

1 CHAD A. READLER  
 Acting Assistant Attorney General  
 2 SCOTT G. STEWART  
 Deputy Assistant Attorney General  
 3 WILLIAM C. PEACHEY  
 Director  
 4 Office of Immigration Litigation  
 U.S. Department of Justice  
 5 WILLIAM C. SILVIS  
 Assistant Director  
 6 Office of Immigration Litigation  
 7 SARAH B. FABIAN  
 Senior Litigation Counsel  
 8 NICOLE MURLEY  
 Trial Attorney  
 9 Office of Immigration Litigation  
 10  
 11

U.S. Department of Justice  
 Box 868, Ben Franklin Station  
 Washington, DC 20442  
 Telephone: (202) 532-4824  
 Fax: (202) 616-8962

ADAM L. BRAVERMAN  
 United States Attorney  
 SAMUEL W. BETTWY  
 Assistant U.S. Attorney  
 California Bar No. 94918  
 Office of the U.S. Attorney  
 880 Front Street, Room 6293  
 San Diego, CA 92101-8893  
 619-546-7125  
 619-546-7751 (fax)

12 *Attorneys for Federal Respondents-Defendants*  
 13

14 UNITED STATES DISTRICT COURT  
 15 SOUTHERN DISTRICT OF CALIFORNIA

16 MS. L, et al.,

Case No. 18cv428 DMS MDD

17 Petitioners-Plaintiffs,

18 vs.

**RESPONDENTS' NOTICE  
 REGARDING COMPLIANCE AND  
 REQUEST FOR CLARIFICATION  
 AND/OR RELIEF**

19 U.S. IMMIGRATION AND CUSTOMS  
 20 ENFORCEMENT, et al.,

21 Respondents-Defendants.  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1       **I. NOTICE REGARDING COMPLIANCE**

2           On June 26, 2018, this Court issued orders granting Plaintiffs’ motion to  
3 certify a class, ECF No. 82, and ordering a preliminary injunction on behalf of that  
4 class, ECF No. 83. After receiving the Court’s preliminary-injunction order,  
5 Defendants immediately acted to implement and comply with it. As a result of that  
6 prompt action, Defendants believe that they are in compliance with all aspects of  
7 the Court’s injunctive order regarding the forward-looking policies on separation  
8 and communication. Defendants have been working diligently on complying with  
9 the Court’s reunification directives. Defendants understand the urgent concerns  
10 underpinning the Court’s order. Defendants have dedicated immense resources and  
11 effort to reunifying families, and personnel at the highest levels of the agencies  
12 have been involved in implementing the Court’s directives. Defendants are  
13 submitting declarations to explain the extensive efforts of the U.S. Department of  
14 Health and Human Services (“HHS”) (declaration attached hereto) and U.S.  
15 Immigration and Customs Enforcement (“ICE”) (declaration to follow) to identify  
16 class members and their children and to reunify class members with their children.  
17

18           In the preliminary-injunction order, the Court set a status conference for July  
19 6. *Id.* Defendants have plans to comply with the injunction, and are prepared to  
20 discuss those plans at the conference. To fully implement these plans, however,  
21 Defendants may need clarification on or relief from certain parts of the order, so  
22 that Defendants can safely reunite families. Among other issues, Defendants need  
23  
24  
25  
26  
27  
28

1 this Court’s guidance on issues that arise because of HHS’s understanding of its  
2 statutory obligations to ensure the safety of children before transferring them out of  
3 HHS custody. The processes that HHS has developed in order to fulfill its statutory  
4 obligations are critical to protecting children against the well-documented risk of  
5 trafficking or abuse, but they also require HHS to follow procedures that are time-  
6 consuming, even in this unique context. Defendants thus seek confirmation about  
7 the Court’s intent in its order as it relates to those procedures and, as appropriate,  
8 relief from the Court’s deadlines.<sup>1</sup> Defendants also seek clarification regarding the  
9 definition of the class certified by this Court.

10  
11  
12  
13 **II. REQUEST FOR CLARIFICATION AND/OR RELIEF**

14 The Government respectfully requests the Court’s prompt resolution of  
15 several critical implementation issues, at or soon after the July 6 status conference.  
16 The Government anticipates that additional clarification or relief may be requested  
17 as its implementation of the Court’s injunction proceeds. The Government will  
18 bring any additional such requests to the Court’s attention promptly.  
19  
20  
21  
22  
23  
24

---

25 <sup>1</sup> The Government also has advised the court in *Flores v. Sessions*, No. 85-4544  
26 (C.D. Cal.), that the Flores Settlement Agreement permits the Government to use  
27 ICE family residential centers to hold families together while in Government  
28 custody. *See Flores*, ECF No. 447 (attached).

1           A. Releasing Children From HHS Custody.

2           As this Court is aware, the class definition includes “[a]ll adult parents who  
3 enter the United States,” whether at or between ports of entry, “who (1) have been,  
4 are, or will be detained in immigration custody by the DHS, and (2) have a minor  
5 child who is or will be separated from them by DHS and detained in ORR custody,  
6 ORR foster care, or DHS custody.” Class-Certification Order, ECF No. 82 at 17.  
7

8           The class excludes parents if there is “a determination that the parent is unfit or  
9 presents a danger to the child.” *Id.* It also excludes parents “with criminal history  
10 that prevents them from being released into the community along with their child  
11 or housed together in a [family] detention center,” parents “with some kind of  
12 communicable disease” raising safety concerns, or “parents who fall within the  
13 [Family Separation Executive Order].” *Id.* at 4 n.5, 10. The Court’s preliminary  
14 injunction, in turn, directs Defendants to “reunify all Class members with their  
15 minor children” within 14 days for children under age 5 and within 30 days for  
16 minor children age 5 and over, “[u]nless there is a determination that the parent is  
17 unfit or presents a danger to the child, or the parent affirmatively, knowingly, and  
18 voluntarily declines to be reunited with the child.” Preliminary-Injunction Order,  
19 ECF No. 83 at 23 ¶ (3).  
20  
21  
22  
23  
24

25           As explained in the attached declaration of Jonathan White, HHS  
26 understands the Court’s order in light of its statutory mission, which requires HHS  
27  
28

1 to ensure child welfare and the safety of minors released from its custody. More  
2 specifically, considering the order in light of its statutory obligations relating to the  
3 release of unaccompanied alien children (UACs), *see* 6 U.S.C. § 279; 8 U.S.C.  
4 § 1232, HHS understands the order to require three distinct findings before a child  
5 can be released.  
6

7  
8 First, to confirm that an individual is, in fact, a class member as well as a  
9 “parent” within the meaning of 6 U.S.C. § 279(g)(2), HHS first must determine  
10 that the individual is the parent of the child with whom he or she seeks to be  
11 reunified. White Declaration ¶¶ 20-26. HHS believes that this requirement applies  
12 regardless of whether the parent is in federal custody or has been released into the  
13 interior. To determine parentage, HHS is using DNA swab testing because it is a  
14 reasonably prompt and efficient method for determining biological parentage in a  
15 significant number of cases. White Declaration ¶¶ 21, 25. HHS is working  
16 diligently to minimize the burdens of confirming parentage, and is expediting  
17 DNA verification. White Declaration ¶¶ 20-24. But given the possibility of false  
18 claims of parentage, confirming parentage is critical to ensure that children are  
19 returned to their parents, not to potential traffickers. White Declaration ¶ 25.  
20

21 Although HHS is moving expeditiously to undertake these DNA tests, that process  
22 takes meaningful time, even when it is expedited—as this Court has implicitly  
23 recognized. *See* Order on Motion to Dismiss 3-4, 8 (noting that on March 8, 2018,  
24  
25  
26  
27  
28

1 the Court ordered that a DNA test for Ms. L. be completed by March 14—which  
2 the Court described as “order[ing] an expedited DNA test”).

