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22 **UNITED STATES DISTRICT COURT**
23 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

24 JENNY LISETTE FLORES; *et al.*,) Case No. CV 85-4544
25)
26 Plaintiffs,) **DEFENDANTS' RESPONSE IN**
) **OPPOSITION TO PLAINTIFFS'**
27 v.) **MOTION TO ENFORCE**
) **SETTLEMENT OF CLASS ACTION**
28 ERIC H. HOLDER, JR., Attorney)
29 General of the United States; *et al.*,) Hearing Date: March 27, 2015
30) Time: 9:30am
31 Defendants.) Dept: Courtroom 7, Los Angeles - Spring
32) Street Courthouse
33)
34)

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1 **I. INTRODUCTION**

2 More than 20 years ago, the Supreme Court wrote “this problem is a serious
3 one” when describing the surge of “more than 8,500” unaccompanied alien
4 children (UACs)¹ apprehended in 1990. *Reno v. Flores*, 507 U.S. 292, 294
5 (1993). In fiscal year 2014 the number of UACs apprehended on the southwest
6 border reached 68,541, and the number of accompanied children (children
7 encountered with a parent or legal guardian) apprehended increased to 38,845.²
8 This unprecedented influx constituted a serious humanitarian situation, as large
9 numbers of alien children—coming both with and without their parents—arrived at
10 our border hungry, thirsty, exhausted, scared, and, at times, in need of urgent
11 medical attention.
12

13 In response to this situation, the U.S. Department of Homeland Security
14 (“DHS”) created additional, family-appropriate immigration detention capacity to
15 hold families apprehended at the border, without requiring separation of parents
16 from their children. These family residential facilities provide for the safety,
17 security, and medical needs of both parents and children. They also ensure both
18 the maintenance of family unity and DHS’s ability to efficiently and effectively
19 process removal cases involving families. As a result of these actions, the number
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25 ¹ This brief will refer to a singular “unaccompanied alien child” as a “UAC,” and plural
26 “unaccompanied alien children” as “UACs.”

² See U.S. Border Patrol Statistics, available at:
http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf .

1 of both UACs and accompanied children illegally entering the United States has
2 decreased significantly.

3
4 Now, Plaintiffs have filed a motion against DHS³ seeking a court order that
5 would prevent the Government from holding family groups (generally defined as
6 children apprehended with adult parents or legal guardians) in U.S. Immigration
7 and Customs Enforcement (“ICE”) family residential centers during their
8 immigration removal proceedings. This request both threatens family unity and
9 ignores the significant growth in the number of children (both accompanied and
10 unaccompanied) apprehended while unlawfully crossing the southwest border.

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13 Plaintiffs cite no constitutional or statutory basis that would prevent the
14 Government from operating these facilities. Instead, Plaintiffs ask the Court to
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16 ³ The original Complaint in this case named as Defendants Edwin Meese, Attorney General of
17 the United States; Immigration and Naturalization Service (“INS”); Harold W. Ezell, Western
18 Regional Commissioner, INS; Behavioral Systems Southwest; and Corrections Corporations of
19 America. *See* Compl., Case No. 85-4544, July 11, 1985. The Agreement names as Defendants
20 then-current Attorney General Janet Reno, *et al.*, but gives no indication who any of the
21 additional Defendants were at that time. Under Federal Rule of Civil Procedure 25(d), Attorney
22 General Eric H. Holder, Jr., is substituted for Attorney General Reno as the current named
23 Defendant. In Plaintiffs’ motion to enforce the Agreement filed on February 2, 2015, Plaintiffs
24 name as Defendants “Jeh Johnson, Secretary of Homeland Security, *et al.*” Plaintiffs’ counsel
25 confirmed that the intended Defendants are “DHS and its subordinate entities, ICE and CBP.”
26 Thus, although Plaintiffs are seeking to enforce the Agreement against DHS, there is no
indication that DHS is, in fact, a Defendant to this action. As discussed more fully below, DHS
does not dispute that the terms of the Agreement as it currently exists apply to some functions
performed by DHS, ICE, and CBP, that were previously performed by INS, and that are clearly
reflected in the Agreement (i.e., custody immediately following apprehension and the
transportation of minors). However, as discussed more fully below, DHS disputes that this
means that the Agreement can be stretched to cover additional functions of DHS and its
components that were not performed by any entity at the time the Agreement was signed and
entered, and were not contemplated by the terms of the Agreement, such as ICE family
residential centers.

