No. 17-56297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.
Plaintiffs-Appellees,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04544-DMG-AGR

BRIEF FOR APPELLANTS

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation

SARAH B. FABIAN
Senior Litigation Counsel
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Fax: (202) 305-7000
Email: sarah.b.fabian@usdoj.gov

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULES OF EVIDENCE

REGULATIONS

INTRODUCTION

In its June 27, 2017 Order, the district court erroneously found both U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"), component agencies of the Department of Homeland Security (DHS), in breach of the *Flores* Settlement Agreement ("Agreement"). In response to its findings of breach, the court ordered CBP and ICE each to appoint a Juvenile Coordinator to oversee compliance with the Agreement. While the Government does not appeal the order to appoint these Juvenile Coordinators, the Government appeals several of the court's findings of breach because they are based on erroneous interpretations of the Agreement that, in some cases, appear to impose new substantive requirements on the government that are absent from the Agreement itself. The Government appeals because the district court should not be permitted to impose requirements on the Government that are not contained within the four corners of the Agreement itself.

With regard to CBP, the Order can be read to improperly read requirements into the Agreement that are not contained within the Agreement's plain terms; any finding of breach based on newly-added requirements in turn should be reversed.

The court's finding of breach also is premised on a series of evidentiary errors that effectively foreordained a finding of substantial non-compliance.

With regard to ICE, the court's Order would require ICE to act in a manner that is inconsistent with the Immigration and Nationality Act ("INA"). It also can be read to require ICE to violate the William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008 ("TVPRA"). The Court should not read the Agreement to supplant the intent of Congress in these statutes, and to the extent the district court's Order does so, the Order should be reversed.

JURISDICTIONAL STATEMENT

On May 19, 2016, Plaintiffs filed a motion to enforce the Agreement. *See Flores v. Johnson*, No. 85-cv-4544 (C.D. Cal.), ECF No. 201. The Government opposed Plaintiffs' motion (ECF No. 208) on June 3, 2016. On June 27, 2017, the district court granted in pertinent part Plaintiffs' motion to enforce, and ordered the appointment of a Juvenile Coordinator for both ICE and CBP to monitor and report on the Government's compliance with the Agreement. *See* ECF No. 363. On August 28, 2017, the Government timely filed a Notice of Appeal of the district court order. Record Excerpts ("RE") 35-37.

While the district court found the Government in breach of several provisions of the Agreement, the only injunctive remedy ordered by the district court is the

appointment of the Juvenile Coordinators. Under this Court's precedent, an order appointing a special master is not an appealable order under 28 U.S.C. § 1292(a)(1), if the appointment does not modify any provision of an injunction or consent decree. *See Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 540 (9th Cir. 1987) (holding that orders appointing a special master "are generally interlocutory and not appealable"); *see also Thompson v. Enomoto*, 815 F.2d 1323, 1326–27 (9th Cir. 1987). Here, the monitor ordered by the district court is required by Paragraph 28A of the Agreement, RE516-17, and so the appointment of the Juvenile Coordinators, standing alone, does not modify the existing terms of the Agreement.

However, other portions of the Order may be appealable to the extent that they modify the existing terms of the Agreement. Section 1292 provides appellate jurisdiction over a district court order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). "[W]hether an order modifies an existing injunction rather than merely interprets it depends on whether it substantially alters the legal relations of the parties." *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir.1998); *see also Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir.1989) (holding order modified, not clarified, injunction because it "substantially changed

the terms and force of the injunction"). Thus, to the extent that this Court concludes that any portion of the district court's Order only enforces the existing terms of the Agreement, and does not alter the obligations previously agreed to by the Government, then that portion of the Order would not be appealable. Conversely, this Court may conclude that a portion of the district court's order has, under the guise of interpreting the Agreement, in fact substantially altered the legal relations of the parties by reading new requirements into the Agreement. If so, that portion of the Order would be appealable. In other provisions of the district court's order, the court may be seen to have refused to modify the Agreement, a determination over which this Court also would have jurisdiction. To the extent this Court finds that the district court's order substantially altered the Government's obligations under the Agreement, or refused to modify the terms of the Agreement, the Government contends that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292.

The Government more fully addresses the question of jurisdiction with regard to each issue on appeal in its briefing below.

STATEMENT OF THE ISSUES

This appeal raises the following issues:

I. Did the district court err when it found CBP in breach of Paragraph 12A of the *Flores* Settlement Agreement with regard to the conditions at CBP facilities?

   a. Did the district court read into the Agreement requirements that were not agreed to by the parties?

   b. Did the district court commit reversible error when it considered the testimony of Plaintiffs' witnesses in hearsay declarations and deposition transcripts rather than requiring in-person testimony, and where it followed procedures that effectively prevented the Government from being able to cross examine Plaintiffs' witnesses?

   c. Were the district court's findings of fact clearly erroneous?

II. For aliens in expedited removal proceedings who have not yet had a positive credible-fear determination, or have been found not to have a credible fear of persecution, and thus are thus subject to mandatory detention "until removed," 8 U.S.C. 1225(b)(1)(B)(iii)(IV), whether the Agreement nonetheless requires ICE to release those aliens on parole so long as they are not a flight risk.

III. Did the district court conclude that ICE is required to assess the suitability of potential custodians and to release minors to custodians other than the minors' parent or legal guardian, and if so does that violate the TVPRA?

IV. Did the district court err in concluding that ICE family residential centers are "secure" and "unlicensed"?

STATEMENT OF THE CASE

I. FACTUAL AND LEGAL BACKGROUND

A. The Flores Settlement Agreement

The complaint in this action was filed on July 11, 1985. Compl., ECF No. 1. Plaintiffs filed the *Flores* lawsuit to challenge "the constitutionality of [the Immigration and Naturalization'' Service's ("INS")] policies, practices, and regulations regarding the detention and release of unaccompanied minors." Agreement at 3. Ultimately, the Supreme Court rejected Plaintiffs' facial challenge to an INS regulation concerning care of juvenile aliens. *Reno v. Flores*, 507 U.S. 292, 305 (1993). On remand from the Supreme Court, the parties entered into a settlement agreement to resolve the case. RE501-46. The Agreement became effective on January 28, 1997, upon its approval by the district court, and provides for continued oversight by the district court.