3  
4 In many cases involving parents who are detained, this process will not  
5 interfere with the Government’s ability to reunify families within the timelines  
6 provided by the Court. In some cases, however, this process may not be conclusive  
7 in establishing parentage, and further evaluation of available documentation may  
8 be required. White Declaration ¶¶ 20, 45. Confirming parentage for adults who  
9 have already been released may also take additional time, including for the parent  
10 to appear for DNA testing or other confirmation. In those cases, it may be harder to  
11 reunify some families within the Court’s timeline.  
12

13  
14 Accordingly, the Government respectfully requests clarification from the  
15 Court as to whether the process for confirming parentage implemented by HHS is  
16 consistent with the Court’s understanding of its mandate, and seeks clarification  
17 that in cases where parentage cannot be confirmed quickly, HHS will not be in  
18 violation of the Court’s order if reunification occurs outside of the timelines  
19 provided by the Court. The Government can for the Court’s consideration prepare  
20 a proposal for an alternative timeline.  
21

22  
23  
24 Second, to confirm that an individual is neither “unfit [n]or presents a danger  
25 to the child,” that the parent is “available to provide care and physical custody,” 6  
26 U.S.C. § 279(g)(2), and that the parent “has not engaged in any activity that would  
27  
28

1 indicate a potential risk to the child,” 8 U.S.C. §1232(c)(3)(A), ICE and HHS must  
2 confirm whether an individual has any criminal history, including a history  
3 indicative of abuse. White Declaration ¶¶ 27, 29. To expedite those determinations  
4 in the unusual context of reunification following government separation, the  
5 agencies are relying on summaries of criminal background checks run by ICE,  
6 which are in turn shared with HHS. White Declaration ¶ 29. That process is not  
7 currently anticipated to delay reunification.  
8  
9

10 Third, before releasing any child to a class member who is not in  
11 government custody, HHS understands that the determination that a parent is not  
12 “unfit or presents a danger to the child,” Preliminary-Injunction Order at 23 ¶ 2,  
13 must be read in conjunction with the TVPRA, 8 U.S.C. § 1232, which imposes  
14 additional safety requirements before “plac[ing]” a child with someone outside  
15 federal custody. Specifically, a UAC “may not be placed with a person or entity  
16 unless [HHS] makes a determination that the proposed custodian is capable of  
17 providing for the child’s physical and mental well-being,” which must include “an  
18 independent finding that the individual has not engaged in any activity that would  
19 indicate a potential risk to the child.” 8 U.S.C. § 1232(c)(3)(A). HHS believes that,  
20 in the context of reunifying a parent with a child following government separation,  
21 when the parent has since been released into the interior and the child remains in  
22 HHS custody, HHS remains obligated to apply existing HHS procedures under the  
23  
24  
25  
26  
27  
28

1 TVPRA. *See* White Declaration ¶¶ 33-44 for an explanation of such procedures.

2 The processes involved in applying these provisions have developed to ensure that  
3 HHS does not inadvertently release a child in its custody into a situation that will  
4 expose him or her to trafficking or abuse. White Declaration ¶¶ 45-46.  
5

6 HHS has worked diligently to expedite these processes to enable the  
7 Government to comply with the timelines in the Court’s order. HHS anticipates,  
8 however, in some instances it will not be able to complete the additional processes  
9 within the timelines the Court prescribed, particularly with regard to class  
10 members who are already not in Government custody (*e.g.*, because they have  
11 previously been paroled or released). White Declaration ¶¶ 45-46.  
12

13 Accordingly, HHS seeks clarification from this Court that it intended for  
14 HHS to follow such procedures in the somewhat unique context of reunification  
15 following government separation, and in particular for reunification with class  
16 members who have been released into the interior. If the Court intended for HHS  
17 to follow a different approach, the Government requests clarification regarding the  
18 precise inquiry that HHS should be making in these circumstances.<sup>2</sup>  
19  
20  
21

---

22  
23 <sup>2</sup> HHS’s aim it to comply with the Court’s injunction, while also following its  
24 normal processes under the TVPRA that HHS has implemented to ensure the  
25 safety of children upon placement by HHS with a parent or other sponsor.  
26 Accordingly, HHS asks that if the Court concludes that HHS must truncate those  
27 normal TVPRA processes to meet court-ordered deadlines, then the Court should  
28 so order in a manner that provides HHS full clarity with regard to its court-ordered  
obligations.



1 Further, if the Court concludes that HHS is properly proceeding in light of  
2 the Court's order and the relevant statutory provisions, then HHS seeks partial  
3 relief from the timelines in the Court's order to allow HHS to comply with these  
4 obligations and to safely achieve the reunifications that the order directs,  
5 particularly for parents who have previously been released. The Government does  
6 not wish to unnecessarily delay reunifications or burden class members. At the  
7 same time, however, the Government has a strong interest in ensuring that any  
8 release of a child from Government custody occurs in a manner that ensures the  
9 safety of that child. The Government can, for the Court's consideration, prepare a  
10 proposal for an alternative timeline that that takes HHS's procedures into account.  
11

12 Thus, Defendants seek clarification to ensure that the Government can  
13 comply with and implement the Court's order consistent with federal laws  
14 protecting child safety in implementing reunification plans.  
15

16 B. ICE's Obligations Under Paragraph (1) Of The Preliminary  
17 Injunction.

18 As described in the Government's declarations, the reunification process  
19 implemented by ICE and HHS for parents who are now in ICE custody requires  
20 extensive and careful coordination between the two agencies so that HHS can  
21 reunify the child with his or her parent in ICE custody. White Declaration ¶¶ 13-  
22 14, 29. HHS is able to reunify families in such cases much faster than it is able to  
23 do so for class members who have already been released from ICE custody. *Id.*  
24  
25  
26  
27  
28

1 Paragraph (1) of the Court’s preliminary-injunction order prohibits ICE  
2 “from detaining Class Members in DHS custody without and apart from their  
3 minor children.” Preliminary-Injunction Order at 22 ¶ (1). Consistent with that  
4 command, reunification could occur in ICE custody in a family residential center,  
5 or by reunifying the parent and child at release. But this paragraph could  
6 potentially be read to require that if HHS has not been able to reunify a child with a  
7 parent in ICE custody by the deadlines ordered by the Court, ICE would still be  
8 required to release the parent from custody before that deadline even without  
9 reunification. Such a requirement would, in most cases, delay reunification because  
10 release of a parent before HHS completes its suitability determination would  
11 trigger additional obligations for HHS to comply with the procedures it has  
12 developed to ensure safe release in accordance with the TVPRA. White  
13 Declaration ¶¶ 33-45.