1 interpret the nearly two-decade-old *Flores* Settlement Agreement (“Agreement”),
2 which the parties entered into in order to govern the treatment of UACs, in a
3 manner that would require the Government to permit all accompanied children
4 apprehended at the border, as well as their adult parents and legal guardians, to be
5 released into the country. Plaintiffs also challenge the conditions under which
6 children are held in U.S. Customs and Border Protection (“CBP”) holding facilities
7 despite the fact that those facilities comply in all material respects with the
8 Agreement, and the issues about which Plaintiffs complain are not contrary to the
9 Agreement and are necessary to ensure the health and safety of all individuals at
10 those facilities.
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14 Plaintiffs’ motion to enforce should be denied for three reasons. First, the
15 parties intended – as, indeed, the Agreement itself demonstrates – that the terms of
16 the Agreement were meant to govern the treatment of UACs, and not accompanied
17 children. Second, to the extent the Agreement is ambiguous on this issue, the
18 context in which the Agreement was signed weighs in favor of reading the
19 Agreement in a manner that does not strictly apply it to situations involving
20 accompanied children and ICE family residential facilities. Finally, CBP holding
21 facilities and ICE residential facilities are in substantial compliance with the
22 Agreement and are not failing to comply with its material terms.
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26 Although well-intentioned, Plaintiffs’ requested relief will prevent DHS
from effectively enforcing immigration laws against families apprehended at the

1 border, thus encouraging additional adults to take themselves and their children on
2 the dangerous and potentially life-threatening journey to our Southwest border.

3
4 For these reasons, the Court should deny Plaintiffs’ motion.

5 **II. BACKGROUND**

6 **A. The Flores Settlement Agreement.**

7
8 The original Complaint in this action was filed on July 11, 1985. Compl.,
9 ECF No. 1, July 11, 1985. Plaintiffs filed the *Flores* lawsuit to challenge “the
10 constitutionality of [the INS’s]⁴ policies, practices, and regulations regarding the
11 detention and release of *unaccompanied* minors” Agreement at 3 (emphasis
12 added). At the time the challenge reached the Supreme Court in 1993, the class
13 consisted of juvenile aliens, “not accompanied by their parents or other related
14 adults,” who were apprehended by the legacy INS. *Reno*, 507 U.S. at 294.

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17 Ultimately, the Supreme Court rejected Plaintiffs’ facial challenge to an INS
18 regulation concerning care of juvenile aliens. *Id.* at 305. On remand from the
19 Supreme Court, the parties entered into a settlement agreement to resolve the case.

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21 The 1997 Agreement is a nearly 20-year-old agreement based on litigation that
22 began yet another decade before that. The Agreement became effective on January
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26 ⁴ In 2002 Congress abolished the INS, and its immigration functions relevant here were assigned to the newly-formed DHS and its components, as well as to the U.S. Department of Health and Human Services (“HHS”). Pub. L. No. 107-296.

1 28, 1997, upon its approval by this Court, and provides for continued oversight by
2 the Court.⁵

3
4 **B. ICE Family Residential Centers.**

5 At the time the parties signed, and the court entered, the *Flores* Settlement
6 Agreement in 1997, there were no family residential facilities in use for family
7 immigration detention by the INS. Declaration of Tae D. Johnson at ¶ 12
8 (“Johnson Decl.”), attached as Exhibit A to Motion to Modify Settlement
9 Agreement, filed concurrently herewith. In the absence of family residential
10 facilities, DHS had previously been faced with a difficult choice. On the one hand,
11 if DHS chose to detain adult parents apprehended at the border (which it is clearly
12 authorized to do, *see* 8 U.S.C. §§ 1225(b), 1226(a)), the Department would
13 essentially be forced to separate such parents from their children and transfer those
14 children to the Department of Health and Human Services (HHS) or to local
15 government social services, Johnson Decl. ¶ 10, an action the Department would
16 not want to take. On the other hand, if DHS chose to release every adult
17 apprehended at the border with his or her child(ren), DHS would essentially be
18 signaling that adults with children can illegally cross the border with impunity,
19 Johnson Decl. ¶ 11, thereby encouraging parents to subject themselves and their
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⁵ The Agreement was originally set to expire within five years, but on December 7, 2001 the Parties agreed to a termination date of “45 days following defendants’ publication of final regulations implementing this Agreement.” Stipulation, Dec. 7, 2001. To date, no such regulations have been published.

1 children to the life-threatening risks that come with efforts to illegally cross the
2 border. *Id.*, see also Declaration of Kevin W. Oaks (“Oaks Decl.”) ¶ 25, attached
3 hereto as Exhibit A. At the same time, DHS would be increasing vulnerabilities
4 that have long been exploited by human trafficking organizations, which have been
5 known to bring children across the border along with groups of smuggled strangers
6 in order to pass the groups off as families. Johnson Decl. ¶ 9. By ending the
7 practice of automatically releasing alien families apprehended while entering the
8 United States, DHS is able to deter human smuggling more effectively and to
9 protect children from being subjected to the high-risk situations associated with
10 human smuggling and attempts to cross the southern border illegally. Oaks Decl.
11 ¶¶ 25-28; Johnson Decl. ¶¶ 7-8.

