No. 19-56326

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**JENNY LISETTE FLORES, *et al.*,**
Plaintiffs-Appellees,

**v.**

**WILLIAM P. BARR, ATTORNEY GENERAL, *et al.*,**
Defendants-Appellants.

# PLAINTIFFS-APPELLEES' ANSWERING BRIEF

On appeal from the
United States District Court for the Central District of California
Case No. 2:85-cv-04544-DMG-AGR

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## STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2241, 8 U.S.C. § 1329, and ¶ 35 of the settlement it approved pursuant to Federal Rule of Civil Procedure 23(e) on January 28, 1997, *reprinted at* Appellants' Excerpts of Record ("ER") at 227-70 ("Agreement"). The orders on appeal are (i) a final order granting Plaintiffs-Appellees' ("Plaintiffs") motion for a permanent injunction barring the Defendants-Appellants ("the Government") from violating the Agreement notwithstanding publication of the regulations entitled Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392-535 (Aug. 23, 2019) (to be codified at 8 C.F.R. pt. 212, pt. 236; 45 C.F.R. pt. 410) ("New Regulations"), ER 34-177; and (ii) a final order denying the Government's motion to terminate the Agreement. Plaintiffs agree with the Government's statement of the statutory basis for this Court's jurisdiction. Plaintiffs agree with the Government's statement regarding the date of the orders on appeal and the timeliness of filing its notice of appeal.

## QUESTIONS PRESENTED FOR REVIEW

1. Was the district court correct in holding that the New Regulations are inconsistent with the Agreement?

2. Did the district court abuse its discretion in denying the Government's motion to terminate the Agreement pursuant to Federal Rule of Civil Procedure 60(b), because the Government failed to show either substantial compliance or changed factual or legal circumstances such that termination serves the public interest?

## STATEMENT OF THE CASE

On appeal, the Government—again—seeks to "light a match" to the *Flores*

Agreement, a class-wide settlement that prescribes minimum standards for the detention, housing, and release of immigrant and asylum-seeking minors civilly detained under the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* ("INA").

### A. The 1997 Agreement

This case was filed in the U.S. District Court for the Central District of California over thirty years ago. Following decisions by this Court and the Supreme Court,[1] the Government voluntarily entered into the Agreement, which the district court approved on January 28, 1997. ER 227-70.

The Agreement protects all minors in immigration-related detention, whether they are taken into custody alone or in the company of parents or other relatives. *Flores v. Lynch*, 828 F.3d 898, 905-07 (9th Cir. 2016) ("*Flores I*").[2] The

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[1] Opinions in this case preceding the Agreement include *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991) (en banc); and *Reno v. Flores*, 507 U.S. 292 (1993). This Court's recent opinions involving the Agreement are *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) ("*Flores I*"); *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) ("*Flores II*"); and *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019) ("*Flores III*").

[2] In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) ("HSA"), Congress dissolved the Immigration and Naturalization Service ("INS") and transferred most of its functions to the Department of Homeland Security ("DHS"). Congress directed, however, that the Office of Refugee Resettlement of the Department of Health and Human Services ("ORR") should care for unaccompanied minors detained pursuant to the INA. 6 U.S.C § 279.

Congress included a savings clause in the HSA that transferred all of INS's legal obligations—including those of the Agreement—to the Government as well. 6 U.S.C. § 552(a)(1) (incorporated by reference into 6 U.S.C. § 279(f)(2)).

In both the HSA and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008)

Agreement obliges the Government to pursue a "general policy favoring release" of children unless continued detention is "required either to secure [their] timely appearance . . . or to ensure the minor's safety or that of others." ER 241-42 ¶ 14.[3]

The Agreement requires the Office of Refugee Resettlement of the Department of Health and Human Services ("ORR") and the Department of Homeland Security ("DHS") to house the general population of class members in non-secure facilities holding a state license to care for dependent, as opposed to delinquent, minors. ER 236-37 ¶ 6; ER 244-46 ¶¶ 19, 21. Licensed programs must also meet the standards set forth in Exhibit 1 of the Agreement, which affords children basic rights, including to reasonable privacy, adequate food, and medical care. ER 236-37 ¶ 6, 255-58.

The Agreement also contains rulemaking and "sunset" provisions. The rulemaking clause allows the Government to promulgate regulations that "implement" the Agreement but provides that any such regulations "*shall not be inconsistent* with the terms of this Agreement." ER 238 ¶ 9 (emphasis added). The sunset provision, Agreement ¶ 40 as modified, provides that the Agreement sunsets "45 days following the Government's publication of final regulations implementing this Agreement." ER 223.

### B. Aborted rulemaking

In 1998, the Government first proposed regulations that would purportedly implement and, *a fortiori*, sunset the Agreement. *See* Processing, Detention, and

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("TVPRA"), Congress preserved the Agreement as a binding consent decree. *Flores II*, 862 F.3d at 870-71, 871 n.7.

[3] Agreement ¶ 24A requires the Government to present its evidence for continuing to detain a child on account of flight-risk or dangerousness for review by an immigration judge during a bond hearing. ER 246; *see generally Flores II*, 862 F.3d at 881.

Release of Juveniles, 63 Fed. Reg. 39,759 (July 24, 1998) (to be codified at 8 C.F.R. pt. 236), Supplemental Excerpts of Record ("SER") at 254-66. For reasons known only to the Government, "[o]ver the subsequent years, that proposed rule was not finalized." ER 41.

In 2002, the Government again published proposed rules. Processing, Detention, and Release of Juveniles, 67 Fed. Reg. 1670 (Jan. 14, 2002) (to be codified at 8 C.F.R. pt. 236), SER 267-74. Again, the Government "abandoned" its efforts to complete rulemaking. ER 41.

### C. Enforcement litigation

In 2014, Plaintiffs moved to enforce the Agreement against the Government's systematic violations. *See Flores v. Johnson*, 212 F. Supp. 3d 864, 869 (C.D. Cal. 2015), SER 68. DHS unilaterally decided that the Agreement afforded accompanied children in its custody no protection against prolonged, secure confinement, such that it could lawfully detain them in secure, unlicensed facilities for as long as it took to remove them. *Id.* at 869, 886.

Plaintiffs moved to enforce the Agreement on the ground that its plain text vests all children, accompanied or not, with identical rights to prompt release and licensed, non-secure placement. *Id.* at 869. The Government responded by filing the first of several "alternative" motions to modify the Agreement. These motions mainly sought leave to detain accompanied children indefinitely in secure, unlicensed "family" detention centers. *Id.* at 883-87. The district court held DHS in breach of the Agreement and that neither a change in law nor facts warranted modifying the Agreement. *Id.* at 886-87. This Court affirmed in all pertinent respects, holding that the Agreement "unambiguously applies to accompanied minors" and that the Agreement anticipated and accommodated an "influx," such that an increase in the number of class members did not warrant equitable

modification of the Agreement. *Flores I*, 828 F.3d at 908-10.

Next, ORR, ignoring Agreement ¶ 24A, also began refusing to submit its grounds for detaining unaccompanied children on account of dangerousness for an immigration judge's review. Plaintiffs again moved to enforce. The district court rejected the Government's argument that the Homeland Security Act ("HSA") and the Trafficking Victims Protection Reauthorization Act ("TVPRA") had superseded the Agreement's hearing requirement and ordered ORR to comply with ¶ 24A. *Flores v. Lynch*, 392 F. Supp. 3d 1144, 1148-51 (C.D. Cal. 2017), SER 94-98. This Court affirmed, holding that nothing in the HSA or the TVPRA excuses ORR from complying with ¶ 24A. *Flores v. Sessions*, 862 F.3d 863, 881 (9th Cir. 2017) ("*Flores II*").[4]

Again in 2018, the Government applied *ex parte* to strip accompanied minors of their protections under the Agreement. The district court again rejected the Government's argument that the Agreement does not apply to accompanied minors and denied its attempt to modify the Agreement. *Flores v. Sessions*, No. 85-cv-4544, 2018 WL 4945000, at *4-5 (C.D. Cal. July 9, 2018).

Subsequently, Plaintiffs were required to seek enforcement of Agreement ¶ 12A when the Government began denying children "safe and sanitary" conditions in Border Patrol facilities. *See Flores v. Barr*, 934 F.3d 910, 912-13 (9th Cir. 2019) ("*Flores III*"). After an evidentiary hearing, the district court found that the Government was failing to provide soap, towels, showers, dry clothing, and toothbrushes to children and was depriving them of adequate sleep. *Id.* at 913-14. This Court held that denying children such basic conditions was a breach of

[4] None of these holdings has stopped the Government from continuing to argue that the Agreement is superseded by the HSA and the TVPRA. *See Flores v. Sessions*, No. 85-cv-4544, 2018 WL 10162328, at *5 (C.D. Cal. July 30, 2018).

Agreement ¶ 12A. *Id.* at 915-16.

### D. The New Regulations

In September 2018, the Government again published proposed rules. ER 4. On November 2, 2018, Plaintiffs moved the district court to declare the Government in anticipatory breach of the Agreement and asked that it enjoin the Government from implementing substantially similar final regulations. ER 4. Plaintiffs argued that the proposed rules were conspicuously inconsistent with the Agreement and the Government's implementing any final regulations based thereon would constitute yet another breach of the Agreement.