14  
15  
16  
17  
18 If, as discussed above, the Court determines that HHS should continue to  
19 follow its TVPRA procedures in making its release decisions, then the Government  
20 further asks the Court to clarify whether: (a) Paragraph (1) of the preliminary-  
21 injunction order requires that ICE release the parent by the compliance deadlines  
22 even if HHS has not completed its processes and where such release might slow  
23 reunification; or (b) ICE may continue to hold parents beyond the current deadlines  
24 until HHS’s processes are complete.  
25  
26  
27  
28

1           C. Scope Of The Class Definition.

2           The Government also respectfully requests clarification on the scope of the  
3 Court's class definition.  
4

5           First, as issued, the class definition contains no date limitations. It thus could  
6 be read to cover individuals who were separated from their children long before  
7 this case began, and long before the May 2018 policy that prompted the Court's  
8 injunction. The absence of any date limitations, moreover, makes it difficult for the  
9 Government to ensure that it has identified all class members.  
10

11           Accordingly, the Government respectfully requests that the Court clarify a  
12 start date for separations that would result in class membership for the separated  
13 parent. The Government proposes that the Court use March 9, 2018, as the starting  
14 point for the reunification requirement, because that is the date of filing for  
15 Plaintiffs' amended complaint which added the class claims in this case.  
16  
17

18           Relatedly, the class definition does not specify whether it includes parents  
19 who had been removed from the United States prior to the issuance of the Court's  
20 class-certification order. The order itself does not address such individuals, nor did  
21 either named Plaintiff experience such a situation. Moreover, the timelines for the  
22 relief ordered by the Court could not encompass such a scenario given the  
23 complexities involved in locating individuals who have been removed, determining  
24 whether they wish to be reunified with their child, and facilitating such a  
25  
26  
27  
28

1 reunification outside of the United States. Accordingly, the Government requests  
2 that the Court clarify that such individuals are not included within the class  
3 definition or, if the Court believes that they are, that the Court allow the  
4 Government the opportunity to brief the matter or that the Court at least provide  
5 the Government relief from the timelines in the order with regard to the  
6 reunification of such individuals, and instead allow the Government the  
7 opportunity to propose a timeline to pursue reunifications for removed individuals.  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 DATED: July 5, 2018

Respectfully submitted,

2  
3 CHAD A. READLER  
Acting Assistant Attorney General  
4 SCOTT G. STEWART  
Deputy Assistant Attorney General  
5 WILLIAM C. PEACHEY  
Director  
6 WILLIAM C. SILVIS  
Assistant Director  
7

8 */s/ Sarah B. Fabian*  
9 SARAH B. FABIAN  
Senior Litigation Counsel  
10 NICOLE MURLEY  
Trial Attorney  
11 Office of Immigration Litigation  
Civil Division  
12 U.S. Department of Justice  
13 P.O. Box 868, Ben Franklin Station  
14 Washington, DC 20044  
15 (202) 532-4824  
16 (202) 616-8962 (facsimile)  
sarah.b.fabian@usdoj.gov  
17

18 ADAM L. BRAVERMAN  
United States Attorney  
19 SAMUEL W. BETTWY  
Assistant U.S. Attorney  
20

21 *Attorneys for Respondents-Defendants*  
22  
23  
24  
25  
26  
27  
28

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 MS. L., et al.

Case No. 18-cv-428 DMS MDD

5 Petitioner-Plaintiff,

6  
7 vs.

**CERTIFICATE OF SERVICE**

8 U.S. IMMIGRATION AND CUSTOMS  
9 ENFORCEMENT, et al.,

10 Respondents-Defendants.

11  
12 IT IS HEREBY CERTIFIED THAT:

13 I, the undersigned, am a citizen of the United States and am at least eighteen years  
14 of age. My business address is 450 Fifth Street, NW, Washington, DC 20001. I am  
15 not a party to the above-entitled action. I have caused service of the accompanying  
16 RESPONDENTS' NOTICE REGARDING COMPLIANCE AND REQUEST FOR  
17 CLARIFICATION AND/OR RELIEF on all counsel of record, by electronically  
18 filing the foregoing with the Clerk of the District Court using its ECF System, which  
19 electronically provides notice.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 DATED: July 5, 2018

22 */s/ Sarah B. Fabian*  
23 SARAH B. FABIAN  
24 Senior Litigation Counsel  
25 Office of Immigration Litigation  
26 Civil Division, U.S. Department of  
27 Justice

*Attorney for Respondents-Defendants*

1 CHAD A. READLER  
 Acting Assistant Attorney General  
 2 WILLIAM C. PEACHEY  
 Director, Office of Immigration Litigation (OIL)  
 3 U.S. Department of Justice  
 WILLIAM C. SILVIS  
 4 Assistant Director, OIL District Court Section  
 SARAH B. FABIAN  
 5 Senior Litigation Counsel  
 NICOLE MURLEY  
 6 Trial Attorney  
 Office of Immigration Litigation  
 7 U.S. Department of Justice  
 Box 868, Ben Franklin Station  
 8 Washington, DC 20442  
 Telephone: (202) 532-4824  
 9 Fax: (202) 616-8962

10 ADAM L. BRAVERMAN  
 United States Attorney  
 11 SAMUEL W. BETTWY  
 Assistant U.S. Attorney  
 12 California Bar No. 94918  
 Office of the U.S. Attorney  
 13 880 Front Street, Room 6293  
 San Diego, CA 92101-8893  
 14 619-546-7125  
 619-546-7751 (fax)

15 Attorneys for Federal Respondents-Defendants

16  
 17 UNITED STATES DISTRICT COURT  
 18 SOUTHERN DISTRICT OF CALIFORNIA

19  
 20 MS. L, et al.,

21 Petitioners-Plaintiffs,

22 vs.

23 U.S. IMMIGRATION AND CUSTOMS  
 ENFORCEMENT, et al.,

24 Respondents-Defendants.  
 25

Case No. 18cv428 DMS MDD

**DECLARATION OF  
 JONATHAN WHITE**

26  
 27  
 28

1 I, Jonathan White, for my declaration pursuant to 28 U.S.C. § 1746, hereby state and depose  
2 as follows, based on my personal knowledge and information provided to me in the course of my  
3 official duties:

4 1. I am a career officer in the United States Public Health Service Commissioned Corps  
5 and have served in the Department of Health & Human Services in three Administrations. I am  
6 presently assigned to the Office of the Assistant Secretary for Preparedness and Response, and  
7 previously served as the Deputy Director of the Office of Refugee Resettlement for the  
8 Unaccompanied Alien Children’s Program.  
9

10 2. I have been involved directly in the actions which HHS has taken to implement  
11 Executive Order (EO) 13841 (“Affording Congress an Opportunity to Address Family Separation”)  
12 and comply with the orders in *Ms. L., et al., v. U.S. Immigration and Customs Enforcement, et al.*,  
13 Case No. 18-cv-428 (S.D.Cal.). President Trump issued EO 13841 on June 20, 2018, and the Court  
14 issued its orders on June 26, 2018.  
15

16 **KEY HHS ACTIONS ON REUNIFICATION**

17 3. Focus on Child Safety: The Secretary of Health and Human Services has directed  
18 HHS to take all reasonable actions to comply with the Court’s orders and to prioritize child safety  
19 and well-being when doing so.  
20

21 4. Deployment of Additional Personnel: On June 22, 2018, the Secretary of Health and  
22 Human Services directed ASPR to deploy personnel and resources to help the Office of Refugee  
23 Resettlement (ORR) of the Administration for Children and Families (ACF) of HHS reunify children  
24 in ORR custody with parents.

25 5. Determination of Class Members: HHS has worked closely with U.S. Department of  
26 Homeland Security (DHS)—including U.S. Customs and Border Protection (CBP) and U.S.  
27 Immigration and Customs Enforcement (ICE)—to try to determine all individuals who meet the  
28



1 Court's criteria for class members. The determination of class membership involves real-time, inter-  
2 agency collection and analysis of facts and data to: verify parentage; determine location of DHS  
3 apprehension and separation; determine parental fitness; and evaluate whether reunification would  
4 present a danger to the child. Class membership is not static; it can change due to transfers of putative  
5 parents from ICE to the Bureau of Prisons (BOP) (or vice-versa), and newly-acquired information.

6  
7 6. Facilitation of Regular Communication Between Class Members and Children in ORR

8 Custody: HHS has deployed field personnel to help putative class members communicate with  
9 children in ORR care.

10 **DEPLOYMENT OF ADDITIONAL PERSONNEL**

11 7. As noted above, on June 22, 2018, the Secretary of Health and Human Services  
12 activated ASPR to augment the resources that ORR had already devoted to expeditiously discharge  
13 children from ORR care. ORR has had to continue performing core program functions for minors  
14 who cross the border without parents (and who far outnumber separated children in ORR care). The  
15 augmenting of resources has helped ORR continue performing those core functions.

