further disregarded its prior ruling that gave the government at least *20 days* before transfer to a licensed program (to address credible fear claims). Dkt. 189. *A fortiori* the expeditious-placement

standard is met by giving the government a short period—an average of just five days for those few minors who are temporarily housed in hotels—to effectuate a public-health order that aims to prevent the spread of disease in congregate facilities.

Moreover, in entering into the Agreement, the parties represented "that they know of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law." Agreement ¶ 41. Thus, the requirement of transfer "as expeditiously as possible" should not be read in a manner that would render it inconsistent with—and in violation of—42 U.S.C. § 265. Requiring that minors in custody under section 265 be transferred to licensed congregate-care facilities within and throughout the United States within three days, as the district court's order does, conflicts with the CDC's efforts to exercise its authority under section 265 by prohibiting the introduction of individuals into congregate settings based on public-health considerations. The district court was wrong to read the Agreement to require the introduction of persons into congregate care facilities throughout the United States in violation of section 265's plain terms.

The court also erred in ruling that the custody at issue is not "safe and sanitary." Order 13-15. The court acknowledged that the hotel rooms and other provided amenities "are generally sanitary under normal circumstances," Order 13, but ruled that the conditions are not "safe." In so ruling, the court relied on a generalized assertion that to be safe, the hotels must provide a "*system of care* for children of different ages and developmental stages." Order 14 (emphasis added; quoting Dkt. 938 at 21). The Agreement does not require a "system of care"—it requires "safe and sanitary" conditions, Agreement ¶ 12.A, and the government has

provided those. Dkt. 925-1. Notably, the district court drew this novel "system of care" requirement from a court-appointed monitor's report. Dkt. 938 at 15. The monitor failed to identify the evidence supporting the purported need for a "system of care" and the court did not provide any opportunity for the government to respond to the monitor's proposed requirement. The district court should not have read this undefined, amorphous requirement into the Agreement—and it was especially inappropriate to do so in the procedurally flawed manner here. A stay is warranted.

II. A Stay Is Needed To Prevent Immediate Irreparable Harm To The United States And The Public.

The district court's order threatens serious, irreparable harm and undermines the public interest. The order will obstruct the CDC's order, which was issued to prevent the unchecked introduction of COVID-19 into the United States. The crux of the CDC's order is that introducing individuals into congregate care facilities increases the risk to those individuals, and to the public, that COVID-19 will spread. 85 Fed. Reg. at 17061. Notably, the plaintiffs and the district court have repeatedly asserted the dangers of holding minors in congregate settings given COVID-19. Dkt. 733-1; Dkt. 784, 833. Yet the district court's order requires that all minors and families who would have been held in individual rooms in a hotel, and then expelled under the CDC order, must now instead be placed into congregate settings regardless of the CDC Director's judgments and regardless of the limitations on the government's ability to maintain appropriate infection-control measures in those settings. That is wrong. The public interest is served by allowing the nation's chief medical expert, the CDC Director, to determine how his emergency health powers

will be operationalized during a global pandemic. It is particularly critical for courts to take care in this context: the Supreme Court has made clear that it disfavors judicial decisions that inject courts into the management of the COVID-19 pandemic. *See, e.g., S. Bay United*, 140 S. Ct. at 1613; *see also Ahlman v. Barnes*, 2020 U.S. Dist. LEXIS 96023 (C.D. Cal., May 26, 2020), *stayed*, No. 20A19, 2020 U.S. LEXIS 3629 (Aug. 5, 2020).

The district court order also imposes extraordinarily intrusive measures on government operations. The order creates a risk of increased COVID-19 infections in CBP, ORR, and ICE facilities. Ortiz Decl. ¶¶ 8, 10; Sualog Decl. ¶ 10-16, 20-21; Hott Decl. ¶ 6-8. This also creates a risk of increased infections in local communities. Ortiz Decl. ¶¶ 11-13; Sualog Decl. ¶ 15, 20-21; Hott Decl. ¶ 11. Finally, the order creates serious risks of interruptions to the operations of these agencies. Ortiz Decl. ¶¶ 8-9, 12-16; Sualog Decl. ¶¶ 11-22, 27-46; Hott Decl. ¶ 7, 9-11.

The plaintiffs do not face comparable harm if the Court issues a stay. Indeed, based on the plaintiffs' ongoing efforts to halt congregate care of minors in family residential centers and ORR facilities, it would be remarkable for them now to assert that brief custody at a hotel is more harmful than congregate care. The government has taken extensive measures to address the risks presented by COVID-19 for minors and family groups temporarily housed at hotels under Title 42. Minors have continual access to the amenities of a typical hotel room, medical care, and oversight by persons who specialize in the care of this vulnerable population. Harper Decl. ¶¶ 2-21. The plaintiffs put forth no evidence of harm to any minor from being held

in a hotel during Title 42 processing, but rather based their claims on the argument that the Agreement required licensed placements. Dkt. 920. Considerations of harm and the equities support a stay.

CONCLUSION

The Court should grant an administrative stay while this stay motion is briefed, expedite this appeal, and, pending the resolution of the appeal, stay the district court's order (Dkt. 976).

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Dated: September 11, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

SCOTT G. STEWART
Deputy Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation

By: *Sarah B. Fabian*
SARAH B. FABIAN
NICOLE N. MURLEY
Senior Litigation Counsel
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Email: sarah.b.fabian@usdoj.gov

Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I certify that on September 11, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ *Sarah B. Fabian*
SARAH B. FABIAN

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 85-4544-DMG (AGRx)**	Date	September 4, 2020
Title	***Jenny L. Flores, et al. v. William P. Barr, et al.***	Page	1 of 18

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AS TO "TITLE 42" CLASS MEMBERS [920]

I. INTRODUCTION

On August 14, 2020, Plaintiffs filed a motion to enforce the *Flores* Settlement Agreement ("FSA" or "Agreement") with respect to Class Members detained in hotels pending expulsion pursuant to 42 U.S.C. section 265 ("Title 42"). [Doc. # 920.] In particular, Plaintiffs argue that (1) minors detained by the Department of Homeland Security ("DHS") under the direction of a Title 42 order by the Centers for Disease Control and Prevention ("CDC") are Class Members within the scope of the *Flores* Agreement, and (2) holding such Class Members in unlicensed hotels for prolonged periods violates the Agreement. Plaintiffs therefore ask the Court to order DHS to stop detaining minors in hotels and to comply with the Agreement with respect to the placement of Class Members. Defendants maintain that the Court lacks jurisdiction to issue such an order because these minors are not Class Members, and in any event, detaining them in hotels does not violate the Agreement. The motion has been fully briefed. [Doc. ## 925, 960.] The Court held a hearing on the motion on September 4, 2020.

Having duly considered the parties' written submissions and oral argument, the Court **GRANTS** Plaintiffs' Motion to Enforce for the reasons stated below. The Court has jurisdiction over this matter and orders DHS to end its practice of detaining Class Members in hotels. DHS cannot evade its obligations under the *Flores* Agreement by hiding behind a different statute while exercising unfettered discretion over the minors within its care.

II. BACKGROUND

On January 28, 1997, this Court approved the *Flores* Agreement—a class action settlement—between Plaintiffs and the federal government. *See Flores v. Sessions*, 862 F.3d

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863, 866 (9th Cir. 2017). At the time, the Immigration and Naturalization Service ("INS") was the primary agency tasked with enforcing the nation's immigration laws, principally the Immigration and Nationality Act, also known as Title 8. It was the INS's conduct that was at issue in the *Flores* litigation, as memorialized in the Agreement's class definition: "All minors who are detained in the legal custody of the INS." FSA at ¶ 10 [Doc. # 101].

In 2002, Congress passed the Homeland Security Act, which abolished the INS and transferred its functions to various agencies within the newly created DHS, as well as to the Office of Refugee Resettlement ("ORR"), an agency within the Department of Health and Human Services ("HHS"). 6 U.S.C. §§ 251, 279, 291. Also transferred to DHS were the functions of the former U.S. Customs Service, which had been a part of the Treasury Department. *Id.* at § 203(1). The immigration and customs security and enforcement-related functions were comingled and vested into two agencies within DHS: Customs and Border Protection ("CBP") and Immigration and Customs Enforcement ("ICE"). *See* 6 U.S.C. § 211; *id.* at § 252 (establishing the Bureau of Border Security); H.R. Doc. No. 108-32, at 1 (renaming the Bureau of Border Security the "Bureau of Immigration and Customs Enforcement").

The *Flores* Agreement is binding upon the named Defendants and their "agents, employees, contractors and/or successors in office." FSA at ¶ 1. Consequently, after the reorganization of the INS, its "obligations under the Agreement now apply to the Department of Homeland Security and the Department of Health and Human Services." *Flores v. Barr*, 934 F.3d 910, 912 n.2 (9th Cir. 2019).

On March 20, 2020, CDC, a subagency of HHS, issued an order closing the United States' borders with Mexico and Canada to certain persons in response to the COVID-19 pandemic. *See* Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020) (effective March 20, 2020) ("Closure Order"). The Closure Order called for covered persons to be removed from the United States and returned to their country of origin, or another practicable location, as rapidly as possible. *Id.* at 17,067. It applied to "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico," and exempted U.S. citizens, permanent residents, and those with valid travel documents or subject to the visa waiver program, among others. *Id.* at 17,061. The Closure Order was issued pursuant to HHS's authority under 42 U.S.C. sections 265 and 268. Enacted in 1944, the relevant section of Title 42 states:

> Whenever [the Secretary of HHS] determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the [Secretary], in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

42 U.S.C. § 265. The Closure Order noted the "serious danger" of COVID-19 entering the United States through land Ports of Entry and Border Patrol Stations operated by CBP. 85 Fed. Reg. at 17,061. The Order "requested that DHS implement this order because CDC does not have the capability, resources, or personnel needed to do so." *Id.* at 17,067. The Closure Order has since been extended twice, the second time indefinitely. *See* Extension of Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists, 85 Fed. Reg. 22,424 (Apr. 22, 2020) (effective April 20, 2020); Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May 26, 2020) (effective May 21, 2020).

On July 22, 2020, the Independent Monitor, Andrea Ordin, and Special Expert, Dr. Paul H. Wise, filed an Interim Report on the Use of Temporary Housing for Minors and Families Under Title 42 ("July 22 Interim Report") [Doc. # 873], alerting the Court to DHS's practice of using hotels to temporarily house accompanied and unaccompanied minors pending their expulsion under Title 42, routinely for multiple days. *Id.* at 11.[1] On August 7, 2020, the Court determined the issue of "hoteling" to be beyond the scope of prior briefing and ordered the Plaintiffs to file a motion to enforce on an expedited briefing schedule. [Doc. # 914.] In the same Order, the Court directed the Independent Monitor to continue observing and reporting on Title 42 hoteling. On August 26, 2020, the Monitor filed another Interim Report, finding that 25 hotels across three states have been used to house 660 minors between the ages of 10 and 17, 577 of whom were unaccompanied. August 26 Interim Report at 12, 15 [Doc. # 938]. Of the unaccompanied minors, 126 (26%) were under 15 years of age. *Id.* at 15. On average, minors are housed in hotels for just under five days, though 25% have been held for more than 10 days,

[1] All page references herein are to page numbers inserted by the CM/ECF system.

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with a maximum stay of 28 days. *Id.* at 16; Supplemental Harper Decl. at ¶ 6 [Doc. # 970].[2] The hoteling program is operated by ICE and its contractor, MVM, Inc. ("MVM"). July 22 Interim Report at 11. It has rapidly expanded since the Closure Order was first issued, becoming a full-scale detention operation for minors and families immediately preceding their expulsion under Title 42. *See id.*; August 26 Interim Report at 12. The Independent Monitor recommended that unaccompanied minors be excluded from the hoteling program, finding there to be "no assurance that the [hoteling program] can provide adequate custodial care for single minors." August 26 Interim Report at 21.[3]

III.
LEGAL STANDARD

The Court incorporates the legal standard for motions to enforce articulated in its July 24, 2015 and June 27, 2017 Orders and need not repeat it here. *See Flores v. Johnson*, 212 F. Supp. 3d 864, 869–70 (C.D. Cal. 2015); *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1048–50 (C.D. Cal. 2017).

IV.
DISCUSSION

As a preliminary matter, the Court makes clear what is *not* at issue in this case—the validity of Title 42 expulsions. Much as an examination of the legal underpinning of the Migrant Protection Protocols ("MPP"), also known as the "Remain in Mexico" policy, is outside the purview of the *Flores* Agreement, so too is Defendants' policy of expelling minors pursuant to Title 42. *See* April 24, 2020 Order at 13 [Doc. # 784].

[2] Statistics on the length of minors' stays in hotels, cited herein, may contain slight inaccuracies due to Defendants' late filing of corrected data. *See* Supplemental Harper Decl.; Corrected Attachment A to Opp. (under seal) [Doc. # 972]. The corrections to the data are not material to any of the Court's conclusions.

[3] Defendants object to the Independent Monitor's Reports, claiming that the Monitor's recommendations hold Defendants to a standard not found in the *Flores* Agreement. [Doc. # 967.] The Monitor found that "the [hoteling program] is not fully responsive to the safe and sanitary requirements of young children." August 26 Interim Report at 19. The "safe and sanitary" requirement is directly found in the *Flores* Agreement, as is the requirement for conditions that "are consistent with the [] concern for the particular vulnerability of minors." FSA at ¶ 12.A. The Monitor's conclusions stem from the well-established definition of "safe and sanitary." *See Flores v. Barr*, 934 F.3d at 916 n.6 ("'safe and sanitary' conditions includes protecting children from developing short- or long-term illnesses as well as protecting them from accidental or intentional injury"); Part IV.B.2, *infra*. The Court therefore **OVERRULES** Defendants' objections.

The sole focus of the Court is Defendants' treatment of minors within their "legal custody" and whether it comports with the requirements of the *Flores* Agreement. The Court considers first the threshold question of whether minors in Title 42 custody are *Flores* Class Members.

A. Jurisdiction Over Minors Detained Under Title 42

The *Flores* Agreement provides protections to its Class Members, who are defined as "[a]ll minors who are detained in the legal custody of the INS." FSA at ¶ 10. Whether minors detained under Title 42 are Class Members therefore depends on who has legal custody over them, and whether that entity is a successor to the INS. The question turns on the definition of "legal custody" as contemplated by the Agreement.

1. The Meaning of "Legal Custody" Under the *Flores* Agreement

When interpreting the language of a contract, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. The *Flores* Agreement discusses "custody" and "legal custody" throughout. Unless detention is necessary to "ensure the minor's safety or that of others," Paragraph 14 instructs the INS to "release a minor from its custody" to, in order of preference, a parent, legal guardian, adult relative, an adult designated by a parent or legal guardian "as willing to care for the minor's well-being," "a licensed program willing to accept custody," or to an adult or entity "seeking custody" when there is no other alternative. Paragraph 15 provides that, prior to a minor being "released from INS custody," the accepting custodian must agree to "provide for the minor's physical, mental, and financial well-being." Under Paragraph 16, if the accepting custodian fails to abide by this agreement, the INS "may terminate the custody arrangements and assume legal custody" of the minor. Paragraph 19 provides that, in the event a minor is not released, "the minor shall remain in INS custody." In such situations, the minor shall be placed in a licensed program, but "[a]ll minors placed in such a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS."

In this context, the definition of "legal custody" is unambiguous. Each use of "custody" or "legal custody" connotes the ability to provide care and supervision for the child. The Agreement discusses the transfer of "custody" from the INS to parents or other private adults or entities, and it requires the transferee custodian to agree to provide for the minor's well-being. It also provides for the ability of the INS to transfer physical possession while retaining "legal custody," in which case only the INS can authorize further transfer or release. The use of the

word "legal" is telling. The Agreement employs the formal meaning of "legal custody," derived from family law, signifying the right and responsibility to care for the well-being of the child and make decisions on the child's behalf. *See* Black's Law Dictionary (11th ed. 2019) (defining "legal custody" as "[t]he authority to make significant decisions on a child's behalf, including decisions about education, religious training, and healthcare"); Cal. Fam. Code §§ 3003, 3006 (defining "legal custody" as "the right and the responsibility to make the decisions relating to the health, education, and welfare of a child"); *see also In re Jennifer R.*, 14 Cal. App. 4th 704, 710 (1993) (recognizing legal custody as the ability to make "major decisions that are going to effect [sic] the life of the child").

