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15
 16 UNITED STATES DISTRICT COURT
 17 CENTRAL DISTRICT OF CALIFORNIA
 18 WESTERN DIVISION

19
 20 Jenny Lisette Flores, *et al.*,
 21 Plaintiffs,
 22 v.
 23 Jeh Johnson, Secretary, U.S. Department
 24 of Homeland Security, *et al.*,
 25 Defendants.

Case No. CV 85-4544-RJK(Px)
**MEMORANDUM IN SUPPORT
 OF MOTION TO ENFORCE
 SETTLEMENT OF CLASS
 ACTION**
 Hearing: March 9, 2015
 Time: TBD
 Dept: TBD

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1 INTRODUCTION

2 On January 28, 1997, this Court approved a class-wide settlement of this
 3 action pursuant to Rule 23, Fed.R.Civ.Proc. Plaintiffs' First Set of Exhibits in
 4 Support of Motion to Enforce Settlement, filed herewith, Exhibit 1 ("Settlement").¹
 5 The agreement sets minimum national standards for the detention, release,
 6 treatment and housing of children detained by U.S. Customs and Border Protection
 7 ("CBP") or U.S. Immigration and Customs Enforcement ("ICE") on suspicion of
 8 being present in the U.S. without authorization.

9 For nearly 18 years² the Settlement has guaranteed class member children (1)
 10 safe and appropriate placement during federal custody; and (2) a fair opportunity
 11 for release on bond or recognizance pending proceedings to determine whether they
 12 are lawfully entitled to be in the United States. These provisions give effect to

13 _____
 14 ¹ Opinions in this action preceding the Settlement include *Flores v. Meese*, 681 F.
 15 Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores*
 16 *v. Meese*, 942 F.2d 1352 (9th Cir. 1992) (en banc); and *Reno v. Flores*, 507 U.S.
 292; 113 S.Ct. 1439; 123 L.Ed.2d 1 (1993).S

17 ² Although the agreement contains a five-year sunset clause, on December 7, 2001,
 18 the parties stipulated that the Settlement remain binding until "45 days following
 19 defendants' publication of final regulations implementing this Agreement." Exhibit
 3. Defendants have never published such regulations.

20 In 2002, the Homeland Security Act, Pub. L. 107-296 (H.R. 5005) ("HSA"),
 21 dissolved the former Immigration and Naturalization Service ("INS") and
 22 transferred most INS functions to the Department of Homeland Security ("DHS")
 23 and its subordinate agencies, including CBP and ICE. 6 U.S.C. § 279. The HSA
 included "savings" provisions providing, *inter alia*, that the Settlement should
 remain in effect as to the successor agencies. HSA §§ 462(f)(2), 1512(a)(1), 1512.

24 The Settlement binds the INS and Department of Justice, as well as "their agents,
 25 employees, contractors, and/or successors in office." Settlement ¶ 1. Defendants
 26 have repeatedly acknowledged that the Settlement binds DHS. *See, e.g.*, Report to
 27 Congress on the Department of Homeland Security Office for Civil Rights and
 28 Civil Liberties (2007), at 20, *available at* www.dhs.gov/xlibrary/assets/crcl-fy07annualreport.pdf (last checked December 9, 2014).

1 defendants’ oft-professed resolve to treat “all minors in its custody with dignity,
2 respect and special concern for their particular vulnerability as minors.” Settlement
3 ¶ 11.

4 Beginning in the summer of 2014, ICE reacted to a temporary “surge” of
5 Central Americans arriving at the U.S.-Mexico border by adopting a policy to
6 detain all female-headed families, including children, in secure, unlicensed facilities
7 for howsoever long as it takes to determine whether they are entitled to remain in
8 the U.S. Class member children and their mothers now fill secure facilities in
9 Leesport, Pennsylvania, Karnes City, Texas, and a new mega-facility in Dilley,
10 Texas, which will eventually “house up to 2,400 individuals’ ...” Exhibit 9.³

11 Defendants’ no-release policy and housing children in secure facilities breach
12 the Settlement in three principal ways:

13 First, the Settlement requires ICE to take affirmative steps to release a child
14 to a parent, close adult relative, or other qualified custodian, except where an
15 individual child’s detention is required “either to secure his or her timely
16 appearance before the INS (now ICE) or the immigration court, or to ensure the
17 minor's safety or that of others...” Settlement ¶ 14. ICE’s no-release policy as
18 applied against class members apprehended with their mothers breaches
19 defendants’ duty to minimize children’s detention. In addition, the Settlement
20 affords class members the right to be released first to their parents. Settlement ¶ 14.
21 ICE’s categorical refusal to consider releasing class members’ mothers denies class
22 members their right to release to the care and protection of their preferred
23 custodian.

24 Second, except for delinquents or serious flight risks, the Settlement obliges
25 defendants to house children, usually no more than 72 hours after arrest, in non-
26 secure facilities that are licensed to care for dependent (as opposed to delinquent)

27 ³The Government recently closed a similar detention facility in Artesia, New
28 Mexico. *Id.*

1 children. Settlement ¶¶ 12, 19. ICE’s family detention facilities meet neither of
2 these requirements.

3 Third, the Settlement requires U.S. Customs and Border Protection (“CBP”)
4 to hold recently apprehended children in facilities that are “safe and sanitary and
5 that are consistent with the [Government’s] concern for the particular vulnerability
6 of minors.” Settlement ¶ 12. In breach of this provision, defendants routinely
7 expose class members to unacceptably harsh conditions during Border Patrol
8 custody, including cold, overcrowding, inadequate food and drink, sleep
9 deprivation, and poor sanitation.