16  
17 8. The activating of ASPR included the Secretary's Operation Center (SOC), which is a  
18 command center that operates 24 hours per day, 365 days per year. The mission of the SOC is to  
19 synthesize critical public health and medical information for the U.S. Government. While typically  
20 used for a public health emergency or natural disaster (e.g., Hurricane Maria in Puerto Rico), the SOC  
21 can also serve as a communications hub for large, data-intensive, inter-departmental operations.

22  
23 9. ASPR activated an Incident Management Team. As of July 3, 2018, the Incident  
24 Management Team had 33 members (in addition to the permanent staff of the SOC). It works full-  
25 time to provide logistical and administrative support.

26 10. ASPR has also dispatched approximately 115 personnel to the field to engage directly  
27 with putative class members in DHS custody. Those personnel—who are organized into four field  
28

1 teams— are from ACF, ASPR, the US Public Health Service Commissioned Corps, and the National  
2 Disaster Medical System’s Disaster Medical Assistance Team (DMAT). The DMAT is a cadre of  
3 trained health and medical professionals and para-professionals that augments ASPR’s capabilities  
4 during public emergencies.

5 11. Finally, HHS has executed a contract with BCFS Health and Human Services, Inc.  
6 (“BCFS”), to provide an additional 100 reunification case managers, plus approximately 40 staff for  
7 logistical and administrative support. HHS has trained the case managers from BCFS, and is  
8 deploying them on Thursday, July 5, and Friday, July 6, 2018, to augment existing field operations.  
9 They too will engage directly with putative class members in ICE custody.

10  
11 **DETERMINATION OF CLASS MEMBERS**

12 12. ORR has a process for placing unaccompanied alien children (UAC) with parents or  
13 other sponsors that is designed to comply with the 1997 Flores Settlement Agreement, the Homeland  
14 Security Act of 2002 (HSA), and the William Wilberforce Trafficking Victims Protection  
15 Reauthorization Act of 2008 (TVPRA), as described in more detail below. This process ensures the  
16 care and safety of children who are apprehended in the United States and then referred to HHS as  
17 unaccompanied children.  
18

19 13. HHS has modified and expedited its ordinary process so that it can determine class  
20 membership using the Court’s criteria and, to the extent possible, reunify class members and their  
21 children within the Court’s deadlines.  
22

23 14. Under its modified process, HHS identifies putative class members with children in  
24 ORR custody and verifies parentage. Also, HHS determines the putative class member’s immigration  
25 history to confirm where they were apprehended and separated from their child. Finally, HHS  
26 collects and analyzes criminal, medical (e.g., communicable disease), and other information to  
27  
28

1 determine the parental fitness of the putative class member and confirm that reunification would not  
2 present a danger to the child. HHS generally performs these checks concurrently.

3 15. Putative class members who are not verified as parents are not included in the class  
4 by HHS. Putative class members apprehended in the interior, who have relevant criminal history,  
5 have a communicable disease, or are otherwise parentally unfit or present a danger to a child, are not  
6 included in the class either.  
7

8 16. In general, HHS knows the names and locations of all children who are in ORR care  
9 and custody at all times because ORR maintains that data in its online case management portal. The  
10 ORR portal includes data about each child that DHS provided when DHS transferred the child to  
11 ORR custody. It also includes health and social data collected or entered by ORR personnel, grantees,  
12 or contractors. While the ORR portal may contain some data about the child's parents, the ORR  
13 portal was not designed to determine class membership or facilitate reunification under the criteria  
14 and deadlines established by the Court's Order. Some of the data required to determine the class  
15 membership of a putative class member resides with DHS, while HHS must collect some data directly  
16 from the putative class member.  
17

18 17. The data collection, sharing, and analysis required to determine class membership is  
19 extraordinarily time and resource intensive. There are myriad reasons for this. For instance, DHS  
20 has different information systems, and those systems were not designed to neatly capture and readily  
21 share all of the data required to determine class membership. The departments must therefore map  
22 their data manually. Also, the class potentially encompasses parents who were separated from their  
23 children *before* the Administration implemented the zero-tolerance policy, and those groups may not  
24 have received the same family unit identifiers from DHS as the groups separated *after* the  
25 Administration implemented the zero-tolerance policy. Absent reliable and consistent identifiers,  
26 HHS must glean the separations of class members and children (and related details) from the case  
27  
28

1 management files on the ORR portal. On top of these variables, a parent's class membership can  
2 change if the parent is transferred between ICE and the Bureau of Prisons (BOP), or if information  
3 obtained directly from the parent affects the class membership analysis.

4 18. To ensure that every separated child in ORR custody who belongs to a class member  
5 is identified and reunified, HHS has had each grantee at one of ORR's approximately 110 shelters  
6 certify the separated children who the grantee reasonably believes are in its care. HHS has also  
7 conducted a full manual review of the case management file for each one of the approximate 11,800  
8 children in ORR custody—the substantial majority of whom were not separated from a putative  
9 parent at the border—to confirm or rule out any indicia of separation. The manual review was  
10 conducted by dozens of HHS personnel working nights and over the weekend. The results of both  
11 the manual review and the grantee certifications are undergoing validation.  
12

13 19. As of July 5, 2018, we have identified approximately 101 minors under age 5, within  
14 ORR care, whose records contain indicia of separation. Class membership analysis for putative class  
15 members associated with the larger group of minors 5 through 18 is ongoing. Also, some of the  
16 identified minors may have been separated prior to crossing the border, or there may be other factors  
17 that need to be explored that would not make their parents members of the class. HHS has received  
18 confirmation from DHS that approximately 40 parents of children in the under-5 group are in DHS  
19 custody and another 9 are in U.S. Marshal's custody. The class membership analysis for putative  
20 class members associated with the remaining children in the group of 101 is ongoing.  
21  
22

### 23 Verifying Parentage

24 20. HHS is using DNA testing to try to verify parentage of *all* putative class members, as  
25 well as all children in ORR custody who ORR reasonably believes were separated from a putative  
26 class member. HHS is conducting the DNA testing concurrent with collecting and reviewing  
27  
28

1 documentation of parentage, interviewing putative class members and family members, and  
2 observing communications or interactions between putative class members and children.

3 21. DNA testing is a faster but costlier method for confirming parentage than collecting  
4 and assessing documentation and anecdotal information. When ORR implements its safety and  
5 suitability policies in the ordinary course of administering its program, it confirms parentage through  
6 DNA testing as a last resort. HHS has dual-tracked global DNA testing to ensure child safety and to  
7 expedite parentage verifications to try to comply with the deadlines in the Court's order.  
8

9 22. ORR grantees are swabbing the cheeks of the children in ORR custody, while DHS  
10 personnel or the field teams deployed by HHS are swabbing the cheeks of the putative class members  
11 in ICE custody. The cheek swabs are then sent to a third-party laboratory services provider to  
12 complete the DNA testing. The results are then transmitted electronically to the Incident  
13 Management Team at the SOC, which shares them with the grantees. HHS will use the results only  
14 for verifying parentage.  
15

16 23. The DNA testing process takes nearly one week to complete for each putative class  
17 member and child. Once HHS has made a data match between a putative class member and child, it  
18 may take the field teams and grantees up to two days to further validate the match and swab cheeks.  
19 It may then take up to three days for laboratory services provider to collect the sample and conduct  
20 the test. Once the laboratory services provider completes the testing, it may take up to 24 hours for  
21 the Incident Management Team to receive and transmit the results back to the grantees and field  
22 teams.  
23

24 24. The field teams are concurrently facilitating the completion of reunification  
25 applications by putative class members. The packets seek medical and social data that bear on the  
26 criteria for class membership, including parentage, parental fitness, and child endangerment. A copy  
27 of a blank reunification application is attached at Tab 1.  
28