The Agreement sets out a "nationwide policy for the detention, release, and treatment of minors in the custody of [DHS] . . . ." Agreement ¶ 9, RE506-07. Specifically, the Agreement provides that DHS must "hold minors in facilities that are safe and sanitary and that are consistent with [DHS's] concern for the particular vulnerability of minors," *id.* ¶ 12.A, RE507-08, and provides a general preference for release of minors out of DHS custody, *see id.* ¶ 14, RE509-10. The Agreement

provides that, if a minor's detention is not required to secure his or her timely appearance before the immigration court, or to ensure the minor's safety or that of others, the minor should be released "without unnecessary delay" to either a specified list of sponsors, or, if no sponsor is available, to a licensed program. *See id.* ¶¶ 12A, 14, 19, RE507-12. During "an influx of minors into the United States," minors must be transferred to such a licensed program "as expeditiously as possible." *Id.* ¶ 12A(3), RE507-08.[1]

B. 2015 Enforcement Proceedings

On February 2, 2015, Plaintiffs filed a motion to enforce the agreement, arguing that ICE's "no-release policy" violated the Agreement; that ICE's "practice of confining children in secure, unlicensed facilities" violated the Agreement; and that conditions in CBP short-term holding facilities violated the Agreement. *See* July 24 2015 Order ("July 2015 Order"), ECF No. 177, at 2, RE447. Defendants filed a response, as well as a motion to amend the Agreement, arguing that the Agreement did not apply to children accompanied by their parents. The district court granted Plaintiffs' motion, and denied Defendants' motion to amend the Agreement on July

[1] An "influx of minors into the United States" is defined as "those circumstances where [DHS] has, at any given time, more than 130 minors eligible for placement in a licensed program . . . ." Agreement ¶ 12B. RE508. Based on the numbers of children and families who have been apprehended or encountered at the border in recent years, DHS is constantly operating in a state of influx.

24, 2015. July 2015 Order. The court issued a subsequent remedial order on August 21, 2015 ("August 2015 Order"), ECF No. 189, RE461-75.

With regard to conditions at CBP facilities, the district court held that "to the extent any Border Patrol station is out of compliance with the Agreement, those stations must comply with the Agreement and Defendants' own acknowledged standards and procedures." August 2015 Order at 13, RE473. The district court further ordered that CBP should "monitor compliance with their acknowledged standards and procedures" for complying with the Agreement, or in the alternative should agree to the appointment of a special monitor for that purpose. *Id.* at 14-15, RE474-75.

With regard to ICE family residential centers, the district court indicated that the government's target of a 20-day average detention time "may fall within the parameters of Paragraph 12A of the Agreement . . . ." *Id.* at 10, RE470. The district court also explained that in periods of influx—as defined in the Agreement—family units may be housed at residential centers for the limited period necessary to conduct asylum and other protection-related screenings, so long as the length of detention is "as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear . . . especially if the brief extension of time will permit the DHS to keep the family unit together." *Id.*

Notably, in the July Order, the district court also recognized that in a "situation where the mother . . . has been deemed a flight or safety risk . . . , Defendants would be justified in detaining both mother and child in that case . . . ." July 2015 Order at 9 n.5, RE484. However, the district court found that "Defendants must release an accompanying parent so long as doing so would not create a flight risk or a safety risk." *Id.*

The government appealed. On appeal, the Ninth Circuit affirmed the district court's application of the *Flores* Agreement to both accompanied and unaccompanied minors, but reversed the district court's order to the extent that it found that the Agreement required ICE to release an accompanying parent along with the accompanied child. *Flores, et al v. Lynch, et al.*, 828 F.3d 898 (9th Cir. 2016).

C. CBP Facilities in the Rio Grande Valley Sector At The Time Of Plaintiffs' 2016 Motion To Enforce

1. CBP Standards and Systems of Record

CBP is responsible for protecting the United States borders from terrorists and other criminals, while facilitating lawful travel and trade. *See* https://www.cbp.gov/about. The two primary components involved in immigration enforcement are the Office of Field Operations ("OFO"), which determines the admissibility of all arriving aliens at official ports of entry, and the United States

Border Patrol ("Border Patrol"), which apprehends aliens who attempt to enter the country between the ports of entry. *See generally* https://www.cbp.gov/border-security. Both OFO and Border Patrol temporarily detain aliens who are determined to be inadmissible to the United States, including *Flores* class members.[2] In the RGV sector, aliens are detained both at Border Patrol stations and at CPC-Ursula, a facility specifically designed to house minors and family units while they await transfer to longer-term facilities. Declaration of Manuel Padilla Jr ("Padilla Decl.") ¶ 5, RE191.

CBP has long taken steps to ensure that its temporarily holding facilities comply with the Agreement. In accordance with the district court's August 2015 Order, CBP has taken nationwide action to ensure that it has implemented systems that can effectively monitor compliance with the requirements of the Agreement at all Border Patrol short-term holding facilities. *See generally* Declaration of Justin Bristow ("Bristow Decl."), RE182-89. Additionally, in October 2015, CBP put into place new nationwide standards that comprehensively govern hold room conditions

[2] Plaintiffs originally sought to challenge the conditions at all CBP facilities nationwide. However, the Court found "there is insufficient evidence to suggest that any other CBP stations in locales outside of the [Rio Grande Valley ("RGV")] Sector have failed to comply with the Court's [July and August 2015 orders]." Order at 8, RE8. Defendants do not challenge this limitation of the Court's findings to the Border Patrol facilities in the RGV Sector, and therefore address here only the evidence submitted related to Border Patrol operations and to the RGV Sector.

at all CBP facilities, and incorporate many of the requirements of the Agreement. *See* U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, and Search* ("TEDS"), October 2015, available at: https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf (last visited Jan. 2, 2018).

Specifically, TEDS requires that minors are to be treated "with dignity, respect and special concern for their particular vulnerability." TEDS § 5.1. TEDS also requires that minors should be: placed in the least restrictive environment appropriate; processed as expeditiously as possible; provided access to basic hygiene items, clean bedding, and, when appropriate, dry clothes; regular access to meals (including hot meals), snacks, milk, and juice; access to toilets and sinks; access to drinking fountains or clean drinking water along with clean drinking cups; emergency medical care, if needed; and access to adequate temperature control and ventilation. TEDS § 5.6. Hold rooms in which minors are held are professionally cleaned and sanitized at least once per day. *Id*. Reasonable efforts are made to provide those who are approaching 48 hours in CBP custody with a shower. *Id.* TEDS also provides that where possible, family units should not be separated, or when they must be separated, the reasons for that separation should be documented in the applicable system of record. *Id.* Further UACs must be held separately from

unrelated adults. TEDS § 5.6.

CBP records all custodial actions in its electronic systems of record.[3] For Border Patrol, that system of record is called e3DM. Bristow Decl. ¶ 11, RE184. To ensure and monitor compliance with the Court's August 2015 Order and with the Agreement, CBP instituted system-wide changes to its systems of record to provide even more comprehensive tracking of custodial actions related to minors. Padilla Decl. ¶ 25, RE196-97; Bristow Decl. ¶ 13, RE185. CBP monitors its compliance with the Agreement and with TEDS by tracking whether a minor is accompanied by a family member or not; any separation from the accompanying family member (as well as the reason for that separation); if separated, any contact a minor has with his or her accompanying family members (or, if contact is not possible, the reasons why); the provision of meals and snacks; a minor's refusal of a meal or snack; the provision of emergency medical care to a minor; the conditions in a minor's hold room (e.g., functioning toilets and sinks, availability of drinking water, temperature range); all steps taken to fix any non-compliant hold room conditions; and all welfare

[3] CBP also maintains paper forms that can be used to record the necessary information in the event that the electronic systems of record become inoperable; information from the paper forms is entered into the system of record once the system returns to operation. Padilla Decl. ¶ 37, RE199.

checks.[4] Padilla Decl. ¶¶ 25-43, 53, 87, 88, RE196-201, 202, 211; Bristow Decl. ¶¶ 15-18, RE185-88.