The district court deferred ruling on Plaintiffs' motion pending the Government publishing the New Regulations. SER 150-51. The district court directed the parties to file supplemental briefs addressing whether the New Regulations were consistent with the Agreement. *Id.*

On August 23, 2019, the Government published the New Regulations, which, like the proposed version, were markedly inconsistent with the Agreement in myriad ways. ER 5, 7-8; ER 26; *see also* SER 159-77 (chart summarizing New Regulations' conflicts with Agreement).

On August 30, 2019, the Government filed a "notice of termination" declaring the Agreement over and a motion "in the alternative" asking the district court to terminate the Agreement under Federal Rule of Civil Procedure 60(b), should it find the New Regulations inconsistent with, and therefore, insufficient to sunset, the Agreement. ER 5, 20; SER 214-20. This was the Government's third attempt at using Rule 60(b) to free itself from the Agreement, but its first seeking to end the Agreement *in toto*, rather than modify it.[5]

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[5] The Government's prior unsuccessful attempts principally sought leave to detain *accompanied* class members—*i.e.*, those apprehended in family units—indefinitely

### E. The district court's September 27, 2019 ruling

On September 27, 2019, the district court granted Plaintiffs' motion to enforce and denied the Government's motion to terminate. ER 4-27.

In ruling on Plaintiffs' motion, the district court identified "myriad relevant and substantive differences" between the Agreement and the New Regulations. ER 21. The court held the New Regulations inconsistent with the Agreement, and accordingly, insufficient to terminate the Agreement under the modified sunset clause. ER 7-20.

Turning to the Government's Rule 60(b) motion, the district court held, *inter alia*, that it "constitute[d] yet another in a long line of not so thinly-veiled motions for reconsideration of prior Orders rejecting similar arguments," ER 22, and that, in any event, "Defendants continue[d] to rely on 'dubious' and 'unconvincing' logic and statistics" to support termination, ER 23.

The court enjoined the New Regulations, holding that their conflicts with the Agreement were so many that "[i]t would be untenable to require DHS and HHS employees to parse through pieces of regulations disembodied from their animating purpose" in an effort to identify parts of the New Regulations that might be implemented despite the Agreement's remaining in force. ER 26.[6] This appeal followed.

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in unlicensed family detention facilities. *See* ER 22; *Flores I*, 828 F.3d at 909-10 (affirming district court's decision declining to modify on account of changes in fact and law); *Flores v. Sessions*, 2018 WL 4945000, at *1-2 (denying *ex parte* application to permit indefinite detention of minors in unlicensed family detention facilities).

[6] The court invited the Government to confer with Plaintiffs in an effort to carve out from the injunction aspects of the New Regulations the Agreement does not address, which the Government would then be free to implement. ER 27, n.17. The Government declined to identify or propose any such carve-outs. SER 250.

## SUMMARY OF THE ARGUMENT

For twenty-three years, the Agreement has protected children from unnecessary detention, guarded their right to release to parents and other qualified custodians, and obliged the Government to observe minimum standards of care for children in its custody. The Agreement was to remain in effect until the Government "publish[ed] the relevant and substantive terms of this Agreement as a Service regulation." ER 238 ¶ 9. The Agreement also required that "[t]he final regulations *shall not be inconsistent* with the terms of this Agreement." ER 238 ¶ 9 (emphasis added). In December 2001, the parties further stipulated that the Agreement would remain binding for 45 days following the Government's publishing final regulations that "implement" the Agreement. ER 223.

The first issue for this Court is whether the New Regulations implement and are consistent with the Agreement. They are not. As the district court correctly held, the New Regulations are insufficient to sunset the Agreement because they would permit the Government to detain children longer and under harsher conditions than the Agreement allows, eviscerate their right to a neutral review of whether they are eligible for release, deny accompanied children release to entire categories of qualified custodians, and gut state licensing and oversight of children's detention centers.[7]

The second issue for this Court is whether the district court abused its discretion in denying the Government's latest Rule 60(b) motion—this time seeking to end the Agreement entirely—because the Government failed to meet its burden to demonstrate substantial compliance with the Agreement or changed circumstances warranting termination in the public interest. As the district court

[7] The New Regulations' conflicts with the Agreement discussed in the text, as well as others too numerous to address individually, are collected in the chart appearing at SER 159-77.

made clear, the numerous conflicts between the Agreement and the New Regulations, coupled with the Government's record of violations, foreclose finding that the Government has substantially complied with the Agreement.

As to changed circumstances, the *only* new "changed circumstance" the Government argued was their having published the New Regulations. The argument that, in issuing regulations, the Government may unilaterally manufacture a change in legal circumstances sufficient to terminate the Agreement turns Rule 60(b) on its head.

All other changed circumstances the Government argued in support of equitable termination—*e.g.*, enactment of the HSA and TVPRA and growth in the number of families arriving at the southern border, which the Government believes justifies detaining children to deter other prospective immigrants—were recycled contentions the Government raised (or could have raised) during prior iterations of its Rule 60(b) motion, and which this Court has previously rejected.[8] *Flores I*, 828 F.3d at 909-10; *Flores II*, 862 F.3d at 874-78.

Recycled or not, protracting children's detention in secure, unlicensed facilities to deter others is unlawful. And in all events, the Government offered *no* evidence that terminating the Agreement would actually reduce the number of children arriving at the southern border. To the contrary, all available empirical data indicate it would not.

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[8] *Compare Flores I*, 828 F.3d at 909 ("The government first argues that the Settlement should be modified because of the surge in family units crossing the Southwest border. . . . The government also argues that the law has changed substantially since the Settlement was approved."), *with* Appellants' Br. 26 (Agreement "prevent[s] the Executive from . . . addressing this unprecedented surge of family migration . . ."*)* *and* 22 ("Termination is warranted because the statutory law governing immigration and alien minors has changed significantly since the Agreement.").

The district court in no way abused its discretion in concluding that "an increase in numbers of families detained at the southern border does not justify, much less require, dissolution of the parties' bargained-for agreement to 'treat[] all minors in [Defendants'] custody with dignity, respect, and special concern for their particular vulnerability as minors.'" ER 23 (quoting Agreement ¶ 11).

Lastly, the Government's appeals to executive power and belated complaints about the certified class are meritless. The Government voluntarily entered into the Agreement, and continuing to protect vulnerable children to the full extent the Agreement provides plainly serves the public interest. This Court should affirm.

## STANDARDS OF REVIEW

This Court reviews the trial court's legal conclusions for granting Plaintiffs' motion to enforce *de novo*. *Flores I*, 828 F.3d at 905. A "motion to enforce [a] settlement agreement essentially is an action to specifically enforce a contract." *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989). "[F]actual findings supporting the decision to grant [an] injunction [are] reviewed for clear error." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). This Court should reverse only if the district court "base[d] its decision on an erroneous legal standard or on clearly erroneous findings of fact." *PlayMakers LLC v. ESPN, Inc.*, 376 F.3d 894, 896 (9th Cir. 2004).

The Court reviews the district court's denial of the Government's Rule 60(b) motion for abuse of discretion. *Flores I*, 828 F.3d at 905. "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (quoting *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)). "A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the

record.'" *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011) (quoting *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010)). "Deference to the district court's use of discretion is heightened where [as here,] the court has been overseeing complex institutional reform litigation for a long period of time." *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004).

## ARGUMENT

### I. THE NEW REGULATIONS ARE INCONSISTENT WITH THE AGREEMENT AND FAIL TO TRIGGER THE AGREEMENT'S SUNSET CLAUSE.

The district court correctly enjoined the New Regulations because they would eviscerate minimum protections for children in immigration-related custody.

"The Settlement is a consent decree, which, 'like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.'" *Flores I*, 828 F.3d at 905 (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005)). The district court was therefore called upon to interpret the Agreement according to its "plain language," *Nodine v. Shiley Inc.*, 240 F.3d 1149, 1154 (9th Cir. 2001), construe it "as a whole and every part interpreted with reference to the whole," *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989), and prefer "reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory," *id*. Similarly, this Court's "task is straightforward—[it] must interpret the Settlement" by "[a]pplying familiar principles of contract interpretation . . . ." *Flores I*, 828 F.3d at 901.

Agreement ¶ 9 provides for the publication of "the relevant and substantive terms of this Agreement as a Service regulation," and requires that "[t]he final regulations *shall not be inconsistent* with the terms of this Agreement." ER 238

¶ 9 (emphasis added). The parties agreed that the Agreement would remain binding for forty-five days following "defendants' publication of final regulations implementing the Agreement." ER 223.

The New Regulations, however, fail to "implement" the Agreement because they are inconsistent with its "relevant and substantive" terms. ER 238 ¶ 9.[9] The New Regulations violate the Agreement because they (a) authorize indefinite detention of immigrant children; (b) eliminate entire categories of custodians to whom children should be released; (c) permit children to be detained in unlicensed

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[9] The Government suggests that promulgating the New Regulations triggers the Agreement's sunset clause, Agreement ¶ 40 as modified, regardless of conflicts with the Agreement. Appellants' Br. 23. That argument fails.

First, accepting the Government's argument would improperly nullify the explicit requirement of Agreement ¶ 9 that the Government's New Regulations "implement" and not be "inconsistent" with the Agreement. *Kennewick Irrigation Dist.*, 880 F.2d at 1032 (interpretations "that are unreasonable, or that would make the contract illusory" disfavored) (citation omitted).