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16 Due to recent increases in the illegal migration of families, and to address
17 very serious concerns related to human smuggling and trafficking, ICE opened the
18 Artesia Family Residential Center in Artesia, New Mexico in June 2014, the
19 Karnes Family Residential Center in Karnes City, Texas in July 2014, and the
20 South Texas Family Residential Center in Dilley, Texas, in December 2014.
21 Johnson Decl. ¶ 15. The Artesia facility, which was a temporary facility, closed in
22 December 2014. *Id.* Based on current plans, when the Dilley facility becomes
23 fully operational upon completion of planned expansions to existing facilities, ICE
24 will have available to it roughly 3,800 beds for housing families while their
25 removal proceedings are ongoing. *Id.* These facilities are essential to ensuring that
26

1 DHS can fulfill its operational mission to secure the border and enforce the
2 immigration laws of the United States. Johnson Decl. ¶¶ 7-8; Oaks Decl. ¶¶ 25-
3 28.⁶

4
5 **III. ARGUMENT**

6 **A. The Agreement Does Not Address ICE Family Residential**
7 **Centers Because There Was No Meeting of the Minds of the**
8 **Parties With Regard to Such Facilities.**

9 ICE's family residential centers should not be viewed as violating the
10 Agreement. The provisions of the Agreement that Plaintiffs seek to enforce should
11 not apply to family residential centers because the parties simply did not
12 contemplate at the time that the Agreement would apply to such facilities, or to the
13 housing of families (including accompanied minors). When the agreement was
14 reached, neither party could foresee the significant growth in the number, and
15 recent influx, of families at the border, nor the need for family residential centers
16 to house such families without separating parents from their children. It is clear
17 from a collective reading of various provisions of the Agreement, as well as the
18 factual circumstances surrounding the execution of the Agreement, that the parties
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22 ⁶ Plaintiffs complain that the fact that these facilities are used to house families with female
23 heads of household, and not with male heads of household, raises equal protection concerns.
24 Memo., ECF No. 100-1 at 13-14. However, Plaintiffs' equal protection claim is without merit.
25 First and foremost, this case is not about the constitutionality of family detention centers, but
26 about whether the Agreement has been breached. Moreover, the housing of families with male
heads of household involves safety and security concerns that are not as prevalent with the
housing of families with female heads of household. Given these concerns, and the significantly
higher number of families with female heads of household that cross the Southwest border, the
current use of these facilities is the most efficient use of ICE's resources. Declaration of Stephen
M. Antkowiak ("Antkowiak Decl.") ¶ 26, attached hereto as Exhibit B.

1 did not intend the Agreement to cover situations involving accompanied minors
2 held in family residential centers together with their parents or legal guardians.
3
4 Enforcement of the Agreement to preclude use of these facilities would render the
5 Agreement nonsensical, and would lead to adverse consequences never considered
6 or anticipated by the parties at the time the Agreement was signed.
7

8 **i. The Agreement Should Be Interpreted as a Consent Decree.**

9 The Agreement became effective in 1997 only upon its approval by this
10 Court and subject to this Court's continued oversight. Agreement [Plaintiffs'
11 Exhibit 2, at 50]. It is thus a consent decree. *See Rufo v. Inmates of Suffolk*
12 *County Jail*, 502 U.S. 367, 378 (1992). A consent decree is interpreted using
13 general contract principles. *City of Las Vegas v. Clark County*, 755 F.2d 697, 702
14 (9th Cir. 1985) ("A consent decree, which has attributes of a contract and a judicial
15 act, is construed with reference to ordinary contract principles."); *see also United*
16 *States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005) ("[C]ourts treat consent
17 decrees as contracts for enforcement purposes."). Like a contract, a consent decree
18 "must be discerned within its four corners, extrinsic evidence being relevant only
19 to resolve ambiguity in the decree." *Asarco*, 430 F.3d at 980; *see also United*
20 *States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("[T]he scope of a consent
21 decree must be discerned within its four corners, and not by reference to what
22 might satisfy the purposes of one of the parties to it."). The consent decree "should
23 be read to give effect to all of its provisions and to render them consistent with
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1 each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63
2 (1995).

3
4 **ii. The Agreement Was Never Intended to Apply to**
5 **Accompanied Minors in Family Residential Centers.**

6 The Agreement should not be interpreted to apply to accompanied minors
7 housed together with their parents in family residential centers, as this was not the
8 intent of the parties. “Under California law, the intent of the parties determines the
9 meaning of the contract.” *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*,
10 962 F.2d 853, 856 (9th Cir. 1992) (citing Cal. Civ. Code §§ 1636, 1638). In
11 interpreting a contract, the Court looks to the objective intent of the parties as is
12 made apparent by the actual agreement, “that is, the intent manifested in the
13 agreement and by surrounding conduct—rather than the subjective beliefs of the
14 parties.” *Id.* As is made clear by the language of the Agreement and the factual
15 circumstances surrounding its creation, the Agreement simply did not contemplate
16 the significant growth in the number, and recent influx, of families or the need to
17 house them in family residential centers during their removal proceedings.
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21 The Agreement was entered into to resolve a lawsuit challenging “the
22 constitutionality of [the INS’s] policies, practices, and regulations regarding the
23 detention and release of *unaccompanied* minors” Agreement at 3 (emphasis
24 added); *see also Reno v. Flores*, 507 U.S. 292, 294 (1993) (noting that the
25 litigation applied to “alien juveniles who are not accompanied by their parents or
26

1 other related adults.”). The entirety of Plaintiffs’ argument rests upon the premise
2 that because the Agreement defines the class as “[a]ll minors who are detained in
3 the legal custody of the INS,” Agreement ¶ 10, and contains a provision defining a
4 “minor” as “any person under the age of eighteen (18) years who is detained in the
5 legal custody of the INS,” Agreement ¶ 4, the Agreement must be read to include
6 accompanied alien minors. But, as the Ninth Circuit has recognized, the “words
7 of a written instrument often lack a clear meaning apart from the context in which
8 the words are written” *Skilstaf, Inc. v. CVS Caremark Corp.* 669 F.3d 1005,
9 1015 (9th Cir. 2012).