Border Patrol agents at CBP facilities in the RGV Sector are aware of the requirement that they document these actions, have been instructed by their leadership on the importance of this requirement, and regularly do so. Padilla Decl. ¶¶ 26, 27, 40, RE197, 200; Declaration of Ronald D. Vitiello ("Vitiello Decl.") ¶ 31, RE259.

2. Compliance with the Agreement and with Applicable Standards and Policies at RGV Sector Border Patrol Facilities

Plaintiffs alleged, through more than 100 declarations of *Flores* class members—the vast majority of whom were held in the RGV sector during late 2015 through early 2016—and others, that the food provided in CBP facilities was "inadequate" for class members; that the water at CBP facilities was "dirty" or tasted of chlorine; that class members lacked access to cups to drink water; that the facilities in which class members were held were not safe and sanitary; that class

[4] Welfare checks are regular checks of hold rooms to ensure the safety and well-being of those in the room. Welfare checks include a visual check of the area to ensure that the hold room continues to be safe and sanitary, that the minor continues to have access to drinking water and a functional toilet, and that the ventilation system for the area continues to be operational. Every time a welfare check is conducted, it is noted in the system of record. Padilla Decl. ¶ 34, RE198; Bristow Decl. ¶ 16, RE187.

members did not have adequate access to hygiene products; that class members were forced to endure "extremely cold" temperatures while in custody at CBP facilities; and that class members were unable to sleep while at Border Patrol stations in RGV sector.

The Government's evidence provides a different story. CBP detention facilities are 24/7 facilities designed for short-term holding during immigration processing. Vitiello Decl. ¶¶ 1, 5, RE252-53. CBP makes every effort to process minors as quickly as possible and either release them or transfer them to more long-term facilities. *Id.* ¶ 12, RE254. Moreover, in the RGV Sector, the vast majority of minors are transferred to the CPC-Ursula facility as soon as possible after their processing is complete, and at that facility they are provided an opportunity to shower, have their clothes laundered, and receive a change of clothes. Padilla Decl. ¶¶ 6, 42, 68, 70, 73, 74, RE191-92, 200, 206-08. Minors at CPC-Ursula also are provided a towel, toothbrush, toothpaste, mouthwash, soap, and shampoo. *Id*. ¶¶ 6, 75, RE191, 208.

Regardless of where they are held, during their relatively brief time in Border Patrol facilities, class member in the RGV Sector are provided with access to regular meals and snacks, as well as drinking water at all times, either by water fountain fixtures in the hold rooms or through the use of plastic water coolers with disposable

cups, which are regularly filled and kept clean by the cleaning staff. Padilla Decl. ¶¶ 6, 46-49, 54, 56-58, 59, RE191, 201-02, 203-04; Vitiello Decl. ¶ 9, RE253-54. In addition, Border Patrol facilities in the RGV maintain cleaning contracts with provide regular cleaning of all hold rooms and the restocking of bathrooms supplies such as toilet paper and soap. Padilla Decl. ¶¶ 21, 42, 60-62, 72, 88, RE195, 200, 204-05, 207, 211; Vitiello Decl. ¶ 9, RE253-54. Sinks and soap or hand sanitizer in the hold rooms provide detainees the opportunity to wash their hands after using the toilet, and offer paper towels for drying. Padilla Decl. ¶¶ 61, 85, 86, RE204-05, 210-11. CBP facilities also stock other personal and hygiene products which are provided to detainees upon request, including diapers and wipes and feminine hygiene products. *Id*. ¶¶ 50, 72, 75, 77, 78, RE202, 207, 208.

Further, the temperature at CBP facilities in the Rio Grande Valley Sector is regulated, and is maintained at a range of 66 to 80 degrees Fahrenheit, a level that is safe and comfortable for both detainees and officers. *Id*. ¶¶ 30 RE197-98. Agents monitor the temperature range, and take immediate steps to remedy any issues in which the temperature is outside of the acceptable range. *Id*. ¶¶ 28, 30-32, RE197-98. Agents also provide mylar or other disposable blankets to class members for bedding, and for additional warmth if needed. *Id*. ¶ 89, RE211-12. Mylar blankets limit the spread of disease and vermin, such as lice and scabies, and eliminate the

problems that many facilities previously experienced of being unable to obtain the laundry services that would be necessary to provide cloth blankets. *Id*. Many facilities also may provide mattresses or mattress pads to minors, where space and supplies are available and it is operationally feasible. *Id.* ¶¶ 89-90, RE211-12. At CPC-Ursula, all class members are provided a mattress pad, as well as a mylar blanket. *Id.*

D. ICE Family Residential Centers At The Time Of Plaintiffs' Motion To Enforce

The Berks Family Residential Center ("Berks") in Berks, Pennsylvania, has been in operation since 2001. ECF No. 120-1, ¶¶ 13, 15. In 2014, an influx of UACs and families came across the southwest border. *Id.* ¶ 14. As part of its overall response to this significant humanitarian situation, DHS opened the Artesia Family Residential Center ("Artesia") in Artesia, New Mexico, in June 2014, the Karnes County Residential Center ("Karnes") in Karnes City, Texas, in July 2014, and the South Texas Family Residential Center ("Dilley") in Dilley, Texas, in December 2014. *Id.* ¶ 15. The Artesia facility, which was a temporary facility, closed in December 2014. *Id*. Berks, Dilley, and Karnes remain in operation.

Since the summer of 2015, ICE family residential centers have operated primarily as short-term intake and processing facilities. *See* ECF No 215 ¶¶ 3-4; ECF No. 216 ¶¶ 3-4. ICE has implemented several improvements at its family residential

centers including increased staff, additional residential resources, improved legal access, and increased oversight of operations. ECF No. 217, Exhibit 22, ¶¶ 5-12. For the vast majority of families who move through these facilities, the length of time they remain in detention is limited to the amount of time it takes to screen them for credible or reasonable fear. ECF No 215 ¶ 3; ECF No. 216 ¶ 3. For the 18,706 residents initially booked into ICE family residential facilities from October 23, 2015, to May 18, 2016, and subsequently released or removed as of May 16, 2016, the average length of stay was 11.8 days. ECF No. 217, Exhibit 22, ¶ 13. Of these 18,706 residents, 58% were released or removed in 10 days or less, 96% in 20 days or less, and 99% in 30 days or less. *Id.* Of those detained as of May 16, 2016, the average length of stay is 17.7 days - 44% have been detained 10 days or less; 88%, 20 days or less, and 94%, 30 days or less. *Id.*[5]

The small percentage of individuals who remain in ICE family residential centers for longer periods of time fall into one of three categories: (1) individuals who are subject to mandatory detention because they have not established a credible

[5] For the 25,871 residents initially booked into ICE family residential facilities from January 1, 2017, to November 25, 2017, and subsequently released or removed as of November 25, 2017, the average length of stay was 15.8 days. Of these 25,871 residents, 53% were released or removed in 10 days or less, 83% in 20 days or less, and 99% in 30 days or less. Of those detained as of November 25, 2017, the average length of stay is 12.2 days - 45% have been detained 10 days or less; 88%, 20 days or less, and 99%, 30 days or less.

fear and have sought and received stays of removal; (2) individuals who have received a negative credible fear determination, are awaiting removal, and are subject to mandatory detention; or (3) individuals in family units with final orders of removal where the parent has been determined to constitute a flight risk. *Id.* ¶ 14.