Second, Agreement ¶ 40 itself requires that the Government's New Regulations "implement" the Agreement. To "'implement' means[ t]o 'carry out, accomplish; *esp.*: to give practical effect to and *ensure of actual fulfillment* by concrete measure' [and] . . . '[t]o complete, perform, carry into effect (a contract, agreement, etc.); *to fulfill (an engagement or promise*).'" *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016) (quoting *Implement*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) & *Implement*, *Oxford English Dictionary*, www.oed.com) (emphasis added). Regulations that strip class members of fundamental protections conferred by the Agreement do not "implement" it.

The district court held correctly in both regards. *See* ER 18 (The Government's argument "reads out portions of Paragraph 9."); ER 20 (Read together, Agreement ¶ 9 and amended Agreement ¶ 40 provide "that only final regulations that 'implement[]' the *Flores* Agreement, incorporate 'the relevant and substantive terms,' and are consistent with the terms thereof may formally terminate this consent decree.").

facilities that have no independent oversight; (d) permit children to be detained in secure detention centers; (e) eliminate children's right to be heard by a neutral arbiter as to whether they are dangerous; and (f) replace the Agreement's mandatory protections with aspirational declarations aimed at evading enforcement. Overall, the New Regulations would prolong children's detention in secure, unlicensed facilities contrary to the Agreement's fundamental purpose: minimizing children's detention and the harm detention causes them.

### A. The New Regulations would prolong children's detention in violation of the Agreement's requirement of expeditious release.

Agreement ¶ 14 generally obliges the Government to "release a minor from its custody without unnecessary delay. . . ." ER 241-42 ¶ 14. The Agreement further requires the Government to "make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14." ER 244 ¶ 18.

If more than one potential custodian is available, the Government must generally release a child first to a parent, then to a legal guardian, adult relative (sibling, aunt, uncle, or grandparent), an unrelated adult or entity designated by the minor's parent, a licensed program, and finally, if there is no likely alternative to long-term detention, a reputable unrelated adult. ER 241-42 ¶ 14A-F.

This Court has held that the protections of the Agreement extend to *all* children, both accompanied and unaccompanied, *Flores I*, 828 F.3d at 906-08, and regardless of whether the Government places them in "expedited" or non-expedited "240" removal proceedings, *Flores III*, 934 F.3d at 916-17.[10]

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[10] The expedited removal system involves a streamlined removal process for individuals apprehended at a point of inspection or near the border region. *See* 8 U.S.C. § 1225(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(iii); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). At the outset of the

1. The New Regulations would authorize the indefinite detention of accompanied children in expedited removal proceedings.

New 8 C.F.R. § 236.3(j)(2) creates a legal scheme where detention is the norm, with only extremely narrow exceptions. The district court held new 8 C.F.R. § 236.3(j)(2) "inconsistent with one of the primary goals of the *Flores* Agreement, which is to instate a general policy favoring release and expeditiously place minors 'in the least restrictive setting appropriate to the minor's age and special needs.'" ER 10-11 (citing Agreement ¶¶ 11, 12, 14). The district court is correct: the New Regulations jettison the Government's duty to release accompanied children without unnecessary delay and instead architect a system of indefinite detention.

Rather than require their release, except in cases of dangerousness or flight-risk, new 8 C.F.R. § 236.3(j)(2) provides that release or "parole" of a child "in expedited removal proceedings (including if he or she is awaiting a credible fear determination)" "is governed by § 235.3(b)(2)(iii) or (b)(4)(ii) of this chapter, as applicable."

8 C.F.R. § 235.3(b)(2)(iii) regulates the "[d]etention and parole of alien[s] in expedited removal," and provides that such persons:

> . . . *shall be detained* pending determination [of their right to admission] and removal, except that parole of such alien[s] . . . may be permitted *only* when the Attorney General determines, in the exercise of discretion, that parole is required to meet a *medical emergency* or is

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expedited removal process, if the individual indicates either an intention to apply for asylum or any fear of return to their country of origin, the officer must refer the individual for a "credible fear interview" (sometimes referred to as a "CFI") with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4). If the asylum officer determines that an applicant satisfies the credible fear standard at 8 U.S.C. § 1225(b)(1)(B)(v), the applicant is taken out of the expedited removal system altogether and placed into standard removal proceedings under 8 U.S.C. § 1229a, often referred to as "240" removal proceedings (referring to INA § 240).

> *necessary for a legitimate law enforcement objective*.

*Id.* (emphasis added).

8 C.F.R. § 235.3(b)(4)(ii) posits a similar categorical preference for detaining children pending a determination that they have a "credible fear" of persecution should they be returned to their country of origin:

> Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien *shall be detained*. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted *only* when the Attorney General determines, in the exercise of discretion, that parole is required to meet *a medical emergency or is necessary for a legitimate law enforcement objective*.

*Id.* (emphasis added).[11]

The New Regulations create very narrow exceptions for children to be released from detention and therefore undermine the right of children who are neither dangerous nor flight-risks to release without unnecessary delay. Such a result is wholly inconsistent with this Court's holding that the Agreement's release provisions apply to all children, regardless of DHS's having placed them in expedited removal proceedings.

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[11] Children and their parents who pass a credible fear interview may be considered for discretionary parole pending disposition of their asylum applications, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 323-24 (D.D.C. 2018), but that possibility does nothing for class members whose fear of persecution the Government deems not credible, for class members who are asylum ineligible due to broad ineligibility requirements and must apply for withholding of removal or relief under the Convention Against Torture, or for class members who assert non-asylum grounds, such as special immigrant juvenile status, T visas for trafficking victims and U visas for crime victims, for remaining in the United States.

2. The New Regulations would eliminate entire categories of custodians to whom DHS must generally release children it places in "240" removal proceedings.

As for children who are referred with their parents to 240 removal proceedings, the New Regulations would greatly shrink the pool of custodians to whom the Government must release.

New 8 C.F.R. § 236.3(j)(5)(i) provides that release to any relative other than a parent or guardian "is within the unreviewable discretion of DHS."

Under the Agreement, in contrast, DHS must release to qualified adult siblings, aunts, uncles or grandparents unless a child is dangerous or a flight-risk. ER 241-42 ¶ 14. The Agreement grants DHS *no* discretion to detain children who are neither dangerous nor flight-risks in lieu of releasing them to licensed youth shelters or to reputable unrelated adults or entities designated by a minor's parent. The Agreement allows the Government to refuse release as a matter of discretion *only* to unrelated adults lacking a parent's designation. ER 242 ¶ 14A-F. The New Regulations' elimination of entire categories of custodians to whom the Government could release children in 240 proceedings would clearly result in many such children being detained far longer than the Agreement allows.[12]

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[12] The Government argues that the New Regulations would result in DHS's detaining children only in the "narrow circumstance . . . where a child is in custody with a parent and the parent seeks release of his or her child to an adult non-relative." Appellants' Br. 50. But whether the New Regulations would result in the indefinite detention of the few or the many is immaterial: the Agreement nowhere conditions a class member's right to release on there being a critical mass of other children who also wish to avail themselves of that right.

In any event, absolutely *no* evidence supports the Government's characterizing such circumstances as "narrow." The Government reported that thousands of family units were encountered at the southwest border in FY 2019. Appellants' Br. 7. Without asking them, there is no way to know how many of these families

In sum, the Government places families in expedited removal proceedings, thus rendering them ineligible for release except when parole is "required to meet a medical emergency or is necessary for a legitimate law enforcement objective." *See* 8 C.F.R. § 235.3(b)(2)(iii). In effect, new 8 C.F.R. § 212.5(b)(3)(i) and (ii) would cede DHS discretion to detain the vast majority of accompanied children for the duration of removal proceedings in violation of Agreement ¶ 14. And even as to children in 240 proceedings, the New Regulations' omission of entire categories of custodians to whom DHS must generally release children departs dramatically from the Agreement's release provisions.

As the district court held, "[t]hese omissions from the regulation are unsurprising, as DHS candidly admits that its New Regulations are intended to allow the agency to 'detain the family unit together . . . during their immigration proceedings.'" ER 10 (citing 84 Fed. Reg. at 44,403).

The intent and function of the New Regulations is to consign accompanied children to secure, unlicensed detention facilities for the duration of their removal proceedings—however long that may take.[13] The district court correctly held the

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would wish their children released to adult non-relatives, licensed programs, or other individuals or entities available to care for their children.

[13] The Government admits the New Regulations will reduce children's right to release to that of adults undergoing expedited removal (who generally have no *right* to release at all). *See* Appellants' Br. 50 ("The new rules clarify that the parole standard that applies in this situation is the same for the child as it is for his or her accompanying parent or legal guardian."); *see generally Flores III*, 934 F.3d at 916-17 (comparing children's and adults' differing eligibility for release pending expedited removal).

The Government seeks to cloak its prolonging children's detention as a wholly humanitarian measure: that is, a means to keep children and parents together. *See* Appellants' Br. 44 ("The rules protect children and address the interest in family unity" by providing that "families can remain in custody together . . . during the

New Regulations inconsistent with the Agreement.

### B. The New Regulations would scuttle accompanied children's right to placement in properly licensed and monitored facilities.

The district court next found the New Regulations inconsistent with the Agreement because they would eliminate a core requirement: *i.e.*, that facilities in which DHS detains children be state-licensed and non-secure. ER 12.