2. "Legal Custody" Under Title 42 Procedures

With this understanding in mind, there is no doubt that DHS maintains legal custody of minors subject to Title 42 expulsion. From the moment they are first apprehended until they are released or expelled, DHS has the authority to make decisions relating to the welfare and legal status of the children.

DHS agents have near complete control over whether, when, and how they apprehend individuals under Title 42. The Closure Order delegated to CBP the responsibility to execute its directives, and noted that CBP had already "developed an operational plan" for its implementation. 85 Fed. Reg. at 17,067. Based on CBP's internal guidance memo on the Closure Order, titled "Operation Capio," Border Patrol agents are tasked with apprehending persons under the Closure Order and "may rely on their training and expertise in detecting, apprehending, and determining whether persons are subject to the CDC order." U.S. Customs & Border Protection, *COVID-19 Capio Memo*, https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html ("Capio Memo") at 1.[4] The Closure Order also grants DHS the discretion to exempt certain covered individuals "based on the totality of the circumstances," although they "shall consult with CDC" regarding these individualized exceptions. 85 Fed. Reg. at 17,061.

DHS also appears to exercise unilateral discretion over whether detained minors remain within the Title 42 expulsion process or are transferred into Title 8 proceedings, such as removal proceedings under 8 U.S.C. section 1229(a). The Capio Memo provides that when an individual is "determined to no longer be amenable" to Title 42 expulsion, they are to be processed under Title 8. Only the "Chief Patrol Agent" of CBP can sign off on such a decision. Capio Memo at

[4] The Capio Memo is an internal document published by the press and cited by Plaintiffs, but Defendants do not dispute its authenticity.

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2. There is no procedure for CDC to review or approve that decision. Moreover, multiple legal services providers attest that DHS summarily re-designates minors from Title 42 to Title 8 custody, with no explanation given, and perhaps for no other reason than that counsel has appeared to advocate on the child's behalf. *See* Nagda Decl. at ¶ 32 [Doc. # 920-4] ("We are not aware of any reason for the children's 're-designation' other than our efforts to notify DHS that we were aware of the child's presence in DHS custody."); Galindo Decl. at ¶ 5 [Doc. # 897-3] ("[E]very time we have contacted the government about a specific child who had not yet been removed, the government has removed that child from the Title 42 Process."); Odom Decl. at ¶ 19 [Doc. # 920-3] ("In almost every case, our intervention has succeeded in officials reprocessing the children under Title 8, rather than Title 42[.]"); Galindo Decl. at ¶ 3 [Doc. # 920-7] ("As of August 13, 2020, the U.S. government has transferred at least 44 unaccompanied children out of the Title 42 process and into ORR care as a result of our efforts.").[5] CDC appears to have no role in this process. *See* Nagda Decl. at ¶ 33 ("[W]e have never interacted with a CDC representative in any capacity[.]"); Seaton Decl. at ¶ 16 [Doc. # 920-5] ("I did not interact or communicate with any representatives from the CDC during my representation of [a minor in Title 42 custody]."). In July 2020, 46 minors were reprocessed from Title 42 to Title 8 custody. *See* Adamson Decl., Ex. 1, Title 42 Data Summary ("July Data Summary") at 20, 25 [Doc. # 960-1].

DHS also has complete control over where and under what conditions to detain minors under Title 42, including over the decision to house them in hotels. The hoteling operation is managed by the Juvenile and Family Residential Management Unit of ICE, which has hired a contractor to run the facilities on the ground, though ICE "oversees all aspects of the operations." *See* Harper Decl. at ¶¶ 1–3, 11 [Doc. # 925-1]. CDC appears to have no role in the process. *See id.* ICE feeds, clothes, and provides for the hygiene of the minors, with apparently no input from CDC. S*ee id.* at ¶¶ 13–18. ICE even handles medical care for the minors, *see id.* at ¶ 20, notwithstanding CDC and HHS's expertise in the field. In other words, DHS maintains "the right and the responsibility to make the decisions relating to the health, education, and welfare of [the] child." Cal. Fam. Code §§ 3003, 3006 (definition of legal custody in the family law context).

Finally, DHS has wide discretion to determine when and whether minors held under Title 42 leave their custody. According to the Independent Monitor, the amount of time minors spend in hotels under Title 42 custody varies widely, with no apparent methodology and no formal

[5] Defendants object to many of Plaintiffs' declarations for lack of personal knowledge. Opp. at 26 n.10 [Doc. # 925]. To the extent that Plaintiffs' declarants offer hearsay testimony on behalf of others in their organizations, any defect as to this testimony can be easily remedied if a full evidentiary hearing is requested and deemed necessary. The Court therefore provisionally **OVERRULES** Defendants' evidentiary objections.

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limits on the length of stays. August 26 Interim Report at 16–19. There is no indication that CDC plays any role in deciding when minors' custody with DHS ends and they are ultimately expelled from the country. DHS retains plenary authority to make this "major decision" affecting the child's life. *See In re Jennifer R.*, 14 Cal. App. 4th at 710.

Defendants do not dispute the degree of control DHS exercises over the minors. Opp. at 19–20 [Doc. # 925]. They also rightly recognize that the Agreement contemplates a definition of "legal custody" distinct from physical custody, even pointing to state family law authorities on the meaning of legal custody. *Id.* at 14–15; Defs.' Response to Pls.' Report on Parties' Conference re "Title 42" Class Members at 5–6 n.2 [Doc. # 900]. But they then insist that legal custody refers to "the source of legal authority to hold the child," irrespective of who actually controls the child's life, and that therefore legal custody belongs to CDC. Opp. at 19. Neither the law nor the *Flores* Agreement employs the term "legal custody" in such a cabined manner.

Defendants point to Paragraph 19, which provides for the INS to hand over physical custody to a licensed program while retaining legal custody, as evidence that CDC too can maintain legal custody even while delegating physical custody to DHS. But Paragraph 19 specifically reserves for the INS the sole authority to release or transfer the minor, as is consistent with the authority inherent in having legal custody. Licensed programs also have a host of minimum standards by which they must abide. *See* FSA, Ex. 1. By contrast, CDC does not appear to have any voice in the child's future legal status or physical placement, whereas DHS has free rein. Even if the Court assumes for the sake of argument that the CDC maintains some form of legal custody as the source of the detention authority, that does not foreclose DHS from having legal custody by virtue of its unbridled authority to take actions and make decisions relating to the minor. *See* Cal. Fam. Code § 3003 (recognizing joint legal custody).

Defendants argue that the Agreement was only ever intended to apply to minors held under Title 8, and that the parties could never have anticipated that DHS would, "by mere coincidence," be tasked with implementing a CDC order under Title 42. Opp. at 19. But nowhere in the Agreement is Title 8 or any other authorizing statute mentioned.[6] The words "pursuant to Title 8" or the like are conspicuously absent from the class definition. The Agreement did not restrict itself to any particular statutory framework, though it easily could

[6] Passing references are made to certain procedures and institutions under Title 8, such as immigration courts and bond hearings. *See, e.g.*, FSA at ¶ 14 ("Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court . . . ."); ¶ 12.A ("Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing, *if applicable*.") (emphasis added). But these references do not imply that custody must be *exclusively* pursuant to Title 8 proceedings.

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have done so. The Court will not insert such a limitation into the Agreement when the plain meaning is evident. Indeed, it very well may be unprecedented and unanticipated for DHS to detain minors pursuant to Title 42. *Cf. Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016) ("[I]t is apparent that this agreement did not anticipate the current emphasis on family detention. . . . Nonetheless, the *Flores* Settlement, by its terms, applies to all 'minors in the custody' of ICE and DHS, not just unaccompanied minors.") (quoting *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *3 (W.D. Tex. Apr. 9, 2007) (alteration in original)). But what the parties very much did anticipate is that when the successors to the INS held minors in their legal custody—whether "by mere coincidence" or not—the Agreement would apply.

Defendants also point to the purported statutory authority under which DHS implements Title 42, providing that "[i]t shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations." 42 U.S.C. § 268. Defendants argue that "customs officers" were not a part of the old INS, and so even though they are subsumed by DHS now, in this capacity DHS is not a successor to the INS. This argument *might* hold some water *if* the officials enforcing the Closure Order and detaining minors in their legal custody were truly customs officers operating separate and apart from immigration authorities. But that is not the case. The Capio Memo specifically tasks the U.S. Border Patrol—which was a part of the INS, *see* 6 U.S.C. § 251(1)—with apprehending persons under the Closure Order and determining their eligibility for Title 42 processes. Capio Memo at 1; *see also* Odom Decl., Ex. B at 17 (correspondence between legal service provider and Border Patrol agent regarding the custody of minor in Title 42 proceedings). Upon entering the Title 42 procedure, minors are placed into the "custody" of the Enforcement and Removal Operations ("ERO") division of ICE, which runs the hoteling operation. Harper Decl. at ¶¶ 1–2. This same division takes custody of individuals when they are processed under Title 8. *See* Capio Memo at 3 ("ICE/ERO will take custody . . . and follow established procedures under Title 8 or Title 42 as applicable."). Defendants' declarant, an ERO official who testifies to overseeing minors' custody under Title 42, has appeared in this case before, testifying to her management of ICE Family Residential Centers ("FRCs"). *See* Decl. of Mellissa Harper at ¶ 1 [Doc. # 746-12]. In fact, at least 21 children held under Title 42 were at one point transferred to an FRC or ORR facility, where presumably they were overseen by the same staff managing those held there under Title 8. *See* July Data Summary at 21–23.

By its terms, the Closure Order applies only to persons "who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station"—in other words, to those who would otherwise enter into Title 8 proceedings. 85 Fed. Reg. at 17,061. And as discussed above, the officials with custody of the minors maintain plenary authority to transfer them from Title 42 to Title 8 proceedings. There is no question that the

immigration authorities of the United States are detaining the minors in their legal custody. These authorities are clearly the successors to the INS and so are squarely bound by the *Flores* Agreement, regardless of what statute they purport to be acting under. *See Flores v. Sessions*, 862 F.3d at 879 ("The government remains bound by its bargain in the *Flores* Settlement, regardless of which agency may now be charged with caring for unaccompanied minors. The acronyms have changed, but the effect remains the same."). A contrary result would be to endorse a shell game.

3. Reconciling the *Flores* Agreement with Title 42 Requirements

Defendants also maintain that the *Flores* Agreement cannot be interpreted in such way as to conflict with the requirements of Title 42. In particular, they argue that placing minors in licensed programs would necessitate their "introduction" into the United States, which Title 42 specifically prohibits. Opp. at 17. But there is no reason why sending minors to licensed facilities would "introduce" them into the United States any more than putting them up in hotels in Phoenix, Houston, and San Antonio already has. *See* August 26 Interim Report at 13. Indeed, to the extent that Title 42 is meant to protect against the introduction of infectious diseases, Defendants have failed to demonstrate how hotels, which are otherwise open to the public and have unlicensed staff coming in and out, located in areas with high incidence of COVID-19, are any better for protecting public health than licensed facilities would be. *See id.* at 13–14; *see also* Part IV.B.2, *infra*. Moreover, in 2008—after both Title 42 and the *Flores* Agreement were implemented—Congress passed the Trafficking Victims Protection Reauthorization Act ("TVPRA"), which codified many of the same protections that the *Flores* Agreement guarantees to unaccompanied minors, including the requirement for *any* agency to transfer unaccompanied minors to ORR within three days. *See Flores v. Sessions*, 862 F.3d at 880–81; *see also* 8 U.S.C. § 1232(b)(3).[7] If Title 42 precludes compliance with the *Flores* Agreement requirement to place minors in licensed programs, then it would also preclude compliance with the TVPRA. The Court need not force a construction that would render the Agreement and the TVPRA incompatible with Title 42 when a perfectly reasonable interpretation that harmonizes them is available. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable

[7] Section 1232(b)(3) states unambiguously:

> Except in the case of exceptional circumstances, ***any*** department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

8 U.S.C. § 1232(b)(3) (emphasis added).

of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Defendants also argue that the *Flores* Agreement was intended to address "longer term immigration custody," making it at odds with the "short-term purposes" of Title 42. Opp. at 17. First, the Court questions Defendants' premise—the Agreement very much accounted for the short term, requiring the INS to place a minor within three days or as expeditiously as possible, and specifically setting requirements for safe and sanitary conditions in the interim period when the INS holds minors in detention. Agreement at ¶ 12.A; *see also* July 24, 2015 Order, 212 F. Supp. 3d at 880–82 (applying Paragraph 12 to short-term holding cells at Border Patrol stations). If Title 42 were solely a short-term framework, then it would not result in minors being held for as many as 28 days. But even if this analysis has some value, the two remain perfectly reconcilable. So long as Title 42 procedures remain sufficiently brief so as not to lead to minors' prolonged detention, then Defendants do not have to worry about the *Flores* Agreement. This was true, for example, when hoteling was used in the past for a day or two preceding long-distance deportation flights or to accommodate unexpected flight cancellations or delays. *See* July 22 Interim Report at 11. But if the process results in detention for any real amount of time, as is clearly the case here, then the Agreement's protections are triggered.

Moreover, DHS has already held at least some minors subject to Title 42 in licensed ORR facilities. In July alone, two children were held in ORR custody while awaiting expulsion under Title 42, and at least one child was transferred from an ORR facility to a hotel before being expelled under Title 42. *See* July Data Summary at 21. Two minors were even transferred from hotels to ORR *after testing positive for COVID-19*. *See* August 26 Interim Report at 20. If transferring covered minors to licensed facilities were truly an affront to Title 42, then DHS has already violated the law several times over.[8]

B. Title 42 Custody's Compliance with the *Flores* Agreement

Having determined that the Court has jurisdiction to hear Plaintiffs' complaints, the Court now turns to the merits of the motion to enforce. Plaintiffs raise a number of ways in which the Title 42 hoteling operation purportedly violates the *Flores* Agreement.

[8] Because the Court finds that DHS unquestionably has legal custody of the minors within the meaning of the *Flores* Agreement, it need not address whether CDC, if it too has legal custody, would be considered a successor in interest to the INS.

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1. Placement in a Licensed Program

The *Flores* Agreement requires that, if there is no qualified adult or entity that can take custody, DHS must transfer the minor to a "licensed program" within three days of their arrest—or, in cases of an "emergency or influx," "as expeditiously as possible." FSA at ¶¶ 12, 19. Licensed programs are those that are "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *Id.* at ¶ 6.

There is no dispute that hoteling is not a licensed program. DHS's contractor, MVM, is not licensed by a state agency to provide care for children. The hoteling also does not meet a number of requirements of licensed programs under the Agreement, including providing an individualized needs assessment, educational services, daily outdoor activity, and counseling sessions, among others. *Id.*, Ex. 1 at ¶¶ A.3–7; July 22 Interim Report at 12. Rather, Defendants argue that hotel stays are only short-term, and minors are removed from the placement as expeditiously as possible under the circumstances required by the Title 42 process. Opp. at 22–25.

On average, children spend approximately five days in hotels. August 26 Interim Report at 16. Over three-quarters of minors stay for three days or more. July Data Summary at 14–15. The Court acknowledges that the COVID-19 pandemic presents an "emergency" situation that could slow down the rate of placements. Care would have to be taken not to group too many children together in close quarters, and this may cause transportation delays. Nonetheless, Defendants fail to show how diverting children to hotels, rather than immediately sending them to licensed facilities in the same region with ample accommodations, in any way expedites the process. Instead, they again argue that doing so would controvert Title 42 by "introducing" minors into the United States. Opp. at 23–24. As discussed above, sending children to licensed facilities is no more an "introduction" than sending them to hotels is. In fact, the reverse is true given that hotels are public accommodations open to all manner of guests.