II. PROCEEDINGS BELOW

A. Evidentiary Rulings

Plaintiffs' enforcement motion was supported by more than 100 declarations, including several from various class members and their parents regarding the conditions they allegedly experienced at CBP facilities, and various aspects of their detention in ICE family residential centers. *See generally* Motion, Exhibits 1-69, ECF Nos. 201-1 through 201-6. Many declarations were composed in English and typed by a third person, as many witnesses did not speak or read English.[6] Many declarations also contained indicia of unreliability, such as the exact same or very similar language appearing in several declarations,[7] or statements that did not appear

[6] A significant number of Plaintiffs' declarations include a certificate of translations stating that the declaration was written in English but read to the declarant in Spanish before signing. *See* ECF No. 201-5 at 25, 29, 32, 35, 38, 41, 44, 49, 53, 59, 63, 67, 72, 76, 79, 82-83, 87, 93, 98, 102, 107, 110, 113, 117, 120, 125 and ECF No. 201-6 at 8, 11, 14, 17, 20, 23, 26, 31, 35, 42, 45.

[7] For example *compare* ECF No. 201-5 at 43 (Declaration of Yessenia E), ¶ 8, *with id.* at 51 (Declaration of Cesia V), ¶ 8, *with id.* at 112 (Declaration of Amarilis L), ¶ 7, *with* ECF No. 201-6 at 13 (Declaration of Flember J), ¶ 7, *with id.* at 16

to come from the witness giving the declaration.[8] Defendants submitted numerous responsive declarations with their June 3, 2016, Response in Opposition to Plaintiffs' Motion, including the declaration of Chief Padilla, who addressed the conditions in Border Patrol's RGV Sector, and the declaration of David Strange, attaching the e3DM records disputing the statements of several of Plaintiffs' declarants. Accordingly, following the initial round of briefing on Plaintiffs' motion, there existed many disputes of material fact, based on conflicting and self-serving hearsay declarations, which could not readily be resolved without the district court determining issues of authenticity, accuracy, reliability, credibility and bias.

(Declaration of Karen L), ¶¶ 7-8. Also *compare* ECF No. 201-5 at 75 (Declaration of Katerin Y) ¶ 10 ("This facility was very crowded the whole time we were there. There was about 35 people in one room. There was no space to do anything. Every time we tried to stand up, they just kept yelling that we should sit or lay down, but there was barely any space. We didn't ask for medical help because the officers were so hostile.") *with id.* at 81 (Declaration of Kenia Y), ¶ 8 ("This facility was very crowded the whole time we were there. There was about 40 people in one room the size of a bedroom. There was no space to do anything. Every time we tried to stand up, they just kept yelling that we should sit or lay down, but there was barely any space. We didn't ask for medical help because the officers were so hostile.").

[8] For example one declarant, Allison M, a 14 year old girl, states that she is detained with her mother and sixteen year old sister, but later states, "I have never received a bond hearing or been told that my son could receive a bond hearing." ECF No. 201-5 at 95-98. Similarly, another declarant, Melvin M, a 16 year old boy, initially said he was detained with his mother, but later states, "No one at the Border Patrol facilities notified me about rights my daughter or son had as minors or any rights that I had under the Flores case." ECF No. 201-6 at 44-45.

Defendants therefore filed a motion asking the district court to hold an evidentiary hearing on the factual issues underlying Plaintiffs' Motion, and to resolve any material factual disputes, in accordance with Federal Rule of Evidence 1101. Motion for Evidentiary Hearing, ECF No. 256. Defendants objected to the district court's consideration of witness statements in the form of declarations on the grounds that "[t]he conflicting out-of-court assertions submitted for the truth of the matters asserted in Plaintiffs' declarations are textbook hearsay, inadmissible under Federal Rule of Evidence 802." *Id.* at 3-4. On October 7, 2016, the district court granted Defendants' motion for an evidentiary hearing, but limited the hearing "only to cross-examination and redirect examination of witnesses." Minute Order, ECF No. 274, at 1, RE178. The district court's Order provided no further guidance as to how the hearing would be conducted.

Given that Plaintiffs had submitted more than one hundred declarations from witnesses, Defendants requested that Plaintiffs identify those witnesses on whose testimony they intended to rely for the January 30, 2017, hearing, so that Defendants could determine if they wished to cross examine those witnesses; however, Plaintiffs declined to do so. Defendants also requested that the district court require Plaintiffs to bring to court those witnesses on whose written testimony they wished to rely, so that they could be subject to cross examination. *See* ECF No. 327. Defendants

identified those witnesses upon whose testimony they intended to rely at the hearing and made arrangements to make those witnesses available for the hearing; however, Plaintiffs stated that they did not intend to cross-examine any of those witnesses. On January 27, 2017, the district court issued an order stating that: "If Plaintiffs have not made a demand to cross-examine any of Defendants witnesses, then there is no need to produce those witnesses for live testimony. Similarly, if Defendants do not wish to cross-examine any of Plaintiffs witnesses, then there is no need for Plaintiffs to produce those witnesses for live testimony." Minute Order Docket Entry, ECF No. 326.[9]

At the January 30, 2017, evidentiary hearing, the government reiterated its position that the district court should not consider inadmissible hearsay declarations and deposition testimony as evidence, and that the court should hear live testimony to assess the credibility of the witnesses. Evidentiary Hearing Tr. at 6:16-7:16, RE95-96. The district court stated that it would consider declarations, *id.* at 7:17-20, RE96, and further stated that it was not Plaintiffs' obligation to identify the witnesses on whom it wished to rely at the evidentiary hearing, but rather Defendants'

[9] Because Defendants had already made arrangements to do so, Defendants produced for the January 30, 2017, hearing the witnesses on whose testimony Defendants intended to rely, but those witnesses were not permitted by the district court to testify at the hearing, nor did Plaintiffs cross-examine any of them. Evidentiary Hearing Tr. at 7:20-8:6, RE96-97.

obligation to identify those witnesses it wished to cross-examine; having failed to identify any of Plaintiffs' witnesses for cross-examination, the district court found Defendants had waived their right to do so. *Id.* at 8:7-9:10, RE97-98. The district court also indicated it would not hear from all of Plaintiffs' declarants even if Defendants had called them to be cross-examined. *Id.* at 6:2-6, RE95. In the district court's June 27, 2017 Order, the district court reiterated that it was overruling Defendants' objections to its consideration of declaration rather than live witness testimony in conjunction with the evidentiary hearing. Order at 5, RE5. The district court also characterized Defendants' objections to the remainder of Plaintiffs' exhibits as "blanket objections" which it also overruled. *Id.* at 6, RE6. Lastly, the district court found that the preponderance of the evidence standard—rather than the clear and convincing standard urged by the government—applied to the question of whether Defendants had breached the Agreement. Order at 3-4, RE3-4.