With narrow exceptions, the Agreement grants *all* children in the Government's custody the right to prompt placement in a non-secure, state-licensed dependent care facility. ER 236-37 ¶ 6, 239-40 ¶ 12A, 244 ¶ 19, 255.[14] This ensures that the Government's detention facilities meet accepted child welfare standards and that state child welfare agencies monitor the conditions and treatment children experience during immigration-related custody. *See generally* SER 207 ¶ 6 (discussing importance of state licensure framework to protecting children's safety).[15]

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pendency of their immigration proceedings . . . ."). The Government's professing a "legitimate interest in not separating families," Appellants' Br. 51, is difficult to square with its recent history of separating "thousands" of families, *see Ms. L. v. U.S. Immigration & Customs Enf't*, 330 F.R.D. 284, 286-89 (S.D. Cal. 2019).

In any event, nothing in the Agreement or the court orders enforcing it stops parents from waiving their children's right to release to adult relatives, non-relatives, or a licensed placement should they wish to remain together. That is a decision for each family to make—not the Government. The New Regulations, in contrast, would impose "family unity" whether parents like it or not.

[14] As the district court recognized, children's general right to licensed placement is permanent: that is, it survives the Agreement's terminating in all other respects. ER 12 (citing, *inter alia*, Agreement ¶ 9 and ¶ 40).

[15] The Government has failed on multiple earlier motions to excuse confining children in unlicensed family detention centers via various theories: *e.g.*, that the Agreement does not protect accompanied children, *see Flores I*, 828 F.3d at 906-07; that secure family detention facilities are not secure, *Flores v. Johnson*, 212 F.

In new 8 C.F.R. § 236.3(b)(9), however, the Government twists the Agreement's guarantee of "licensed placement" to defeat this protection:

> Licensed facility means an ICE detention facility that is licensed by the state, county, or municipality in which it is located, *if such a licensing process exists*. . . . If a licensing process for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS *shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE*.

(emphasis added).

As the district court discerned, new 8 C.F.R. § 236.3(b)(9) would allow DHS to place children in facilities that fail to meet state child welfare standards and are not monitored by state licensing authorities. ER 12. Instead these facilities would be watched over by unidentified, ICE-selected entities for compliance with unidentified, ICE-decreed standards. ER 12.

The Government insists that the New Regulations "fully defer[] to states in licensing family residential centers" except where "state licensing schemes . . . do not exist." Appellants' Br. 47 (emphasis omitted). However, the Government's self-monitoring of self-selected standards is wholly inconsistent with the purpose of the Agreement's licensing requirement: ensuring that the Government's facilities meet accepted child welfare standards and that qualified child welfare agencies regularly, comprehensively and *independently* monitor the treatment and

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Supp. 3d at 877-80; and that the Agreement's licensing requirement does not apply if a state simply will not license facilities in which children have regular contact with unrelated adults, *id*. at 877-78.

The Government resurrects that argument here. Appellants' Br. 47 ("demanding state licensing schemes that do not exist cannot be squared with the flexible approach to long-term consent decrees . . ."). The Government failed on appeal from the first order rejecting that argument, *Flores I*, 828 F.3d 898, and its position gains nothing from repetition here.

conditions children experience in those facilities. ER 12; *see also Flores v. Johnson*, 212 F. Supp. 3d at 879 (noting the Government's agreement that independent "oversight was the animating concern of the Agreement's licensing requirement").[16]

The Government has previously conceded that the Agreement's licensing requirement "make[s] it impossible for ICE to house families at the family residential centers." *Flores v. Johnson*, 212 F. Supp. 3d at 877 n.8.[17] But the Government determines whether any given facility is eligible for licenses by condoning conditions in them that preclude state licensing. As the district court previously held, "The fact that the family residential centers cannot be licensed by an appropriate state agency simply means that, under the Agreement, class members cannot be housed in these facilities except as permitted by the Agreement." *Id.* at 877.[18]

The district court previously held that exempting family detention centers from the Agreement's licensing requirement would condone a "fundamental and material breach of the parties' Agreement." *Flores v. Sessions*, 2018 WL 4945000, at *2. The New Regulations' authorizing just such a breach is plainly inconsistent with the Agreement.

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[16] The Government also suggests that the licensing requirement improperly grants states authority "to effectuate a state ban on federal immigration custody." Appellants' Br. 48. The Government itself, however, agreed to such state oversight when it entered the Agreement. *See* Appellants' Br. 49.

[17] Again, nothing stops families from waiving their children's right to licensed placement if they prefer to remain detained together in an unlicensed facility.

[18] The evidence before the district court demonstrated that family detention facilities are also highly secure. *See* SER 178-86; SER 187-203.

### C. The New Regulations would scrap the Agreement's requirement that licensed facilities be non-secure.

The district court next held the New Regulations inconsistent with the Agreement because new 8 C.F.R § 236.3(b)(11) would classify facilities as "non-secure" so disingenuously as to eviscerate the Agreement's requirement that children be placed in non-secure facilities. ER 13.

Agreement ¶ 6 requires that, except in specified circumstances, the Government place children in facilities that are "non-secure as required under state law." ER 237 ¶ 6. New 8 C.F.R. § 236.3(b)(11), however, defines a "non-secure" facility as one—

> that meets the definition of non-secure under state law in the state in which the facility is located. If no such definition of non-secure exists under state law, a DHS facility shall be deemed non-secure if egress from a portion of the facility's building is not prohibited through internal locks within the building or exterior locks and egress from the facility's premises is not prohibited through secure fencing around the perimeter of the building.

Under this definition, a facility may prohibit egress from its detention area through internal locks, yet still be "non-secure" so long as one part—a reception area on the public side of a sally gate, for example—is unlocked.[19]

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[19] The New Regulations' definition of "non-secure" looks like—but is not—the inverse of Pennsylvania's definition of a *secure* facility suitable for *delinquent* juveniles. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,497 n.14 (Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212, pt. 236; 45 C.F.R. pt. 410), SER 292. Pennsylvania's statute provides:

> *Secure care* — Care provided in a 24-hour living setting to one or more children who are delinquent or alleged delinquent, from which voluntary egress is prohibited through one of the following mechanisms:
> (i) Egress from the building, or a portion of the building, is prohibited through internal locks within the building or exterior locks.

The Government admits the New Regulations would free them to confine children in its existing family detention centers, including Karnes, ER 85 ("DHS maintains that its FRCs have been and continue to be nonsecure . . . ."), notwithstanding that the district court specifically found Karnes "a secure facility." ER 13; *see also Flores v. Johnson*, 212 F. Supp. 3d at 879-80 (discussing undisputed evidence that Karnes is secure).[20]

In sum, the New Regulations would normalize the indefinite detention of children in secure and unlicensed facilities, a violation of their rights under the Agreement (1) to prompt release *and* placement in (2) licensed and (3) non-secure facilities. ER 236-37 ¶ 6, 244 ¶ 19, 255. The New Regulations "cannot be reasonably characterized as . . . 'implementing this Agreement.'" ER 14.

### D. The New Regulations would end children's right to neutral and detached review of whether they may be detained on account of dangerousness or flight-risk.

In 2017, the district court held that Agreement ¶ 24A requires ORR to afford

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> (ii) Egress from the premises is prohibited through secure fencing around the perimeter of the building.

55 Pa. Code § 3800.5. The New Regulations turn Pennsylvania's definition on its head. Under the Pennsylvania definition, if any portion of a facility is locked, the facility is secure. In contrast, the New Regulations would define a facility as non-secure if any portion is unlocked.

[20] Nor does a state's having omitted to define "non-secure" save the New Regulations. The Agreement requires non-secure placement "*as required* under state law," not "as defined" by state law. ER 237 ¶ 6 (emphasis added). If state law posits no definition of "non-secure," then the common definition of the term applies. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) ("A primary rule of interpretation is that 'the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.'" (quoting 4 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 618 (W. Jaeger 3d ed. 1961))).

any child it refuses to release on account of flight-risk or dangerousness a hearing at which a neutral and detached decisionmaker—an immigration judge—reviews the justification for continued confinement. *Flores v. Lynch*, 392 F. Supp. 3d at 1146-47. This Court affirmed, declaring "[t]he bond hearing under Paragraph 24A is a fundamental protection guaranteed to unaccompanied minors under the *Flores* Settlement." *Flores II*, 862 F.3d at 867. The New Regulations eviscerate this right in three ways.

First, the New Regulations "shift such determinations away from independent immigration judges," and instead commit them to HHS employees of unspecified training and experience. ER 16. The Government's retort—that the "rule reasonably allocated responsibility for these hearings to HHS," Appellants' Br. 38—both disregards the plain language of Agreement ¶ 24A, which expressly requires hearings before "an immigration judge," and deviates from a well-established feature of immigration practice the parties plainly incorporated into the Agreement. *Flores II*, 862 F.3d at 877 n.15 ("Review *by a division of the DOJ* of detention decisions made by other Government agencies is thus a well-established feature of the [immigration] statutory framework.") (emphasis added).

Second, the district court held new 45 C.F.R. § 410.810(a) deficient because it conditions children's right to a hearing on their affirmatively requesting one. The New Regulations would "transform the bond redetermination hearing into an opt-in rather than opt-out right." ER 16.

The Government's denying any "practical difference between opting in and opting out" is unavailing. Appellants' Br. 39. The Government's argument first fails as a matter of law. *Flores II*, 862 F.3d at 879 ("[E]ven if the government were correct that the determination by an immigration judge would have little practical effect, it would not be excused from nonetheless providing bond hearings. The *Flores* Settlement is the reflection of both parties' bargained-for positions.").