1           25. My opinion is that DNA testing is the method of parental verification most likely to  
2 protect children from harm given the compressed timeframe imposed by the court's order. The risk  
3 of placing children with adults who are not their parents is a real and significant child welfare concern  
4 for HHS because the experience of ORR is that children are smuggled across the border or trafficked  
5 by adults who fraudulently hold themselves out as parents. The children may not disclose the  
6 situation to CBP, ICE, or ORR because they may fear retaliation by the adults who brought them  
7 across the border. In some instances, they may fear retaliation by their parents in their home country,  
8 who have given them to the smuggler or trafficker so that they may earn money in the United States.  
9 My opinion is that DNA testing mitigates the risk of the United States Government placing children  
10 back with adults who are not their parents and who would endanger them.  
11

12           26. If, however, HHS concludes that it can reliably and more quickly determine the  
13 parentage of a putative class member based on documentation or anecdotal information collected  
14 from the putative class member, then HHS will make that determination to try to comply with the  
15 Court's reunification deadlines.  
16

#### 17           Background Checks for Parental Fitness

18           27. HHS is assessing the backgrounds of putative class members by reviewing summaries  
19 of prior criminal background checks provided by ICE. Already such background check information  
20 has come back with two results that show that two putative parents of children under five may  
21 endanger the child (charges of kidnapping/rape and child cruelty), and 12 more need to be further  
22 assessed.  
23

#### 24           Parental Fitness and Child Endangerment

25           28. As discussed below, HHS' ordinary process for placing children with sponsors  
26 involves a safety and suitability analysis, as well as a home study in certain circumstances. These  
27 checks can sometimes take weeks or months.  
28

1           29.     HHS has modified and expedited its ordinary process when further assessing parental  
2 fitness and potential child endangerment for a potential reunification with a putative class member in  
3 DHS custody. For potential reunifications with putative class members in DHS custody, any further  
4 assessment of parental fitness and potential child endangerment involves only the review of the case  
5 management records (which includes, for example, case review notes and other electronic files) and  
6 the putative class member’s completed reunification packet for indicia of child abuse or neglect. If  
7 there are no such indicia, then HHS will not conduct further assessment.  
8

9           30.     When further assessing parental fitness and potential child endangerment for potential  
10 reunifications of putative class members who are no longer in DHS custody, HHS is modifying and  
11 expediting its ordinary process on a case-by-case basis to try to comply with court-ordered deadlines  
12 in ways that do not endanger child welfare.  
13

14           31.     For example, when placing a child with a putative parental sponsor who is no longer  
15 in DHS custody, HHS would ordinarily verify the potential sponsor’s residential address and conduct  
16 background checks of adult cohabitants to try to ensure that the potential sponsor is capable of  
17 providing shelter and care – and that the potential sponsor’s cohabitants do not endanger the child—  
18 after placement. To try to comply with the Court’s deadlines, HHS will likely need to streamline its  
19 address verification process for putative class members. But HHS does not believe that it can  
20 streamline background checks.  
21

22           32.     UAC sponsors have always included the parents of UACs , and close to half of the  
23 sponsors to whom ORR ordinarily releases UACs are parents.

24           33.     The *Flores* settlement agreement (“FSA”) prioritizes release to parents, if they are  
25 available, and also specifically provides for ORR to ensure the suitability of such releases, and to  
26 protect the child from danger. *See* FSA paragraphs 14-18.  
27  
28

1           34. The FSA describes a variety of criteria to consider before the government releases a  
2 UAC to a parent (or other sponsor). *See* FSA paragraphs 14-18. These factors include:

- 3           • Verifying the identity of the parent;
- 4           • Verifying the identity and employment of the individuals offering support to the parent  
5           and minor;
- 6           • Receiving information from their address and any future change of address;
- 7           • Ensuring the parent will provide for the minor’s physical, mental, and financial well-  
8           being;
- 9           • Investigating the living conditions in which the minor would be placed and the  
10           standard of care he would receive;
- 11           • Interviewing the members of the household where the parent will live with the child,  
12           and in some cases a home visit; and
- 13           • Requiring the parent to ensure the minor’s presence at all future immigration  
14           proceedings.
- 15           • Requiring the parent to ensure the minor’s presence at all future immigration  
16           proceedings.

17           35. Furthermore, under the HSA and TVPRA, HHS has developed a series of safety and  
18 suitability requirements that ensure child welfare, upon release, is protected. These policies, many  
19 of which were refined after Congressional oversight, are contained in Section 2 of the ORR Policy  
20 Guide: Children Entering the United States Unaccompanied, available at:

21 [https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.1)  
22 [2#2.1](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.1) .

23           36. The policies include identifying the sponsor; submitting the application for release  
24 and supporting documentation; evaluating the suitability of the sponsor, including verification of  
25 the sponsor’s identity and relationship to the child; background checks; and in some cases home  
26 studies; and planning for post-release.  
27  
28



1           37.     ORR requires all potential sponsors, including parents, to undergo fingerprinting in  
2 order to ensure the safety and suitability of release. The fingerprints are used to run background  
3 checks of databases involving criminal history. ORR also checks sexual abuse information, child  
4 abuse information, and other public record sources.

5           38.     ORR also requires that, if there are other adults living in the household with a  
6 sponsor (including a parent), those adults also undergo background checks. This ensures the child  
7 will not be endangered if, for example, those household members have a history of child abuse or  
8 sexual abuse that ORR must further consider before approving the release.

9           39.     ORR also requires that sponsors, including parents, identify an alternative caregiver,  
10 who will be able to provide care in the event the original sponsor is unavailable. These adult  
11 caregivers must also be identified and undergo background checks.

12           40.     To ensure safety and suitability for children, ORR considers the following factors  
13 when evaluating release of a UAC to parents, other family members, and other potential sponsors in  
14 the community:  
15

- 16
- 17           a. The nature and extent of the sponsor's previous and current relationship with the child or  
18           youth and the unaccompanied alien child's family, if a relationship exists.
  - 19           b. The sponsor's motivation for wanting to sponsor the child or youth.
  - 20           c. The UAC's parent or legal guardian's perspective on the release to the identified  
21           potential sponsor (for cases in which the parent or legal guardian is not the sponsor).
  - 22           d. The child or youth's views on the release and whether he or she wants to be released to  
23           the individual.
  - 24           e. The sponsor's understanding of the unaccompanied alien child's needs, as identified by  
25           ORR and the care provider.
  - 26
  - 27
  - 28

- 1 f. The sponsor’s plan to provide adequate care, supervision, access to community  
2 resources, and housing.
- 3 g. The sponsor’s understanding of the importance of ensuring the unaccompanied alien  
4 child’s presence at all future hearings or proceedings, including immigration court  
5 proceedings, and the sponsor’s receipt of Legal Orientation Program for Custodians  
6 information that ORR provides to all potential sponsors.
- 7
- 8 h. The linguistic and cultural background of the child or youth and the sponsor, including  
9 cultural, social, and communal norms and practices for the care of children.
- 10 i. The sponsor’s strengths, resources, and mitigating factors in relation to any risks or  
11 special concerns of the child or sponsor, such as a criminal background, history of  
12 substance abuse, mental health issues, or domestic violence and child welfare concerns.
- 13
- 14 j. The unaccompanied alien child’s current functioning and strengths in relation to any risk  
15 factors or special concerns, such as children or youth who are victims of human  
16 trafficking; are a parent or are pregnant; have special needs, disabilities or medical or  
17 mental health issues; have a history of criminal, juvenile justice, or gang involvement; or  
18 a history of behavioral issues.