Moreover, this Court has previously relaxed the three-day transfer requirement when Defendants acted "in good faith and in the exercise of due diligence" to expeditiously transfer minors to licensed programs. August 21, 2015 Order, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015). Here, hoteling is *not* part of a good faith effort towards placing children in licensed programs. It would be one thing if hoteling served as a temporary stopgap in the process of cautiously sending children to licensed facilities with all deliberate speed given the extenuating circumstances of the pandemic. But that is not what the hotel placements are for. Hoteling has *fully replaced* licensed programs for minors in Title 42 custody for the period prior to expulsion. *See* July 22 Interim Report at 17; July Data Summary at 17, 19, 21 (only 3 out of 197

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unaccompanied hotelled children were transferred from the hotel to ORR while remaining in Title 42 custody). Significantly, ORR shelters were 97% vacant as of August 22, 2020, with a capacity of over *10,000* beds. August 24, 2020 ORR Juvenile Coordinator Report at 3 [Doc. # 932-2]. All 197 unaccompanied minors hotelled in July could have been sent to ORR without making a dent in the facilities' capacity—making Defendants' claim that hoteling is necessary to alleviate an emergency ring especially hollow. Meanwhile, as discussed further below, hoteling presents particular vulnerabilities to COVID-19. *See* Part IV.B.2, *infra*. Defendants cannot seriously argue in good faith that flouting their contractual obligation to place minors in licensed programs is necessary to mitigate the spread of COVID-19. Therefore, the Court finds Defendants have materially breached their duty under Paragraphs 12 and 19 to place minors in licensed facilities as expeditiously as possible.

2. Safe and Sanitary Conditions

Paragraph 12.A of the *Flores* Agreement also requires that, immediately following arrest, DHS shall hold minors in conditions that are "safe and sanitary" and that recognize "the particular vulnerability of minors." These requirements include "protecting children from developing short- or long-term illnesses as well as protecting them from accidental or intentional injury." *Flores v. Barr*, 934 F.3d at 916 n.6. They do not incorporate specific standards nor are they limited to the other enumerated requirements of Paragraph 12. *Id.* at 916. Rather, they encompass those safeguards that "reflect a commonsense understanding" of what safe and sanitary conditions, with concern for the particular vulnerability of minors, require. *Id.*

According to Defendants, upon leaving CBP stations, minors or their family members are given an age- and gender-appropriate travel kit that includes basic hygiene items such as soap, shampoo, a toothbrush, toothpaste, deodorant, and feminine hygiene products. Harper Decl. at ¶ 13. In the hotel rooms, they receive clothes, beds, a backpack, snacks, water, three hot meals a day, and showers. *Id.* at ¶¶ 14–16. The rooms are cleaned regularly. *Id.* at ¶ 18. The hotels appear to be mainstream chains that offer mid-tier accommodations. August 26 Interim Report at 19. The Court appreciates these efforts and finds that they are generally sanitary under normal circumstances.

But that does not end the inquiry. The detention must also be "safe," keeping in mind the "particular vulnerability of minors." *See Flores v. Barr*, 934 F.3d at 915 ("Courts interpreting the language of contracts should give effect to every provision, and an interpretation which renders part of the instrument to be surplusage should be avoided.") (quoting *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1265 (9th Cir. 2003)) (internal quotation marks omitted). Each minor is overseen by an MVM "Transportation Specialist," who remains inside the room

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and within the line-of-sight of the child or family members at all times in order "to safeguard the minors and family groups/units." Harper Decl. at ¶¶ 6–7. These Transportation Specialists are required to have a high school diploma and three years of experience "in a field related to law, social work, detention, corrections, or similar occupational area" (or two years of experience, if they have an associate degree). *Id.* at ¶ 3. The Specialists are employed by ICE's contractor, MVM, about which Defendants provide little information other than that it is "a company specializing in the transportation and care of this vulnerable population." *Id.* at ¶ 2. "Most" Specialists are native Spanish speakers, and they "interact" with unaccompanied minors by "playing board or video games or watching television and movies (chosen by the minor) in order to keep them comfortable, engaged, and at ease." *Id.* at ¶¶ 9–10.

The Independent Monitor and Dr. Wise have raised concerns with this lack of qualified, specialized supervision, especially for younger, unaccompanied children. August 26 Interim Report at 19–20; July 22 Interim Report at 17, 19. The Court agrees. Children as young as 10 are left alone with an adult who has no qualifications or training in childcare. Defendants offer no formal protocols for how MVM Specialists are to adequately care for unaccompanied minors, other than vague assurances that they "interact" with the children by playing games or turning on the TV. There appear to be no separate standards for how 10-year-olds are cared for compared to 17-year-olds, despite the significant developmental differences and "particular vulnerability" of younger children. *See* July 22 Interim Report at 19 ("It is also important to recognize that a detention experience need not require mistreatment to be traumatic for a young child."). Put simply, Defendants' purported "list of amenities is not a system of care for children of different ages and developmental stages." August 26 Interim Report at 21.[9]

Moreover, oversight of the hoteling program is vague and minimal. MVM "quality control compliance specialists" are on site, but Defendants give no indication as to whether they have formal qualifications or follow specific procedures. *See* Harper Decl. at ¶ 5. ICE personnel are physically present at one hotel, and "regularly visit" the others "to ensure compliance," but again, Defendants provide no information about their qualifications or procedures—or indeed, even what "compliance" looks like. *See id.* at ¶ 11. The only "independent" oversight consists of ICE's contractor conducting "virtual" inspections, which have occurred in all three cities but not necessarily in all hotels. Defendants do not provide any details as to these inspections. *See id.* at ¶ 12.

[9] While the words "system of care" do not appear in the *Flores* Agreement, the phrase has similar connotations to concepts that *are* in the Agreement, such as "setting appropriate to the minor's age and special needs," "special concern for their particular vulnerability as minors," and "safe." FSA at ¶¶ 11–12.A.

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The Court finds that these conditions are not adequately safe and do not sufficiently account for the vulnerability of unaccompanied minors in detention.

Additionally, this Court has previously held that "safe and sanitary" conditions require measures to prevent the spread of COVID-19. *See* April 24, 2020 Order at 4–5 [Doc. # 784]. ICE provides masks, gloves, hand sanitizer, and cleaning wipes, and surfaces are regularly sanitized and wiped. Harper Decl. at ¶ 18. Transportation Specialists regularly have their temperatures taken and respond to COVID-19 related questions prior to beginning their shift, and children also have their temperatures taken daily. *Id.* at ¶ 19; July 22 Interim Report at 16. Medical professionals are on site and conduct daily screenings. Harper Decl. at ¶ 20.

On the other hand, detainees and MVM staff are not regularly tested for COVID-19, except before detainees depart the country. July 22 Interim Report at 16. The hotel staff, including housekeeping and others who may enter the rooms, fall outside of any protective measures. *Id.* at 18–19. The hotels are open to the public and located in cities such as McAllen, El Paso, Phoenix, Houston, and San Antonio, which have all experienced high rates of local COVID-19 transmission. *See id.* at 13–14; August 26 Interim Report at 13–14. Hotels in general have a high-turnover population of travelers, a group at high risk of transmitting COVID-19. Many of the hotels are located adjacent to airports. *See* July Data Summary at 16. Also, ICE and MVM have no specific protocols in place for when minors or family members test positive for COVID-19. *See* July 22 Interim Report at 19–20; August 26 Interim Report at 20–21. Some individuals at hotels who tested positive were transferred to ORR or FRCs, while others remained quarantined at the hotel. *Id.*

On balance, the Court finds that the hotel program is not safe with respect to preventing minors from contracting COVID-19 or providing the type of care and supervision suitable for unaccompanied minors.

3. Access to Counsel

Plaintiffs raise particular concern with the inability of counsel to discover, locate, and contact minors detained in hotels. Mot. at 21–22. Defendants provided no notice to Plaintiffs' counsel that minors were being held in hotels—lawyers only discovered the program when family members called to seek help. *See* Vargas Decl. at ¶ 14 [Doc. # 920-2]; Odom Decl. at ¶¶ 17–18; Nagda Decl. at ¶ 29; Corchado Decl. at ¶ 7 [Doc. # 920-6]. Legal services providers attest that they face unusual difficulty locating children within Title 42 custody, and DHS officials often are unable to provide accurate information as to where a child is at any given moment. *See* Corchado Decl. at ¶ 8 ("I have also found that immigration officials sometimes

have conflicting information among agencies about who has custody of a child."); Nagda Decl. at ¶ 30 ("DHS has no designated point of contact, and we frequently reach out to multiple CBP and ICE officials when trying to locate each child."); Odom Decl. at ¶ 23 ("These contacts may involve repeated emails and telephone calls to CBP facilities and our known points of contact in CBP and ICE."). When attorneys were able to locate a child, ICE physically prevented them from entering the hotel. Vargas Decl. at ¶ 22 ("Unidentified men, who appeared to be contractors of DHS, refused to permit [Texas Civil Rights Project] attorneys to offer any legal services to these children."). ICE has also limited children's ability to speak to attorneys by phone. Corchado Decl. at ¶ 11 ("[T]here were delays of several days before children were able to speak to a lawyer, because DHS limited the phone calls that a child could make to family, which necessarily delays either the child or family being able to learn about legal assistance and reach out to any lawyer."); Odom Decl. at ¶ 27 ("[C]hildren have reported to [Kids in Need of Defense] attorneys that while they were held in hotels or other unlicensed placements subject to Title 42, they were not told that they had a right to speak to a lawyer.").

Paragraph 32 of the *Flores* Agreement entitles Plaintiffs' counsel to visits with Class Members, even though the attorneys may not have the names of the minors in custody. Defendants do not dispute any of Plaintiffs' accounts, but simply offer that minors are provided "a minimum of one phone call a day," with additional phone calls allowed "upon request." Harper Decl. at ¶ 21. If an attorney has a notice of appearance on record, or if a minor requests an attorney call, "the call is scheduled and facilitated as soon as possible." *Id.*

As the legal services providers' experiences demonstrate, this process is woefully inadequate and not substantially compliant with Paragraph 32. The Agreement contemplates attorneys having near-unfettered access to minors in custody, provided they meet certain well-established protocols. DHS instead puts the entire onus on the minor to seek out counsel, requiring children to have the wherewithal to put their one phone call a day towards retaining a lawyer. This is exactly the scenario the *Flores* Agreement intended to avoid. Paragraph 32 is straightforward in requiring that Plaintiffs' counsel be allowed to access the facilities and contact the minors, even if they do not yet know the identity of a specific minor.

V.
CONCLUSION

Since March 2020, Title 42 has largely replaced the Title 8 framework at the southwest border. *See* August 26 Interim Report at 9–10 (showing sharp increase in Title 42 expulsions correlating with decline in Title 8 apprehensions). This Court is sensitive to the exigencies created by COVID-19 and recognizes that the pandemic may require temporary, emergency

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modifications to the immigration system to enhance public safety. But that is no excuse for DHS to skirt the fundamental humanitarian protections that the *Flores* Agreement guarantees for minors in their custody, especially when there is no persuasive evidence that hoteling is safer than licensed facilities. While the legality of the Closure Order generally is beyond the scope of this Court's jurisdiction, the Court *is* obligated to ensure that minors in DHS custody are not left in a legal no-man's land, where no enforceable standards apply. Defendants may not exploit Title 42 to send children in their legal custody "off into the night." *Flores v. Sessions*, 862 F.3d at 878 n.17 (quoting *Reno v. Flores*, 507 U.S. 292, 295 (1993)).

In light of the foregoing, Plaintiffs' motion to enforce the *Flores* Agreement is **GRANTED**. The Court hereby **ORDERS** as follows:

1. All minors detained in the legal custody of DHS or ORR pursuant to Title 42 are Class Members as defined by Paragraph 10 of the *Flores* Agreement. Defendants shall comply with the Agreement with respect to such minors to the same degree as any other minors held in their custody.

2. Implementation of this Order shall be stayed until **September 8, 2020.** DHS shall cease placing minors at hotels by no later than **September 15, 2020**. Consistent with past practice, exceptions may be made for one to two-night stays while in transit or prior to flights, if minors are traveling longer distances, or due to unexpected flight delays. If other exigent circumstances arise that necessitate future hotel placements, Defendants shall immediately alert Plaintiffs and the Independent Monitor, providing good cause for why such unlicensed placements are necessary.

3. Except as provided in Paragraph 12.A of the *Flores* Agreement, DHS shall transfer all minors—both accompanied and unaccompanied—currently held in hotels to licensed facilities as defined in Paragraph 6 as expeditiously as possible.[10] Under Paragraph 12.A, if a bed in a licensed facility is immediately available, DHS shall generally make a licensed placement of class members within 72 hours of arrest or apprehension.

4. Plaintiffs' counsel shall be permitted to visit any facility where minors in Title 42 custody are held, and to meet with any minor held in Title 42 custody, in accordance

[10] The Court notes that while FRCs, where accompanied minors are likely to be placed as a practical matter, may be unlicensed facilities because they are secure, they at least have well-established standards of care and oversight in common with licensed facilities.

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with Paragraphs 32 and 33 of the *Flores* Agreement, with limitations to account for social distancing as necessary.

5. The Independent Monitor, Andrea Ordin, and Special Expert, Dr. Paul Wise, may in the exercise of their monitoring duties conduct investigations, interviews, and site visits with respect to any minors held in Title 42 custody and any facilities where minors in Title 42 custody are held, pursuant to Ms. Ordin's authority under the Court's October 5, 2018 Order [Doc. # 494] and to ensure compliance with this Order.

6. The ICE and ORR Juvenile Coordinators shall maintain records and statistical information on minors held in Title 42 custody pursuant to Paragraph 28A, and shall monitor compliance with the Agreement with respect to any minors held in Title 42 custody pursuant to Paragraph 29. The Juvenile Coordinators shall file their next interim report by **October 2, 2020** and include an update regarding the number of minors held in Title 42 custody and the status of compliance with this Order, along with the other topics specified in the Court's Order regarding Plaintiffs' Motion to Enforce [Doc. # 919] for a Notice of Rights.

7. Plaintiffs and Defendants may file a **joint** response by **October 9, 2020** to the Juvenile Coordinators' reports after having met and conferred regarding areas of dispute and attempted to achieve resolution.

8. The Court shall hold a further telephonic or video status conference on **October 16, 2020 at 11:00 a.m.** to discuss compliance with the Court's Orders.

IT IS SO ORDERED.