13 The purpose and context for the definition of “minor” shows no intent that
14 the parties intended the term to apply to accompanied children. Rather, the
15 definition was meant to provide clarity as to who would be treated as a child and
16 who would be treated as an adult under the Agreement. *See* Agreement ¶ 4
17 (differentiating between minors and adults based on age). In 1997 (and now), a
18 “child” was defined in the Immigration and Nationality Act (INA) as “an
19 unmarried person under twenty-one years of age” *Wong v. Bell*, 642 F.2d
20 359, 360 (9th Cir. 1981) (citing 8 U.S.C. § 1101(b)(1)). Had the agreement failed
21 to define the term “minor,” there would have been confusion as to whether the
22 Agreement applied to individuals under the age of 21 or individuals under the age
23 of 18. In addition, to qualify as a “child” under the INA, an individual could not
24 be married. 8 U.S.C. § 1101(b)(1). Consequently, in the context of the
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1 Agreement, the definition of “minor” was necessary to capture UACs under the
2 age of 18 regardless of their marital status.

3
4 To the extent that the definition appears to signal the intent of the parties to
5 encompass accompanied children (and not just UACs), or to the extent that the
6 definition is ambiguous on this point, the court should consider the context and
7 structure of the Agreement as a whole. The Agreement is clearly crafted in a
8 manner that indicates that the parties did not intend its provisions to apply to
9 accompanied children. In addition to the provisions discussed in succeeding
10 sections, the following provisions indicate that the parties did not intend for it to
11 apply to accompanied children:
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13

- 14 • On page 3 of the Agreement, the parties note that the Agreement is
15 designed to require that minors “in [Government] custody . . . be
16 housed in facilities meeting certain standards, including state
17 standards for housing and care of *dependent* children,” making no
18 mention regarding the housing of families or of children who enter the
19 United States in the custody of their parents.
- 20 • Paragraph 24 of the Agreement, which references enforcement of the
21 Agreement, mentions actions a child can take to be released from
22 custody. None of the provisions in this paragraph mention the ability
23 of a child to consult with his or her parent prior to seeking a bond
24 hearing or filing a federal court action. To the contrary, the
25 Agreement simply presumes that the child does not have a parent
26 available to make these decisions on his or her behalf.
- Section VIII of the Agreement addresses the transportation of children
arrested or taken into immigration custody. In no part of this section
does it describe what to do with family members, including a parent
apprehended or taken into custody together with his or her child
during this process.

1 Further, at the time the Agreement was signed in 1997, there were no family
2 residential facilities in operation. Johnson Decl. ¶ 12. There is also no indication
3 that the parties anticipated that such facilities would be developed,⁷ or even that
4 they anticipated the significant increases in the numbers of alien children
5 accompanied by their parents crossing the U.S. southwest border that would
6 necessitate the development of such facilities. See Johnson Decl. ¶¶ 7-8; Oaks
7 Decl. ¶¶ 25-28.
8

9
10 In fact, the Agreement contains clear evidence of the parties' expectations
11 with regard to the numbers of UACs crossing the border that would constitute an
12 "influx," defining that as "circumstances where the INS has, at any given time,
13 more than 130 minors eligible for placement in a licensed program." Agreement ¶
14 12.B; see also *Reno*, 507 U.S. at 295 (noting that an influx of approximately 8,500
15 UAC was a serious problem). But in fiscal year 2012, the Border Patrol
16 apprehended more than 24,400 UACs alone, and that number jumped to more than
17 38,800 in fiscal year 2013.⁸ In fiscal year 2014 the number of UACs apprehended
18 on the southwest border reached 68,541, and the number of accompanied children
19 (children encountered with a parent or legal guardian) apprehended surged to 38,
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24 ⁷ While the district court in Texas did find that the Agreement, by its terms, was applicable to the
25 Hutto family facility because it refers to "minors" throughout, that court also clearly recognized
26 that the Agreement "did not anticipate the current emphasis on family detention" *Bunikyte*,
2007 WL 1074070 at *3.

⁸ See U.S Border Patrol Statistics, available at:
<http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10.-FY14.pdf>.