10 THIS COURT HAS JURISDICTION TO ENFORCE THE SETTLEMENT AS A CONTRACT AND
11 CONSENT DECREE.

12 This class action challenged the former-INS’s policies (1) to release
13 apprehended children only to parents or legal guardians; and (2) to house children
14 in facilities in which they were provided no education, recreation, or visitation, and
15 in which they were commingled with unrelated adults.⁴

16
17
18 ⁴On November 30, 1987, this Court approved a partial settlement in which the
19 Government pledged to remedy the “deplorable conditions” affecting detained
20 minors in western states. *See* Memorandum of Understanding, etc., Nov. 30, 1987,
21 Exhibit 26 (MOU). The MOU required defendants to house minors in “special
22 child-care facilities”: *i.e.*, “community based shelter care programs’ that will
23 ‘provide a safe and appropriate environment’ ... [meeting] ‘state licensing
24 requirements for the provision of shelter care ... and related services to dependent
25 children.’” *Id.* at 2 and 11.

24 In contrast to juvenile halls and like institutions for youthful offenders, nearly all
25 states require that *dependent* children be placed only in non-secure facilities. *E.g.*,
26 Cal. Welf. & Inst. Code § 206; Cal. Health & Safety Code §§ 1500, *et seq.*; Cal.
Admin. Code §§ 80000 *et seq.*; Ariz. Rev. Stat. § 546-134-2.

27 The Settlement supersedes and expands upon the MOU, but likewise requires
28 defendants to house the general population of detained minors in non-secure
facilities licensed to care for dependent children.

1 After several years' litigation, the parties settled. The Settlement, which the
2 Court approved in January 1997, protects children, whether accompanied or
3 unaccompanied, detained anywhere in the country. Settlement ¶ 9 ("The certified
4 class in this action shall be defined as follows: 'All minors who are detained in the
5 legal custody of the INS.'").

6 In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375; 114 S. Ct. 1673; 128 L.
7 Ed. 2d 391 (1994), the Court held that a proceeding to enforce a settlement requires
8 its own basis of jurisdiction. *Id.* at 378. "Such a basis for jurisdiction may be
9 furnished by separate provision (such as a provision retaining jurisdiction over the
10 settlement agreement) or by incorporating the terms of the settlement agreement in
11 the order." *Flanegan v. Arizona*, 143 F.3d 540, 544 (9th Cir. 1998).

12 Here, the Settlement and, *a fortiori*, this Court's order approving it,⁵ reserve
13 jurisdiction in this Court to redress class-wide violations. Settlement ¶ 37 ("This
14 paragraph provides for the enforcement, in this District Court, of the provisions of
15 this Agreement except for claims brought under Paragraph 24."); Order, January
16 28, 1997, Exhibit 2.⁶

17 The law guiding enforcement of the Settlement is well-established. The
18 Settlement is a contract, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378;
19 112 S. Ct. 748; 116 L. Ed. 2d 867 (1992), and is therefore generally construed and
20 enforced as such. *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989).

21 The Settlement is also an order of the Court and therefore a consent decree.
22 *See Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human*
23 *Resources*, 532 U.S. 598, 604 n.7; 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001); *Rufo*,

24 _____
25 ⁵ The Settlement resolves a certified class action, and the Court was accordingly
26 required to find the accord consistent with law and the public interest. Rule
27 23(e)(1)(A), Fed. R. Civ. Proc.

28 ⁶ Paragraph 24 of the Settlement provides for judicial review of placement decisions
affecting individual class members in any judicial district with venue. Paragraph 37
therefore requires that claims of class-wide violations be brought in this Court.

1 *supra*, 502 U.S. at 378 (settlement “a judicial decree that is subject to the rules
2 generally applicable to other judgments and decrees.”). The prospective provisions
3 of the Settlement operate as an injunction. *See Plummer v. Chemical Bank*, 668
4 F.2d 654, 659 (2d Cir. 1982); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.
5 1983).

6 Whether enforced as a contract or consent decree, the Court’s task is largely
7 the same. *City of Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Cir. 1985) (“A
8 consent decree, which has attributes of a contract and a judicial act, is construed
9 with reference to ordinary contract principles.”).⁷ Foremost, the Court enforces the
10 agreement “according to the plain meaning of its terms.” *Nodine v. Shiley Inc.*, 240
11 F.3d 1149, 1154 (9th Cir. 2001) (emphasis supplied); *United States v. Armour &*
12 *Co.*, 402 U.S. 673, 682; 91 S. Ct. 1752; 29 L. Ed. 2d 256 (1971) (settlement’s
13 requirements “must be discerned within its four corners, ...”).

14 If the agreement is breached, the Court may issue orders “commanding or
15 enjoining particular conduct.” *TNT Marketing, Inc. v. Agresti*, 796 F.2d 276, 278
16 (9th Cir. 1986).

17 ARGUMENT

18 I ICE’S NO-RELEASE POLICY IS A MATERIAL BREACH OF THE SETTLEMENT.

19 A ICE’s new no-release policy breaches the Settlement’s requirement 20 that defendants minimize the detention of children.

21 In Part VI of the Settlement, “General Policy Favoring Release,” defendants
22 agreed that detention is detrimental to children and that they would therefore
23 release a child to a qualified custodian “without unnecessary delay” whenever

24
25 ⁷ Generally, “the construction and enforcement of settlement agreements are
26 governed by principles of local law...” *Airline Stewards v. Trans World Airlines,*
27 *Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) (citation omitted). However, “federal law
28 controls the interpretation of a contract entered pursuant to federal law when the
United States is a party.” *Kennewick Irrigation Dist. v. United States*, 880 F.2d
1018, 1032 (9th Cir. 1989). Here, federal and state law accord.

1 continued “detention of the minor is not required either to secure his or her timely
2 appearance before the INS or the immigration court, or to ensure the minor’s safety
3 or that of others ...” Settlement ¶ 14.