EXHIBIT B

8/12/96

CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Carlos Holguín
Peter A. Schey
256 South Occidental Boulevard
Los Angeles, CA 90057
(213) 388-8693

NATIONAL CENTER FOR YOUTH LAW
Alice Bussiere
James Morales
114 Sansome Street, Suite 905
San Francisco, CA 94104
(415) 453-3307

Attorneys for Plaintiffs

Michael Johnson
Assistant United States Attorney
300 N. Los Angeles St., Rm. 7516
Los Angeles, CA 90012

Allen Hausman
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Attorneys for Defendants

Additional counsel listed next page

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNY LISETTE FLORES, et al.,	)	Case No. CV 85-4544-RJK(Px)
	)	
Plaintiffs,	)	Stipulated Settlement
	)	Agreement
-vs-	)	
	)	
JANET RENO, Attorney General	)	
of the United States, et al.,	)	
	)	
Defendants.	)	

Plaintiffs' Additional Counsel

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Mark Rosenbaum
Sylvia Argueta
1616 Beverly Boulevard
Los Angeles, CA 90026
Telephone: (213) 977-9500

STREICH LANG
Susan G. Boswell
Jeffrey Willis
1500 Bank of America Plaza
33 North Stone Avenue
Tucson, AZ 85701
Telephone: (602) 770-8700

Defendants' Additional Counsel:

Arthur Strathern
Mary Jane Candaux
Office of the General Counsel
U.S. Immigration & Naturalization Service
425 I St. N.W.
Washington, DC 20536
/ / /

STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs have filed this action against Defendants, challenging, *inter alia*, the constitutionality of Defendants' policies, practices and regulations regarding the detention and release of unaccompanied minors taken into the custody of the Immigration and Naturalization Service (INS) in the Western Region; and

WHEREAS, the district court has certified this case as a class action on behalf of all minors apprehended by the INS in the Western Region of the United States; and

WHEREAS, this litigation has been pending for nine (9) years, all parties have conducted extensive discovery, and the United States Supreme Court has upheld the constitutionality of the challenged INS regulations on their face and has remanded for further proceedings consistent with its opinion; and

WHEREAS, on November 30, 1987, the parties reached a settlement agreement requiring that minors in INS custody in the Western Region be housed in facilities meeting certain standards, including state standards for the housing and care of dependent children, and Plaintiffs' motion to enforce compliance with that settlement is currently pending before the court; and

WHEREAS, a trial in this case would be complex, lengthy and costly to all parties concerned, and the decision of the district court would be subject to appeal by the losing parties with the final outcome uncertain; and

WHEREAS, the parties believe that settlement of this action is in their best interests and best serves the interests of justice by avoiding a complex, lengthy and costly trial, and subsequent appeals which could last several more years;

NOW, THEREFORE, Plaintiffs and Defendants enter into this Stipulated Settlement

Agreement (the Agreement), stipulate that it constitutes a full and complete resolution of the issues raised in this action, and agree to the following:

I DEFINITIONS

As used throughout this Agreement the following definitions shall apply:

1. The term "party" or "parties" shall apply to Defendants and Plaintiffs. As the term applies to Defendants, it shall include their agents, employees, contractors and/or successors in office. As the term applies to Plaintiffs, it shall include all class members.

2. The term "Plaintiff" or "Plaintiffs" shall apply to the named plaintiffs and all class members.

3. The term "class member" or "class members" shall apply to the persons defined in Paragraph 10 below.

4. The term "minor" shall apply to any person under the age of eighteen (18) years who is detained in the legal custody of the INS. This Agreement shall cease to apply to any person who has reached the age of eighteen years. The term "minor" shall not include an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult. The INS shall treat all persons who are under the age of eighteen but not included within the definition of "minor" as adults for all purposes, including release on bond or recognizance.

5. The term "emancipated minor" shall refer to any minor who has been determined to be emancipated in an appropriate state judicial proceeding.

6. The term "licensed program" shall refer to any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. A licensed program must also meet those standards for licensed programs set forth in

Exhibit 1 attached hereto. All homes and facilities operated by licensed programs, including facilities for special needs minors, shall be non-secure as required under state law; provided, however, that a facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others in appropriate circumstances, *e.g.*, cases in which a minor has drug or alcohol problems or is mentally ill. The INS shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.

7. The term "special needs minor" shall refer to a minor whose mental and/or physical condition requires special services and treatment by staff. A minor may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A minor who has suffered serious neglect or abuse may be considered a minor with special needs if the minor requires special services or treatment as a result of the neglect or abuse. The INS shall assess minors to determine if they have special needs and, if so, shall place such minors, whenever possible, in licensed programs in which the INS places children without special needs, but which provide services and treatment for such special needs.

8. The term "medium security facility" shall refer to a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets those standards set forth in Exhibit 1 attached hereto. A medium security facility is designed for minors who require close supervision but do not need placement in juvenile correctional facilities. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a facility operated by a licensed program in order to control problem behavior and to prevent escape. Such a facility may have a secure perimeter but shall not be equipped internally with

major restraining construction or procedures typically associated with correctional facilities.

II SCOPE OF SETTLEMENT, EFFECTIVE DATE, AND PUBLICATION

9. This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and shall supersede all previous INS policies that are inconsistent with the terms of this Agreement. This Agreement shall become effective upon final court approval, except that those terms of this Agreement regarding placement pursuant to Paragraph 19 shall not become effective until all contracts under the Program Announcement referenced in Paragraph 20 below are negotiated and implemented. The INS shall make its best efforts to execute these contracts within 120 days after the court's final approval of this Agreement. However, the INS will make reasonable efforts to comply with Paragraph 19 prior to full implementation of all such contracts. Once all contracts under the Program Announcement referenced in Paragraph 20 have been implemented, this Agreement shall supersede the agreement entitled Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention (hereinafter "MOU"), entered into by and between the Plaintiffs and Defendants and filed with the United States District Court for the Central District of California on November 30, 1987, and the MOU shall thereafter be null and void. However, Plaintiffs shall not institute any legal action for enforcement of the MOU for a six (6) month period commencing with the final district court approval of this Agreement, except that Plaintiffs may institute enforcement proceedings if the Defendants have engaged in serious violations of the MOU that have caused irreparable harm to a class member for which injunctive relief would be appropriate. Within 120 days of the final district court approval of this Agreement, the INS shall initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation. The final regulations shall not be inconsistent with the terms of this Agreement. Within 30 days of final court approval of this

Agreement, the INS shall distribute to all INS field offices and sub-offices instructions regarding the processing, treatment, and placement of juveniles. Those instructions shall include, but may not be limited to, the provisions summarizing the terms of this Agreement, attached hereto as Exhibit 2.

III CLASS DEFINITION

10. The certified class in this action shall be defined as follows: "All minors who are detained in the legal custody of the INS."

IV STATEMENTS OF GENERAL APPLICABILITY

11. The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others. Nothing herein shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

V PROCEDURES AND TEMPORARY PLACEMENT FOLLOWING ARREST

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

supervision to protect minors from others, and contact with family members who were arrested with the minor. The INS will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours. If there is no one to whom the INS may release the minor pursuant to Paragraph 14, and no appropriate licensed program is immediately available for placement pursuant to Paragraph 19, the minor may be placed in an INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. However, minors shall be separated from delinquent offenders. Every effort must be taken to ensure that the safety and well-being of the minors detained in these facilities are satisfactorily provided for by the staff. The INS will transfer a minor from a placement under this paragraph to a placement under Paragraph 19, (i) within three (3) days, if the minor was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases; except:

1. as otherwise provided under Paragraph 13 or Paragraph 21;
2. as otherwise required by any court decree or court-approved settlement;
3. in the event of an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible; or
4. where individuals must be transported from remote areas for processing or speak unusual languages such that the INS must locate interpreters in order to complete processing, in which case the INS shall place all such minors pursuant to Paragraph 19 within five (5) business days.

B. For purposes of this paragraph, the term "emergency" shall be defined as any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such

emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors). The term "influx of minors into the United States" shall be defined as those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19, including those who have been so placed or are awaiting such placement.

C. In preparation for an "emergency" or "influx," as described in Subparagraph B, the INS shall have a written plan that describes the reasonable efforts that it will take to place all minors as expeditiously as possible. This plan shall include the identification of 80 beds that are potentially available for INS placements and that are licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children. The plan, without identification of the additional beds available, is attached as Exhibit 3. The INS shall not be obligated to fund these additional beds on an ongoing basis. The INS shall update this listing of additional beds on a quarterly basis and provide Plaintiffs' counsel with a copy of this listing.

13. If a reasonable person would conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require the alien to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor in accordance with this Agreement for all purposes.

VI GENERAL POLICY FAVORING RELEASE

14. Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or

that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

A. a parent;

B. a legal guardian;

C. an adult relative (brother, sister, aunt, uncle, or grandparent);

D. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant's paternity or guardianship;

E. a licensed program willing to accept legal custody; or

F. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

15. Before a minor is released from INS custody pursuant to Paragraph 14 above, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

A. provide for the minor's physical, mental, and financial well-being;

B. ensure the minor's presence at all future proceedings before the INS and the immigration court;

C. notify the INS of any change of address within five (5) days following a move;

D. in the case of custodians other than parents or legal guardians, not transfer custody of the minor to another party without the prior written permission of the District Director;

E. notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and

F. if dependency proceedings involving the minor are initiated, notify the INS of the initiation of such proceedings and the dependency court of any immigration proceedings pending against the minor.

In the event of an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 72 hours. For purposes of this paragraph, examples of an "emergency" shall include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian, in writing, seeks written permission for a transfer, the District Director shall promptly respond to the request.

16. The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement required under Paragraph 15. The INS, however, shall not terminate the custody arrangements for minor violations of that part of the custodial agreement outlined at Subparagraph 15.C above.

17. A positive suitability assessment may be required prior to release to any individual or program pursuant to Paragraph 14. A suitability assessment may include such components as an investigation of the living conditions in which the minor would be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. Any such assessment should also take into consideration the wishes and concerns of the minor.

18. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody.

VII INS CUSTODY

19. In any case in which the INS does not release a minor pursuant to Paragraph 14, the minor shall remain in INS legal custody. Except as provided in Paragraphs 12 or 21, such minor shall be placed temporarily in a licensed program until such time as release can be effected in accordance with Paragraph 14 above or until the minor's immigration proceedings are concluded, whichever occurs earlier. All minors placed in such a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS; provided, however, that in the event of an emergency a licensed program may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.

20. Within 60 days of final court approval of this Agreement, the INS shall authorize the United States Department of Justice Community Relations Service to publish in the Commerce Business Daily and/or the Federal Register a Program Announcement to solicit proposals for the care of 100 minors in licensed programs.

21. A minor may be held in or transferred to a suitable State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility, having separate accommodations for minors whenever the District Director or Chief Patrol Agent determines that the minor:

A. has been charged with, is chargeable, or has been convicted of a crime, or is the subject

of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act; provided, however, that this provision shall not apply to any minor whose offense(s) fall(s) within either of the following categories:

i. Isolated offenses that (1) were not within a pattern or practice of criminal activity and (2) did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc. This list is not exhaustive.);

ii. Petty offenses, which are not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc. This list is not exhaustive.);

As used in this paragraph, "chargeable" means that the INS has probable cause to believe that the individual has committed a specified offense;

B. has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

C. has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.);

D. is an escape-risk; or

E. must be held in a secure facility for his or her own safety, such as when the INS has

reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

22. The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

A. the minor is currently under a final order of deportation or exclusion;

B. the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

C. the minor has previously absconded or attempted to abscond from INS custody.

23. The INS will not place a minor in a secure facility pursuant to Paragraph 21 if there are less restrictive alternatives that are available and appropriate in the circumstances, such as transfer to (a) a medium security facility which would provide intensive staff supervision and counseling services or (b) another licensed program. All determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator.

24.A. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.

B. Any minor who disagrees with the INS's determination to place that minor in a particular type of facility, or who asserts that the licensed program in which he or she has been placed does not comply with the standards set forth in Exhibit 1 attached hereto, may seek judicial review in any

United States District Court with jurisdiction and venue over the matter to challenge that placement determination or to allege noncompliance with the standards set forth in Exhibit 1. In such an action, the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action.

C. In order to permit judicial review of Defendants' placement decisions as provided in this Agreement, Defendants shall provide minors not placed in licensed programs with a notice of the reasons for housing the minor in a detention or medium security facility. With respect to placement decisions reviewed under this paragraph, the standard of review for the INS's exercise of its discretion shall be the abuse of discretion standard of review. With respect to all other matters for which this paragraph provides judicial review, the standard of review shall be *de novo* review.

D. The INS shall promptly provide each minor not released with (a) INS Form I-770, (b) an explanation of the right of judicial review as set out in Exhibit 6, and (c) the list of free legal services available in the district pursuant to INS regulations (unless previously given to the minor).

E. Exhausting the procedures established in Paragraph 37 of this Agreement shall not be a precondition to the bringing of an action under this paragraph in any United District Court. Prior to initiating any such action, however, the minor and/or the minors' attorney shall confer telephonically or in person with the United States Attorney's office in the judicial district where the action is to be filed, in an effort to informally resolve the minor's complaints without the need of federal court intervention.

VIII TRANSPORTATION OF MINORS

25. Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except:

A. when being transported from the place of arrest or apprehension to an INS office, or

B. where separate transportation would be otherwise impractical.

When transported together pursuant to Clause B, minors shall be separated from adults. The INS shall take necessary precautions for the protection of the well-being of such minors when transported with adults.

26. The INS shall assist without undue delay in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released pursuant to Paragraph 14. The INS may, in its discretion, provide transportation to minors.

IX TRANSFER OF MINORS

27. Whenever a minor is transferred from one placement to another, the minor shall be transferred with all of his or her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions will be shipped to the minor in a timely manner. No minor who is represented by counsel shall be transferred without advance notice to such counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived such notice, in which cases notice shall be provided to counsel within 24 hours following transfer.

X MONITORING AND REPORTS

28A. An INS Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall monitor compliance with the terms of this Agreement and shall maintain an up-to-date record of all minors who are placed in proceedings and remain in INS custody for longer than 72 hours. Statistical information on such minors shall be collected weekly from all INS district offices and Border Patrol stations. Statistical information will include at least the following: (1)

biographical information such as each minor's name, date of birth, and country of birth, (2) date placed in INS custody, (3) each date placed, removed or released, (4) to whom and where placed, transferred, removed or released, (5) immigration status, and (6) hearing dates. The INS, through the Juvenile Coordinator, shall also collect information regarding the reasons for every placement of a minor in a detention facility or medium security facility.

B. Should Plaintiffs' counsel have reasonable cause to believe that a minor in INS legal custody should have been released pursuant to Paragraph 14, Plaintiffs' counsel may contact the Juvenile Coordinator to request that the Coordinator investigate the case and inform Plaintiffs' counsel of the reasons why the minor has not been released.

29. On a semi-annual basis, until two years after the court determines, pursuant to Paragraph 31, that the INS has achieved substantial compliance with the terms of this Agreement, the INS shall provide to Plaintiffs' counsel the information collected pursuant to Paragraph 28, as permitted by law, and each INS policy or instruction issued to INS employees regarding the implementation of this Agreement. In addition, Plaintiffs' counsel shall have the opportunity to submit questions, on a semi-annual basis, to the Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation with regard to the implementation of this Agreement and the information provided to Plaintiffs' counsel during the preceding six-month period pursuant to Paragraph 28. Plaintiffs' counsel shall present such questions either orally or in writing, at the option of the Juvenile Coordinator. The Juvenile Coordinator shall furnish responses, either orally or in writing at the option of Plaintiffs' counsel, within 30 days of receipt.

30. On an annual basis, commencing one year after final court approval of this Agreement, the INS Juvenile Coordinator shall review, assess, and report to the court regarding compliance with the

terms of this Agreement. The Coordinator shall file these reports with the court and provide copies to the parties, including the final report referenced in Paragraph 35, so that they can submit comments on the report to the court. In each report, the Coordinator shall state to the court whether or not the INS is in substantial compliance with the terms of this Agreement, and, if the INS is not in substantial compliance, explain the reasons for the lack of compliance. The Coordinator shall continue to report on an annual basis until three years after the court determines that the INS has achieved substantial compliance with the terms of this Agreement.

31. One year after the court's approval of this Agreement, the Defendants may ask the court to determine whether the INS has achieved substantial compliance with the terms of this Agreement.

XI ATTORNEY-CLIENT VISITS

32.A. Plaintiffs' counsel are entitled to attorney-client visits with class members even though they may not have the names of class members who are housed at a particular location. All visits shall occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs' counsel may limit any such notice of appearance to representation of the minor in connection with this Agreement. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

B. Every six months, Plaintiffs' counsel shall provide the INS with a list of those attorneys who

may make such attorney-client visits, as Plaintiffs' counsel, to minors during the following six month period. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law in Los Angeles, California or the National Center for Youth Law in San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

C. Agreements for the placement of minors in non-INS facilities shall permit attorney-client visits, including by class counsel in this case.

D. Nothing in Paragraph 32 shall affect a minor's right to refuse to meet with Plaintiffs' counsel. Further, the minor's parent or legal guardian may deny Plaintiffs' counsel permission to meet with the minor.