It fails for practical reasons as well. There is an obvious difference between providing class members—vulnerable, non-English-speaking children, who have little or no understanding of U.S. immigration law—hearings as a matter of course and doing so only if a child has the wherewithal to request one. The New Regulations' converting an "opt-out" to an "opt-in" procedure would, as a practical matter, seriously undercut children's right to a hearing, if not eliminate it altogether.[21]

Finally, new 8 C.F.R. § 236.3(m) would strip children the Government places in expedited removal proceedings of their right to bond hearings entirely: it provides, "Minors in DHS custody who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determinations." The Agreement, in contrast, requires the Government to release class members in expedited removal proceedings just as it does children undergoing 240 proceedings. *Flores III*, 934 F.3d at 917.[22] As the district court noted, "DHS makes no effort to hide the fact that this revision is intended to prevent '[m]inors who are in expedited removal proceedings' from obtaining bond hearings." ER 17 n.14. The district court correctly held the New Regulations "patently irreconcilable" with ¶ 24A of the Agreement. ER 17 n.14.

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[21] The Government's speculation that class members may not want to be heard, Appellants' Br. 39, is specious. Nothing in Agreement ¶ 24A requires class members to have a hearing.

[22] Until the New Regulations, even the Government agreed that accompanied children were entitled to bond hearings despite DHS's having placed them in expedited removal. *Flores II*, 862 F.3d at 881 n.20 ("The government does not contest that accompanied minors remain entitled to bond hearings.").

### E. The New Regulations would replace the Agreement's mandatory protections with aspirational statements of doubtful enforceability.

The district court next found the New Regulations inconsistent with the Agreement because they repeatedly describe what the Government purports to do, instead of prescribing what it *must* do.

Statements that an agency "'will' take this, that, or the other action" are not enforceable "absent clear indication of binding commitment in the terms of the plan." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004); *Tin Cup, LLC v. U.S. Army Corps of Eng'rs*, 904 F.3d 1068, 1074 (9th Cir. 2018) ("The Supreme Court has distinguished descriptive 'will' statements from mandatory 'shall' statements."). The New Regulations contain no clear indication that their many descriptive statements create binding commitments.[23] The New Regulations thus contrive to abrogate children's protections under myriad provisions of the Agreement: *e.g.*, the right to expeditious processing;[24] the right to be held in "safe and sanitary" facilities;[25] and the right to release without unnecessary delay.[26]

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[23] The Government's litigation position that "there is such a commitment" and that it is required to follow its regulations, Appellant Br. 40 n.5, affords no comfort. *Cf. United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position.").

[24] *Compare* new 8 C.F.R. § 236.3(g)(2)(i) ("DHS will process the minor or UAC as expeditiously as possible"), *with* Agreement ¶ 12A, ER 239 (providing that the Government "shall expeditiously process the minor").

[25] *Compare* new 8 C.F.R. § 236.3(g)(2)(i) ("DHS will hold minors and UACs in facilities that are safe and sanitary"), *with* Agreement ¶ 12A, ER 239 (providing that the Government "shall hold minors in facilities that are safe and sanitary").

[26] *Compare* new 8 C.F.R. § 212.5(b)(3)(i) ("Minors may be released to a parent, legal guardian, or adult relative" under certain circumstances), *with* Agreement

The Government offers *no* authority for its argument that the New Regulations' use of the present tense creates enforceable rights, whereas saying what it *will* do using the future tense does not.[27] Appellants' Br. 40 n.5. Grammatically, that proposition makes no sense. More ominously, the Government fails to explain why the New Regulations so frequently describe what the Government does or will do, rather than forthrightly prescribing, as the Agreement does, what it "shall" do.

That the New Regulations contrive to eliminate the Agreement's mandatory protections is all the more apparent because the Government selectively employs the Agreement's mandatory "shall" when it wishes. *See, e.g.*, 8 C.F.R. § 236.3(i)(4)(xii) (children's "right to privacy . . . shall include . . . "); 45 C.F.R. § 410.201(e) (children in ORR custody "shall be separated from delinquent offenders").

Courts "presume that the use of 'different words in connection with the same subject' signifies that the drafter intended to convey different meanings by its disparate word choice." *AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm. Inc.*, 651 F.3d 980, 992 (9th Cir. 2011) (quoting *Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1250 (9th Cir. 2007)).

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¶ 14, ER 242 (providing that the Government "shall release a child from its custody without unnecessary delay").

[27] *Compare, e.g.*, new 45 C.F.R. § 410.201(f) ("ORR makes and records the prompt and continuous efforts on its part toward family reunification"), *with* Agreement ¶ 18, ER 244 (the Government "shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor").

Multiple other provisions also eliminate the Agreement's mandatory "shall" in favor of descriptive or aspirational declarations. *See* SER at 159-77 (compiling list of alterations).

The Government's use of the mandatory "shall" in provisions of its choosing exposes the remainder of its regulations as aspirational statements aimed not at implementing the Agreement, but at undermining the protections it confers on vulnerable children. *Tin Cup, LLC*, 904 F.3d at 1074 ("Had Congress intended to bind the Corps, it would have used the word 'shall.'").

## II. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING THE GOVERNMENT'S REPETITIOUS MOTION TO TERMINATE.

The district court also correctly denied the Government's latest attempt to evade its contractual obligations via appeal to equity.

To warrant termination of the Agreement pursuant to Rule 60(b), the Government was required to establish (1) that it has "substantially complied with the [Agreement]" or (2) "that facts or law have changed so that 'it is no longer equitable that the judgment should have prospective application.'" *Jeff D. v. Otter*, 643 F.3d at 281(quoting *Jeff D. v. Kempthorne*, 365 F.3d at 851).

The Government failed to establish either substantial compliance or changed factual or legal circumstances warranting equitable termination of the decree. The district court did not abuse its discretion in declining to terminate the Agreement.

### A. Both the New Regulations and the Government's history of violations foreclose termination on the basis of "substantial compliance."

Assessing the Government's compliance with the Agreement, the district court properly considered (1) "whether the larger purposes of the decree have been served"; and (2) the Government's "record of compliance." *See Jeff D. v. Otter*, 643 F.3d at 288.

The showing required of the Government is rigorous: if a settlement's objectives "have not been adequately served, the decree[] may not be vacated." *Id.* at 289. "[C]ourts don't release parties from a consent decree unless they have

substantially complied with *every one* of its provisions." *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016).

As the district court explained, "one of the primary goals of the *Flores* Agreement" was "to instate a general policy favoring release and expeditiously place minors 'in the least restrictive setting appropriate to the minor's age and special needs.'" ER 10-11 (citing Agreement ¶¶ 11, 12, 14). The district court correctly held that, "[g]iven the myriad relevant and substantive differences between the Agreement and the New Regulations' requirements," the Government has "'substantially . . . defeat[ed] the object which the parties intend to accomplish,' not substantially complied." ER 21-22 (quoting *Jeff D. v. Otter*, 643 F.3d at 283-84). Given the conspicuous conflicts between the Agreement and the New Regulations analyzed above, the district court acted well within its discretion in so holding.

The district court further held that "the history of this case is replete with findings of Defendants' non-compliance with the Agreement," and that "ongoing litigation in this case, more than 20 years after the Agreement was executed, evidence Defendants' lack of substantial compliance." ER 18, 22. The New Regulations aside, the Government's having repeatedly flaunted its obligations under the Agreement independently demonstrates that it has not substantially complied with its specific requirements.[28]

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[28] Since 2015, the Government's breaches of the Agreement have required Plaintiffs to prosecute numerous motions seeking to bring the Government into compliance. *See Flores I*, 828 F.3d at 905-08 (breach of the Agreement with respect to accompanied class members); *Flores II*, 862 F.3d at 867-80 (breach of the Agreement's provision requiring bond hearings); *Flores v. Sessions*, 2018 WL 10162328 (breach of, *inter alia*, the Agreement's provisions related to psychotropic medications and denial of licensed placement); *Flores III*, 934 F.3d at

The district court's assessment of the Government's record, based on its oversight of this litigation for an extended period of time, is entitled to heightened deference. *See Jeff D. v. Kempthorne*, 365 F.3d at 850. This Court should affirm.

### B. The Government has failed to carry its burden to show that continued application of the Agreement is detrimental to the public interest due to change in law or fact.

Nor did any change in law or fact require the district court to terminate the Agreement as a matter of equity.

Under Rule 60(b)(5), a court may modify or terminate a consent decree "if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992)). The Government "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383.

"When the basis for modification is a change in law, the moving party must establish that the provision it seeks to modify has become 'impermissible.'" *Flores I*, 828 F.3d at 909-10 (quoting *Rufo*, 502 U.S. at 388); *accord Flores II*, 862 F.3d at 874.[29] Because a consent decree can properly include "undertaking[s] to do more than the Constitution itself requires," the "proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo*, 502 U.S. at 389-91. Changes in law do not "automatically open[] the

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915-16 (breach of the Agreement's requirement to provide safe and sanitary conditions for children in Border Patrol custody).