4 Further ensuring that detaining children would be a last resort, the Settlement
5 requires defendants to take affirmative steps to find qualified custodians for
6 detained children:

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

12 Settlement ¶ 18 (emphasis added).⁸

13 These provisions place defendants under an affirmative obligation to locate
14 suitable custodians—preferably parents—and to release children to such custodians
15 except as otherwise provided in the Settlement. Since the summer of 2014,
16 however, ICE has detained children apprehended with their mothers *en masse*
17 regardless of whether they are flight-risks, dangerous, or whether qualified
18 custodians are available to care for them:

19 ⁸The Settlement also directs defendants to release a child “in order of preference to
20 —

- 21 A. a parent;
22 B. a legal guardian;
23 C. an adult relative (brother, sister, aunt, uncle, or grandparent);
24 D. an adult individual or entity designated by the parent or legal guardian as
25 capable and willing to care for the minor's well-being in (i) a declaration
26 signed under penalty of perjury before an immigration or consular officer or
27 (ii) such other document(s) that establish(es) to the satisfaction of the INS, in
28 its discretion, the affiant's paternity or guardianship;
E. a licensed program willing to accept legal custody; or
F. an adult individual or entity seeking custody, in the discretion of the INS,
when it appears that there is no other likely alternative to long term detention
and family reunification does not appear to be a reasonable possibility.”

Settlement ¶ 14.

1 Prior to June 2014, ICE’s general practice was to release children and
 2 parents upon a determination that those individuals were not a significant
 3 flight risk or danger to the public. Generally, delays in releasing children
 4 and their parents were not significant. ... Since June, ICE has begun
 5 detaining all Central American families without the possibility of release
 6 on bond, recognizance, supervision or parole if it believes that those
 7 families arrived in the United States as part of the “surge” or
 8 unauthorized entrants—mostly children—that purportedly began in the
 9 summer of 2014.

10 Declaration of Bridget Cambria, November 7, 2014, Exhibit 10 ¶¶ 3-5 (Cambria).⁹

11 The Settlement, however, posits only two exceptions to defendants’
 12 obligation to seek out qualified custodians and to release children to their care: (1) a
 13 minor is demonstrably dangerous; or (2) extraordinarily likely to abscond, such that
 14 detention is “*required*” to secure his or her appearance. Settlement ¶ 14 (emphasis
 15 supplied).¹⁰ Yet —

16 ICE applies its current no-release policy indiscriminately to all Central
 17 American children and their mothers. ICE does not consider the individual

18 ⁹ See also, e.g., Declaration of Barbara Hines, Jan. 31, 2014, Exhibit 17 (Hines) ¶ 12
 19 (“Since DHS began detaining families at the Karnes City facility, DHS has insisted
 20 on categorical detention of all of the families of mothers and children who are
 21 brought to the facility.”); Declaration of Virginia Raymond, Dec. 13, 2014, Exhibit
 22 35 ¶ 7; Declaration of Carol Anne Donohoe, Nov. 15, 2014, Exhibit 11 (Donohoe)
 23 ¶ 5.

24 ¹⁰ To comport with due process, civil immigration detention must serve discrete
 25 statutory purposes and be accompanied by “constitutionally adequate” procedures
 26 to ensure confinement is not erroneous. *Zadvydas v. Davis*, 533 U.S. 678 (2001);
 27 *Demore v. Kim*, 538 U.S. 510, 532-33; 123 S.Ct. 1708; 155 L. Ed. 2d 724 (2003)
 28 (Kennedy, J., concurring). Here, ICE’s detaining children apprehended with their
 mothers *en masse* lacks a “reasonable relation” to the purposes for immigration
 detention: *i.e.*, to prevent flight or danger. ICE also detains children generally “to
 deter others” even in the absence of any reason to believe an individual child is an
 exceptional flight risk or danger.

1 child's age, reasons for coming to the United States, prior immigration
2 violations, family ties in the United States, eligibility for lawful status or
3 favorable exercise of prosecutorial discretion, credible fear of persecution
4 abroad, likelihood to abscond, or the child's safety or the safety of others. ...
5 Presently, a single man has a greater chance of being released from detention
6 than a Central American mother with child.

7 Cambria ¶ 5; *see also, e.g.*, Donohoe ¶ 5; Hines ¶ 15.

8 In opposing requests that immigration judges order children's release over its
9 objection, ICE has repeatedly admitted and defended its no-release policy. *E.g.*,
10 Exhibits 7 and 8.

11 ICE's stock opposition features the declaration of Philip Miller, ICE's
12 Assistant Director of Field Operations, who asserts that "the high probability of a
13 prompt release, coupled with the likelihood of low or no bond, is among the
14 reasons" motivating Central American detainees' coming to the United States.
15 Exhibit 8 at 5. Miller opines that "implementation of a 'no bond' or 'high bond'
16 policy would significantly reduce the unlawful mass migration of Guatemalans,
17 Hondurans and Salvadoran (sic)." *Id.*¹¹

18
19 ¹¹ Traci Lembke, ICE's Assistant Director over Investigative Programs, similarly
20 declares, "Illegal migrants to the United States who are release on a minimal bond
21 become part of 'active migration networks,' ... which in turn likely encourages
22 further illegal migration into the United States." *Id.* at 10.

23 ICE also customarily relies on *In re D-J-*, 23 I. & N. Dec. 572 (A.G. 2003), which
24 upheld detention of a Haitian adult crossing by sea as a national security risk and to
25 deter similar "unlawful mass migrations." *Id.* at 579.

26 ICE has also sometimes defended its no-release policy as a humanitarian measure
27 "to maintain family unity as families await the outcome of immigration hearings or
28 return to their home countries." Exhibit 9. But this is feeble justification for
stripping children of their rights under the Settlement.

First, ICE's no-release policy encourages mothers and children to enter separately.
Children apprehended alone or with anyone other than a parent—whether smuggler,

1 ICE’s novel no-release policy plainly breaches the Settlement. The
2 agreement obliges defendants to search out an appropriate custodian and, with two
3 exceptions, to release a child if one is available. Yet ICE makes no effort to locate
4 custodians for children apprehended with their mothers and refuses to release class
5 members even when a qualified custodian is available.¹² ICE’s no-release policy
6 unilaterally revises ¶ 14 of the Settlement to provide as follows:

7 Where the INS determines that the detention of the minor is not required
8 either to secure his or her timely appearance before the INS or the
9 immigration court, or to ensure the minor's safety or that of others, *or the*
10 *minors has been apprended with a mother and the INS determines all such*
11 *children should remain detained in order to deter future unauthorized entry*
12 *by others*, the INS shall release a minor from its custody without unnecessary
13 delay, ...