1 845.⁹ Thus, in 2014, an average of approximately 188 UACs came into
2 Government custody each day, suggesting that the “influx” provisions of the
3 Agreement remained generally applicable throughout that year. Given that the
4 parties clearly did not anticipate the influx levels present today, it follows that the
5 parties could not have anticipated the need for family detention to handle this
6 influx. Thus, the Agreement should not be stretched to cover situations the parties
7 never anticipated.
8
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10 **B. The “Preference for Release” Provision of the Agreement**
11 **Should Not Be Applied to Accompanied Minors in Family**
12 **Residential Centers.**

13 Paragraph 14, as written, provides for release of a “minor from its custody
14 without unnecessary delay” to a parent, legal guardian, or adult relative “where the
15 INS determines that the detention of the minor is not required either to secure his
16 or her timely appearance before the INS or immigration court, or to ensure the
17 minor’s safety or that of others” Agreement ¶ 14. The procedures and
18 conditions of that release (which are discussed in Section VI) clearly contemplate
19 the release of a UAC in Government custody to a parent or other individual who
20 was previously present in the interior of the United States.¹⁰ There is absolutely no
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24 ⁹ See U.S. Border Patrol Statistics, available at:
25 [http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf)
26 [Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf) .

¹⁰ Paragraph 15, for example, requires that the potential custodian sign an affidavit and agreement attesting that he or she will be able to “provide for the minor's physical, mental, and financial well-being” and “ensure the minor’s presence at all future proceedings before the INS

1 basis to find that the parties intended these provisions to apply to an accompanied
2 child together with a parent or guardian who just entered the country and would
3 not be able to establish a pre-existing stable living environment. *See Bunikyte*,
4 2007 WL 1074070 at 3 (“Of course, this preference for release makes no sense
5 when the minor’s parents are detained with the child.”); *id.* (“[T]he release policy
6 expressed in Paragraph 14 has limited utility in the context of family detention . . .
7 .”).¹¹

8
9
10 Moreover, as proof that Plaintiffs acknowledge that the language of the
11 Agreement is ambiguous, Plaintiffs contend – without citing any specific language
12 mandating this result – that Paragraph 14 of the Agreement requires ICE to release
13 not only accompanied children, but also their parents. Memo, ECF No. 100-1, at
14 5-11. Plaintiffs argue that releasing such parents would enable accompanied
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17 and the immigration court”. Agreement ¶ 15. Paragraph 16 enables the INS to terminate such
18 custodial arrangements if a custodian fails to comply with the affidavit and agreement.
19 Agreement ¶ 16. Paragraph 17 even provides that the potential custodian may be subject to a
20 “suitability assessment” that includes components such as “an investigation of the living
21 conditions in which the minor would be placed and the standard of care he would receive” as
22 well as “verification of identity and employment of the individuals offering support, interviews
23 of members of the household, and a home visit.” Agreement ¶ 17.

24 ¹¹ Plaintiffs argue that Defendants are violating this provision because they are applying a no-
25 release policy. This claim is also at the heart of a district court case in the District of Columbia
26 in which the Court recently addressed a similar claim. *See R.I.L.R., et al. v. Johnson, et al.*,
Case No. 15-0011, Opinion, ECF No. 33 (D.D.C. Feb. 20, 2015). Notably, in that case the Court
found that the Government does not have a blanket no-release policy for women and children,
but rather had a policy of considering deterrence of mass migration as a factor in making custody
determinations. *Id.* at 8-9. The Court then went on to find that consideration of this factor was
impermissible, and has enjoined the Government from its consideration. *See generally id.*
However, this decision is not yet final, and the Court’s conclusion was based on an incomplete
factual record. Much of the evidence put forth before this Court has not yet been presented to
the Court in *R.I.L.R.*

1 minors to have the opportunity for “preferential release to a parent.” *Id.* But
2 Plaintiffs’ reading of the Agreement stretches it far beyond its terms. Plaintiffs
3 point to no provision where the Agreement provides for the release of parents and
4 legal guardians who have no lawful immigration status, nor any provision of the
5 Agreement that explicitly addresses adult rights and treatment within family
6 residential centers. Indeed, there is no basis to find that the Agreement provides
7 for or requires the release of adults in immigration custody. *See Bunikyte*, 2007
8 WL 1074070 at *16 (“The Flores settlement, however, does not provide any
9 particular rights or remedies for adult detainees.”).

13 Additionally, Paragraph 14 also provides that an alien child may continue to
14 be detained “to ensure the minor’s safety or that of others.” Agreement ¶ 14.
15 Detaining an accompanied child together with his or her parent, rather than
16 releasing him or her to another individual, complies with this provision of the
17 Agreement because separating a child from his or her parent endangers the safety
18 of the child, and keeping the family together is generally in the child’s best
19 interest. *See Bunikyte*, 2007 WL 1074070 at *16 (“Both Plaintiffs and Defendants
20 recognize that keeping the minor Plaintiffs with their parents is in their best
21 interests . . .”). Further, release of all accompanied children and their parents (or
22 guardians) incentivizes such families to make the dangerous journey to this
23 country. Oaks Decl. ¶ 25. Adults looking to smuggle children or otherwise cross
24 the border illegally also would effectively be rewarded for having children
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1 accompany them. Johnson Decl. ¶ 11. Smuggling endangers both the children
2 who are victims of the smugglers, and the public in general. Johnson Decl. ¶ 9.
3 Moreover, releasing accompanied children and their parents after their
4 apprehension encourages increased migration and attendant national security
5 concerns, while the availability of detention is proven to reduce migration and
6 reduce these threats. Johnson Decl. ¶¶ 7-9, 11; Oaks Decl. ¶¶ 25-28.¹²
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9 **C. The “Licensing” Provision of the Agreement Should Not Apply**
10 **to Family Residential Centers.**