[29] Although *Rufo* also contemplates the possibility of modification in circumstances when "the statutory or decisional law has changed to make legal what the decree was designed to prevent" or "the parties had based their agreement on a misunderstanding of the governing law," 502 U.S. at 388-90, Defendants have not argued that these circumstances exist in this case.

door for relitigation of the merits" of settlements, lest courts "undermine the finality of such agreements" and discourage settlement. *Id.* at 389.[30] Even if the moving party meets these standards, the court should consider whether the proposed modification is "suitably tailored to the changed circumstance." *Id.* at 383.

The district court correctly held that the Government "fail[ed] to carry [its] burden to show that continued application of the Agreement is neither equitable nor in the public interest due to 'a significant change in circumstances.'"[31] ER 21 (quoting *Flores I*, 828 F.3d at 909). Indeed, the Government failed to meet the requirements for equitable modification of the Agreement, much less its termination.

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[30] The Government's reliance on *Horne*, 557 U.S. 433, is generally misplaced. At issue in *Horne* was an injunction issued after trial, not a consent decree. *Id.* at 441-45. Modifying an injunction presents none of the concerns with discouraging settlement at issue in *Rufo*.

[31] Contrary to the Government's characterizations, *see* Appellants' Br. 33-34, the district court recognized that "[c]ourts take a 'flexible approach' to modifying consent decrees," but correctly noted that such an approach results in relief only "*when the circumstances warrant*." ER 23 (quoting *Horne*, 577 U.S. at 450); *see also Rufo*, 502 U.S. at 383. The district court then properly considered all the relevant factors and held that–

> Given the parties' bargained-for positions in the Agreement, the New Regulations' failure to implement the Agreement, *and* Defendants' repeatedly unavailing arguments about changes in law and fact, the termination of the Agreement and removal of critical protections promised to minors in DHS and HHS custody are not in the public interest.

ER 23 (emphasis added).

1. No change in law warrants equitable termination of the Agreement.

The Government first argues that "[t]ermination is warranted because the statutory law governing immigration and alien minors has changed significantly since the Agreement." Appellants' Br. 22 (citing the HSA and TVPRA). The Government has *twice* lost that selfsame argument before this Court, *Flores I*, 828 F.3d at 910, and *Flores II*, 862 F.3d at 881, and several more times in the district court.[32] Repetition does nothing to bolster the Government's argument. That neither the HSA nor the TVPRA warrant modifying the Agreement is the law of this case.[33]

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[32] *See Flores v. Johnson*, 212 F. Supp. 3d 864; *Flores v. Lynch*, 392 F. Supp. 3d at 1150; *Flores v. Sessions*, 2018 WL 10162328, at *5.

[33] The Government also resurrects its position that the Agreement "was never intended to cover accompanied minors," Appellants' Br. 23, which, as discussed above, this Court has also rejected. *Flores I*, 828 F.3d at 901; *Flores II*, 862 F.3d at 866 n.1 ("Last year, we held that the *Flores* Settlement applies to both accompanied and unaccompanied minors.").

Under the law of the case doctrine, this Court should not revisit this argument. Law of the case rules were developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE, § 4478 (2d ed. 2019). The doctrine "is similar to the issue preclusion prong of *res judicata* . . . [but] is concerned with the extent to which law applied in a decision at one stage of litigation becomes the governing principle in later stages of the same litigation." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *see generally Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 836 (C.D. Cal. 2007).

The Government has not previously argued that the HSA and TVPRA *wholly* supersede the Agreement, but they certainly could have, and it is too late to do so now. *Cf. Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from

The Government next argues that the New Regulations themselves constitute a "change in law" warranting termination. Appellants' Br. 23-26. The Government's logic—that a party may unilaterally change "the law" in breach of its agreement such that the agreement must yield to its breach—is novel, to say the least. The Government offers no authority for its circular proposition, and courts have predictably rejected analogous arguments. *See Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007) (holding that an agency cannot issue a regulation unilaterally "dictat[ing] the meaning of the decree to the court or reliev[ing] itself of its obligations under the decree"); *Berger v. Heckler*, 771 F.2d 1556, 1578 (2d Cir. 1985) (affirming order requiring agency to promulgate new regulations when "the regulations promulgated subsequent to the decree did not comport with the decree"); *Ferrell v. Pierce*, 560 F. Supp. 1344, 1360, 1372 (N.D. Ill. 1983), *aff'd*, 743 F.2d 454 (7th Cir. 1984) (rejecting change of law argument and enjoining proposed agency regulations inconsistent with consent decree); *cf. Rufo*, 502 U.S at 388 (modification of the consent decree "may be warranted when the *statutory or decisional law* has changed to make legal what the decree was designed to prevent" (emphasis added)).[34]

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relitigating issues that were *or could have been raised* in that action.") (emphasis added).

Even assuming, *arguendo*, the argument were still available to it, the Government's arguing that the HSA and TVPRA wholly supersede the Agreement cannot be squared with those enactments' savings clauses. *See Flores II*, 862 F.3d at 870-71 (The HSA and TVPRA savings clauses "preserve[] the *Flores* Settlement.").

[34] Nor does the Government's purported adherence to the APA in promulgating the New Regulations change anything. As the district court held, "it is necessary, but not sufficient, for the New Regulations to follow APA rulemaking procedures. The New Regulations must also satisfy Paragraphs 9 and 40, and as discussed *supra*, they do not." ER 19.

2. No change in facts warrants equitable termination of the Agreement.

The Government also sought to terminate the Agreement based on changed facts: namely, changes in migration patterns to the United States. Here again, that is no longer an argument available to the Government: this Court previously held that the Government is not entitled to modify, much less terminate, the Agreement because the number of children seeking to cross the southern border is larger than when the Agreement was signed. *Flores I*, 828 F.3d at 910.

In *Flores I*, this Court rejected "influx" as grounds for modifying the Agreement because, *inter alia*, the Agreement itself "expressly anticipated an influx" and increases in the size of the Plaintiff class. *Id.*; *see also id.* ("'Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." (quoting *Rufo*, 502 U.S. at 385)). The Government offers no reason for the Court to revisit its prior holding.[35]

Under the law of the case doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (quoting *Maag v. Wessler*, 993 F.2d 718, 720 n.2 (9th Cir. 1993)). Obstinacy is no reason for this Court to reconsider prior rulings. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (motions to alter or amend a judgment offer an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources").

Even were the Court to entertain its "influx" argument anew, the

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[35] Fluctuation in the number of arriving minors was readily foreseeable when the Government entered into the Agreement. *See* SER 231-33 ¶¶ 17, 30 ("[T]he migration of children and family units across the southern US border, though recently and prominently in US headlines, is fundamentally not a new phenomenon. . . .").

Government wholly fails to explain: (1) how the Agreement prevents it from "addressing" a "crisis" in family migration; and (2) how the New Regulations would enable the Government to do so. Appellants' Br. 26. Though the Government's brief is silent on both counts, an answer is not difficult to supply: the Government wishes to detain children longer and under harsher conditions because it thinks doing so will deter others.

The Government has periodically sought to detain alleged unlawful entrants to deter others,[36] but has just as often failed because civil detention is both an unlawful and ineffective means of deterring migration. *Kansas v. Crane*, 534 U.S. 407, 412 (2002); *accord R. I. L-R v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015) (family detention impermissible as general immigration deterrent).[37] The New Regulations are the latest reiteration of a tired and discredited "deterrence

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[36] *See, e.g.*, *Flores v. Johnson*, 212 F. Supp. 3d at 875 ("Defendants contend that release of accompanied children and their parents gives families a strong incentive to undertake the dangerous journey to this country."); *Flores v. Lynch*, 212 F. Supp. 3d at 915 ("Defendants state that 'the proposed remedies could heighten the risk of another surge in illegal migration . . . .'"); *Flores v. Sessions*, 2018 WL 4945000, at *1 (The Government argues "that detaining family units in unlicensed family residential facilities deters others from unlawfully entering the country.").

[37] Civil detention aimed at deterrence is also generally unlawful under international law, because deterrence must be based on an individualized assessment of necessity. *See, e.g.*, U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention*, ¶ 3 (2012) ("*Detention Guidelines*"), www.refworld.org/pdfid/503489533b8.pdf ("[T]here is no evidence that detention has any deterrent effect on irregular migration. Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.") (internal citation omitted); *see also* U.N. Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, ¶¶ 19-24 (2018), www.refworld.org/docid/5a903b514.html.

policy" refrain.

In all events, the Government failed to produce any credible evidence that protracting children's detention would reduce unauthorized immigration in the slightest. ER 23 ("Defendants continue to rely on 'dubious' and 'unconvincing' logic and statistics to support their changed-circumstances argument."); *Flores v. Johnson*, 212 F. Supp. 3d at 886 ("Defendants do not satisfactorily explain why the Agreement, after being in effect since 1997, should only now encourage others to enter the United States without authorization."); *Flores v. Sessions*, 2018 WL 4945000, at *2 (The Government's argument that the enforcement order of July 24, 2015, caused a surge in family migration was "'dubious' and unconvincing."). Migration experts, as well as researchers working directly with Central American children and families, have noted the absence of evidence supporting the Government's view that civil detention deters migration.[38]

3. The Government fails to demonstrate a class-related justification for termination of the Agreement.

The Government next argues that terminating the Agreement is in the public interest because the class is too unwieldy and diverse, parents were not included in

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[38] *See Flores v. Sessions*, 2018 WL 4945000, at *2-3; *see also* SER 238 ¶ 12 ("[T]here was no statistically significant increase in U.S. Border Patrol apprehensions of families at the southwest border after the 2015 *Flores* ruling. In other words, there is no evidence that the 2015 *Flores* ruling increased the number of families arriving at the southwest border."); SER 226 ¶ 29 ("In my extensive experience, I have never had reason to believe that the *Flores* Settlement Agreement and subsequent court orders in the *Flores* case have influenced children and families from Central America in their decision to come to the United States. These children and families are coming to the United States because their home countries are deeply afflicted by corruption, crime, violence and poverty. Moreover, few to none of them are even aware of the existence of the *Flores* Settlement Agreement.").

the class certification process, and the Agreement fails to account for parents' interests. Appellants' Br. 14, 26-27. These arguments are both tangential and meritless.