14 ICE’s unilateral revision is wholly unlawful. Apart from extraordinary
15 circumstances nowhere present here, a party may not unilaterally add to a
16 settlement. *Walnut Creek Pipe Distrib., Inc. v. Gates Rubber Co. Sales Div.*, 228
17

18
19 human trafficker, or complete stranger—remain eligible for release. ICE’s policy
20 thus promotes family disintegration, not unity.

21 Second, ICE need not detain families to keep them together. ICE can and should
22 release mothers and children together in accordance with actual equities, just as the
23 agency’s regulations. 8 C.F.R. § 1236.3(b) (2014) (“(2) If an individual specified in
24 paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody
25 of a juvenile, and the juvenile has identified a parent, legal guardian, or adult
relative in Service detention, simultaneous release of the juvenile and the parent,
legal guardian, or adult relative shall be evaluated on a discretionary case-by-case
basis.” (Emphasis added.)

26 ¹² See, e.g., Declaration of R_E_A_, Jan. 8, 2015, Exhibit 20 ¶ 7 (R_E_A_Ex20);
27 Declaration of J_H_M, Sept. 20, 2014, Exhibit 12 ¶ 7 (J_H_M_Ex12); Declaration
28 of M_C_T, Sept. 19, 2014, Exhibit 13 ¶ 7 (M_C_T_Ex13); Declaration of M_F_S,
Sept. 19, 2014, Exhibit 14 ¶ 8 (M_F_S_Ex14).

1 Cal.App.2d 810, 816, 39 Cal.Rptr. 767 (1964) (courts should not imply additional
2 terms, except in cases of “obvious necessity.”).¹³

3 Defendants’ no-release policy thus violates the Settlement’s “general policy
4 favoring release” and its specific provisions requiring ICE to seek out qualified
5 custodians and release children to them absent exceptional circumstances.¹⁴

6 _____
7 ¹³ Additional terms may be implied only if *all* of the following conditions are
8 satisfied:

- 9 (1) the implied term must arise from the language of the contract itself or it
10 must be indispensable to effectuate the intention of the parties;
- 11 (2) it must appear from the language used that the term was so clearly within the
12 contemplation of the parties that they deemed it unnecessary to express it;
- 13 (3) the additional term must be justified on the grounds of legal necessity;
- 14 (4) it must appear that the additional term would have been included had
15 attention been called to it; and
- 16 (5) the additional term may not treat a subject completely covered by the
17 contract.

18 *Stockton Dry Goods v. Girsh*, 36 Cal.2d 677, 680; 227 P.2d 1 (1951). The addition
19 defendants unilaterally invent meets none of these criteria.

20 As for “obvious necessity,” ICE initially justified its no-release policy as a response
21 to the influx of *unaccompanied* minors that started in March 2014. The influx,
22 however, proved short-lived: by October 2014, defendants apprehended 2,529
23 unaccompanied children, fewer than the 2,986 apprehended in February 2013. *See*
24 http://www.dhs.gov/sites/default/files/publications/secretary/14_1009_s1_border_slide_508.pdf#page=31 (last checked January 16, 2015).

25 Of course, ICE’s no-release policy targets not *unaccompanied* minors, but children
26 apprehended with mothers, a far smaller population: by October 2014, fewer than
27 100 families were apprehended in the Border Patrol Rio Grande Sector, by far the
28 sector most impacted by the surge. *Id.*; www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children-2014 (last checked Jan. 16, 2015).

¹⁴ Even assuming, *arguendo*, defendants had some basis to evade their obligations
under the Settlement, their remedy is to ask the Court to reform the agreement, not
unilaterally breach it. *United States v. ITT Continental Baking Co.*, 420 U.S. 223,
236-37; 95 S. Ct. 926; 43 L. Ed. 2d 148 (1975); *United States v. Atlantic Refining*
Co., 360 U.S. 19, 23; 79 S. Ct. 944; 3 L. Ed. 2d 1054 (1959) (that government’s
interpretation of consent decree might better accord with statute would “not warrant
our substantially changing the terms of a decree ... without any adjudication of the
issues.”).

1 **B ICE must consider releasing class members with their preferred**
 2 **custodians: their mothers.**

3 The Settlement further grants class members a right to release “in order of
 4 preference to ... a parent; ...” Settlement ¶ 14.¹⁵ ICE’s denying their mothers any
 5 chance for release denies class members a right the Settlement explicitly confers:
 6 preferential release to a parent.¹⁶

7 Until June 2014, defendants exercised individualized discretion to release
 8 women who are statutorily eligible regardless of whether they were apprehended
 9 with their children. Hines ¶ 9; Cambria ¶ 2.¹⁷ Women who are lawfully eligible for

10 _____
 11 ¹⁵ As noted, defendants’ own regulations require much the same. *See* 8 C.F.R. §
 12 1236.3(b) (2015).

13 The Supreme Court has also remarked that mothers should generally be considered
 14 for release along with their children:

15 The Board of Immigration Appeals has stated that “an alien generally ... should not
 16 be detained or required to post bond except on a finding that he is a threat to the
 17 national security ... or that he is a poor bail risk.” ... In the case of arrested alien
 18 juveniles, however, the INS cannot simply send them off into the night on bond or
 19 recognizance. The parties to the present suit agree that the Service must assure itself
 20 that someone will care for those minors pending resolution of their deportation
 21 proceedings. *That is easily done when the juvenile’s parents have also been*
 22 *detained and the family can be released together; ...*

23 *Reno v. Flores, supra*, 507 U.S. at 295 (citations omitted; emphasis added).

24 ¹⁶ On January 6, 2015, a proposed class action challenging ICE’s no-release policy
 25 as applied against *Flores* class members’ mothers commenced in the United States
 26 District Court for the District of Columbia. *R.I.L.R., v. Johnson*, No. 15-00011. The
 27 suit contends that ICE’s no-release policy violates mothers’ rights apart from those
 28 the Settlement confers on class members herein. *See* Memorandum in Support of
 Preliminary Injunction, Exhibit 36.