XII FACILITY VISITS

33. In addition to the attorney-client visits permitted pursuant to Paragraph 32, Plaintiffs' counsel may request access to any licensed program's facility in which a minor has been placed pursuant to Paragraph 19 or to any medium security facility or detention facility in which a minor has been placed pursuant to Paragraphs 21 or 23. Plaintiffs' counsel shall submit a request to visit a facility under this paragraph to the INS district juvenile coordinator who will provide reasonable assistance to Plaintiffs' counsel by conveying the request to the facility's staff and coordinating the visit. The rules and procedures to be followed in connection with any visit approved by a facility under this paragraph are set forth in Exhibit 4 attached, except as may be otherwise agreed by Plaintiffs' counsel and the facility's staff. In all visits to any facility pursuant to this Agreement, Plaintiffs' counsel and their associated experts shall treat minors and staff with courtesy and dignity and shall not disrupt the normal functioning of the facility.

XIII TRAINING

34. Within 120 days of final court approval of this Agreement, the INS shall provide appropriate guidance and training for designated INS employees regarding the terms of this Agreement. The INS shall develop written and/or audio or video materials for such training. Copies of such written and/or audio or video training materials shall be made available to Plaintiffs' counsel when such training materials are sent to the field, or to the extent practicable, prior to that time.

XIV DISMISSAL

35. After the court has determined that the INS is in substantial compliance with this Agreement and the Coordinator has filed a final report, the court, without further notice, shall dismiss this action. Until such dismissal, the court shall retain jurisdiction over this action.

XV RESERVATION OF RIGHTS

36. Nothing in this Agreement shall limit the rights, if any, of individual class members to preserve issues for judicial review in the appeal of an individual case or for class members to exercise any independent rights they may otherwise have.

XVI NOTICE AND DISPUTE RESOLUTION

37. This paragraph provides for the enforcement, in this District Court, of the provisions of this Agreement except for claims brought under Paragraph 24. The parties shall meet telephonically or in person to discuss a complete or partial repudiation of this Agreement or any alleged non-compliance with the terms of the Agreement, prior to bringing any individual or class action to enforce this Agreement. Notice of a claim that a party has violated the terms of this Agreement shall be served on plaintiffs addressed to:

/ / /

CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Carlos Holguín
Peter A. Schey
256 South Occidental Boulevard
Los Angeles, CA 90057

NATIONAL CENTER FOR YOUTH LAW
Alice Bussiere
James Morales
114 Sansome Street, Suite 905
San Francisco, CA 94104

and on Defendants addressed to:

Michael Johnson
Assistant United States Attorney
300 N. Los Angeles St., Rm. 7516
Los Angeles, CA 90012

Allen Hausman
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

XVII PUBLICITY

38. Plaintiffs and Defendants shall hold a joint press conference to announce this Agreement. The INS shall send copies of this Agreement to social service and voluntary agencies agreed upon by the parties, as set forth in Exhibit 5 attached. The parties shall pursue such other public dissemination of information regarding this Agreement as the parties shall agree.

XVIII ATTORNEYS' FEES AND COSTS

39. Within 60 days of final court approval of this Agreement, Defendants shall pay to Plaintiffs the total sum of $374,110.09, in full settlement of all attorneys' fees and costs in this case.

/ / /

XIX TERMINATION

40. All terms of this Agreement shall terminate the earlier of five years after the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with this Agreement, except that the INS shall continue to house the general population of minors in INS custody in facilities that are licensed for the care of dependent minors.

XX REPRESENTATIONS AND WARRANTY

41. Counsel for the respective parties, on behalf of themselves and their clients, represent that they know of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law. Defendants' counsel represent and warrant that they are fully authorized and empowered to enter into this Agreement on behalf of the Attorney General, the United States Department of Justice, and the Immigration and Naturalization Service, and acknowledge that Plaintiffs enter into this Agreement in reliance on such representation. Plaintiffs' counsel represent and warrant that they are fully authorized and empowered to enter into this Agreement on behalf of the Plaintiffs, and acknowledge that Defendants enter into this Agreement in reliance on such representation. The undersigned, by their signatures on behalf of the Plaintiffs and Defendants, warrant that upon execution of this Agreement in their representative capacities, their principals, agents, and successors of such principals and agents shall be fully and unequivocally bound hereunder to the full extent authorized by law.

For Defendants: Signed:_____Title:_____

Dated:_____

For Plaintiffs: Signed:_____Title:_____

Dated:_____

EXHIBIT 1

MINIMUM STANDARDS FOR LICENSED PROGRAMS

A. Licensed programs shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes and shall provide or arrange for the following services for each minor in its care:

1. Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items.

2. Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary.

3. An individualized needs assessment which shall include: (a) various initial intake forms; (b) essential data relating to the identification and history of the minor and family; (c) identification of the minors' special needs including any specific problem(s) which appear to require immediate intervention; (d) an educational assessment and plan; (e) an assessment of family relationships and interaction with adults, peers and authority figures; (f) a statement of religious preference and practice; (g) an assessment of the

minor's personal goals, strengths and weaknesses; and (h) identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in family reunification.

4. Educational services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program shall provide minors with appropriate reading materials in languages other than English for use during the minor's leisure time.

5. Activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.

6. At least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short term objectives, and addressing both the developmental and crisis-related needs of each minor.

7. Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present. It is a time when new minors are given the

opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems.

8. Acculturation and adaptation services which include information regarding the development of social and inter-personal skills which contribute to those abilities necessary to live independently and responsibly.

9. Upon admission, a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and the availability of legal assistance.

10. Whenever possible, access to religious services of the minor's choice.

11. Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff shall respect the minor's privacy while reasonably preventing the unauthorized release of the minor.

12. A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house rules and regulations; and (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

13. Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the minor.

14. Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.

B. Service delivery is to be accomplished in a manner which is sensitive to the age, culture, native language and the complex needs of each minor.

C. Program rules and discipline standards shall be formulated with consideration for the range of ages and maturity in the program and shall be culturally sensitive to the needs of alien minors. Minors shall not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping. Any sanctions employed shall not: (1) adversely affect either a minor's health, or physical or psychological well-being; or (2) deny minors regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance.

D. A comprehensive and realistic individual plan for the care of each minor must be developed in accordance with the minor's needs as determined by the individualized need assessment. Individual plans shall be implemented and closely coordinated through an operative case management system.

E. Programs shall develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.

F. Programs shall maintain adequate records and make regular reports as required by the INS that permit the INS to monitor and enforce this order and other requirements and standards as the INS may determine are in the best interests of the minors.

EXHIBIT 2

INSTRUCTIONS TO SERVICE OFFICERS RE:
PROCESSING, TREATMENT, AND PLACEMENT OF MINORS

These instructions are to advise Service officers of INS policy regarding the way in which minors in INS custody are processed, housed and released. These instructions are applicable nationwide and supersede all prior inconsistent instructions regarding minors.

(a) Minors. A minor is a person under the age of eighteen years. However, individuals who have been "emancipated" by a state court or convicted and incarcerated for a criminal offense as an adult are not considered minors. Such individuals must be treated as adults for all purposes, including confinement and release on bond.

Similarly, if a reasonable person would conclude that an individual is an adult despite his claims to be a minor, the INS shall treat such person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require such an individual to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor for all purposes.

(b) General policy. The INS treats, and will continue to treat minors with dignity, respect and special concern for their particular vulnerability. INS policy is to place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with the need to ensure the minor's timely appearance and to protect the minor's well-being and that of others. INS officers are not required to release a minor to any person or agency whom they have reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

(c) Processing. The INS will expeditiously process minors and will provide a Form I-770 notice of rights, including the right to a bond redetermination hearing, if applicable.

Following arrest, the INS will hold minors in a facility that is safe and sanitary and that is consistent with the INS's concern for the particular vulnerability of minors. Such facilities will have access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. The INS will separate unaccompanied minors from unrelated adults whenever possible. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.

If the juvenile cannot be immediately released, and no licensed program (described below) is available to care for him, he should be placed in an INS or INS-contract facility that has separate accommodations for minors, or in a State or county juvenile detention facility that separates minors in

INS custody from delinquent offenders. The INS will make every effort to ensure the safety and well-being of juveniles placed in these facilities.

(d) Release. The INS will release minors from its custody without unnecessary delay, unless detention of a juvenile is required to secure her timely appearance or to ensure the minor's safety or that of others. Minors shall be released, in the following order of preference, to:

(i) a parent;

(ii) a legal guardian;

(iii) an adult relative (brother, sister, aunt, uncle, or grandparent);

(iv) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer, or (ii) such other documentation that establishes to the satisfaction of the INS, in its discretion, that the individual designating the individual or entity as the minor's custodian is in fact the minor's parent or guardian;

(v) a state-licensed juvenile shelter, group home, or foster home willing to accept legal custody; or

(vi) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

(e) Certification of custodian. Before a minor is released, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

(i) provide for the minor's physical, mental, and financial well-being;

(ii) ensure the minor's presence at all future proceedings before the INS and the immigration court;

(iii) notify the INS of any change of address within five (5) days following a move;

(iv) if the custodian is not a parent or legal guardian, not transfer custody of the minor to another party without the prior written permission of the District Director, except in the event of an emergency;

(v) notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and

(vi) if dependency proceedings involving the minor are initiated, notify the INS of the initiation of such proceedings and the dependency court of any deportation proceedings pending against the minor.

In an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS, but must notify the INS of the transfer as soon as is practicable, and in all cases within 72 hours. Examples of an "emergency" include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian seeks written permission for a transfer, the District Director shall promptly respond to the request.

The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement. However, custody arrangements will not be terminated for minor violations of the custodian's obligation to notify the INS of any change of address within five days following a move.

(f) Suitability assessment. An INS officer may require a positive suitability assessment prior to releasing a minor to any individual or program. A suitability assessment may include an investigation of the living conditions in which the minor is to be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The assessment will also take into consideration the wishes and concerns of the minor.

(g) Family reunification. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, will promptly attempt to reunite the minor with his or her family to permit the release of the minor under Paragraph (d) above. Such efforts at family reunification will continue as long as the minor is in INS or licensed program custody and will be recorded by the INS or the licensed program in which the minor is placed.

(h) Placement in licensed programs. A "licensed program" is any program, agency or organization licensed by an appropriate state agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. Exhibit 1 of the *Flores v. Reno* Settlement Agreement describes the standards required of licensed programs. Juveniles who remain in INS custody must be placed in a licensed program within three days if the minor was apprehended in an INS district in which a licensed program is located and has space available, or within five days in all other cases, except when:

(i) the minor is an escape risk or delinquent, as defined in Paragraph (i) below;

(ii) a court decree or court-approved settlement requires otherwise;

(iii) an emergency or influx of minors into the United States prevents compliance, in which case all minors should be placed in licensed programs as expeditiously as possible; or

(iv) the minor must be transported from remote areas for processing or speaks an unusual

language such that a special interpreter is required to process the minor, in which case the minor must be placed in a licensed program within five business days.

(i) Secure and supervised detention. A minor may be held in or transferred to a State or county juvenile detention facility or in a secure INS facility or INS-contracted facility having separate accommodations for minors, whenever the District Director or Chief Patrol Agent determines that the minor —

(i) has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act, unless the minor's offense is

(a) an isolated offense not within a pattern of criminal activity which did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc.); or

(b) a petty offense, which is not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc.);

(ii) has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

(iii) has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc.);

(iv) is an escape-risk; or

(v) must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

"Chargeable" means that the INS has probable cause to believe that the individual has committed a specified offense.

The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

(a) the minor is currently under a final order of deportation or exclusion;

(b) the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

(c) the minor has previously absconded or attempted to abscond from INS custody.

The INS will not place a minor in a State or county juvenile detention facility, secure INS detention facility, or secure INS-contracted facility if less restrictive alternatives are available and appropriate in the circumstances, such as transfer to a medium security facility that provides intensive staff supervision and counseling services or transfer to another licensed program. All determinations to place a minor in a secure facility will be reviewed and approved by the regional Juvenile Coordinator.

(j) Notice of right to bond redetermination and judicial review of placement. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing. A juvenile who is not released or placed in a licensed placement shall be provided (1) a written explanation of the right of judicial review as set out in Exhibit 6 of the *Flores v. Reno* Settlement Agreement, and (2) the list of free legal services providers compiled pursuant to INS regulations (unless previously given to the minor.

(k) Transportation and transfer. Unaccompanied minors should not be transported in vehicles with detained adults except when being transported from the place of arrest or apprehension to an INS office or where separate transportation would be otherwise impractical, in which case minors shall be separated from adults. INS officers shall take all necessary precautions for the protection of minors during transportation with adults.

When a minor is to be released, the INS will assist him or her in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released. The INS may, in its discretion, provide transportation to such minors.

Whenever a minor is transferred from one placement to another, she shall be transferred with all of her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions must be shipped to the minor in a timely manner. No minor who is represented by counsel should be transferred without advance notice to counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived notice, in which cases notice must be provided to counsel within 24 hours following transfer.

(l) Periodic reporting. Statistical information on minors placed in proceedings who remain in INS custody for longer than 72 hours must be reported to the Juvenile Coordinator by all INS district offices and Border Patrol stations. Information will include: (a) biographical information, including the minor's name, date of birth, and country of birth, (b) date placed in INS custody, (c) each date placed, removed or released, (d) to whom and where placed, transferred, removed or released, (e) immigration

status, and (f) hearing dates. INS officers should also inform the Juvenile Coordinator of the reasons for placing a minor in a medium-security facility or detention facility as described in paragraph (i).

(m) Attorney-client visits by Plaintiffs' counsel. The INS will permit the lawyers for the *Flores v. Reno* plaintiff class to visit minors, even though they may not have the names of minors who are housed at a particular location. A list of Plaintiffs' counsel entitled to make attorney-client visits with minors is available from the district Juvenile Coordinator. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law of Los Angeles, California, or the National Center for Youth Law of San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

Visits must occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff must provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs' counsel may limit the notice of appearance to representation of the minor in connection with his placement or treatment during INS custody. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

A minor may refuse to meet with Plaintiffs' counsel. Further, the minor's parent or legal guardian may deny Plaintiffs' counsel permission to meet with the minor.

(n) Visits to licensed facilities. In addition to the attorney-client visits, Plaintiffs' counsel may request access to a licensed program's facility (described in paragraph (h)) or to a medium-security facility or detention facility (described in paragraph (i)) in which a minor has been placed. The district juvenile coordinator will convey the request to the facility's staff and coordinate the visit. The rules and procedures to be followed in connection with such visits are set out in Exhibit 4 of the *Flores v. Reno* Settlement Agreement, unless Plaintiffs' counsel and the facility's staff agree otherwise. In all visits to any facility, Plaintiffs' counsel and their associated experts must treat minors and staff with courtesy and dignity and must not disrupt the normal functioning of the facility.

EXHIBIT 3

CONTINGENCY PLAN

In the event of an emergency or influx that prevents the prompt placement of minors in licensed programs with which the Community Relations Service has contracted, INS policy is to make all reasonable efforts to place minors in programs licensed by an appropriate state agency as expeditiously as possible. An "emergency" is an act or event, such as a natural disaster (e.g. earthquake, fire, hurricane), facility fire, civil disturbance, or medical emergency (e.g. a chicken pox epidemic among a group of minors) that prevents the prompt placement of minors in licensed facilities. An "influx" is defined as any situation in which there are more than 130 minors in the custody of the INS who are eligible for placement in licensed programs.

1. The Juvenile Coordinator will establish and maintain an Emergency Placement List of at least 80 beds at programs licensed by an appropriate state agency that are potentially available to accept emergency placements. These 80 placements would supplement the 130 placements that the INS normally has available, and whenever possible, would meet all standards applicable to juvenile placements the INS normally uses. The Juvenile Coordinator may consult with child welfare specialists, group home operators, and others in developing the List. The Emergency Placement List will include the facility name; the number of beds potentially available at the facility; the name and telephone number of contact persons; the name and telephone number of contact persons for nights, holidays, and weekends if different; any restrictions on minors accepted (e.g. age); and any special services that are available.