This Court has already held that the Government "waived its ability to challenge class certification when it settled the case and did not timely appeal the final judgment." *Flores I*, 828 F.3d at 908.

Even were the argument still available, the Government never moved the district court to decertify *or* modify the class. Such a motion would have been denied as the district court ruled that class members remain united by at least one common question: "whether the New Regulations terminate the *Flores* Agreement." ER 23; *see Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (the relevant inquiry under Federal Rule of Civil Procedure 23(a)(2) is whether at least one significant common question of law or fact unifies the class).[39]

Finally, nothing in the Agreement impedes parental rights by forcing the Government to release accompanied children over their parents' objection. Plaintiffs have consistently affirmed that "parents may . . . waive their children's rights to prompt release and placement in state-licensed facilities." *Flores v. Sessions*, 2018 WL 4945000, at *4. The district court has also determined that parents, not the Government, "may choose to exercise their . . . right to reunification or to stand on their children's *Flores* Agreement rights." *Id.* The

[39] Of course, numerous other common questions of law and fact persist, including whether the treatment and conditions children experience in Border Patrol facilities satisfy the Agreement's requirements for safety, sanitation, and concern for the particular vulnerability of children. *See Flores III*, 934 F.3d at 912-14.

Governments' contrary suggestion is baseless.[40]

4. The Agreement's continuing to protect vulnerable children is both equitable and in the public interest.

The Government next argues that dismantling the Agreement is in the public interest because it impermissibly intrudes on executive power. Appellants' Br. 19-21. The Government's argument is, once again, meritless.

As discussed above, the New Regulations would extend children's detention under harsher conditions than the Agreement allows. Under no conceivable formulation could protracting children's confinement in unlicensed facilities serve the public interest.

The Supreme Court has repeatedly noted the public's "urgent interest in the welfare of the child." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). "[T]he whole community" has an interest in safeguarding children from abuse. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *see also Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968).[41]

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[40] The Government's procedural objections to the class certification process also ignore that notice to the class was reasonable and aligns with a district-court approved procedure to which the Government recently stipulated in connection with a motion for attorney's fees, *see* SER 152-56, SER 157-58, and that the district court approved the Agreement before the 2003 amendment to Rule 23 added the fairness hearing requirement, *see* Fed. R. Civ. P. 23(e), Adv. Comm. Notes 2003.

[41] The public also has an interest in seeing that the United States complies with international law protecting the child. Under the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and long-established Supreme Court precedent, *The Paquete Habana*, 175 U.S. 677, 700 (1900), international law is part of U.S. law and must be applied by U.S. courts.

International law prohibits the unnecessary detention of children. In *Baban v. Australia*, the United Nations Human Rights Committee ("HRC"), charged with

Child welfare experts are unanimous that detention, even under ideal conditions, is inimical to children's mental and physical well-being. *See, e.g.*, Julie M. Linton et al., *Detention of Immigrant Children*, PEDIATRICS, April 2017, at 6 ("[E]xpert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."). Detention-induced trauma is all the worse if the conditions and treatment children experience during detention are substandard. *See id*. at 1 ("The Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings."); *see also* SER 207 ¶ 5 (former Acting Assistant Secretary of the Administration for Children and Families characterizing state licensing as "helpful . . . to protect the safety of children").

As the district court held, "the evidentiary record . . . overwhelmingly shows that throughout several presidential administrations, the Agreement has been necessary, relevant, and critical to the public interest in maintaining standards for the detention and release of minors arriving at the United States' borders." ER 24.

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monitoring compliance with the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, held that Australia's detaining a father and minor son "should not continue beyond the period for which the State party can provide appropriate justification." U.N. Hum. Rts. Comm., Commc'n No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sept. 18, 2003). The HRC found Australia in violation of international law because it had failed to demonstrate that there were not "less invasive means" of accomplishing its immigration policy objectives. *Id.*

Absent a contradictory U.S. statute, U.S. courts should also apply customary international law. *See The Paquete Habana*, 175 U.S. at 700-01. Customary international law generally prohibits detaining children to regulate immigration. The U.N. High Commissioner for Refugees, the highest official of the United Nations charged with ensuring refugees' human rights, has interpreted the general principles of customary international law to prohibit detaining immigrant or refugee children. U.N. High Commissioner for Refugees, *Detention Guidelines* ¶¶ 51-54.

Terminating the agreement, in contrast, would lift "critical protections promised to minors in DHS and HHS custody. . . ." ER 23.

5. The Government's appeal to executive power is meritless.

As against the clear contributions the Agreement makes to a well-established public interest in child welfare, the Government's argument for executive power carries no weight.

Absent any showing of significant changes in law or fact, holding the Government to its commitments does not infringe on executive prerogatives.[42] The Government voluntarily entered into the Agreement, a decision that is itself an exercise of official judgment. *See United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008); *see also Berger*, 771 F.2d at 1578-80 (ordering rulemaking to implement consent decree does not impair agency discretion because the decree itself is the work of the agency).

Permissively terminating consent decrees at federal defendants' behest "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo*, 502 U.S. at 389; *see also All. to End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) ("Not even the government will benefit in the long run from

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[42] Contrary to the Government's characterization of *Rufo*, the district court was not required to defer to the Government in deciding whether to terminate the Agreement. *See* Appellants' Br. 19-20. The Supreme Court has made clear that "the moving party bears the burden of establishing that a significant change in circumstances warrants modification of a consent decree" and "[n]o deference is involved in this threshold inquiry." *Rufo*, 502 U.S. at 392 n.14. Deference to the views of Government officials is required only *after* the district court "has determined that a modification is warranted." *Id.* Here, the Government failed to meet its threshold burden to demonstrate a change in circumstances warranting modification.

being excused from having to honor its agreement; for who will make a binding agreement with a party that is free to walk away from an agreement whenever it begins to pinch?"). The Agreement in no way intrudes impermissibly into executive power. The cases the Government cites are not to the contrary.[43]

This Court has enforced consent decrees against federal defendants—including multiple times in this very case—without expressing doubts about the constitutionality of such decrees.[44] *See, e.g.*, *Nehmer*, 494 F.3d at 863-65; *see also Segar v. Mukasey*, 508 F.3d 16, 26-27 (D.C. Cir. 2007); *Berger*, 771 F.2d at 1579-80; *Ferrell v. Pierce*, 743 F.2d 454, 462-63 (7th Cir. 1984). Indeed, this Court has observed that permitting a federal agency to supplant the district court's authority and unilaterally repudiate its obligations under a court order would itself raise troubling separation of powers concerns. *Nehmer*, 494 F.3d at 860-61.

That this case implicates immigration issues does not give the Government license to breach its commitments to vulnerable children. As the district court recognized, nothing in the Agreement limits Congress's power to regulate immigration or to prescribe how immigrant children are treated.[45] *See* ER 19. Congress has not indicated any intention to abrogate its terms and "the HSA and

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[43] In *Reno*, 507 U.S. at 301, the Supreme Court assumed that the Government would be bound by its commitments in a consent decree governing detention conditions for immigrant children. In *Alliance to End Repression v. City of Chicago*, 742 F.2d at 1018, the court made clear that the FBI likewise remained bound by a consent decree.

[44] Although *National Audubon Society, Inc. v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1982), raised the possibility of constitutional questions, it declined to address them.

[45] This case does not involve the federalism concerns at issue when federal consent decrees bind the legislative and executive branches of state or local governments. *Cf. Horne*, 557 U.S. at 448-49.

TVPRA in fact affirm the broad goals of the *Flores* Settlement." *Flores II*, 862 F.3d at 880.

## III. THE GOVERNMENT WAIVED ITS INSTANT OBJECTIONS TO THE SCOPE OF THE DISTRICT COURT'S REMEDY.

In November 2018, when Plaintiffs filed their motion to enforce, the Government refused to commit to abiding by the Agreement's sunset provision, which provides for a forty-five-day waiting period.[46] Because it seemed probable that the Government would publish a final rule materially identical to its proposed version and that it would implement the rule immediately upon publication, Plaintiffs asked the district court to enjoin the final rule. ER 4. The district court declined to do so until after the Government issued its final rule. ER 4.

In publishing the New Regulations, the Government stated that they would not go into effect for sixty days. ER 40. In supplemental briefing, Plaintiffs advised the district court that declaring the Agreement operative notwithstanding the New Regulations would afford Plaintiffs a sufficient remedy because the Agreement itself operates as an injunction.[47] *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) ("The consent decree is an injunction."); *Healey v. Spencer*, 765 F.3d 65, 75 (1st Cir. 2014) ("A consent decree is both a settlement and an

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[46] The operative sunset provision appears in the parties' stipulation modifying Agreement ¶ 40. ER 223. In response to the Government's November 6, 2018, request that Plaintiffs agree to an extension of time to oppose the motion to enforce, Plaintiffs stated that they would not oppose such an extension as long as the Government agreed to defer implementation of any final regulations until forty-five days after the later of (1) the final regulations' publication date or (2) the district court's ruling on the motion to enforce. SER 149. Instead of agreeing to abide by its commitment, the Government filed its opposition to Plaintiffs' motion to enforce. SER 139-43.