B. Ruling on CBP Claims

The district court granted Plaintiffs' motion to enforce with regard to the RGV Sector on all of the conditions alleged in Plaintiffs' motion to enforce except for the question of whether class members were able to sleep while in CBP facilities. On that question, the district court found that the conditions at CPC-Ursula (but no other Border Patrol facility) complied with the Agreement.

i. Access to Food

The district court credited and relied on class member declarations to find that Border Patrol does not comply with the Agreement or with its own standards with regard to providing adequate food to minors. Order at 8-11, RE8-11. The district court found that Defendants' "generalized evidence" regarding its compliance with its own policies did not counter these class members' assertions regarding their experiences. *Id.* at 9, RE9. The district court further discredited the declaration of Chief Padilla relating to his understanding of agents' compliance with the Agreement and with CBP's own policies. *Id.* Lastly, the court found that even where Defendants' e3DM records specifically refuted Plaintiffs' evidence relating to the adequacy of food, those records were insufficient and unreliable, and therefore did not undermine the credibility of the class member statements presented regarding the frequency and quality of the food they received. *Id.* at 9-10, RE9-10.

ii. Access to Water

The district court credited and relied on class member declarations to find that Border Patrol does not comply with the Agreement or with its own standards with regard to providing adequate drinking water to minors. *Id.* at 11-12, RE11-12. The district court characterized Chief Padilla's testimony that "the holding rooms in the [RGV] each have sport style five gallon water coolers . . . with disposable cups made

available to detainees" as evidence of Border Patrol's "general policies[,]" and then found that Defendants' evidence of its "general policies and practices and contracts with third party providers" did not undermine the credibility of these class member assertions regarding their experiences. *Id.* The court specifically noted that "Defendants have not offered evidence based on records or a witness' personal knowledge to contradict the specific accounts by Plaintiffs' witnesses of inadequate water, both in quality and availability, during their CBP-facility detention." *Id.* at 12, RE12.

iii. Sanitary Conditions

The district court credited and relied on class member declarations to find that Border Patrol does not provide sanitary conditions in its stations, and therefore does not comply with the Agreement or with its own policies. Order at 12-15, RE12-15. The district court again found that evidence of Defendants' "policies and practices" could not undermine the credibility of class members' declarations. *Id.* at 14, RE14. The court noted that Border Patrol records refuted some of Plaintiffs' statements, but stated that it would not rely on those records because they were unreliable, without further explanation. *Id.* at 15, RE15. The court also rejected Defendants' argument that "soap, towels, showers, dry clothing, or toothbrushes" are not required under the Agreement because the Agreement makes no mention of those items. *Id.* at 13,

RE13. Instead, the district court found that "these hygiene products fall within the rubric of the Agreement's language requiring "safe and sanitary" conditions and Defendants' own established standards." *Id.*

iv. Temperature

The district court credited and relied on declarations to find the temperatures at Border Patrol stations violate the Agreement and CBP's own policies. Order at 15-16, RE15-16. The district court also specifically highlighted class members' declarations stating that Border Patrol agents lowered the temperature in response to detainee complaints. *Id.* at 16, RE16. The court did not give weight to CBP's policy providing that temperature should not be used punitively. TEDS § 4.6. The court found that Border Patrol records showing that the temperature is maintained between 66-80 degrees and monitored to ensure it stays within this range "do[] not contradict the large volume of specific accounts by Plaintiffs' witnesses that they experienced extreme discomfort with cold temperatures." Order at 16, RE16.

v. Sleeping Conditions

The district court credited and relied on detainee statements to find that conditions at Border Patrol stations force class members to endure sleep deprivation. *Id.* at 16-18, RE16-18. The district court rejected Defendants' argument that the Agreement makes no mention of sleep, and found that whether conditions in Border

Patrol stations permitted class members to sleep was relevant to the question of whether CBP acted in a manner that was consistent with CBP's "concern for the particular vulnerability of minors," as required by the Agreement. *Id.* at 17, RE17. The court did find that there was evidence that minors were able to sleep at CPC-Ursula, and so found no breach at that facility, but found that the stations in the RGV Sector violated the Agreement on this issue. *Id.* at 17-18, RE17-18.

C. Ruling on ICE Claims

i. Efforts Towards Release

The district court found that the Agreement requires ICE to make a discretionary decision on whether to parole each minor who comes into its custody and who is subject to an expedited removal order and awaiting a credible fear determination, or has received a negative credible fear determination, based solely on that minor's flight risk. Order at 20-26, RE20-26. The district court relied on 8 C.F.R. §§ 212.5(b) and 236.3, and the standards laid out therein for how parole of minors should be considered, in support of this requirement. However, the district court overlooked 8 U.S.C. 1225(b)(1)(B)(iii)(IV), which specifies that aliens in this category "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Ibid.* The court also overlooked 8 C.F.R. § 235.3(b)(4)(ii), which implements that mandate and

limits release to situations where "parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." *See also* 8 CFR § 235.3(b)(2)(iii).

The district court also found that ICE is in breach of the Agreement because, under the terms of the Agreement, unless ICE determines that a child is a flight risk or that keeping him or her in detention is in his or her best interest, the minor must be considered for release to certain sponsors. Order at 26-27, RE26-27. As part of that requirement, the district court suggests that ICE, and not HHS, should consider the suitability of those sponsors for release and document that consideration. *Id.* In so doing the district court seems to reject ICE's position that, if it determines it should release a child to a sponsor other than a parent or legal guardian, it would turn the child over to the U.S. Department of Health and Human Services ("HHS") Office of Refugee Resettlement ("ORR"). *Id.* The Order makes no mention of the requirements of the TVPRA, which require the result described above, in reaching its conclusions. *Id.*

ii. Licensing

The district court found that ICE family residential facilities are both "secure" and "unlicensed" and that Defendants therefore are violating the Agreement to the extent that minors who are not released from custody are not placed into "non-secure, licensed facilities in accordance with the Agreement." Order at 28-29, RE28-29.

iii. Length of Custody

The district court granted Plaintiffs' motion to enforce Paragraphs 12A and 14 of the Agreement "on the length of detention issue." Order at 29-31, RE29-31. The district court based its finding of breach on the fact that it appeared to the court that "a significant number of detainees still remained in detention for over 20 days during the 13-month period Defendants identified." *Id.* at 30, RE30. In its prior orders, however, the district court had concluded that ICE could detain a family unit so long as it was moving "as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go" towards release. August Order at 10; RE470. Thus, the Order appears to find simply that the agency is not in substantial compliance with the Agreement, but does not go so far as to impose any firm 20-day limit on

detention in an ICE family residential center.[10]

D. Plaintiffs' Request for a Special Monitor

Having found Defendants in breach of the Agreement as discussed above, the district court declined Plaintiffs' request to appoint a special monitor, and instead ordered that Defendants appoint their own internal monitor by appointing a Juvenile Coordinator in accordance with Paragraph 28 of the Agreement. Order at 32-33, RE32-33. If the objectives of the Juvenile Coordinator are not met in one year, the district court will reconsider Plaintiffs' request for a special monitor. *Id.*

SUMMARY OF THE ARGUMENT

The district court's order appears to have read into the Agreement terms that were never agreed to by the parties, and that are not apparent from the plain language of the Agreement. To the extent this Court finds that the district court has done so it should take jurisdiction over this appeal and should reverse the district court.

