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19 **UNITED STATES DISTRICT COURT**

20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

21 JENNY LISETTE FLORES; *et al.*,

22 Case No. CV 85-4544-DMG

23 Plaintiffs,

24 **JOINT STATUS REPORT**

25 v.

26 WILLIAM P. BARR, Attorney General
of the United States; *et al.*,

Defendants.

1 On June 26, 2020, the Court ordered the parties to continue to meet and confer
2 regarding “the adoption and implementation of proper written advisals and other
3 protocols to inform detained guardians/parents about minors’ rights under the FSA
4 and obtain information regarding, and procedures for placement with, available and
5 suitable sponsors, as well as discuss conditions at the Cowlitz and NORCOR
6 detention facilities[,]” and to provide a joint status report regarding these efforts to
7 meet and confer no later than July 8, 2020. Order, ECF No. 833, ¶ 6. The parties did
8 so. *See* ECF No. 846. On July 25, 2020, the Court denied an application filed by
9 Defendants seeking to stay the proceedings, and in denying that application ordered
10 as follows with regard to the meet and confer process:

11 If the parties solicit the Court’s suggestions, it will endeavor to provide
12 constructive guidance. But the Court cannot and will not dictate the
13 results of the parties’ negotiations or force an agreement where there is
14 none. Nor should the parties seek the Court’s approval of a protocol
15 that they have not yet agreed upon. Until the parties evidence some
16 agreement regarding a know-your-rights protocol, there is none. As of
17 today, the Court is not aware of any agreement that has been reached
18 between the parties. The proper avenue for the parties to inform the
19 Court of their agreement—or lack thereof—and of the progress of their
20 discussions on the know-your-rights protocol is through the filing of a
21 joint status report, as required under Paragraph 6 of the June 6, 2020
22 Order. In light of the flurry of *ex parte* briefing within the last 48 hours,
23 the Court requests that the parties file a further joint status report
24 consistent with Paragraph 6 by August 5, 2020.

25 Order, ECF No. 887, at 2. In accordance with the Court’s order, the parties file the
26 following joint report.

1 **Plaintiffs' Position:**

2 Defendants state below that they “will not voluntarily agree to any protocol
3 that would potentially provide for the separation of a parent and child who are
4 currently housed together in an ICE FRC.” What Defendants mean is that they have
5 in the past opposed and continue to oppose the release of *any* accompanied minor,
6 regardless of what a Class Member’s parent may think is in the best interest of his
7 or her child.¹

8 What Defendants also mean is they oppose parents of detained Class Members
9 *being advised of their child’s rights* under the *Flores* Settlement Agreement
10 (“FSA”), and definitely oppose establishing any procedures to follow should a parent
11 decide it’s in her child’s best interest to be released to close relatives living in the
12 U.S.

13 The FSA “creates a presumption in favor of releasing minors.” *Flores v. Barr*,
14 934 F.3d 910, 916 (9th Cir. 2019); *accord Flores v. Lynch*, 828 F.3d 898, 901 (9th
15 Cir. 2016); *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017).

16 The following holding of the Court of Appeals is instructive on the current
17 issue now before the Court:

18 Construing the Agreement as requiring only the particular conditions
19 specifically enumerated renders both the "safe and sanitary" and the
20

21 ¹ Defendants have twice unsuccessfully moved the Court to terminate the rights of
22 accompanied minors, they have also unsuccessfully argued before this Court and the
23 Court of Appeals that the FSA was not intended to provide any protections to
24 accompanied minors, and they have promulgated final regulations-the
25 implementation of which was blocked by this Court-aimed principally at terminating
26 the FSA’s protections for accompanied minors. So Defendants now seek to
accomplish through the back door what they failed to achieve through the front door
by never advising parents of their children’s FSA rights and not having *any*
procedures in place to implement those rights should a parent believe it’s in their
child’s best interest to be released.

1 "particular vulnerability of minors" phrases wholly superfluous. We
2 cannot accept that the parties to the Agreement included gratuitous
3 standards that have no practical impact. "Courts interpreting the
4 language of contracts 'should give effect to every provision,' and 'an
5 interpretation which renders part of the instrument to be surplusage
6 should be avoided.'" *United States v. 1.377 Acres of Land*, 352 F.3d
7 1259, 1265 (9th Cir. 2003) (quoting *Appalachian Ins. Co. v.*
8 *McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 12, 262 Cal. Rptr. 716
9 (Ct. App. 1989)); *see also* Restatement (Second) of Contracts §
10 203 (Am. Law Inst. 1981). We conclude that paragraph 12A's
11 provisions that facilities be "safe and sanitary and . . . consistent with
12 the INS's concern for the particular vulnerability of minors" do have
13 independent force and can be interpreted and enforced without
14 thereby modifying the Agreement.