11 The purpose of requiring that alien children be placed in licensed facilities
12 was, as Plaintiffs acknowledge, to ensure that “ICE placements meet child-welfare
13 standards.” ECF No. 100-1, p.15. This provision was not meant to apply to family
14 detention or to federal family residential facilities. The parties never intended –
15 and could not have intended – such to apply to federally-operated family
16 residential centers that did not yet exist at the time of the parties entered the
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21 ¹² Plaintiffs also argue that release is required because housing families in ICE family residential
22 centers does not comport with the requirements of due process. Motion, ECF No. 100-1 at 7,
23 n.10. However, Plaintiffs’ ability to raise any challenge in this context is limited to the four
24 corners of the Agreement, and is not a generalized right to challenge their detention – such
25 challenges must be raised in a petition for habeas corpus in the district in which they are
26 detained. Moreover, Plaintiffs’ reliance on *Zadvydas v. Davis*, 533 U.S. 678 (2001) is
misplaced. Plaintiffs point to no basis to find that ICE is subjecting families to indefinite, post-
order detention, as was the issue in *Zadvydas*, nor have they pointed to any other basis to find
that detention in ICE family residential centers is generally contrary to law, or outside ICE’s
statutory authority. And again, such a claim would need to be raised not in a contractual
enforcement motion, but in a petition for a writ of habeas corpus in the court with authority to
issue such a writ.

1 Agreement. Johnson Decl. ¶ 12. There is simply no basis to find that the state
2 licensure provision was intended to apply to such facilities.

3
4 Moreover, nothing in the language of this section of the Agreement makes
5 reference to the housing of families (including accompanied children). Section VI,
6 Paragraph 19 provides that, as an alternative to releasing a minor held in custody to
7 a potential custodian, “[i]n any case in which the INS does not release a minor
8 pursuant to Paragraph 14 . . . , such minor shall be placed temporarily in a licensed
9 program” Settlement ¶ 19. Under the Agreement, a “licensed program” is
10 defined as a “program, agency or organization that is licensed by an appropriate
11 State agency to provide residential, group, or foster care services for *dependent*
12 *children*” Settlement ¶ 6 (emphasis added). The reference to “dependent
13 children” is clearly a reference to children who are not accompanied by a parent or
14 guardian. This reading of the Agreement is supported by the fact that there is no
15 state licensing process available – nor was there in 1997 – for residential centers
16 that house children along with their parents or guardians. It is illogical to assume
17 that the parties intended this provision to apply to facilities that did not even exist
18 at the time, and for which no such licensing would have been available. This
19 provision should not be stretched to have the entirely unintended consequence of
20 making it impossible for ICE to house families at ICE family residential centers,
21 and to instead require ICE to separate accompanied children from their parents or
22 legal guardians.
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1 Finally, Defendants note that Plaintiffs have raised no challenges with regard
2 to the standards of the conditions at any ICE family residential center. In fact, if
3 the substantive requirements of the Agreement concerning facility conditions were
4 read to apply to family residential centers, ICE would be in substantial compliance
5 with the requirements of the Agreement even in the absence of licensing. *See Jeff*
6 *D. v. Otter*, 643 F.3d 278, 283-84 (9th Cir. 2011) (“Because consent decrees have
7 ‘many of the attributes of ordinary contracts [and] . . . should be construed
8 basically as contracts’ . . . , the doctrine of substantial compliance, or substantial
9 performance, may be employed.”) (quoting *United States v. ITT Cont'l Baking Co.*,
10 420 U.S. 223, 236 (1975)). ICE family residential centers are operated in strict
11 compliance with ICE family residential standards. *See ICE Family Residential*
12 *Standards*, available at: <http://www.ice.gov/detention-standards/family-residential>;
13 *see generally* Antkowiak Decl. The family residential standards were developed
14 with input from medical, psychological, and educational experts, as well as civil
15 rights organizations, with the goal of mirroring community standards and ensuring
16 that all residents are treated with dignity and respect. Johnson Decl. ¶ 17.
17 Residents at ICE family residential centers enjoy free movement during waking
18 hours and have access to health and social services. Johnson Decl. ¶ 18;
19 Antkowiak Decl. ¶¶ 5, 13, 16, 24. Each center permits visitors and provides indoor
20 and outdoor recreational areas and activities, such as soccer, volleyball and
21 basketball. Johnson Decl. ¶ 18; Antkowiak Decl. ¶¶ 10, 19. All dining rooms