First, the court erroneously found that CBP facilities in Border Patrol's RGV Sector violate the Agreement. In particular, although the district court's decision is ambiguous, its Order can be read to have found CBP in breach of requirements that

[10] While the Government does not read the Order as imposing any bright line limit on detention in ICE family residential centers, to the extent this Court reads the order as imposing a 20-day cap on such detention, Defendants contend that such a reading would impose restrictions beyond what is required by the Agreement and should be reversed.

are found nowhere in the plain terms of the Agreement. The terms of the Agreement governing conditions in CBP custody immediately following arrest are listed broadly, in sharp contrast to the specific conditions required by Exhibit 1 to the Agreement for facilities in which a class member may be held after he or she is transferred to longer-term custody. These generalized terms allow CBP to exercise its discretion with regard to the most appropriate conditions at its facilities, taking into account the unique operational requirements of these facilities, so long as those conditions comply with these general, enumerated requirements. Nonetheless, the district court's Order can be read to have found CBP in breach of the Agreement based on a conclusion that CBP failed to comply with its own TEDS standards, and failed to provide certain other conditions that Plaintiffs asserted should be required under the Agreement.

To the extent the district court effectively added terms to the Agreement, and then found CBP in breach of these newly-added terms, that rationale was plainly flawed. The ambiguity of the Order also puts the Government in the position of needing to comply with the court's decision on the assumption that it has imposed

new requirements, notwithstanding that the Government never agreed to those requirements and lacks clear notice of what exactly may be required.

Moreover, the district court erred because in finding CBP in breach of the Agreement the court effectively prevented the Government from providing any evidence to rebut the Plaintiffs' own testimony. Specifically, the court relied on unreliable hearsay testimony in the form of more than 100 declarations by witnesses who were not made available to the Government for cross-examination, and whose credibility the court failed to assess for itself because those witnesses were never required to appear for in-person testimony. The court also relied on deposition testimony from witnesses who were not shown to be unavailable. This failure was harmful to the Defendants because the declarations on which the court relied contained numerous contradictions and errors. At the same time, the court declined to accord the Government any presumption of regularity with regard to its evidence of its practices, procedures, or records, but instead rejected this evidence outright, finding that it was unreliable and that it failed to sufficiently rebut the declaration testimony of Plaintiffs' witnesses.

The court's evidentiary rulings constituted plain error, and require reversal of the court's finding of breach against CBP. With these rulings, the court held CBP to an unreasonable evidentiary standard, where Plaintiffs can prevail on a motion to

enforce the Agreement by simply providing declarations of class members regarding their claims of conditions experienced in CBP facilities, much of which may be subjective (*see* Order at 11, RE11 ("The water tasted very bad"); Order at 15, RE15 ("I believe that as more people came into the room, the air conditions were turned up"), and the only evidence the court would accept to refute such allegations is testimony from a Government witness who can recall the specific declarant and who can contradict the declarant's specific testimony, based on personal knowledge, as to the conditions the declarant experienced. The application of this impossible standard in this case led to an erroneous finding of breach in this Order, and will lead to erroneous future findings of breach unless this Court finds that the application of this evidentiary standard constituted reversible error.

Second, the district court erred in finding that ICE is in breach of the Agreement with regard to certain of its practices and procedures at ICE family residential centers. To start, the district court erred because it ignored the plain terms of the INA, which expressly mandate detention for aliens in expedited removal proceedings who are awaiting credible-fear determinations or have been found to lack a credible fear of persecution. 8 U.S.C. 1225(b)(1)(B)(iii)(IV). Instead the court ordered ICE to evaluate minors in this category for parole under 8 C.F.R. § 212.5(b) as a result of a case-by-case determination of flight risk. In so ordering, the district

court essentially read the Agreement to abrogate the INA's clear intent to impose a uniquely strict detention mandate for aliens in this category.

Third, to the extent the district court required ICE to parole minors directly to a custodian who is not a parent or legal guardian, the court clearly erred. Once ICE determines to release a minor other than to his or her parent or legal guardian, that minor becomes a UAC as defined in the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2). Section 235 of the TVPRA, as codified in principal part at 8 U.S.C. § 1232, plainly prohibits ICE from releasing a UAC, and instead requires that ICE transfer that minor to the care and custody of the HHS ORR, *see* 8 U.S.C. § 1232(b)(3), where HHS will conduct a suitability assessment of any potential sponsor. The court plainly erred to the extent that it required ICE to release any minor in violation of the limitations imposed by the TVPRA.

Fourth, the district court erred in concluding that ICE family residential facilities are "secure" and "unlicensed," because this issue was not properly before the court.

ARGUMENT

I. The District Court Erred When it Found CBP in Breach of Paragraph 12A of the *Flores* Settlement Agreement With Regard to the Conditions at CBP Facilities.

A. The district court's Order appears to read into the Agreement requirements that were not agreed to by the parties and are not found in the plain language of the Agreement.

The Agreement requires that "[f]ollowing arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors." Agreement ¶ 12.A, RE507-08. More specifically, the Agreement requires CBP to "provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor." *Id.* These requirements, which were negotiated and agreed to by the parties in 1997, leave room for the government to exercise its discretion in creating conditions at its facilities that comply with the language of the Agreement, while still taking into account necessary operational flexibility.

The court's opinion is ambiguous and can be read to conclude that there is enough evidence of non-compliance with the terms of the Agreement itself to warrant appointment of an internal monitor. The court's description of what

constitutes the breach, however, also can be read to incorporate into the Agreement itself a series of more rigid and detailed standards. To the extent the district court has done so, this Court has jurisdiction to hear the Government's appeal on this issue, and should reverse.

To start, the district court does not explain what standards it is applying to determine if CBP is in compliance with the terms of the Agreement. The only standards the Court applies are CBP's own internal TEDS standards, which were implemented years after the Agreement was signed. *See, e.g.,* Order at 8, 11, 12, 15, ER8, 11, 12, 15. The Order contains no separate analysis that explains what the Agreement requires. While CBP does not object to complying with its own standards—and believes it does so—CBP would object to any conclusion that the Agreement in some way incorporates those standards into its terms because that conclusion would be inconsistent with the plain intent of Agreement. By leaving the terms of Paragraph 12A extremely general, the Agreement leaves the specifics of compliance up to CBP. While CBP may choose to ensure compliance by setting detailed and high standards such as the TEDS standards and then aiming to comply with them, that should not mean that those terms are incorporated into the Agreement itself and thus subject to the enforcement proceedings in this case.