2. The Juvenile Coordinator will maintain a list of minors affected by the emergency or influx, including (1) the minor's name, (2) date and country of birth, (3) date placed in INS custody, and (4)

place and date of current placement.

3. Within one business day of the emergency or influx the Juvenile Coordinator or his or her designee will contact the programs on the Emergency Placement List to determine available placements. As soon as available placements are identified, the Juvenile Coordinator will advise appropriate INS staff of their availability. To the extent practicable, the INS will attempt to locate emergency placements in geographic areas where culturally and linguistically appropriate community services are available.

4. In the event that the number of minors needing emergency placement exceeds the available appropriate placements on the Emergency Placement List, the Juvenile Coordinator will work with the Community Relations Service to locate additional placements through licensed programs, county social services departments, and foster family agencies.

5. Each year the INS will reevaluate the number of regular placements needed for detained minors to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of minors eligible for placement in licensed programs. However, any decision to increase the number of placements available shall be subject to the availability of INS resources. The Juvenile Coordinator shall promptly provide Plaintiffs' counsel with any reevaluation made by INS pursuant to this paragraph.

6. The Juvenile Coordinator shall provide to Plaintiffs' counsel copies of the Emergency Placement List within six months after the court's final approval of the Settlement Agreement.

EXHIBIT 4

AGREEMENT CONCERNING FACILITY VISITS UNDER PARAGRAPH 33

The purpose of facility visits under paragraph 33 is to interview class members and staff and to observe conditions at the facility. Visits under paragraph 33 shall be conducted in accordance with the generally applicable policies and procedures of the facility to the extent that those policies and procedures are consistent with this Exhibit.

Visits authorized under paragraph 33 shall be scheduled no less than seven (7) business days in advance. The names, positions, credentials, and professional association (e.g., Center for Human Rights and Constitutional Law) of the visitors will be provided at that time.

All visits with class members shall take place during normal business hours.

No video recording equipment or cameras of any type shall be permitted. Audio recording equipment shall be limited to hand-held tape recorders.

The number of visitors will not exceed six (6) or, in the case of a family foster home, four (4), including interpreters, in any instance. Up to two (2) of the visitors may be non-attorney experts in juvenile justice and/or child welfare.

No visit will extend beyond three (3) hours per day in length. Visits shall minimize disruption to the routine that minors and staff follow.

EXHIBIT 5

LIST OF ORGANIZATIONS TO RECEIVE INFORMATION RE: SETTLEMENT AGREEMENT

Eric Cohen, Immig. Legal Resource Center, 1663 Mission St. Suite 602, San Francisco, CA 94103

Cecilia Munoz, Nat'l Council Of La Raza, 810 1st St. NE Suite 300, Washington, D.C. 20002

Susan Alva, Immig. & Citiz. Proj Director, Coalition For Humane Immig Rights of LA, 1521 Wilshire Blvd., Los Angeles, CA 90017

Angela Cornell, Albuquerque Border Cities Proj., Box 35895, Albuquerque, NM 87176-5895

Beth Persky, Executive Director, Centro De Asuntos Migratorios, 1446 Front Street, Suite 305, San Diego, CA 92101

Dan, Kesselbrenner, , National Lawyers Guild, National Immigration Project, 14 Beacon St.,#503, Boston, MA 02108

Lynn Marcus , SWRRP, 64 E. Broadway, Tucson, AZ 85701-1720

Maria Jimenez, , American Friends Service Cmte., ILEMP, 3522 Polk Street, Houston, TX 77003-4844

Wendy Young, , U.S. Cath. Conf., 3211 4th St. NE, , Washington, DC, 20017-1194

Miriam Hayward , International Institute Of The East Bay, 297 Lee Street , Oakland, CA 94610

Emily Goldfarb, , Coalition For Immigrant & Refugee Rights, 995 Market Street, Suite 1108 , San Francisco, CA 94103

Jose De La Paz, Director, California Immigrant Workers Association, 515 S. Shatto Place , Los Angeles, CA, 90020

Annie Wilson, LIRS, 390 Park Avenue South, First Asylum Concerns, New York, NY 10016

Stewart Kwoh, Asian Pacific American Legal Center, 1010 S. Flower St., Suite 302, Los Angeles, CA 90015

Warren Leiden, Executive Director, AILA, 1400 Eye St., N.W., Ste. 1200, Washington, DC, 20005

Frank Sharry, Nat'l Immig Ref & Citiz Forum, 220 I Street N.E., Ste. 220, Washington, D.C. 20002

Reynaldo Guerrero, Executive Director, Center For Immigrant's Rights, 48 St. Marks Place , New York, NY 10003

Charles Wheeler , National Immigration Law Center, 1102 S. Crenshaw Blvd., Suite 101 , Los Angeles, CA 90019

Deborah A. Sanders, Asylum & Ref. Rts Law Project, Washington Lawyers Comm., 1300 19th Street, N.W., Suite 500 , Washington, D.C. 20036

Stanley Mark, Asian American Legal Def.& Ed.Fund, 99 Hudson St, 12th Floor, New York, NY 10013

Sid Mohn, Executive Director, Travelers & Immigrants Aid, 327 S. LaSalle Street, Suite 1500, Chicago, IL, 60604

Bruce Goldstein, Attornet At Law, Farmworker Justice Fund, Inc., 2001 S Street, N.W., Suite 210, Washington, DC 20009

Ninfa Krueger, Director, BARCA, 1701 N. 8th Street, Suite B-28, McAllen, TX 78501

John Goldstein, , Proyecto San Pablo, PO Box 4596,, Yuma, AZ 85364

Valerie Hink, Attorney At Law, Tucson Ecumenical Legal Assistance, P.O. Box 3007 , Tucson, AZ 85702

Pamela Mohr, Executive Director, Alliance For Children's Rights, 3708 Wilshire Blvd. Suite 720, Los Angeles, CA 90010

Pamela Day, Child Welfare League Of America, 440 1st St. N.W., , Washington, DC 20001

Susan Lydon, Esq., Immigrant Legal Resource Center, 1663 Mission St. Ste 602, San Francisco, CA 94103

Patrick Maher, Juvenile Project, Centro De Asuntos Migratorios, 1446 Front Street, # 305, San Diego, CA 92101

Lorena Munoz, Staff Attorney, Legal Aid Foundation of LA-IRO, 1102 Crenshaw Blvd., Los Angeles, CA 90019

Christina Zawisza, Staff Attorney, Legal Services of Greater Miami, 225 N.E. 34th Street, Suite 300, Miami, FL 33137

Miriam Wright Edelman, Executive Director, Children's Defense Fund, 122 C Street N.W. 4th Floor, Washington, DC 20001

Rogelio Nunez, Executive Director, Proyecto Libertad, 113 N. First St., Harlingen, TX 78550

EXHIBIT 6
NOTICE OF RIGHT TO JUDICIAL REVIEW

"The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form."

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Jenny Lisette Flores, *et. al.*, *Plaintiffs,*	)	
v.	)	2:85-cv-04544-DMG-AGR
William P. Barr, *et al.*, *Defendants.*	)	

DECLARATION OF RAUL L. ORTIZ

I, Raul L. Ortiz, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me from official records, and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

1. I am currently the Deputy Chief, U.S. Border Patrol (USBP), U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been in this position since March 2, 2020. In this role, I am responsible for executing the mission of the U.S. Border Patrol to protect the border between ports of entry, which includes patrolling the approximately 6,000 miles of Mexican and Canadian international land borders and 2,000 miles of coastal waters surrounding the Florida Peninsula and the island of Puerto Rico. I oversee more than 20,000 Border Patrol Agents and other employees across the country.

2. I have been a Border Patrol agent since May 13, 1991, when I entered into service in San Diego Sector. I have held various leadership positions in the Del Rio Sector, such as Assistant Patrol Agent in Charge, Patrol Agent in Charge and Assistant Chief Patrol Agent. From 2009 to 2012, I served as the Director of Border Management Task Force, Senior Advisor to DHS' envoy to Afghanistan and Pakistan, and as the DHS Attaché in Kabul. In 2012, I was promoted to Deputy Chief, Law Enforcement

Operational Programs in Border Patrol Headquarters. In 2013, I became the Deputy Chief Patrol Agent of Border Patrol's Rio Grande Valley Sector. In 2019, I became Chief Patrol Agent of the Del Rio Sector.

3. I understand the court recently issued an order requiring DHS to discontinue its practice of holding those alien minors processed under 42 U.S.C. § 265 (Title 42) in hotels pending their return to their home country, absent extraordinary circumstances. I make this declaration to explain the likely operational impact of that order on USBP.

4. On March 20, 2020, the U.S. Centers for Disease Control and Prevention (CDC) issued an Order that temporarily suspended the introduction of certain persons traveling from Canada and Mexico, based on its finding that the introduction of such persons posed a serious danger of further introduction of COVID-19 into the United States. In accordance with this Order, subject to certain exceptions, aliens who travel from Canada or Mexico and who would otherwise be introduced into a congregate setting in USBP facilities at or near the United States borders with Canada and Mexico for processing are instead expeditiously expelled from the United States, unless an USBP agent, with supervisory approval, determines that it is appropriate to except an individual from the Title 42 process. USBP works to immediately return those individuals processed under Title 42 to their country of last transit whenever possible. In the event a person cannot be returned to the country of last transit, CBP works with U.S. Immigration and Customs Enforcement (ICE) and other partners to expel the individual to his or her country of origin as expeditiously as possible.

5. The purpose of the CDC Order is to prevent the introduction of COVID-19 into the United States. Therefore, USBP's goal is to process and expel those individuals subject to the Order as quickly as possible, and to limit the time that individuals spend

in USBP facilities pending their expulsion. This is particularly important given the nature of USBP's facilities, which are generally designed for short-term holding, and are not equipped for social distancing or quarantining a large number of people. There is often not sufficient space, for instance, to maintain six feet of distance between individuals, and USBP is not equipped to be able to isolate or quarantine large numbers of individuals. Therefore, a single case of COVID-19 in a facility will reduce the capacity of that facility, as it will be necessary to take steps to decontaminate the entire facility. Additionally, while USBP works to ensure that all individuals in its custody receive appropriate medical care, USBP facilities are not equipped to provide long-term or critical care, as may be required for individuals infected with COVID-19.

6. Between March 20 and September 9, 2020, USBP has expelled more than 159,000 individuals along the southwest border under Title 42. Of these, approximately 8,800 were single minors (e.g., minors apprehended without any accompanying adult family member) and approximately 7,600 were members of family units or family groups. While USBP was able to immediately expel almost 7,000 families and more than 6,500 single minors to Mexico, USBP transferred more than 600 family units/family groups and more than 2,200 single minors to ICE custody to be repatriated directly to their home countries. I understand that ICE often held family units, family groups, and single minors in hotels pending available return flights to their home country, in order to limit the spread of COVID-19 in ICE family residential centers and Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) shelters.

7. I understand that the court's order prohibits ICE from holding any minor processed

under the CDC Order in hotels pending their return. I understand that, under the order, if a minor is not able to be expelled to Mexico or expelled to their country of origin within a few days, that the minor must be transferred to a "licensed facility" pending their expulsion consistent with normal *Flores* requirements. It is my understanding that, for those single minors who are not able to be expelled within a few days, they must be transferred to the custody of HHS ORR. It is my understanding that, for those minors who are part of family units and family groups who are not able to be expelled to Mexico or expelled to their country of origin within a few days, this will require ICE to hold these individuals in its family residential centers.

8. This order is likely to cause three significant problems. First, the order is likely to lead to crowding and an increased risk of COVID-19 exposure in USBP facilities, both for individuals in CBP custody and USBP agents. Second, the order is likely to cause an increased risk of COVID-19 exposure in HHS and ICE facilities. Third, the order is likely to strain an already overburdened system.

9. First, and based on historical practice, while USBP may be able to expel some population of single minors immediately to Mexico or their home countries within a few days of their apprehension, USBP must transfer those minors who cannot be returned in this manner to ICE or HHS custody. Specifically, USBP anticipates that it may need to refer approximately 60-140 additional single minors to HHS per week as a result of the order. Without the ability to hold those minors in hotels pending return, ICE and HHS must hold those minors in their facilities. I understand that both ICE and HHS have implemented significant public health measures in their facilities in response to COVID-19 including, for instance, steps to ensure appropriate social

distancing and quarantine, when appropriate. Such steps, by their very nature, limit the number of people that can be housed in any particular facility. Therefore, there are fewer available beds at both ICE and HHS facilities, which limits the number of individuals that ICE and HHS are able to accept from USBP. Thus, ICE and HHS are likely to be limited in their ability to accept even a small increase in the number of minors transferred to their custody.

10. Such a decrease in both ICE and HHS capacity will lead to an increased risk of COVID-19 in USBP facilities, as increased numbers of minors are likely to spend longer time in USBP facilities. As described above, USBP facilities are not designed nor equipped for social distancing or quarantining large numbers of people. USBP facilities generally have holding cells or pods, where individuals remain in relatively close proximity to each other pending processing and transfer to another facility. If there are more than a few people in a particular holding cell or pod, it is not possible to remain more than six feet apart. While it is possible to isolate an individual in a particular hold room, all other individuals in custody then have comparatively less space. For instance, if a facility has five hold rooms and 40 individuals in custody, isolating one person means that the other 39 individuals must be held in the remaining four hold rooms. If two individuals require isolation, this further limits the space available to the remaining 38 individuals. Additionally, USBP facilities do not, in general, have isolation rooms with negative pressure, separate HVAC systems, or other measures that may be required to contain the spread of COVID-19. Therefore, an increased number of individuals in custody, in a finite amount of space, dramatically increases the risk that individual in custody will become infected with COVID-19.

11. Additionally, while some USBP facilities have medical providers on-site, the medical providers generally provide treatment for acute conditions, and do not provide long-term or critical care such that would likely be required for individuals infected with COVID-19. Therefore, USBP relies heavily on the local medical system, and USBP must transport individuals in custody who become infected with COVID-19 to local hospitals. Therefore, an increased number of infections in USBP custody also increases the risk of exposure in local communities, placing a further strain on their local healthcare systems. It is important to note that many USBP facilities on the southern border are in areas, such as the Rio Grande Valley in Texas and Tucson, Arizona, already facing a high number of COVID-19 cases in their local population.

12. Lastly, the increase in exposure to COVID-19 in USBP facilities will significantly increase the risk that USBP agents will be exposed and will become infected. USBP – and CBP more broadly – has already seen a significant number of its employees impacted by COVID-19. As of September 7, 2020, 2,018 CBP employees had tested positive for COVID-19, a 12% increase compared to the 1,806 who tested positive on August 7, 2020. Also as of September 7, 2020, 12 employees and one CBP contractor have died from COVID-19. Additionally, when USBP employees test positive or are exposed, they must self-quarantine for 14 days until they recover and are no longer contagious. USBP has a finite number of agents who can take over for those agents, which severely impacts USBP's ability to perform its mission. For instance, in the Laredo Sector, which saw a significant number of its personnel test positive for COVID-19 over the summer, Border Patrol has had to increase the number of shifts that agents must work at its checkpoints, reassign personnel to those checkpoints, and suspend certain law enforcement trainings. These strains on USBP's personnel and

corresponding resource reassignments put the safety and security of the border at risk.

13. Additionally, it is likely that, as the number of minors that both ICE and HHS are required to hold in their facilities increases due to a prohibition on the use of hotels, the number of COVID-19 infections in these facilities are likely to increase. This increased exposure places the health and safety of those in custody at risk, as well as ICE and HHS personnel. Such exposure is likely to require ICE and HHS to take additional measures to limit the spread of COVID-19 in their facilities, which will further limit the number of available beds and may also lead to further restrictions on the ability to accept individuals from USBP.