15 *Flores v. Lynch*, *supra*, 828 F.3d at 915.

16 Similarly, the FSA's provisions addressing the release rights of accompanied
17 children have independent force and can be interpreted and enforced by requiring
18 that parents be advised of their children's rights and that ICE adopts procedures to
19 simply comply with Class Members' release rights without thereby modifying the
20 Agreement.

21 As they previously reported to the Court, the parties did meet and confer
22 regarding adoption of an advisal to be provided parents and procedures for ICE to
23 follow in the event a parent decided it was in their child's best interest to be released
24 and reached agreement on virtually every aspect of a protocol with the exception of
25 only three areas: (1) the extent to which counsel of record for parents should be
26 advised of ICE's decisions, (2) how to release a child if an approved sponsor is
unable to appear at an ICE detention facility to take custody of a child, and (3) the
extent to which ICE may initiate enforcement action against a sponsor simply

1 because they cooperate with the sponsor application process. Because Defendants
2 have withdrawn their agreement to these document and do not agree to jointly file
3 them with this status report, Plaintiffs will separately lodge these documents with
4 the Court.

5 Consistent with their long-held position that accompanied children should
6 have *no* rights under the FSA, from the beginning of this process Defendants made
7 clear to Plaintiffs and the Court that they object to parents being informed of their
8 children's rights or to adopting *any* procedures to give effect to those rights.

9 Plaintiffs leave it to the Court to provide further guidance on this issue but are
10 firm in their belief that the important rights the FSA extends to accompanied children
11 cannot be largely eviscerated simply because Defendants do not want parents of
12 accompanying Class Members to be informed of their children's rights under the
13 FSA, and also do not wish to adopt any procedures to implement those rights should
14 a parent believe it's in their child's best interest to be released to close family
15 members. This state of affairs effectively means that Defendants have caused the
16 FSA's presumption of release for accompanied Class Members to become relatively
17 meaningless.²

18 **Defendants' Position:**

19 Defendants understand the Court's July 25, 2020, Order to make clear that in
20 order to implement Paragraph 1 of the Court's June 26, 2020, Order with regard to
21 the requirement that Defendants obtain "consent of [a class member's]
22 guardians/parents to release them to an available suitable sponsor," the parties must

23 ² As Plaintiffs have previously pointed out, the previous administration achieved
24 substantial compliance with the FSA by having a ninety to ninety-five percent (90-
25 95%) credible fear approval rate, and promptly released Class Members with their
26 parents found to possess a credible fear of persecution if returned to their home
countries. That approach to compliance no longer exists as the credible fear approval
rate has now dropped to about ten percent (10%) when the current Administration
substantially restricted its asylum policies.

1 reach full *voluntary* agreement regarding a protocol for such implementation. ECF
2 No. 887 at 2. If such voluntary agreement is not reached, then “Paragraph 1 of the
3 June 26, 2020 Order is unenforceable by its own terms.” *Id.* Defendants have
4 objected, and continue to object, to the implementation of any protocol that would
5 potentially provide for the separation of a parent and child who are currently housed
6 together in an ICE family residential center (FRC). Defendants’ participation in the
7 ongoing discussions regarding these protocols was based on their understanding that
8 they were being required by the Court to negotiate and implement such protocols in
9 order to meet the Court’s deadline of July 17, 2020 (later extended to July 27, 2020),
10 or risk a Court order to submit to Plaintiff-proposed protocols that might be
11 unworkable as an operational matter. Given this understanding, the government has
12 made clear throughout these discussions that its participation in the development of
13 these protocols was not voluntary. Rather, the government’s participation has been
14 based solely on the government’s understanding that such participation was required
15 for compliance with the Court’s order.

16 In light of the Court’s recent statement that Defendants’ voluntary agreement
17 to these protocols is required for their implementation, Defendants state that they do
18 not believe that any voluntary agreement can be reached. Specifically, Defendants
19 will not voluntarily agree to any protocol that would potentially provide for the
20 separation of a parent and child who are currently housed together in an ICE FRC.
21 Defendants disagree with Plaintiffs’ characterization of the Parties’ disagreement,
22 particularly the assertion that Defendants “oppose parents of detained Class
23 Members being advised of their child’s rights under the *Flores* Settlement
24 Agreement,” as well as Plaintiffs’ suppositions as to Defendants’ intentions and
25 motivations. Defendants believe at this time that further meet-and-confer discussions
26 on this issue would not be fruitful.

1 DATED: August 5, 2020

/s/Peter Schey (with permission)
Class Counsel for Plaintiffs
CENTER FOR HUMAN RIGHTS &
CONSTITUTIONAL LAW
Peter A. Schey
Carlos Holguín

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6 DATED: August 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2020, I served the foregoing pleading on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ Sarah B. Fabian
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