19 41. In certain cases, the TVPRA requires a home study, prior to release. 8 U.S.C. §  
20 1232(c)(3)(B) states: “A home study shall be conducted for a child who is a victim of a severe form  
21 of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title  
22 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate  
23 that the child's health or welfare has been significantly harmed or threatened, or a child whose  
24 proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the  
25 child based on all available objective evidence.” In circumstances in which a home study is not  
26 required by the TVPRA or ORR policy, the Case Manager and an independent third party Case  
27  
28

1 Coordinator may recommend that a home study be conducted if they agree that the home study will  
2 provide additional information required to determine that the sponsor is able to care for the health,  
3 safety and well-being of the child.

4 42. ORR does not disqualify potential sponsors on the basis of their immigration status,  
5 but does require sponsors (including parents) to complete a sponsor care plan. Among other things,  
6 the care plan identifies the adult caregiver who will act for the sponsor, should the sponsor become  
7 unavailable, and how such caregiver will be notified of such situation. It also includes a safety plan  
8 in some circumstances.  
9

10 43. Throughout the release process, care providers work with the child and sponsor so  
11 that they can plan for the child's after care needs. This involves working with the sponsor and the  
12 unaccompanied alien child to prepare them for post-ORR custody, assess the sponsor's ability to  
13 access community resources, and provide guidance regarding safety planning, sponsor care plans,  
14 and accessing services for the child. The care provider explains the U.S. child abuse and neglect  
15 standards and child protective services that are explained on <https://www.childwelfare.gov>, human  
16 trafficking indicators and resources, and basic safety and how to use the 9-1-1 number in  
17 emergency situations.  
18

19 44. Once the assessment is complete and a sponsor has been approved, the sponsor  
20 enters into an agreement with the Federal government in which he or she agrees to:

- 21 a. Provide for the physical and mental well-being of the child, including but not  
22 limited to, food, shelter, clothing, education, medical care and other services as  
23 needed.  
24  
25 b. Attend a legal orientation program provided under the Department of  
26 Justice/Executive Office for Immigration Review's (EOIR) Legal Orientation  
27 Program for Custodians (Sponsors), if available where he or she resides.  
28

- 1 c. Depending on where the unaccompanied alien child’s immigration case is  
2 pending, notify the local Immigration Court or the Board of Immigration  
3 Appeals within 5 days of any change of address or phone number of the child  
4 (Form EOIR-33). (If applicable, file a Change of Venue motion on the child’s  
5 behalf.<sup>10</sup> A “change of venue” is a legal term for moving an immigration  
6 hearing to a new location.)  
7
- 8 d. Notify the DHS/U.S. Citizenship and Immigration Services within 10 days of  
9 any change of address by filing an Alien’s Change of Address Card (AR-11) or  
10 electronically at <http://www.uscis.gov/ar-11>.  
11
- 12 e. Ensure the unaccompanied alien child’s presence at all future proceedings before  
13 the DHS/Immigration and Customs Enforcement (ICE) and the DOJ/EOIR.  
14
- 15 f. Ensure the unaccompanied alien child reports to ICE for removal from the  
16 United States if an immigration judge issues a removal order or voluntary  
17 departure order.  
18
- 19 g. Notify local law enforcement or state or local Child Protective Services if the  
20 child has been or is at risk of being subjected to abuse, abandonment, neglect or  
21 maltreatment or if the sponsor learns that the child has been threatened, has been  
22 sexually or physically abused or assaulted, or has disappeared. (Notice should be  
23 given as soon as it is practicable or no later than 24 hours after the event or after  
24 becoming aware of the risk or threat.)  
25
- 26 h. Notify the National Center for Missing and Exploited Children at 1-800-843-  
27 5678 if the unaccompanied alien child disappears, has been kidnapped, or runs  
28 away. (Notice should be given as soon as it becomes practicable or no later than  
24 hours after learning of the child’s disappearance.)

- 1 i. Notify ICE at 1-866-347-2423 if the unaccompanied alien child is contacted in  
2 any way by an individual(s) believed to represent an alien smuggling syndicate,  
3 organized crime, or a human trafficking organization. (Notice should be provided  
4 as soon as possible or no later than 24 hours after becoming aware of the  
5 information.)  
6  
7 j. In case of an emergency, such as serious illness, destruction of home, etc.,  
8 temporarily transfer physical custody of the child to another person who will  
9 comply with the terms of the Sponsor Care Agreement.  
10  
11 k. In the event that a sponsor who is not the child’s parent or legal guardian is no  
12 longer able and willing to care for the unaccompanied alien child and is unable to  
13 temporarily transfer physical custody, notify ORR using the ORR National Call  
14 Center, at 1-800-203-7001.

15 45. If HHS cannot reasonably complete processes that are material to ensuring the welfare  
16 of the children presently in ORR custody within the deadlines ordered by the Court, then HHS has  
17 no choice but to make class membership determinations with incomplete information. The use of  
18 incomplete information increases the risk of not only incorrect class membership determinations, but  
19 also reunifications that endanger the welfare of the children presently in ORR care.

20 46. My opinion is that some relaxing of the Court’s deadlines is needed to allow HHS, on  
21 a case-by-case basis, to complete processes that HHS determines are necessary to make informed  
22 class membership determinations and to protect the welfare of the children presently in ORR custody.

23  
24 **FACILITATION OF CLASS MEMBER COMMUNIATIONS**

25 47. HHS has facilitated communication between putative class members by helping  
26 putative class members connect with case managers. HHS has directed field staff to help facilitate a  
27 conversation between a putative class member and his or her child. For example, field staff may call  
28

1 a case manager in a minor's shelter and ask the case manager to call or contact the detained parent.  
2 In other instances, the detained adult may be given the shelter case manager's telephone number.

3 48. The ORR Helpline is a bilingual call center that ordinarily works with ORR grantees  
4 to facilitate communications between potential sponsors and the children in the care of the grantees.  
5 See <https://www.acf.hhs.gov/orr/about/ucs/contact-info> (last visited July 5, 2018). Potential sponsors  
6 who call the ORR Helpline provide their name, contact information, relationship to the child, and  
7 other information to the ORR Helpline representative, who communicates the information to the ORR  
8 grantee caring for the child. The ORR grantee then responds to the potential sponsor and facilitates  
9 direct communications with the child and a case worker. The ORR Helpline does not verify parentage  
10 or make determinations regarding parental fitness or child endangerment.  
11

12 49. HHS operates with the goal of facilitating communications between putative class  
13 members and children in ORR custody twice a week.  
14

15  
16  
17 I declare under penalty of perjury that the foregoing is true and correct. Executed on July 5,  
18 2018.

19  
20  
21  
22 

23 Jonathan White,  
24  
25  
26  
27  
28

# Please wait...

If this message is not eventually replaced by the proper contents of the document, your PDF viewer may not be able to display this type of document.

You can upgrade to the latest version of Adobe Reader for Windows®, Mac, or Linux® by visiting [http://www.adobe.com/go/reader\\_download](http://www.adobe.com/go/reader_download).

For more assistance with Adobe Reader visit <http://www.adobe.com/go/acrreader>.

Windows is either a registered trademark or a trademark of Microsoft Corporation in the United States and/or other countries. Mac is a trademark of Apple Inc., registered in the United States and other countries. Linux is the registered trademark of Linus Torvalds in the U.S. and other countries.