Similarly, portions of the Order can be read to conclude, erroneously, that the

Agreement specifically requires CBP to provide minors, in all situations, with sleeping accommodations, toothbrushes, toothpaste, showers, soap, towels, and dry clothes. Order at 13, RE13. Specifically, the district court stated that "whether Defendants have set up conditions that allow class members to sleep in the CBP facilities is relevant to the issue of whether they have acted in a manner that is consistent with 'the INS's concern for the particular vulnerability of minors' as well as the Agreement's 'safe and sanitary' requirement[,]" Order at 17, RE17, and that "hygiene products fall within the rubric of the Agreement's language requiring "safe and sanitary" conditions . . . ." Order at 13, RE13. But that broad language does not impose the specific requirements that the district court addressed. These rulings appear to go beyond the district court's role in assessing whether the government is in compliance with the generalized requirements of the Agreement. In ruling for Plaintiffs on this issue, the court did not ask for, nor require the presentation of, any evidence that the parties discussed or agreed to any such specific terms in 1997. The district court's analysis is not the correct one to determine whether the Government is in compliance with the Agreement.

Rather, the question in this case should have been whether the conditions in CBP facilities meet the Agreement's generalized requirements in Paragraph 12A. In reading the additional, specific terms into the Agreement, the district court

committed reversible error. *See U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412, 413 (9th Cir.1990) (noting the same). Accordingly, to the extent this Court concludes that the district court found the Government to be in violation of the Agreement for failing to comply with requirements that do not appear in the plain terms of the Agreement, it should reverse.

B. The district court committed reversible error by considering the testimony of Plaintiffs' witnesses in declarations and deposition transcripts rather than requiring in-person testimony and by employing procedures that effectively prevented the Government from cross-examining Plaintiffs' witnesses.

In this action to enforce the *Flores* Agreement, Plaintiffs bore the burden of proof to show that Defendants violated the Agreement. *See Tenet Healthsystem Desert, Inc. v. Fortis Ins. Co., Inc.*, 520 F. Supp. 2d 1184, 1194 (C.D. Cal. 2007) ("Plaintiff has the burden at trial of proving all elements of its breach of contract claim."). In attempting to meet this burden, Plaintiffs presented over 100 purported witness declarations. Plaintiffs also presented to the district court deposition testimony from some of those witnesses, who were never shown to be unavailable for in-court testimony. Ultimately, the district court relied almost exclusively on

these out-of-court statements of Plaintiffs' witnesses in concluding that the conditions at CBP facilities were not in substantial compliance with the Agreement.

The district court made two separate reversible errors which combined to effectively deny the Government the opportunity to meaningfully challenge Plaintiffs' evidence. First, the district court's consideration of hearsay evidence in deciding the motion—including declaration and deposition testimony from witnesses who were not shown to be unavailable—was in error. The Federal Rules of Evidence exist, explicitly, "to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102. The out-of-court assertions submitted for the truth of the matters asserted in Plaintiffs' declarations are textbook hearsay, inadmissible under Federal Rule of Evidence 802. *See also Rodriguez v. City of Los Angeles*, 2015 WL 13308598, at *7 (C.D. Cal. 2015) ("Cazarez's Declaration does not constitute "former testimony" under Rule 804 as Defendants had no opportunity to depose or cross-examine him before his death."). Moreover the declarations themselves contain indicia of unreliability, including the fact that they are not drafted in the native language of the declarants, *see supra* note 6, and that different declarations contain the same stock phrases concerning conditions at CBP facilities and Plaintiffs' interactions with Defendants, or statements that didn't make sense coming from the particular declarant. *See supra notes* 7 and 8. It was also error for the district

court to consider the deposition testimony of Plaintiffs' witnesses without requiring any showing that those witnesses were unavailable. Fed. R. Evid. 804.

The district court's complete reliance on this type of inadmissible evidence denied the government the opportunity for a "just determination" regarding the disputed issues of fact in this case. While Federal Rule of Civil Procedure 43(c) grants the district court discretion in determining whether to take oral testimony in deciding motions, in cases such as this one, where the resolution of the factual issues turns on an evaluation of the credibility of the witnesses, hearing oral testimony was the only way for the district court to fairly resolve these issues. *See United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 858 (9th Cir. 1992) ("Where factual questions not readily ascertainable from the declarations of witnesses or questions of credibility predominate, the district court should hear oral testimony."); *see also* 8 James Wm. Moore, Moore's Federal Practice—Civil § 43.05[2] (3d ed. 2012) ("A district court has considerable discretion to decide Rule 43(c) motions solely on the basis of affidavits or to take oral testimony at a hearing, but when questions of fact or credibility predominate, the district court should hear oral testimony; a failure to do so is likely to be considered an abuse of discretion."); Arthur R. Miller, Federal Practice and Procedure, 9A Fed. Prac. & Proc. Civ. § 2416 (3d ed.) ("However, when questions of fact or credibility predominate, a district

court's decision not to hear oral testimony often is found to be an abuse of discretion; courts often cite to Rule 43 to support this inherent proposition."); *Hubbard v. Houghland*, 471 Fed. Appx. 625, 626 (9th Cir. 2012) ("[T]he district court, without holding an evidentiary hearing, determined that Hubbard's statement was not credible. In making this credibility determination without holding an evidentiary hearing, the district court abused its discretion.").

The district court did not explain why consideration of hearsay evidence was permissible in the context of Plaintiffs' motion to enforce the *Flores* Agreement. The injunctive relief sought in Plaintiffs' Motion—the appointment of an outside monitor—would be permanent. Therefore, Plaintiffs' motion is more akin to a motion for a permanent injunction than a motion for a preliminary injunction (which courts routinely decide on the basis of hearsay declarations). *See Forsberg v. Pefanis*, 261 F.R.D. 694, 700 (N.D. Ga. 2009) (noting that Federal Rule of Civil Procedure 43(c) allows a court to consider hearsay in the context of a preliminary injunction motion, and that the question is whether this type of evidence is appropriate given the character and objectives of the injunctive proceeding). In this case, the character and objectives of the proceeding before the district court—seeking invasive, and prolonged relief against the government—justified the fair application of the hearsay rule. Notably, a motion to enforce a settlement or consent

decree also is not listed as among the proceedings exempted from the Rules of Evidence under Federal Rule of Evidence 1101(d).[11] For all of these reasons, the district court's consideration of hearsay evidence to decide the motion to enforce constituted reversible error.