¹⁷ The Immigration and Nationality Act (INA) generally permits detention pending
 removal proceedings only where an arrestee is a danger to the community or to
 prevent flight where the risk of absconding cannot be mitigated through imposition
 of bond or other conditions. *Demore v. Kim, supra*, 538 U.S. at 527-28; *Matter of*
Guerra, 24 I. & N. Dec. 37 (BIA 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102
 (BIA 1999); *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976). The INA and

1 release include bona fide asylum-seekers: *i.e.*, those who prove a credible fear of
 2 persecution. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The mothers of *many* class members
 3 are bona fide asylum-seekers,¹⁸ and until now were deemed a “low priority” for
 4 detention.¹⁹

5 Even now, women apprehended without children—and nearly all adult
 6 males—receive an individualized assessment of whether detention is warranted if
 7 they prove a credible fear of persecution. Hines ¶ 17. Defendants reserve their most
 8 rigid detention policy for mothers apprehended with children despite their being
 9 statutorily eligible for release:

10 DHS has applied this policy and practice of categorical detention even to
 11 Central American families who have been found to have a credible fear of
 12 persecution in their home countries and are eligible for release. ... I am not
 13 aware of any family detained at Karnes who despite being eligible for release
 14 under 8 U.S.C. § 1226(a), and despite having received a favorable credible
 15 fear finding, then received an DHS custody determination allowing for

16 implementing regulations direct ICE to exercise discretion to determine whether a
 17 non-citizen’s release on bond will prove dangerous or inadequate to secure his or
 18 her appearance. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(c)(8).

19 ¹⁸ *E.g.*, Declaration of Anne Chandler, Dec. 1, 2014, Exhibit 28 ¶ 14 (Chandler);
 20 Declaration of Allison Boyle, Nov. 24, 2014, Exhibit 29 ¶ 15 (Boyle); Declaration
 21 of Brittany Perkins, Nov. 28, 2014, Exhibit 30 ¶ 12 (Perkins); Declaration of
 Clayton Matheson, Nov. 30, 2014, Exhibit 31 ¶ 11 (Matheson).

22 ¹⁹ *See, e.g.*, ICE, Directive 11002.1, *Parole of Arriving Aliens Found to Have a*
 23 *Credible Fear of Persecution or Torture* § 6.2 (Dec. 8, 2009), available at
 24 [www.ice.gov/doclib/dro/pdf/11002.1-hd-](http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)
 parole_of_arriving_alien_found_credible_fear.pdf (last checked Jan. 18, 2015).

25 In fiscal year 2012, DHS released 80 percent of bona fide asylum-seekers. U.S.
 26 Comm’n on Int’l Religious Freedom, *Assessing the U.S. Government’s Detention of*
 27 *Asylum Seekers: Further Attention Needed to Fully Implement Reforms* 9-10 (Apr.
 28 2013), available at [www.uscirf.gov/sites/default/files/resources/ERS-](http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf)
 detention%20reforms%20report%20April%202013.pdf (last checked Jan. 18,
 2015).

1 release.

2 B. Hines ¶ 14; *see also*, Declaration of Kate Lincoln, Dec. 2, 2014, Exhibit 32 ¶ 13;
3 Declaration of Melissa Cuadrado, Nov. 26, 2014, Exhibit 33 ¶ 12 (Cuadrado);
4 Declaration of Scott Williams, Dec. 1, 2014, Exhibit 34 ¶ 11.

5 ICE’s no-release policy toward mothers cannot be squared with the
6 Settlement’s granting class members a right to preferential release to a parent. A
7 “written contract must be read as a whole and every part interpreted with reference
8 to the whole.” *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1032
9 (9th Cir. 1989). “Preference must be given to reasonable interpretations as opposed
10 to those that are unreasonable, or that would make the contract illusory.” *Id.* ICE’s
11 exercising discretion to release mothers as 8 U.S.C. § 1226(a) directs is essential if
12 children’s right to preferential release to a parent is to have any meaning at all.

13 Further, consent decrees should also be enforced whenever practicable so as
14 to avoid raising constitutional questions. *Cf. Walsh v. Schlecht*, 429 U.S. 401, 408,
15 50 L. Ed. 2d 641, 97 S. Ct. 679 (1977) (“Contracts should not be interpreted to
16 render them illegal and unenforceable where the wording lends itself to a logically
17 acceptable construction that renders them legal and enforceable.”). Here, construing
18 the Settlement to allow ICE to detain class members’ mothers merely because they
19 have been apprehended together would raise substantial constitutional concerns.

20 First, ICE’s releasing class members—as the Settlement clearly requires—
21 while refusing even to exercise discretion to release their mothers would undermine
22 children’s due process interest in parental care. *Smith v. Organization of Foster*
23 *Families*, 431 U.S. 816, 844, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (due process
24 right of children in not being dislocated from the “emotional attachments that
25 derive from the intimacy of daily association” with the parent).

26 Second, defendants continue to release men, women, and adolescents
27 apprehended separately in accordance with 8 U.S.C. § 1226(a). Detaining *only*
28 mothers merely because they were apprehended with their children bears no

1 relationship to any legitimate governmental purpose and would accordingly raise
 2 substantial equal protection concerns. *Nordlinger v. Hahn*, 505 U.S. 1, 10; 112
 3 S.Ct. 2326; 120 L.Ed.2d 1 (1992) (equal protection component of the Fifth
 4 Amendment “keeps governmental decisionmakers from treating differently persons
 5 who are in all relevant respects alike.”).

6 ICE’s refusing to exercise discretion to release class members’ mothers
 7 accordingly breaches the preference for parental custody ¶ 14 posits. Detaining
 8 children is universally recognized as inimical to their well-being, and release
 9 together with a parent is not only required by ¶ 14, it is clearly in the best interests
 10 of a particularly vulnerable population.²⁰

11 II ICE’S ROUTINE CONFINEMENT OF CHILDREN IN SECURE, UNLICENSED
 12 FACILITIES BREACHES THE SETTLEMENT.

13 The Settlement stipulates that defendants shall house the general population
 14 of children they do not release in facilities that are licensed to care for *dependent*
 15 minors: “In any case in which the INS does not release a minor pursuant to
 16 Paragraph 14, ... [e]xcept as provided in Paragraphs 12 or 21, such minor shall be
 17 placed temporarily in a licensed program ...” Settlement ¶ 19.