14. Even putting aside concerns about the public health implications of the order, the requirements of the order will strain the capacity of an already-burdened system. Even without a pandemic, ICE and HHS have facility restrictions, often based on gender, demographics, and particular medical needs that often limit or impact who USBP can transfer to ICE and HHS custody. For instance, HHS has limited facilities that can accept unaccompanied alien children with particular medical needs. The further restrictions required by COVID-19 already placing a further strain on the capacity of the system. Thus, while USBP has excepted from the CDC Order and processed for immigration proceedings under Title 8 more than 1,600 family units and 1,500 unaccompanied alien children, there is already limited HHS and ICE capacity to hold these individuals.

15. The restrictions required by the order will further strain this capacity, as it will require both HHS and ICE to hold those minors and families that were previously held in hotels in their facilities. As outlined above, this increased population is likely to further exacerbate the risks of COVID-19 infection in those facilities, which will

further limit the ability of HHS and ICE to accept custody of minors and families.

16. Even in the absence of a pandemic, capacity constraints at ICE and HHS mean that individuals will remain in USBP custody for longer periods of time, and make it more likely that USBP facilities become overcrowded. Such conditions pose a health and safety risk to individuals in USBP custody and to Border Patrol agents even in the absence of a pandemic. For instance, in order to ensure that USBP provides safe conditions for all individuals, particularly minors, USBP generally takes steps to ensure that, for instance, unaccompanied minors are not held in the same area as unrelated adults, and single males are not held with female head-of –household families. As the number of individuals in custody increases, it becomes more difficult for USBP to meet these requirements and keep minors safe. Additionally, even putting aside concerns about COVID-19, overcrowded conditions are more likely to lead to the spread of other communicable diseases such as scabies, chicken pox, and flu.

17. I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 11 day of September, 2020.

Raul L. Ortiz
Deputy Chief, U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT D

No. _____

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.
Plaintiffs-Appellees,

v.

WILLIAM P. BARR,
Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DECLARATION OF JALLYN SUALOG,
DEPUTY DIRECTOR, OFFICE OF REFUGEE RESETTLEMENT

I, Jallyn Sualog, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am the Deputy Director of the Office of Refugee Resettlement ("ORR"), an Office within the Administration for Children and Families ("ACF"), U.S. Department of Health and Human Services ("HHS").

2. I have held the position of Deputy Director since June 2018. I was previously the Director of Children's Services from September 2013 through June 2018. I have worked at ORR since February 2007. I have a Master's of Arts in Clinical Psychology. Before joining ORR, I worked as a mental health professional

and managed the child welfare and social services programs for Hawaii's largest non-profit organization.

3. As the Deputy Director of ORR, I have responsibility for the oversight of the Unaccompanied Alien Children ("UAC") program, including all aspects of operations, planning and logistics, medical services, and monitoring. My job duties include the formulation and implementation of ORR's response to coronavirus disease 2019 (COVID-19) across its network of grantee care-provider facilities. In the course of performing my duties, I have gained personal knowledge of the factors that impact ORR operations, and the challenges associated with implementing ORR's COVID-19 infection control protocols.

4. My testimony in this declaration is based upon this personal knowledge, and information obtained from records and systems maintained by ORR in the regular course of performing my job duties.

5. I am testifying in this declaration to the best of my knowledge, and understand that this declaration is for use in the Government's appeal of the district court's September 4, 2020 order in *Flores v. Barr*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal.), Dkt. No. 976 ("September 4 Order").

The district court's order will significantly disrupt ORR operations and endanger UAC and ORR personnel

6. I have been asked by ORR leadership to assess the potential impact that material changes in the current ORR operating environment would have on ORR program operations, including the impact of the September 4 Order.

7. It is my understanding that the September 4 Order directs the Government to cease temporarily housing alien minors in hotels pending their expulsion pursuant to the CDC Order prohibiting the introduction of certain "covered aliens" into the United States.

8. I understand that in the September 4 Order, the district court determined that minors held pursuant to the CDC Order are also members of the *Flores* settlement class, and therefore must be transferred "as expeditiously as possible" to a licensed ORR grantee care provider facility if "a bed in a licensed facility is immediately available." Dkt. No. 976, 17, para.1. I also understand that the September 4 Order directs that, once in ORR care, any minors subject to the CDC Order must be treated identically to the population of UAC that it is ORR's statutory mission to care for. *See id.*

9. It is my understanding the district court stayed the September 4 Order until midnight on September 8, after which, the U.S. Department of Homeland Security (DHS) must cease placing minors in hotels by September 15. *Id.* at 17, para.2. Absent an emergency stay, I anticipate that on or about September 15, ORR

will begin receiving referrals from DHS of alien minors who would otherwise have been cared for in hotels and then expelled under the CDC Order.

10. As described below, ORR has implemented robust COVID-19 infection control protocols, which I believe have helped to protect both UAC and ORR and grantee personnel from COVID-19 thus far. ORR's infection control protocols were developed in consultation with CDC, and take into account the relatively low and stable ORR census during the COVID-19 pandemic. Although the ORR network is comprised of many facilities that house and care for UAC in congregate settings, the relatively low and stable ORR census has allowed ORR to implement infection control measures across the ORR network that would be unworkable if the number of UAC referred to ORR were to increase materially above current levels.

11. I anticipate that the September 4 Order will lead to an increase in the number of referrals to ORR. If the number of referrals increases materially, ORR will not be able to safely absorb incoming UAC according to its existing COVID-19 infection control measures, which will increase the risk of introducing COVID-19 into the ORR network, which I understand to be the type of situation the CDC Order was intended to avoid.

12. Indeed, it is my understanding that hotels are used to house Title 42 minors pending their expulsion precisely because hotels furnish accommodations

conducive to an effective quarantine. Specifically, it is my understanding that hotels enable Title 42 minors to be confirmed to individual rooms with closed doors, where each minor has their own sleeping, eating, and bathing facilities. According to CDC guidance, it is ideal to quarantine individuals in private quarters because it eliminates the opportunity for others to come into contact with surfaces that may have been contaminated with respiratory droplets produced the quarantined individual, such as doorknobs, faucet handles, and other high-touch surfaces.[1]

13. Under the September 4 Order, hotels are no longer an option for temporarily housing Title 42 minors pending their expulsion. As a result, Title 42 minors who would have been housed in hotels Order will now be referred to ORR.

14. As the number of UAC in the ORR network increases, ORR will gradually lose the extra space that must be held in reserve to quarantine or isolate UAC as needed, and ORR will be forced to house UAC in denser conditions, which will further increase the risk of transmission of COVID-19.

[1] *See* CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (updated July 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html ("In order of preference, multiple quarantined individuals should be housed: IDEAL: Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully."); *see also* CDC, Guidance for Shared or Congregate Housing, https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html (last updated Aug. 3, 2020) ("If possible, designate a separate bathroom for residents with COVID-19 symptoms.").

15. Furthermore, immediate implementation of the September 4 Order will require ORR to abruptly transfer hundreds of UAC currently housed in shelters along the Southwest border further inland, in order to make room to medically stage additional incoming UAC in facilities along the Southwest border. This will require UAC and ORR personnel to travel long distances on common carriers, such as airplanes, creating additional risk of infection. The movement of so many UAC across the ORR network also increases the risk of introducing COVID-19 into the shelters that receive transferred UAC, and the communities where those shelters are located.

16. I am concerned that once implementation of the September 4 Order begins, the operational complexity of the implementation will have the unintended consequence of increasing the danger of COVID-19 within the ORR network.

Material changes in the ORR operating environment will negatively impact the program

17. At this point in time, ORR is implementing infection control measures across its system in response to the COVID-19 pandemic, and the system-wide census (that is, the number of UAC in the system) is low relative to the maximum capacity of the system when there is no pandemic. It is also low relative to the historical highs in the census when there is no pandemic. The relatively low census

has remained relatively stable for months. ORR attributes the current operating environment to the CDC Order.

18. My experience is that a host of factors can impact ORR operations. Some of those factors are within ORR's control. Others are not. ORR does not, for example, control the number of referrals of UAC that it receives from DHS; the home countries, demographics, or clinical presentations of the UAC referred by DHS; the numbers or locations of potential sponsors for the UAC; the public health situation domestically or internationally; the public health measures implemented by individual U.S. states or transportation companies (e.g., commercial airlines) in response to the COVID-19 pandemic; and natural disasters that take ORR shelters offline (e.g., recent hurricanes in Texas and Louisiana). ORR can control the public health measures that it implements within its system—as well its decisions concerning the placement and release of UACs—within the operating environment that is presented to ORR and is outside of ORR's control.

19. My best programmatic judgment is that the relatively low and stable census in recent months has given ORR needed operational flexibility to effectively implement infection control measures—and make prompt and safe placement and release decisions—across the system. ORR has, for example, been able to isolate or quarantine confirmed or suspected cases of COVID-19, respectively, among the UAC population as they arise. These measures have protected the health and safety

of UAC in ORR's care and custody and prevented the development of more serious public health concerns in ORR shelters.

20. It would increase the risks to the federal and grantee staff who care for the UAC if there were a material increase in UAC referrals or the percentage of UACs who have tested positive for COVID-19 or been exposed to the disease; the complexity of ORR operations would increase as well and have a potentially negative impact on the effectiveness of the infection control measures in ORR shelters. Indeed, under the current infection control measures, there are limits to the number of UAC that ORR can safely absorb into the system at any one time. A breakdown in the operationalization of the infection control measures—triggered by a large volume of referrals or shift in the clinical presentations of UACs—would increase the danger of COVID-19 for newly-referred UACs and those presently in the system.

21. The health and safety of federal and grantee staff is critical because the loss of staff to sickness or self-quarantine diminishes the capacity of ORR to care for UAC. ORR already loses dozens of staff each week to self-quarantine for COVID-19 because of state and local rules that mandate self-quarantine when traveling between U.S. jurisdictions with high rates of community transmission. When members of the staff transport UAC to sponsors as part of the release process, many become temporarily unavailable regardless of whether they have actually

become infected with or exposed to COVID-19. Any outbreaks in ORR shelters that might result from increases in the census or breakdowns in infection control measures would put additional stress on program operations. Sadly, there have also been several staff deaths associated with COVID-19 during the pandemic; rigorous adherence to infection control measures is important to maintaining morale and the ability to recruit and retain new staff during this challenging time.

22. My best programmatic judgment is that the ORR system would likely come under significant stress if ORR were to begin to receive on a regular basis approximately 75 to 100 referrals of UAC per week, with approximately 30% of the UAC having tested positive or been exposed to COVID-19. The compounding of that stress by other factors outside of ORR's control—such as a material shift in the demographics of UAC referrals towards younger children, which would limit the number of licensed facilities capable of caring for such children—would likely worsen the situation and jeopardize ORR's ability to maintain effective infection control measures. If the September 4 Order becomes effective, and the volume of referrals to ORR increases in kind, then the risk of such a scenario and the attendant consequences would increase dramatically.

The COVID-19 pandemic presents unprecedented operational challenges for ORR

23. ORR is the agency charged with the care and custody of UAC pursuant to 8 U.S.C. § 1232(c) and other provisions. As such, ORR is committed to providing for the safety and well-being of all UAC in its care, as well as protecting the health and safety of the communities in which these children live—including from the risk of COVID-19.

24. To carry out its mission, ORR relies on a network of grantee care-provider facilities located across the country. There are a total of 107 facilities in the ORR grantee care-provider network that house UAC in a congregate setting.

25. ORR has experience with the identification, mitigation, and treatment of communicable diseases affecting UAC, including seasonal influenza (flu), mumps (parotitis), chicken pox (varicella), and tuberculosis. ORR has policies pertaining to communicable disease control that predate the COVID-19 pandemic. ORR's general, long-standing policies concerning the management of communicable disease require the routine assessment of travel history when a child arrives at a care-provider program; medical screenings and vaccinations within 48 hours of arriving at ORR shelters; ability to isolate or quarantine individuals for the purpose of communicable disease control; hand hygiene and respiratory etiquette education efforts; and established communicable disease reporting to the local health authority.

26. The operational challenges presented by the COVID-19 pandemic far exceed those presented by other communicable diseases in the past. Previously, when ORR needed to address infection prevention and control, it was in response to isolated cases or outbreaks in individual facilities, where the cause typically was an already-infected UAC. Other instances involved localized outbreaks in communities where ORR facilities are located. ORR and its care providers have never before confronted a situation where all incoming UAC increased the danger of the introduction of a quarantinable communicable disease into the United States, [2] or where the same quarantinable communicable disease posed a risk to the current UAC population and ORR and grantee personnel based on the community transmission of that disease in locations where ORR facilities are located. Likewise, ORR and its care providers did not originally structure the physical plants or ordinary operations of their facilities to address the challenges presented by the COVID-19 pandemic; the pandemic has required substantial and novel adjustments in the use, operations, and capacity of facilities by ORR and its care providers. In these respects, the COVID-19 pandemic has been unprecedented in the history of the program.

[2] *See* Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020) (effective Mar. 20, 2020) (determining that "covered aliens" who have traveled through Mexico pose a risk of introducing COVID-19 into the United States due to the prevalence of COVID-19 in Mexico).

ORR's infection control measures are workable and safe with a stable and low census

27. Since the first reports of COVID-19 in the U.S., ORR has monitored the public health reporting on COVID-19 in the jurisdictions in which grantee care-provider facilities operate. ORR has provided regular updates to grantee care-provider facilities on infection prevention and control, and issued guidance regarding the screening and management of UAC, facility personnel, and visitors who have potentially been exposed to COVID-19. All of these measures are rooted in guidance from CDC.

28. Personnel from ORR's Division of Heath for Unaccompanied Children (DHUC) began consulting with CDC to develop COVID-19 infection control measures that could be implemented across the ORR network, notwithstanding the variation in physical structures, staffing, and operations across ORR care provider facilities. Specifically, DHUC, including DHUC Director Dr. Michael Bartholomew, consulted with relevant subject matter experts from CDC, including Dr. Amanda Cohn, who reviewed ORR's guidance to care provider facilities on COVID-19 to confirm that it aligned with CDC's guidelines and recommendations, and the best practices for preventing and controlling the spread of COVID-19 within residential facilities. This includes guidance related to symptom and temperature monitoring of staff and children, cleaning and hygiene guidance, and ensuring the ability to isolate ill UAC and quarantine potentially

exposed UAC. *See* Decl. of A. Cohn, *Lucas R. v. Azar*, No. 2:18-cv-5741 DMG (PLAx), Dkt. No. 230-11 (Mar. 27, 2020) (describing CDC's consultation with ORR).

29. To prevent those who may have been exposed to or infected with COVID-19 from entering ORR facilities, ORR has mandated that all visitors and staff seeking to enter any grantee care-provider facility answer COVID-19 screening questions and submit to a mandatory temperature check. With the exception of UAC who are being processed for admission, grantee care-provider facilities are required to deny access to anyone with a fever of 100°F or above; or who exhibits signs of symptoms of an acute respiratory infection, such as a cough or shortness of breath; or who has had contact with someone with a confirmed diagnosis of COVID-19 in the previous 14 days; or who has been tested for COVID-19 and is awaiting test results; or who, in the previous 14 days, has traveled to a country identified by CDC as having widespread, sustained community transmission of COVID-19.

30. In addition, UAC entering ORR care are screened for COVID-19 exposure or symptoms during their initial medical examination ("IME"), which has been expanded to include a COVID-19 health screening protocol consistent with CDC COVID-19 guidelines.

31. UAC at risk of COVID-19 exposure based on reported travel history, but without symptoms, are quarantined and monitored for 14 days. UAC who exhibit COVID-19 symptoms during their IME are isolated and tested in consultation with the local health authority.

32. ORR has also instituted a symptom-monitoring regime to ensure that any UAC in any facility who begins exhibiting potential symptoms of COVID-19 after their IME is immediately identified and appropriately isolated in consultation with the local health authority.