1 serve three meals per day and residents have access to beverages and snacks 24
2 hours per day. Johnson Decl. ¶ 18; Antkowiak Decl. ¶¶ 14, 23. Education is
3 provided to all school-age children. Johnson Decl. ¶ 18; Antkowiak Decl. ¶¶ 11,
4 20. Residents are permitted to wear their own personal attire or other non-
5 institutional clothing, which is provided free of charge to those in need. Johnson
6 Decl. ¶ 18; Antkowiak Decl. ¶ 7. Residents also have access to telephones,
7 televisions, video games, the internet, and law libraries with printing and copying
8 capabilities. Johnson Decl. ¶ 18; Antkowiak Decl. ¶¶ 9, 12, 18, 22.
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12 The ICE Enforcement and Removal Operations Juvenile and Family
13 Residential Management Unit oversees the ICE family residential centers and
14 ensures their compliance with the family residential standards. Johnson Decl. ¶ 19.
15 The family residential centers are also subject to inspections by the ICE Office of
16 Professional Responsibility's Office of Detention Oversight and an independent
17 compliance inspector. *Id.* Given that these conditions place DHS in substantial
18 compliance with the terms of the Agreement, and noting that DHS is concurrently
19 filing a motion to modify the Agreement to specifically allow for Plaintiffs to have
20 oversight regarding ICE's compliance with these standards for ICE family
21 residential centers, it would be even more inappropriate to stretch the Agreement to
22 impose a licensing requirement in a way never intended by the parties almost two
23 decades ago.
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1 **D. CBP Facilities Comply With the Requirements of the**
2 **Agreement.**

3 The Agreement requires that “[f]ollowing arrest, the INS shall hold minors
4 in facilities that are safe and sanitary and that are consistent with the INS’s concern
5 for the particular vulnerability of minors.” Agreement ¶ 12.A. With the enactment
6 of the Homeland Security Act of 2002, the INS’s responsibility to temporarily
7 detain UACs based on their immigration status following apprehension at or
8 between the ports of entry was transferred to CBP. And CBP has complied with –
9 and indeed, far exceeded – the minimal standards set forth in the Agreement with
10 regard to the conditions of detention for UACs for the short time period that they
11 are in CBP custody.
12

13 CBP sets and enforces clear standards for safe and sanitary conditions at the
14 Border Patrol stations through facilities design guides and written policy guidance.
15 Standards addressed by CBP address the necessary aspects of care for children in
16 CBP custody and include, but are not limited to, the requirements of the
17 Agreement to “provide access to toilets and sinks, drinking water and food as
18 appropriate, medical assistance if the minor is in need of emergency services,
19 adequate temperature control and ventilation, adequate supervision to protect
20 minors from others, and contact with family members who were arrested with the
21 minor.” Agreement ¶ 12.A Hold Rooms and Short Term Custody Policy (“Hold
22 Room Policy”) 6.24.7, available at <http://foiarr.cbp.gov/streamingWord.asp?i=378>.
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1 UACs remain in CBP custody for an extremely short period of time. In
2 accordance with the provisions of the TVPRA, UACs must be transferred to HHS
3 custody within 72 hours of a determination that a child is, in fact, a UAC. 8 U.S.C.
4 § 1232(b)(3). Under Border Patrol policy, every effort is made to transfer UACs to
5 HHS custody within 12 hours. Oaks Decl. ¶ 14.¹³ Given the sheer volume of
6 individuals passing through any given Border Patrol station each day, as well as
7 the short duration of aliens' stay at a Border Patrol station, it would be impossible
8 for CBP to provide the same level of care at a Border Patrol station that one would
9 expect at a longer-term facility, a fact which is recognized by the lesser standards
10 required by the Agreement for these facilities as compared to the standards for
11 longer-term facilities. CBP nonetheless embraces the need to meet children's basic
12 needs, such as adequate food and safe shelter, for the short time children are there.
13 *See, e.g.*, Hold Room Policy at 6.8-6.11; 6.16; 6.24; 6.26.6; 7. CBP also has in
14 place performance measures to ensure that its Agents understand and maintain the
15 requirements of the Agreement. *See* Hold Room Policy 6.24.11; *id.* at 7.

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21 A Border Patrol station provides shelter in hold rooms, which are designed
22 to have sufficient space and the appropriate number of toilets for the designated
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24 ¹³ On average, in 2014, UACs spent only 34 hours in CBP custody; accompanied alien children
25 were in CBP custody only slightly longer, with an average of 46 hours. During the unanticipated
26 and unprecedented influx of aliens along the southwest border from March 2014 through July
2014, these averages rose, such that some children were in CBP custody for several days. Once
these surge conditions subsided, however, the average time spent in custody reverted back to a
period of less than two days. *See* USBP Unaccompanied and Accompanied Alien Children
Apprehensions Average Hours in Custody, attached hereto as Exhibit C.

1 maximum number of occupants. *See* Oaks Decl. ¶ 15; Hold Room Policy 6.24.7;
2 7.1.2.¹⁴ The typical hold room is constructed of hardened materials that are easy to
3 clean and hygienic. *See* Oaks Decl. ¶ 15. There are no trash cans in the rooms for
4 safety reasons; however, supervisors are required to ensure that every room is
5 regularly cleaned and sanitized. *See* Oaks Decl. ¶¶ 15, 16; Hold Room Policy
6 7.1.3; 7.2. CBP employs custodial staff to regularly address sanitation needs and
7 any required maintenance in holding areas. Oaks Decl. ¶ 17.
8