1 CHAD A. READLER  
2 Acting Assistant Attorney General  
3 AUGUST E. FLENTJE  
4 Special Counsel to the Assistant Attorney General  
5 Civil Division  
6 WILLIAM C. PEACHEY  
7 Director  
8 COLIN KISOR  
9 Deputy Director  
10 SARAH B. FABIAN  
11 Senior Litigation Counsel  
12 U.S. Department of Justice  
13 Office of Immigration Litigation  
14 District Court Section  
15 Box 868, Ben Franklin Station  
16 Washington, DC 20442  
17 Telephone: (202) 532-4824  
18 Fax: (202) 616-8962

19 Attorneys for Defendants

20  
21 **UNITED STATES DISTRICT COURT**  
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
23

24 JENNY LISETTE FLORES; *et al.*, ) Case No. CV 85-4544-DMG  
25 )  
26 Plaintiffs, ) **DEFENDANTS' NOTICE OF**  
27 ) **COMPLIANCE**  
28 )  
29 v. )  
30 )  
31 JEFFERSON B. SESSIONS III, )  
32 )  
33 Attorney General of the )  
34 United States; *et al.*, )  
35 )  
36 Defendants. )  
37 )  
38 )



1           The Government’s June 21, 2018, ex parte application explained that the  
2 Flores Agreement—as interpreted by this Court and the Ninth Circuit—put the  
3 Government in the difficult position of having to separate families if it decides it  
4 should detain parents for immigration purposes. Defendants wish to inform the  
5 Court that, following the filing of our application to this Court, a federal district  
6 court in the Ninth Circuit held that such separation likely violates substantive due  
7 process under the Fifth Amendment. *Ms. L v. U.S. Immigration and Customs*  
8 *Enforcement*, No. 18-428 (S.D. Cal. June 26, 2018) (attached as exhibit). The *Ms.*  
9 *L* court certified a class and entered a class-wide preliminary injunction requiring  
10 reunification—both for parents released into the interior of the United States and  
11 for parents in DHS custody— and barring future separations for families in DHS  
12 custody.  
13  
14  
15  
16  
17

18           Defendants are submitting this notice of compliance to explain how the  
19 government is applying the Flores Agreement in light of this injunction. To  
20 comply with the *Ms. L* injunction barring parents in DHS custody from being  
21 separated from their children, the Government will not separate families but detain  
22 families together during the pendency of immigration proceedings when they are  
23 apprehended at or between ports of entry. As explained below, we believe that the  
24 Flores Agreement permits the Government to detain families together to comply  
25 with the nationwide order in *Ms. L*. We nevertheless continue to believe that an  
26  
27  
28

1 amendment of the Flores Agreement is appropriate to address this issue. Until that  
2 amendment, this submission sets out the Government’s interpretation and  
3 application of the Agreement in light of *Ms. L*.  
4

5       **A.** There are many legitimate justifications for detaining arriving aliens  
6 under the immigration laws, including well-established rules that allow arriving  
7 aliens at the border to be detained pending a determination of whether they may  
8 legally be admitted to the United States. Such detention, which Congress has made  
9 mandatory in many circumstances under 8 U.S.C. § 1225(b), is essential to  
10 protecting our southwest border, discouraging families that are not entitled to  
11 remain in this country from making the dangerous journey to the border, and  
12 returning families promptly when they are not entitled to relief in this country. *See*  
13 *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018); *cf. Demore v. Kim*, 538 U.S.  
14 510, 526 (2003) (discussing the Supreme Court’s “longstanding view that the  
15 Government may constitutionally detain deportable aliens during the limited period  
16 necessary for their removal proceedings”).  
17  
18  
19  
20  
21

22       We have explained over a period of years that one impact of the *Flores*  
23 requirements, if applied to minors that come into DHS custody accompanied by  
24 their parents, would be the separation of parents from their children. In construing  
25 the Flores Agreement, over the government’s objection, to apply to children taken  
26 into custody with their families, the Ninth Circuit understood that the separation of  
27  
28

1 parents from their children was a direct consequence of its holding. *Flores v.*  
2 *Lynch*, 828 F.3d 898, 908-09 (9th Cir. 2016). But the Ninth Circuit also made  
3 clear that neither the Flores Agreement nor court rulings applying it impose any  
4 legal barrier on the critical authority of DHS to detain adults who come into  
5 immigration custody at the border with their children. *Flores*, 828 F.3d at 908-09.  
6

7  
8 The *Ms. L* court reached the same conclusion in considering the situation of  
9 the separation of accompanied children from their parents, this time from the point  
10 of view of the parents, who were not parties to the *Flores* case or the Settlement  
11 Agreement. The *Ms. L* court issued class-wide relief requiring that, in most  
12 circumstances, parents be kept with their children during the pendency of  
13 immigration proceedings. Notably, like the Ninth Circuit, the court in *Ms. L*  
14 recognized the authority of DHS to detain parents in immigration custody pending  
15 resolution of their immigration cases. As the court emphasized, even in light of the  
16 court’s injunction requiring families to be kept together and reunified, the  
17 “Government would remain free to enforce its criminal and immigration laws, and  
18 to exercise its discretion in matters of release and detention consistent with law.”  
19 Order at 20; *see also id.* at 3 (“Order does not implicate the Government’s  
20 discretionary authority to enforce immigration laws . . . including its decision to  
21 release or detain class members.”). Thus, while the Government must keep  
22 families together when it chooses to exercise its discretion to detain or release a  
23  
24  
25  
26  
27  
28

1 parent under the INA, the court cited the *Flores* in explaining that the Government  
2 otherwise remains “free” to exercise “discretion in matters of release and  
3 detention.” *Id* at 20 (citing *Flores*); *see id.* at 7 (for “children placed in federal  
4 custody, there are two options,” the first option is separating the family and placing  
5 the child alone in ORR custody and “the second option is family detention”).  
6

7  
8 **B.** Reading the Flores Agreement together with the subsequent nationwide  
9 order in *Ms. L*, we understand the courts to have provided that minors who are  
10 apprehended with families may not be separated from their parents where it is  
11 determined that continued detention is appropriate for the parent. The Flores  
12 Agreement allows this result for two reasons.  
13

14  
15 *First*, the Agreement’s express terms accommodate court orders like the one  
16 recently issued in *Ms. L*. Paragraph 12A of the Flores Agreement provides for the  
17 release of minors to a parent (or others) when possible under Paragraph 14 or,  
18 alternatively, transfer to an appropriate facility with a licensed program under  
19 Paragraph 19. *See Flores v. Lynch*, 828 F.3d 898, 901 (9<sup>th</sup> Cir. 2016) (“Settlement  
20 creates a presumption in favor of releasing minors and requires placement of those  
21 not released in licensed, non-secure facilities that meet certain standards”). But  
22 these provisions include exceptions to releasing or transferring minors to  
23 accommodate a ruling like that in *Ms. L* requiring families to be kept together, and  
24 those exceptions permit family detention in these circumstances.  
25  
26  
27  
28

1           *Release provision.* In Paragraph 14, the Flores Agreement specifies that a  
2 minor should be “release[d] from its custody *without unnecessary delay*” to a  
3 parent or other relative. Flores Agreement ¶ 14 (emphasis added). The court’s  
4 order in *Ms. L*, which requires that the minor be kept with the parent, makes delay  
5 necessary in these circumstances. The minor cannot be released under Paragraph  
6 14 without separating him or her from their parent, as such a separation would  
7 violate the injunction issued in *Ms. L*. See *Ms. L* Order at 22 (DHS is “enjoined  
8 from detaining Class Members in DHS custody without and apart from their minor  
9 children”). Under those circumstances, the release of the minor from custody must  
10 be “delay[ed]” pursuant to the Agreement during the period the parent is detained  
11 by DHS. Flores Agreement ¶ 14. Indeed, the court’s order in *Ms. L* envisions that  
12 a parent would be “reunited with the child *in DHS custody*” and that a child would  
13 be released only “[*if Defendants choose to release Class Members [i.e., parents]*  
14 *from DHS custody*” or if a parent consents. Order at 23 (emphasis added). This  
15 application of the Flores Agreement is also consistent with another aspect of  
16 Paragraph 14 of the Agreement – which sets placing the minor with “a parent” as  
17 the first “order of preference.” Flores Agreement ¶ 14; *id.* ¶ 18 (requiring  
18 “continuous efforts . . . *toward family reunification* and . . . release”) (emphasis  
19 added); see *Flores*, 828 F.3d at 903 (“[t]he settlement creates a presumption in  
20 favor of release *and favors family reunification*”) (emphasis added).  
21  
22  
23  
24  
25  
26  
27  
28