18 The agreement defines a “licensed program” as a “program, agency or
 19 organization that is *licensed by an appropriate State agency* to provide residential,
 20 group, or foster care services for *dependent children* ...” Settlement ¶ 6 (emphasis
 21 added).²¹

22
 23 _____
 24 ²⁰ *E.g.*, Lutheran Immigration and Refugee Services, *et al.*, *Flores Settlement*
 25 *Agreement and DHS Custody: Key Flores Provisions & DHS Noncompliance*
 (undated), Exhibit 37 (LIRS Report).

26 ²¹ In this regard, the Settlement is consistent with federal law regulating the
 27 detention of juveniles. 42 U.S.C. § 5633(a)(12)(B) prohibits secure confinement of
 28 juveniles not charged with delinquency or crime. The U.S. Department of Justice
 maintains that housing non-delinquent class members in secure facilities would
 therefore be inconsistent with federal policy. Office of Juvenile Justice and Juvenile

1 The Settlement's requiring that detention facilities be licensed ensures that
 2 disinterested state officials with appropriate expertise are regularly monitoring and
 3 certifying that ICE placements meet child-welfare standards.²²

4 Exceptional cases aside,²³ the Settlement precludes ICE from housing
 5 children in unlicensed facilities, and even then only if no less restrictive alternative
 6 is available. *Id.* ¶ 23. Yet ICE freely admits it is routinely holding non-delinquent
 7 class members in facilities that are not licensed to care for dependent minors. *See*

8
 9
 10 Delinquency Prevention, *Juveniles in Federal Custody: Recommendations and*
Prospects for Change (1998), at 40.

11 ²² Child welfare and protection expert Genevra Berger elaborates on the importance
 12 of licensing:

13 It bears emphasis that the state licensing agency plays a pivotal role not only in
 14 initially assessing the standards are met but also in conducting periodic inspections
 15 to determine continuing compliance. ... [M]ost importantly, ... the lack of licensing
 16 means that no qualified and independent agency is verifying that the minimal safety
 17 requirements ... are being met. Nor is there any qualified and independent child
 welfare agency available to receive and investigate allegations of child abuse or
 neglect ...

18 Declaration of Genevra Berger, Jan. 12, 2015, Exhibit 25 ¶¶ 25, 28 (Berger).

19 ²³ The Settlement leaves defendants free to place delinquents and exceptional
 20 escape-risks in unlicensed, secure facilities, such as juvenile halls. Settlement ¶ 21.

21 The Settlement also allows defendants to place children who are neither escape-
 22 risks nor delinquent in unlicensed facilities in the event of an "influx." *Id.* ¶ 12.
 23 Defendants have not yet sought to excuse their housing class members apprehended
 with their mothers in unlicensed facilities under the influx provision. Their doing so
 could not possibly be excused as an influx response.

24 First, the influx of children apprehended with their mothers ended months ago.
 25 Note 13, *ante*. Second, defendants continue to place *unaccompanied* minors, who
 26 have always far outnumbered children apprehended with their mothers, *id.*, in
 27 licensed placements. Third, ¶ 12 of the Settlement stipulates that even "in the event
 28 of an ... influx of minors into the United States, ... the INS shall place all minors"
 in licensed settings "as expeditiously as possible..." Defendants feign no effort at
 all to place minors apprehended with their mothers in licensed settings.

1 e.g., Defendants’ response to questions re: implementation of class action
2 settlement, November 3, 2014, Exhibit 6 at 12.

3 In addition to licensing, the Settlement stipulates that “[a]ll homes and
4 facilities operated by licensed programs ... shall be *non-secure* as required under
5 state law ...”; that defendants “usually house[] persons under the age of 18 in an
6 *open setting*, such as a group home, *and not in detention facilities.*” *Id.* (emphasis
7 supplied).²⁴ Yet ICE’s family detention facilities are unquestionably secure:

8 The Karnes City facility is a large block building, which appeared to have
9 only one entrance. To enter, my colleagues and I were ... directed to a sally
10 port, which comprised two heavy metal doors with a small room between.
11 We passed through one door, it closed behind us; ... the second door was
12 opened, we walked through, and we then reached the interior of the facility.
13 The Karnes facility is constructed of concrete block. A staff member stated
14 the facility had been designed to house adult male prisoners. ... [A] central
15 open area ... was effectively surrounded by the high block walls of the
16 facility itself, denying those inside any means of ingress or egress except via
17 the secure entrance I earlier described. Facility staff stated that children
18 detained at Karnes have never been permitted outside the facility to go to the
19 park, library, museum, or other public places.

20 Declaration of Carlos Holguín, January 15, 2013, Exhibit 23 ¶¶ 4-5; *see also* Hines
21 ¶ 63; Matheson ¶ 17; Cuadrado ¶ 6; Chandler ¶ 21; Perkins ¶ 21.

22
23 ²⁴ Dr. Luis Zayas, a leading child psychologist and Dean of the School of Social
24 Work at the University of Texas at Austin emphasizes the harm secure confinement
25 does to children: “The medical and psychiatric literature has shown that
26 incarceration of children, even in such circumstances as living with their mothers in
27 detention, has long-lasting psychological, developmental, and physical effects.”
28 Declaration of Luis Zayas, Dec. 10, 2014, Exhibit 24 ¶¶ 1-6. After interviewing
children at ICE’s Karnes detention center, Dr. Zayas found that “children [at
Karnes] are suffering emotional and other harms as a result of being detained.” *Id.*
¶10.

1 In sum, ICE’s detaining children in secure, unlicensed facilities is
2 “detrimental to child welfare and places the detained children at grave risk of
3 serious harm.” Berger ¶ 16. It also clearly breaches ICE’s duty to house the general
4 poplation of children it does not release in non-secure settings that are properly
5 licensed to care for dependent minors.