33. Since March 19, 2020, ORR has required each grantee care-provider facility to monitor the temperature of every UAC in care. UACs' temperatures are taken twice daily, once in the morning and again in the evening, and are recorded in a master census temperature report that each facility is required to maintain. If any UAC is found to have a temperature above 100°F, the grantee care-provider is required to immediately alert ORR. The grantee care-provider is required to alert ORR each day that any child has a temperature over 100°F. So for example, if a UAC has a 101°F fever for three days, ORR will be alerted of this fact every day for the duration of the child's fever. Early identification of potential COVID-19 cases allows for early introduction of appropriate public health measures.

34. Any UAC exhibiting symptoms consistent with COVID-19, such as coughing, fever, or difficulty breathing, at any point during their time in ORR care

are to be immediately isolated and referred for evaluation by a licensed medical provider, in consultation with the local health authority. If a UAC is recommended for testing by the healthcare provider or public health department, the UAC is tested.

35. The same isolation procedures are used for any UAC determined to be at risk for COVID- 19 exposure or infection, whether based on information collected during the IME, or through subsequent monitoring. The affected UAC will be provided with a private room, with a closed door and bathroom access, preferably a private bathroom that is not used by other staff or UAC. State and local health departments, along with DHUC are immediately notified and consulted for additional guidance on risk assessment, symptom monitoring, and isolation or quarantine.

36. Facility personnel who enter an occupied isolation room are required to wear personal protective equipment, including an N95 respirator and goggles or a face shield, per CDC guidelines. If a UAC in isolation needs to leave the isolation room for any reason (e.g., to attend a medical appointment, etc.), the UAC must wear a surgical mask for the duration of their time outside the isolation room.

37. If a UAC must be transported to a health clinic or other off-site location, the facility must notify the local health department for guidance on proper precautions during transport. The facility is also required to alert the intended

destination so that proper infection control measures may be implemented prior to the UAC's arrival.

38. UAC are required to remain in isolation until cleared by the local health department or DHUC. During this time in isolation, UAC receive the same services as their non-isolated peers in the same facility, although services—particularly education services—may be adjusted to accommodate proper infection-control procedures.

39. Program staff will provide an affected UAC with notice of the isolation requirement and address questions or concerns the child may have about medical isolation, as well as potential delays to anticipated transfers or discharge plans. In order to protect the health of UAC and the local community, UAC cannot be transferred either to another facility or released to a sponsor until cleared by local health authorities and DHUC.

40. In my judgment, these infection control measures have protected the health and safety of UAC and federal and grantee staff alike. As I discuss more fully below, the ORR system has had to manage UAC and staff who have tested positive for COVID-19 or been exposed to the disease. The management of those situations pursuant to ORR's infection control measures has succeeded in preventing more serious public health concerns from developing in ORR facilities.

41. In my judgment, ORR has been able to implement the infection control measures effectively due in part to its system-wide census during the COVID-19 pandemic. The system-wide census during the pandemic has been far less than either ORR's maximum capacity or historical highs.

42. As of September 8, 2020, there are a total of 1,097 UAC in ORR care. This includes 409 UAC in long-term foster care and 139 UAC in transitional foster care, which are not congregate settings. For congregate settings only, there are 515 UAC in shelter facilities.

43. Currently, ORR's care-provider facilities are operating below their maximum capacity and historical highs. For example, at this time last year (August/September of 2019), ORR was receiving approximately 2,779 monthly referrals and had almost 5,039 minors in care with a 41% occupancy rate (including influx and variance beds). In contrast, August 2020 referrals were approximately 423 with approximately 972 minors in care, and an 8% occupancy rate (including influx and variance beds).

44. Critically, based on the August 2020 referrals, ORR is already receiving approximately 105 referrals a week, which is the upper limit of referrals ORR can safely absorb while maintaining COVID-19 infection prevention protocols. Thus, ORR is already at its functional intake capacity. It is my understanding that DHS anticipates that it may need to refer approximately 60-140

additional minors to ORR per week after the September 4 Order takes effect and DHS can no longer house minors in hotels.

45. Thus, I anticipate that ORR will immediately begin receiving approximately 165 to 245 referrals a week from DHS once the September 4 Order becomes effective, which exceeds the threshold of 75 to 100 referrals a week that ORR can safely absorb according to its COVID-19 infection prevention protocols.

46. Although ORR has a large number of available beds on paper, the majority of these beds are located in congregate facilities, where UAC live in dormitory-like conditions, with shared sleeping, eating, and bathing facilities. ORR cannot use its full capacity to shelter UAC without jeopardizing its ability to maintain its current infection control measures. Moreover, many of the available beds are in shelters located in the interior of the United States, and ORR could not utilize them without transporting UAC from the U.S.-Mexico border region, through multiple states, to the shelters. This would increase the risk of COVID-19 exposure for UAC and federal and grantee staff alike, in addition to leading to reductions in ORR operational capacity due to subsequent self-quarantines of returning staff. The relatively stable, historically low system-wide census within ORR facilities during the COVID-19 pandemic has allowed ORR the operational flexibility that it needs to implement infection control measures effectively.

Careful placement and release decisions are another key part of the COVID-19 response

47. ORR is continually monitoring the jurisdictions in which its grantee care-provider facilities operate to determine whether the conditions in the community surrounding the facility warrant the suspension of placements due to concerns related to COVID-19. For example, beginning on March 9, 2020, ORR stopped placements of UAC on a rolling basis in the states of California, New York, and Washington due to the ongoing outbreaks of COVID-19 among the general public in those states.

48. In addition, ORR is prioritizing local placements for all new referrals from DHS in order to limit the need for UAC to travel on commercial airliners, which poses a risk of exposing passengers (including UAC) to COVID-19. Care providers may still use air travel to reunify a UAC with their sponsor if it is safe to do so. But care providers are required to assess the safety of the UAC's ultimate destination, in order to anticipate logistical issues associated with the COVID-19 pandemic. Care-provider facilities are required to consult with their Federal Field Specialist ("FFS"), or delegate, if a UAC will be traveling to a jurisdiction with widespread community transmission of COVID-19 or that is subject to a community-wide "lock down." In such cases, release should be postponed until it is deemed safe, which may be an undetermined and lengthy period, further burdening ORR capacity. This safety assessment includes consideration of the

particular UAC's unique medical needs and vulnerabilities, and the UAC's respective medical specialists are consulted in the safety planning process.

49. The increased operational complexity associated with placement and release decisions during the COVID-19 pandemic is yet another reason why a stable and low census is important to the effective implementation of infection control measures within the ORR system. ORR cannot utilize its full capacity during the COVID-19 pandemic without jeopardizing its ability to maintain effective infection control measures. At the same time, ORR must account for an array of public health concerns whenever it moves UAC into and out of ORR facilities. A stable and low census gives ORR the operational flexibility that it needs to make placement and release decisions that are not only prompt but also safe for UAC and the public.

COVID-19 has already impacted ORR care-provider facilities

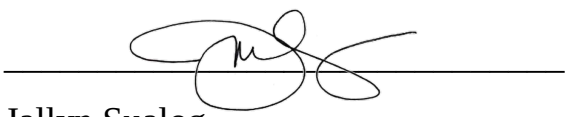
50. Despite the robust measures described above, COVID-19 has still impacted ORR. As of September 8, 2020, there have been a total of 204 confirmed COVID-19 cases among UAC across all ORR care-provider facilities since March 24, 2020, when the first infection of a UAC was reported in a facility in New York. Currently, there are 65 active cases. Active cases are primarily in Texas, where ORR within the last two weeks received over 100 referrals of UAC infected with or exposed to COVID-19. These UAC are currently in isolation, per ORR and CDC guidelines, and are receiving appropriate monitoring and medical care. Even if

some eventually test negative, they must be presumed positive and cared for as such until results are available.

51. In addition, a total of 745 program staff and contractors have self-reported testing positive for COVID-19 since March 18, 2020. The majority of infected staff are in Texas, Arizona and New York. ORR has received reports that four (4) facility staff members and one (1) foster parent have died as a result of COVID-19. ORR's medical team and the affected programs have worked in close coordination with the local public health departments on appropriate public health measures for staff members, which typically involve self-quarantine at home, and the tracking and monitoring of the affected staff members' contacts within the care-provider facility, per CDC guidance.

52. In addition to the COVID-19 protocols described above, care-provider facilities are directed to follow any local requirements issued by the state licensing agency or other local public health authority related to the identification, reporting, and control of communicable diseases that are more stringent than ORR's protocols.

Executed on September 11, 2020.



Jallyn Sualog
Deputy Director
Office of Refugee Resettlement

EXHIBIT E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNY L. FLORES, et al., Plaintiffs, vs. EDWIN MEESE, et al., Defendants.	Case No. 2:85-cv-04544-DMG-AGRx [Judge: Hon. Dolly M. Gee] **DECLARATION OF RUSSELL HOTT IN SUPPORT OF REQUEST FOR EMERGENCY STAY OF THIS COURT'S SEPTEMBER 4, 2020, ORDER GRANTING PLAINTIFFS MOTION TO ENFORCE**

I, Russell Hott, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. Currently, I am the Acting Assistant Director for the Custody Management Division ("CMD") for Enforcement and Removal Operations ("ERO") at U.S. Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security ("DHS"). I have held this position since February 2020. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of three divisions led by three Deputy Assistant Directors under my direct supervision: (1) the Alternatives to Detention Division; (2) the Detention Management Division; and (3) the Custody Programs Division.

2. As the Acting Assistant Director, I am responsible for the effective and proficient performance of these three Divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention

facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 35,000 detainees daily (approximately 21,000 detainees daily since April 2020), at approximately 250 facilities nationwide, including three family residential shelters located in Texas and Pennsylvania.

3. As a part of my official duties, I am familiar with the September 4, 2020, decision in *Flores v. Barr*, No. 85-4544 (C.D. Cal. filed July 11, 1985), ECF No. 976.

4. The information in this declaration is based upon my personal knowledge and experience as a law enforcement officer and upon information provided to me in my official capacity. Operational realities are fluid with new decisions required on a regular basis. The information in this declaration is current and accurate as of the time I signed below.

5. ERO considers alien minors who are accompanied by one or both parents and/or legal guardian to be a family unit, and in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA). Family units subject to removal from the United States pursuant to Title 8 are housed at a Family Residential Center (FRC). FRCs are designed as residential centers and not detention centers; therefore, security protocols (i.e. fencing, secured doors, controlled movement, level of security staffing, etc.) are not present in the same form as at ICE's adult detention facilities. Housing family units subject to the Title 42 process, as well as those subject to Title 8, will present challenges.

6. Because of the pandemic and consistent with the guidelines set forth in ERO's Pandemic Response Requirements (PRR), ERO has implemented measures such as social distancing, cohorting new intakes and positive cases, and operating at a reduced capacity in an effort to reduce the risk of spreading COVID-19. Generally, FRCs have the capacity to hold

approximately 3,000 family unit individuals with one family unit housed per suite; however, in the midst of COVID-19, ERO's PRR recommends limiting capacity of the FRCs to 75% or less, and ERO has maintained the FRCs at 5% to 10% of capacity to mitigate the risk of COVID-19. Given the physical layout of FRCs and the various permutations of the family units detained there, the addition of Title 42 cases will make it difficult for ERO to maintain an operating capacity of even 50%. With a limited number of suites in the medical housing unit at the FRCs, an influx of positive Title 42 cases could force cohorting of COVID positive family units in other areas of the facility, thereby increasing the risk of cross-contamination with the FRC's general population.

7. To the extent ERO has held family units subject to Title 42 at the FRCs, it has only been done in limited instances, such as when hotel accommodations were terminated with little notice and other hotels lacked vacancy. If all family units subject to Title 42 must be housed at FRCs, ERO likely will not have the ability to cohort all incoming Title 42 family units for 14 days separately from the existing FRC population. If new Title 42 family units are comingled with the existing FRC population, it could lead to an introduction of COVID-19 within the existing FRC population which, to date, has been successfully mitigated. Should COVID-19 be introduced into an existing FRC population, quarantining the population could essentially lead to the inability to accept any new residents, either Title 8 or Title 42, for at least 14 days.

8. Because the FRCs lack the same security protocols as detention centers, ERO's ability to effectively maintain separation of various populations, such as the separation of Title 42 cases from Title 8 cases or cohorting a large influx of new intakes, is limited. Cohorting and separation of separate populations is most effective with physical barriers, which are limited at

the FRCs. At this time, the open plan layouts of the FRCs do not provide the necessary physical separation and thus, depending on the amount and frequency of newly arriving families, full separation of T42 family units from Title 8 cases may not be operationally possible. In the absence of full physical separation of the two populations or sufficient space to cohort various Title 42 groups, introduction of all Title 42 family units to FRCs pose a risk of contagion and spread of the virus within the FRCs. Other reasons warranting a separation of Title 42 cases from Title 8 cases are the following: 1) differing administrative processes; 2) staging for transport as Title 42 cases are immediately eligible for expulsion from the United States; and 3) cleaning considerations as the suites housing Title 42 cases are likely to turnover more quickly.

9. Additionally, not every family unit is eligible for placement in an FRC. For example, a Title 42 family unit that includes a parent with a criminal history may not be amenable for placement at an FRC but could potentially be housed together in a hotel, where the family unit would not be co-mingling with other family units. Without an ability to utilize hotels, in this scenario, ERO may need to separate the family unit because no Title 42 family members with a criminal history will be commingled with other families at an FRC.

10. Given the court's order and the immediacy of its implementation, ERO would likely either need to forego sight and sound separation between Title 42 and Title 8 cases at the FRCs, release Title 8 cases it would not otherwise release, or incur additional expense and extend the length of detention by transporting Title 42 cases to a location farther away from the border.

11. In addition to the challenges faced at FRCs, ERO may face difficulty transporting unaccompanied minors on behalf of CBP and/or HHS. The inability to house minors in hotels will require the transport of single minors for longer distances so that they may be held by

HHS's Office of Refugee Resettlement (ORR) and, thereby, likely increase the length of detention. Currently, ERO is largely able to transport the single minors by vehicle, which poses a risk of virus transmission to the transportation specialists but is a lesser risk to the general public than other means of transport; however, the longer transport distances, as well as the strain it will place on staffing and equipment resources, will likely necessitate an increased use of commercial air or land transportation. Utilizing commercial services significantly increases the possibility of COVID-19 exposure to the traveling public, increases the potential of an absconder, and increases the possibility of hostile public interaction. ORR alone determines placement for juveniles transferred into their custody; currently, I understand that ORR maintains approximately 195 facilities located across 23 states. Should ERO need to transfer Title 42 juveniles to ORR, this additional travel throughout the United States is imprudent and poses an additional risk to the general public.

12. ERO is assisted with transportation through a contract with MVM. Pursuant to the contract with MVM, it must follow a fully developed training curriculum, and transportation staff shall have the highest level of competency possible. Upon onboarding, training is given on the topics below, and refresher training on the same topic is required quarterly. Transportation staff must complete at least 16 hours of training when onboarding. In addition, supervisors must attend 24 hours of additional training. MVM must certify that personnel have successfully passed all the required training and provide documentation of required training. Areas of training include:

a. Airport rules and regulations for travelers,
b. Crisis intervention,
c. Child development,
d. Working with and transporting youth with special needs,

e. Transporting youth with behavioral problems,

f. CPR, Epi-pens & First Aid training,

g. Non-secured UAC and family policy, and

h. Procedures for and implementation of contingency plans in the event of crisis during transport, including de-escalation techniques.

i. Ethics and Authority

j. Note-Taking and Report Writing

k. Self-Defense

l. Human Relations

m. Handling Disorderly Conduct, Civil Disturbances, and Other Incidents

n. Cultural and Ethnic Sensitivity

o. Bloodborne Pathogens and Respiratory Viruses, including work practices that help eliminate or reduce the risk of exposure

13. For these and other reasons, ICE requires an emergency stay in order to mitigate the impact of the court's September 4, 2020, order.

Signed on this 10th day of September 2020.

Russell Hott
Acting Assistant Director
Custody Management Division
ICE Enforcement and Removal Operations