1           *Transfer provision.* The Flores Agreement also permits transfer of a child to  
2 a licensed program under Paragraph 19. *See* Flores Agreement ¶ 12A. Under  
3 Paragraph 12A, during an influx DHS is required to transfer a minor for placement  
4 in a licensed program “as expeditiously as possible.” *Id.* ¶ 12A.3. But the  
5 obligation to transfer applies “except . . . as otherwise required by any court decree  
6 or court-approved settlement.” *Id.* ¶ 12A.2. Here, the court decree in *Ms. L*  
7 prohibits the transfer of the minor to a licensed program, because such a transfer  
8 would separate the child from his or her parent. *Ms. L* Order at 22. A transfer  
9 therefore cannot occur consistent with that court decree.<sup>1</sup>  
10  
11

12           ***Second***, both *Ms. L* and *Flores* expressly envision that adults who arrive at  
13 the United States with children are properly subject to detention – a critical aspect  
14 of border enforcement. Given that express conclusion in each decision, it would be  
15 remarkable to read the orders together as mandating the opposite conclusion – that  
16 detention may never occur. Doing so would undermine the express holdings in  
17 both cases. *Ms. L*, for its part, held that DHS would retain the same authority to  
18 detain the parent as it had before – it simply required that such detention be of the  
19  
20  
21  
22  
23

---

24 <sup>1</sup> The issue regarding how the Flores Agreement licensing provisions apply to  
25 family detention centers is the subject of ongoing litigation. But to the extent that  
26 family detention centers are treated as licensed consistent with the Flores  
27 Agreement, a transfer under this provision could occur consistent with *Ms. L*. We  
28 have also asked this Court to modify the Agreement to permit the transfer of  
families together to family residential centers without requiring a state license.

1 family as a unit. *See Ms. L* Order at 3 (“Order does not implicate the  
2 Government’s discretionary authority to enforce immigration laws . . . including its  
3 decision to release or detain class members”); *id.* at 22 (DHS may “choose to  
4 release” class members).  
5

6         Likewise, the Ninth Circuit ruling in *Flores* held that the “settlement does  
7 not require the government to release parents.” *Flores*, 828 F.3d at 908; *see also*  
8 *Bunikyte v. Chretoff*, 2007 WL 1074070, at \*16 (W.D. Tex. 2007) (rejecting  
9 argument that Flores Agreement required release of both minors and parents). As  
10 the Ninth Circuit explained, providing rights to minors under the agreement “does  
11 not mean that the government must also make a parent available” by releasing the  
12 parent with the child. *Flores*, 828 F.3d at 908; *id.* at 909 (“parents were not  
13 plaintiffs in the *Flores* action, nor are they members of the certified class,” and the  
14 settlement “therefore provides no affirmative releases rights for parents”). Because  
15 the Flores Agreement does not require the release of parents, and *Ms. L* requires  
16 DHS to keep parents and children together when the parents are in detention, the  
17 rulings work together to permit detention of parents with their minor children with  
18 whom they are apprehended.  
19

20         C. No other aspect of the Flores Agreement or *Ms. L* require the United  
21 States to release all individuals held in border-related detention when they arrive at  
22 the border with children. Instead, other aspects of the rulings lead to the opposite  
23  
24  
25  
26  
27  
28

1 conclusion. The *Ms. L* ruling addresses reunification of children with their parents,  
2 and specifically requires reunification “when the parent is returned to immigration  
3 custody” after a release from criminal custody. Order at 10; *see id.* at 11 (court  
4 order provides for “reunification during intervening . . . ICE detention prior to  
5 actual removal, which can take months”). But this aspect of the *Ms. L* ruling  
6 would make little sense if that reunification would necessitate an immediate release  
7 of the parents from immigration custody under the Flores Agreement.  
8  
9

10 The *Ms. L* decree also provides that the parent may consent to the release of  
11 the child without the parent. Order at 23 (parent may “affirmatively, knowingly,  
12 and voluntarily decline[] to be reunited with the child in DHS custody”). This  
13 authority permits the continued operation of the provisions of the Flores  
14 Agreement governing release of the child – albeit with the accompanying parent’s  
15 consent before they go into effect. Relying on a parent’s consent in these  
16 circumstances where the family is together makes sense, particularly because  
17 plaintiffs in this case have always agreed that detention of the family together is  
18 permissible if the parent consents. *See Flores*, Transcript at 37-38 (April 24,  
19 2015) (in response to question whether the “agreement allows[s] for an  
20 accommodation to . . . a parent who wishes to remain in the [family residential]  
21 facility,” “the plaintiffs’ positions is . . . a class member is entitled to waive those  
22 rights” and that waiver may “parents speak for children all the time”) (relevant  
23  
24  
25  
26  
27  
28



1 pages attached as exhibit); *see also*

2 <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement->  
3 [and-its-effects-on-immigration](https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-) (June 22, 2018) (last visited June 29, 2018)

4  
5 (counsel for plaintiffs explaining that “choice” to remain in family detention “is  
6 not something the Flores settlement itself addresses or prevents”). That is a  
7 preference expressed by other plaintiffs who have challenged family separation.<sup>2</sup>

8  
9 This aspect of the *Ms. L* order – allowing release of the child with the consent of  
10 the parent – would make little sense if the Government was under an affirmative  
11 obligation to release the entire family together.  
12

13 **D.** Accordingly, for the reasons explained, the Flores Agreement permits  
14 the Government to detain families together given the nationwide order in *Ms. L*  
15 that bars the separation of families in DHS custody. To comply with the *Ms. L*  
16 injunction, the government will not separate families but detain families together  
17 during the pendency of immigration proceedings when they are apprehended at or  
18 between ports of entry and therefore subject to the *Ms. L* injunction.  
19  
20  
21

22  
23 <sup>2</sup> *See Mejia-Mejia v. ICE*, No. 18-1445, Complaint ¶ 4 (D.D.C. filed June 19,  
24 2018) (“If, however, the government feels compelled to continue detaining these  
25 parents and young children, it should at a minimum detain them together in one of  
26 its immigration family detention centers”); *Padilla v. ICE*, NO. 18-928 (W.D.  
27 Wash), Complaint ¶ 12 (“If, however, the government insists on continuing to  
28 detain these parents and children, it must at a minimum detain them together in one  
of its immigration family detention centers.”).

1 DATED: June 29, 2018

Respectfully submitted,

2  
3 CHAD A. READLER  
Acting Assistant Attorney General

4  
5 /s/ August E. Flentje  
6 AUGUST E. FLENTJE  
Special Counsel to the Assistant Attorney  
7 General  
8 Civil Division

9 WILLIAM C. PEACHEY  
10 Director  
11 COLIN KISOR  
Deputy Director  
12 SARAH B. FABIAN  
13 Senior Litigation Counsel  
14 U.S. Department of Justice  
Office of Immigration Litigation  
15 District Court Section  
16 Box 868, Ben Franklin Station  
Washington, DC 20442  
17 Telephone: (202) 532-4824  
18 Fax: (202) 616-8962

19  
20  
21 *Attorneys for Defendants*  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I served the foregoing pleading on all  
counsel of record by means of the District Clerk’s CM/ECF electronic filing  
system.

/s/ August E. Flentje  
August E. Flentje  
Attorney for Defendants

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28