6 III DEFENDANTS VIOLATE THE SETTLEMENT BY REGULARLY EXPOSING CHILDREN
7 IN BORDER PATROL CUSTODY TO HARSH, SUBSTANDARD CONDITIONS AND
8 TREATMENT.

9 The Settlement guarantees class members a minimum level of care even
10 while they await release or transfer to a licensed placement:

11 Following arrest, the INS shall hold minors in facilities that are safe and
12 sanitary and that are consistent with the INS’s concern for the particular
13 vulnerability of minors. Facilities will provide access to toilets and sinks,
14 drinking water and food as appropriate, medical assistance if the minor is in
15 need of emergency services, adequate temperature control and ventilation, ...
16 Settlement ¶ 12.

17 Typically, upon apprehension class members are taken first to a Border
18 Patrol station. Children may spend from one to several nights in Border Patrol
19 holding cells before they are turned over to the Office of Refugee Resettlement, if
20 unaccompanied, or if accompanied, to ICE, for longer term housing. *See* 6 U.S.C. §
21 279. Though ¶ 12 guarantees that children will be treated in accordance with
22 minimum standards during Border Patrol detention, reports of agonizing cold,
23 overcrowding, and inadequate nutrition and hygiene are endemic:

24 [W]e were first taken to a Border Patrol station near McAllen, Texas, where
25 we spent three days and four nights. ... The Border Patrol put us in a cell
26 with perhaps 100 other women and children. There were so many of us that
27 only perhaps half of us could lie down. ... We were given neither mattress
28 nor pillow, so we did our best to sleep on the hard concrete floor, which was

1 covered with dust. We were given nothing to keep warm except a cover of
2 aluminum foil. Neither my children nor I could sleep that first night.

3 The cell had only two toilets for all of us to use. There were short walls
4 surrounding the toilets, but it was so crowded that people were sitting or
5 lying down in the stalls, so any privacy the stall might have provided was
6 lost. There was no waste basket in the stalls, so people had to throw used
7 Kotex and used toilet paper on the floors. There was no soap for us to use to
8 wash our hands, and we were not permitted to bathe or brush our teeth the
9 entire time we were there.

10 The cell had no window to allow daylight to enter; only a window out to the
11 central part of the Border Patrol station. They kept the light on all the time,
12 and there was no clock so we lost track of whether it was day or night, but I
13 believe it was the next morning when we were finally given something to eat,
14 which was a baloney sandwich. For the next days, we were given nothing
15 else to eat except baloney sandwiches three times a day. We were constantly
16 hungry.

17 Declaration of D_ V_A, Jan. 9, 2015, Exhibit 18 ¶¶ 3-5 (D_V_A_Ex18).²⁵

18 _____
19 ²⁵ Journalists, human rights observers, and advocates have repeatedly expressed
20 concern over Border Patrol conditions. *See, e.g.* Americans for Immigrant Justice,
21 *The Hieleras: A Report on Human and Civil Rights Abuses Committed by U.S.*
22 *Customs and Border Protection Agency*, Aug. 2013, available at
23 http://d3n8a8pro7vhm.cloudfront.net/aijustice/pages/391/attachments/original/1398795271/The_Hieleras_A_Report.pdf?1398795271; Center for Investigative
24 Reporting, *Detained border crossers may find themselves sent to "the freezers,"*
25 Nov. 18, 2013, available at <http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574>; National Public Radio, *Amid Wave of Child Immigrants, Reports of Abuse by Border Patrol*, July 24, 2014, available at
26 www.npr.org/2014/07/24/334041633/amid-wave-of-child-immigrants-reports-of-abuse-by-border-patrol; Complaint regarding Systemic Abuse of Unaccompanied
27 Children in CBP Custody, June 11, 2014, available at
28 www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf.

1 Detainees’ accounts of harsh Border Patrol conditions are disturbingly
 2 consistent. Children routinely endure extreme cold and have little or no access to
 3 clothing, blankets, or beds.²⁶ Detainees consistently refer to CBP facilities as
 4 “hieleras” or iceboxes.²⁷ Coverings, when provided, are of “aluminum foil” and are
 5 often inadequate to keep children warm in “ice box” temperatures.²⁸

6 Children and their mothers regularly report being held for one to three days
 7 in extremely overcrowded rooms with 100 or more unrelated adults and children.²⁹
 8 In overcrowded conditions, children must frequently sleep standing up or not at all;
 9 they often lack space even to walk around.³⁰ Whatever floor space may be available
 10 consists of concrete floors caked with mud and dirt from migrants’ shoes.³¹

11 _____
 12 ²⁶ *E.g.* Declaration of H_R_M, Jan. 9, 2015, Exhibit 19 ¶ 5 (H_R_M_Ex19);
 13 Declaration of E_G_M, Jan. 9, 2015, Exhibit 41 ¶ 5 (E_G_M_Ex41); Declaration
 14 of M_G_S, Jan. 8, 2015, Exhibit 40 ¶ 4 (M_G_S_Ex40).

15 ²⁷ *E.g.* Declaration of A_F_E, Jan. 9, 2015, Exhibit 44 ¶ 5 (A_F_E_Ex44);
 16 H_R_M_Ex19 at ¶ 5; Declaration of C_C_C, Jan. 8, 2015, Exhibit 47 ¶ 7
 17 (C_C_C_Ex47); Declaration of S_A_M_B, Jan. 8, 2015, Exhibit 50 ¶ 6
 18 (S_A_M_B_Ex50). CBP facility temperatures are so cold that children have fallen
 19 ill. *E.g.* A_F_E_Ex44 ¶¶ 9-13; Declaration of S_C_M, Jan. 8, 2015, Exhibit 38 ¶ 4
 20 (S_C_M_Ex38).