[47] Plaintiffs are still of that view and open to mediating amendments to the remedial portions of the district court's order accordingly.

injunction.").

The Government said little to the district court regarding an appropriate remedy should it grant Plaintiffs' motion to enforce. The Government's sole comment was a complaint that Plaintiffs were willing to accept a *narrower* remedy against the New Regulations than they had sought against the proposed rules.[48] SER 247 n.1; *see also* ER 24 n.15 (finding that the Government was on notice as to the nature of Plaintiffs' requested relief).

The district court concluded that the *raison d'être* of the New Regulations is to eviscerate the Agreement, not implement it. *See* ER 26. Inasmuch as profound inconsistencies between the two foreclosed termination of the Agreement, the district court concluded, "It would be untenable to require DHS and HHS employees to parse through pieces of regulations disembodied from their animating purpose" in an effort to decide which parts of the New Regulations might be implemented notwithstanding the Agreement. ER 26.

The Government does not appear to fault the district court directly on either count. Instead, it complains that the court below "failed to address whether the Agreement could be terminated, in part, by modifying the decree as required under *Rufo*." Appellants' Br. 52. The Government's argument is meritless.

First, the Agreement nowhere contemplates piecemeal termination. Pursuant to ¶ 9 and amended ¶ 40, the Agreement ends in its entirety forty-five days after the Government issues regulations that are consistent with and implement the Agreement, or else not at all. ER 238 ¶ 9; ER 223 ¶ 40. The Government neither bargained for nor secured Plaintiffs' agreement to sunset the

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[48] To the extent the Government now objects to the scope of injunctive relief, it cannot raise these objections for the first time on appeal. *See Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014).

Agreement in dribs and drabs, nor does the Government explain how ending unspecified parts of the Agreement seriatim serves the public interest or satisfies any other requirement of Rule 60(b).

Second, the Government moved to *terminate* the Agreement in whole, not in part, and not to modify it at all. *See* SER 215 ("In the alternative, if the Court determines that the Agreement does not terminate by its terms, DHS and HHS hereby move to terminate the Agreement under Federal Rules of Civil Procedure 60(b)(5) and (6).").[49] If the Government has grounds for modifying the Agreement it has not previously argued, it is free to move the court below for an appropriate order. The Government should not now be heard to complain that the district court failed to grant relief it failed to request.

Finally, the Government rejected the district court's invitation to identify provisions of the New Regulations for which the Agreement contains no analog, which the district court indicated the Government would then be free to implement. ER 27 n.17; SER 250-53. To the extent the Government contends the district court

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[49] In its notice declaring the Agreement terminated, the Government suggested, "[T]o the extent the Court believes further litigation over specific issues addressed by the Rule is warranted, it should agree the Agreement is terminated except as to those specific issues." SER 220. This hardly amounted to a "motion" to terminate the Agreement in part, nor did it adequately notify the district court or Plaintiffs of which parts of the Agreement the Government wanted the court to terminate. *See Greisen v. Hanken*, 925 F.3d 1097, 1115 n.6 (9th Cir. 2019) ("briefly allud[ing]" to an issue in an opening brief is "insufficient to raise the issue").

The Government first argued in its reply brief that, should the district court "conclude[] that the provision of the regulations governing the same subject [as the Agreement is] invalid," it should selectively modify or terminate the Agreement. SER 248-49. The Government's request came too late. *See Greisen*, 925 F.3d at 1115 (arguments first raised in reply brief waived); *accord Kevin Barry Fine Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F. Supp. 3d 959, 969 n.3 (N.D. Cal. 2019).

erred in enjoining those provisions, its argument is likewise waived. *See Foti v. City of Menlo Park*, 146 F.3d 629, 637-38 (9th Cir. 1998) (argument waived when party "failed to present complete arguments" after trial court requested "fuller explanations").

## IV. CONCLUSION

For the foregoing reasons, this Court should affirm.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Cir. R. 32-1 because: this brief contains 13,438 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface and Times New Roman size 14 font.

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# ADDENDUM

# ADDENDUM OF REGULATIONS & STATUTES, ETC.

## UNITED STATES CONSTITUTION

**U.S. Const. art. VI, cl. 2**

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

## REGULATIONS

**8 C.F.R. § 212.5(b)(3)(i), (ii)**

§ 212.5. Parole of aliens into the United States.

…

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

…

(3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

**8 C.F.R. § 235.3(b)(2)(iii)**

§ 235.3. Inadmissible aliens and expedited removal.

…

(b) Expedited removal.

…

(2) Determination of inadmissibility –

…

(iii) Detention and parole of alien in expedited removal. An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

**8 C.F.R. § 235.3(b)(4)**

§ 235.3. Inadmissible aliens and expedited removal.

…

(b) Expedited removal.

…

(4) Claim of asylum of fear of persecution or torture – If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with 8 CFR 208.30. The examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern, and to establish the alien's inadmissibility.

(i) Referral. The referring officer shall provide the alien with a written disclosure on Form M-444, Information About Credible Fear Interview, describing:

(A) The purpose of the referral and description of the credible fear interview process;

(B) The right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government;

(C) The right to request a review by an immigration judge of the asylum officer's credible fear determination; and

(D) The consequences of failure to establish a credible fear of persecution or torture.

(ii) Detention pending credible fear interview. Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. Prior to the interview, the alien shall be given time to contact and consult with any person or persons of his or her choosing. Such consultation shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained, shall be at no expense to the government, and shall not unreasonably delay the process.

**8 C.F.R. § 236.3(b)(9)**

§ 236.3. Processing, detention, and release of alien minors.

…

(b) Definitions.

…

(9) Licensed facility means an ICE detention facility that is licensed by the state, county, or municipality in which it is located, if such a licensing process exists. Licensed facilities shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes. If a licensing process for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE. Such audits will take place at the opening of a facility and on a regular, ongoing basis thereafter. DHS will make the results of these audits publicly available.

**8 C.F.R. § 236.3(j)(2)**

§ 236.3. Processing, detention, and release of alien minors.

…

(j) Release of minors who are not UACs from DHS custody.

…

(2) If a minor who is not a UAC is in expedited removal proceedings (including if he or she is awaiting a credible fear determination), or is subject to a final expedited removal order, custody is governed by § 235.3(b)(2)(iii) or (b)(4)(ii) of this chapter, as applicable.

**8 C.F.R. § 236.3(m)**

§ 236.3. Processing, detention, and release of alien minors.

…

(m) Bond hearings. Bond determinations made by DHS for minors who are in removal proceedings pursuant to section 240 of the Act and who are also in DHS custody may be reviewed by an immigration judge pursuant to 8 CFR part 1236 to the extent permitted by 8 CFR 1003.19. Minors in DHS custody who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determinations.

**45 C.F.R. § 410.201(e)**

§ 410.201. Considerations generally applicable to the placement of an unaccompanied alien child.

…

(e) If there is no appropriate licensed program immediately available for placement of a UAC pursuant to this subpart, and no one to whom ORR may release the UAC pursuant to subpart C of this part, the UAC may be placed in an ORR-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. In addition to the requirement that UACs shall be separated from delinquent offenders, every effort must be taken to ensure that the safety and well-being of the UAC detained in these facilities are satisfactorily provided for by the staff. ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.

**45 C.F.R. § 410.201(f)**

§ 410.201. Considerations generally applicable to the placement of an unaccompanied alien child.

…

(f) ORR makes and records the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is in ORR custody.

## STATUTES

**8 U.S.C. § 1225(b)(1)(A)(i)-(iii)**

§ 1225. Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.

…

(b) Inspection of applicants for admission.

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening.

(i) In general. If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum. If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general. The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and

unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described. An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

**8 U.S.C. § 1225(b)(1)(B)(v)**

§ 1225. Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.

…

(b) Inspection of applicants for admission.

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(B) Asylum interviews.

…

(v) "Credible fear of persecution" defined. For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

**8 U.S.C. § 1329**

§ 1329. Jurisdiction of District Courts.

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district

to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor. Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers.

**28 U.S.C. § 1331**
§ 1331. Federal Question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**28 U.S.C. § 1361**
§ 1361. Action to Compel an Officer of the United States to Perform his Duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

**28 U.S.C. § 2241**
§ 2241. Power to Grant Writ.

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

**Homeland Security Act of 2002, Pub. L. No. 107-296 1165 Stat. 2135, Sec. 462(f)(2).**

§ 462. Children's Affairs.

…

(f) Other Transition Issues. –

…

(2) SAVINGS PROVISIONS.—Subsections (a), (b), and (c) of section 1512 shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this Act to the Department of Homeland Security.

**55 Pa. Code § 3800.5**

§ 3800.5. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

…

Secure care- Care provided in a 24-hour living setting to one or more children who are delinquent or alleged delinquent, from which voluntary egress is prohibited through one of the following mechanisms:

(i) Egress from the building, or a portion of the building, is prohibited through internal locks within the building or exterior locks.

(ii) Egress from the premises is prohibited through secure fencing around the perimeter of the building.