9
10 In Border Patrol facilities, UACs are separated from unrelated adults and
11 either placed in a segregated hold room or placed in an open area under the
12 constant visual supervision of a Border Patrol agent. *See* Hold Room Policy 7.1.1;
13 DHS, Office of the Inspector General, CBP's Handling of Unaccompanied Alien
14 Children at 20 (September 2010), available at
15 http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf . All aliens,
16 including UACs, are separated by age and gender; however, CBP makes every
17 effort to keep young children with their parents. *See* Hold Room Policy 7.1.1. ;
18 Oaks Decl. ¶ 12. Although families may need to be separated to ensure the safety
19 and security of all aliens being held at a Border Patrol station, Border Patrol agents
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24 ¹⁴ When CBP experienced the unprecedented influx of alien children and families crossing the
25 Southwest border in 2014, Border Patrol stations were pushed to their limits. During that time
26 CBP used Centralized Processing Centers (“CPC”) to help ameliorate overcrowding. The CPC
is an integral part of the RGV Sector’s strategy to develop a more efficient way to process all
categories of aliens, with the ability to provide services associated with the care and temporary
custody of children and families. These services include hot meals, showers, child monitors, and
laundry services, among others. *See* Oaks Decl. ¶ 4.

1 provide reasonable opportunities for contact between children and their family
2 members. *See* Oaks Decl. ¶ 12.

3
4 Medical care is available at each Border Patrol station for all individuals,
5 including children. *See* Oaks Decl. ¶¶ 9-11; Hold Room Policy 6.7.2; 7.2.3. Upon
6 arrival, each individual is screened for serious contagious diseases, outward signs
7 of illness, or complaints of any illness or discomfort. *See* Oaks Decl. ¶ 10; Hold
8 Room Policy 6.7.2. Individuals who require medical treatment that cannot be
9 provided by medical personnel on site, or where there is no medical staff on site,
10 are transported to an appropriate medical facility. *See* Oaks Decl. ¶ 11; Hold
11 Room Policy 6.7.2.
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14 Absolute privacy is not guaranteed in CBP hold rooms because of safety and
15 security concerns. *See* Oaks Decl. ¶ 18. For example, locked or closed doors are
16 not available or permitted. *See id.* The toilet areas are separated from the rest of
17 the room by a screen wall which allows agents to monitor and protect detainees,
18 especially children, while still providing privacy. *See id.*; Hold Room Policy 6.23.
19
20 Border Patrol agents also monitor hold rooms via cameras mounted in the rooms.
21 *See* Oaks Decl. ¶ 16; Hold Room Policy 6.5. Additionally, agents visually check
22 each hold room at regular intervals. *See* Oaks Decl. ¶ 16. For security purposes,
23 the hold rooms are designed as interior rooms with no exterior windows. *See* Oaks
24 Decl. ¶ 18. The rooms also remain well-lit at all times, not only to provide
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1 adequate lighting for detainees and for officers, but also to minimize the risks of
2 safety and security problems. *See* Oaks Decl. ¶ 19.

3
4 CBP also maintains strict standards to ensure children receive adequate
5 drinking water and food. Potable drinking water is available at all times. *See* Hold
6 Room Policy 6.9. All detainees are provided snacks and juice every four hours,
7 and children of all ages and pregnant women have regular access to snacks, milk,
8 or juice at all times. *See* Hold Room Policy 6.8. All children are offered meals
9 every six hours; two of every three meals are hot meals. *See id.* CBP Policy
10 requires that agents record the provision of meals. *See* Hold Room Policy 6.24.8-
11 9, 6.24.13; Use of the Updated e3 Detention Module, attached hereto as Exhibit D.
12
13 As feasible, CBP provides meals that conform to the culinary, cultural, and
14 religious dietary restrictions and/or differences of all detainees. *See* Hold Room
15 Policy 6.8.
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18 CBP makes every effort to maintain the Border Patrol stations at a
19 universally comfortable temperature. Oaks Decl. ¶ 20. CBP also provides Mylar
20 blankets which provide the most hygienic solution for temperature control. *See*
21 Oaks Decl. ¶ 21; Hold Room Policy 6.11.
22

23 CBP makes every effort to care for the children in its custody, which
24 includes complying with the requirements of the Agreement. In those areas in
25 which Plaintiffs contend that conditions at CBP facilities do not comply, an
26 underlying Governmental interest, such as safety, is often the cause of the

1 complained-of conditions. For example, the need to ensure the safety of all aliens,
2 to include children, causes the hold rooms to be well-lit at all times and the
3 wastebaskets to be removed. Likewise, the need to ensure sanitary conditions
4 leads to water that may taste different than that to which individuals from another
5 country are accustomed, and blankets that seem sterile. Ensuring safe and sanitary
6 conditions, as required by the Agreement, is the primary goal, and at times may
7 override individual comfort concerns.
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10 Regardless, CBP makes every effort to ensure the safety, health, and comfort
11 of UACs as required by the Agreement during the brief period they are in CBP
12 custody. Based on the above, the Court should find that CBP is in substantial
13 compliance with the Agreement.
14

15 **IV. CONCLUSION**
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17 For the foregoing reasons, the Government requests that the Court deny the
18 Plaintiffs' Motion to Enforce Class Action Settlement.
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I served the foregoing pleading on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

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