21 ²⁸ *E.g.* Declaration of A_Z_M, Jan. 9, 2015, Exhibit 42 ¶ 5 (A_Z_M_Ex42);
 22 Declaration of A_C_G, Jan. 9, 2015, Exhibit 43 ¶ 6 (A_C_G_Ex43); A_F_E_Ex44
 23 at ¶ 5; H_R_M_Ex19 ¶ 5; Declaration of H_M_P, Jan. 9, 2015, Exhibit 45 ¶ 8
 24 (H_M_P_Ex45); E_G_M_Ex41 ¶ 5; Declaration of M_M_M, Jan. 9, 2015, Exhibit
 25 46 ¶ 5 (M_M_M_Ex46); R_E_A_Ex20 ¶ 3; D_V_A_Ex18 ¶ 4; C_C_C_Ex47 ¶ 7;
 26 Declaration of S_M_A, Jan. 9, 2015, Exhibit 48 ¶ 5 (S_M_A_Ex48); Declaration of
 27 L_B_S, Jan. 8, 2015, Exhibit 49 ¶ 5 (L_B_S_Ex49); Declaration of S_B_T, Jan. 8,
 28 2015, Exhibit 39 ¶¶ 5-6 (S_B_T_Ex39).

²⁹ *E.g.* A_F_E_Ex44 ¶ 5; M_M_M_Ex46 ¶ 5; R_E_A_Ex20 ¶ 3; D_V_A_Ex18 ¶ 4
 (cell shared with 100 women and children); S_C_M_Ex38 ¶ 4.

³⁰ *E.g.* Declaration of O_F_C_M, Jan. 9, 2015, Exhibit 51 ¶ 6 (O_F_C_M_Ex51);
 H_M_P_Ex45 ¶ 6; M_G_S_Ex40 ¶ 4; S_C_M_Ex38 ¶ 4; S_A_M_B_Ex50 ¶ 6.
 Many children and their mothers report that lights are left on at night, further
 preventing them from sleeping. *E.g.* O_F_C_M_Ex51 ¶ 6; H_M_P_Ex45 ¶ 6;
 M_M_M_Ex46 ¶ 5 (“You could not tell if it was day or night because there were no

1 Children have virtually no privacy in Border Patrol holding cells and must
 2 often use toilets that are open and visible to other detainees.³² Children’s access to
 3 toilets is often wholly inadequate: at times only one toilet for 50 to 100 detainees;
 4 toilets quickly become overwhelmed, and used toilet paper and sanitary napkins
 5 piles into corners.³³

6 Children are frequently provided inadequate food and water during Border
 7 Patrol custody.³⁴ Children and mothers report that drinking water tastes of chlorine
 8 bleach to the point that it is nearly undrinkable.³⁵ Nutrition typically consists of
 9 sandwiches served three times daily. Special or additional meals, milk, or nutrition
 10 for breast-feeding mothers, infants, or toddlers is out of the question.³⁶

11 Whether considered individually or together, Border Patrol detention
 12 conditions are anything but “safe and sanitary” or “consistent with the
 13 [Government’s] concern for the particular vulnerability of minors.” Settlement ¶ 12.
 14 Other than “standards prescribed by the American Society of Heating, Refrigeration

15 windows”); R_E_A_Ex20 ¶ 4; D_V_A_Ex18 ¶ 6 (no sleep because of
 16 overcrowding, noise, lights); S_M_A_Ex48 ¶ 5; L_B_S_Ex49 ¶ 8.

17 ³¹ *E.g.* A_F_E_Ex44 at ¶ 7; D_V_A_Ex18 at ¶ 4.

18 ³² *E.g.* A_C_G_Ex43 ¶ 6 (“Everyone could see when you used the bathroom.”);
 19 Declaration of J_E_F, Jan. 9, 2015, Exhibit 52 ¶ 6 (J_E_F_Ex52) (same);
 20 S_C_M_Ex38 ¶ 4; S_A_M_B_Ex50 ¶ 6.

21 ³³ *E.g.* A_Z_M_Ex42 ¶ 5; H_R_M_Ex19 ¶ 6 (one toilet for 125 people);
 22 E_G_M_Ex41 ¶ 5; D_V_A_Ex18 ¶ 4 (two toilets for 100; no waste baskets, soap,
 23 bathing or brushing of teeth); L_B_S_Ex49 ¶ 5 (mothers sleeping in bathroom with
 24 babies in arms).

25 ³⁴ *E.g.* A_Z_M_Ex42 ¶ 5; E_G_M_Ex41 ¶ 5; M_M_M_Ex46 ¶ 5 (only two meals a
 26 day); D_V_A_Ex18 ¶ 5 (nothing to eat but sandwiches). Numerous children and
 27 mothers eating nothing more than a cold taco or ham sandwich. *E.g.* H_R_M_Ex19
 28 ¶ 7; M_G_S_Ex40 ¶ 4; S_B_T_Ex39 ¶ 5.

³⁵ *E.g.* J_E_F_Ex52 ¶ 11 (“The water tasted terrible, like bleach, and it was very
 hard to drink.”); H_R_M_Ex19 ¶ 7 (same).

³⁶ *E.g.* A_F_E_Ex44 ¶ 6.

1 and Air Conditioning Engineers” for keeping holding cells at “room temperature,”
2 defendants report adhering to *no* specific standards regulating the treatment and
3 conditions children experience during Border Patrol custody. Exhibit 6 at 16-19.³⁷

4 IV CONCLUSION

5 For the foregoing reasons, this Court should grant this motion and enter an
6 order in the form lodged concurrently herewith.³⁸

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22 ³⁷ Defendants fail to report any procedures for *monitoring* temperature,
23 overcrowding, nutrition, etc., in Border Patrol facilities. *Id.* CBP’s reluctance to
24 treat allegations of Border Patrol abuse seriously has been independently remarked.
25 *See American Immigration Council, No Action Taken: Lack of CBP Accountability*
26 *in Responding to Complaints of CBP Abuse*, May 2014, available at
27 [www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_](http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_Final.pdf)
28 [Final.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_Final.pdf).

³⁸ Plaintiffs will separately move the Court to award them attorney’s fees and costs
incurred in the prosecution of this motion pursuant to the Equal Access to Justice
Act, 28 U.S.C. § 2412(d).

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