Second, even if it had been permissible for the district court to take testimony on direct examination through written hearsay declarations at the hearing on Plaintiffs' motion, the district court erred because it applied procedures for the evidentiary hearing that effectively denied the government the opportunity to challenge Plaintiffs' evidence through cross-examination. While the Ninth Circuit has approved the practice of allowing direct testimony through written declarations, that approval was specifically premised on the notion that the witness who provided the declaration would be made available for cross-examination. *See In re Adair*, 965 F.2d. 777, 779 (9th Cir. 1992) (approving a procedure by which "the parties submit written narrative testimony of each witness they expect to call for purposes of direct evidence[, and t]he witness then testifies orally on cross-examination and on redirect"); *see also Sanders v. Ayers*, 2008 WL 4224554, at *2 (E.D. Cal. Sept. 12, 2008) (setting procedures for an evidentiary hearing at which direct testimony would

[11] Routine discovery motion hearings, in contrast, conducted under Federal Rule of Civil Procedure 43(c) are appropriate for resolution using hearsay evidence. *See, e.g., Arista Records v. Does 1-27*, 584 F. Supp. 2d 240, 255-56 (D. Me. 2008).

be presented by written declaration and requiring that any witnesses whose testimony the parties intended to offer into evidence must be present at the hearing for cross-examination); *Kuntz v. Sea Eagle Diving Adventures Corp.*, 199 F.R.D. 665, 666 (D. Haw. 2001) (discussing permissibility of procedures requiring submission of written testimony on direct in lieu of oral testimony where, "[u]nless otherwise agreed, witnesses must then be made available for live cross-examination and for live redirect examination."). The Local Rules of the Central District of California likewise make clear that while direct testimony in a non-jury proceeding may be heard by written, as opposed to oral, testimony, the acceptance of such written testimony is premised on the witness's adopting the written testimony in open court, thus making that witness available in court for live cross-examination. *See* L.R. 43-1 ("In any matter tried to the Court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness' cross-examination at the trial. Such written, direct testimony shall be adopted by the witness orally in open court, unless such requirement is waived.").

In accordance with this understanding of the permissibility of written testimony on direct, the Government brought to the hearing the witnesses on whose written testimony it wished to rely, and made them available for cross-examination, although no cross-examination was taken. Hearing Tr. at 7:20-8:6, RE96-97.

Defendants also requested that the district court require Plaintiffs to bring to court those witnesses on whose written testimony they wished to rely, so that they could be subject to cross examination. *See* ECF No. 327. But Plaintiffs did not do so, and the district court made clear that in any event it would not permit the Government to cross-examine all of Plaintiffs' witnesses, *Id.* at 6:2-6, RE95, while at the same time declining to require Plaintiffs to identify a more limited number of witnesses on which they wished to rely, or to ensure that those witnesses were present at the evidentiary hearing to provide the opportunity for cross-examination by the Government. *Id.* at 8:7-9:10, RE97-98. Together, these procedures effectively allowed Plaintiffs to submit written direct testimony for more than 100 witnesses, without providing any meaningful opportunity for the government to cross-examine those witnesses in court.

By considering Plaintiffs' unreliable hearsay declarations and improperly submitted deposition testimony, while also failing to allow the government the opportunity to cross-examine Plaintiffs' witnesses in court, the district court committed reversible error. Moreover, this error was not harmless because the court's decision was based almost entirely on its finding that the testimony provided by Plaintiffs' witnesses in their declarations was credible, despite specific concerns raised by Defendants as to their reliability. *See, e.g.*, Order at 9, RE9 (finding that

Defendants' evidence did not "undermine[] the veracity of Plaintiffs' firsthand experiences"); at 11, RE11 (crediting declaration statements "that recent detainees drank water that tasted dirty and did not have access to clean drinking cups"); at 12, RE12 (finding that Defendants' evidence "fails to controvert Plaintiffs' first-hand accounts"); at 14, RE14 (finding Defendants' evidence "does not undermine the credibility of the assertions made by numerous class members"); at 16, RE16 (Defendants' evidence "does not contradict the large volume of specific accounts by Plaintiffs' witnesses that they experienced extreme discomfort with cold temperatures"). This error also was compounded by the court's refusal to consider much of Defendants' evidence and the evidentiary standard that resulted, as discussed more fully below.

Because the district court committed reversible error in its evidentiary rulings, this Court should reverse the district court's findings of breach with regard to conditions at CBP facilities.

C. The district court's findings of fact were clearly erroneous and held the Government to an unreasonable evidentiary standard.

In finding CBP in breach of the Agreement with regard to conditions at CBP facilities in the RGV Sector, the district court held CBP to an unreasonable evidentiary standard, and its resulting findings of fact were clearly erroneous. The district court relied almost entirely on more than 100 unreliable hearsay declarations

submitted by Plaintiffs regarding conditions experienced by class members in CBP custody, and in some instances on deposition testimony from those same witnesses. Despite declining to hear in-person witness testimony, or provide any meaningful opportunity for the Government to cross-examine those witnesses, the district court's Order does not question the credibility, accuracy, or reliability of this witness testimony, but rather accepts the declarations wholesale as true evidence of the conditions experienced by those witnesses, and thus of the actual conditions in CBP facilities. *See, e.g.*, Order at 8, RE8 ("[M]any detainees attested to, among other things, not receiving hot, edible, or a sufficient number of meals during a given day spent at a CBP facility."); Order at 11, RE11 ("Plaintiffs present testimony that recent detainees drank water that tasted dirty and did not have access to clean drinking cups."); Order at 12, RE12 (noting that class members "describe unsanitary conditions with respect to the holding cells and bathroom facilities, and lack of privacy while using the restroom, access to clean bedding, and access to hygiene products (*i.e.*, toothbrushes, soap, towels)")); Order at 15, RE15 (noting that class members "continue to describe the CBP facilities as *hieleras* or 'iceboxes'").

At the same time, the district court unfairly discounted *all* of the evidence submitted by Defendants. The Government's evidence, as relevant to the district court's consideration of CBP facilities in the RGV Sector, consisted of: (1) the TEDS

policies; (2) declaration and deposition testimony from Chief Padilla, Chief Vitiello, and Chief Bristow; and (3) e3DM records contradicting the statements of some of Plaintiffs' witnesses. Yet the district court largely refused to consider any of this evidence, and did not grant any deference to Border Patrol's e3DM records.

The district court repeatedly found that the government's "generalized" evidence regarding the applicable policies and procedures, and the testimony from the Chief Patrol Agent responsible for implementing these policies and procedures in RGV Sector, did nothing to "undermine[] the veracity of Plaintiffs' firsthand experiences." Order at 9, RE9; *see also* Order at 11-12, RE11-12 ("In response, Defendants again point to their general policies and practices and contracts with third party providers." *See, e.g.*, [Padilla Decl. ¶¶ 56–57] ("the holding rooms in the Rio Grande Valley each have sport style five-gallon water coolers . . . with disposable cups made available to detainees"). This does not contradict the specific detainee statements provided by Plaintiffs . . . . Indeed, Defendants have not offered evidence based on records or a witness'[s] personal knowledge to contradict the specific accounts by Plaintiffs' witnesses of inadequate water, both in quality and availability, during their CBP-facility detention.")). The court's finding does not acknowledge the substance of Chief Padilla's testimony, which explained, for example, the precise food items that minors are provided at each meal in the RGV

Sector, Padilla Decl. ¶ 48, RE201-02, and the many ways in which CBP ensures that water is available to detainees at its different stations. Padilla Decl. ¶¶ 56–59, RE203-04. The district court in fact made no effort to balance the government's evidence regarding its policies and practices against the conflicting statements by class members, it simply rejected outright the notion that the government's "generalized" evidence could have *any* probative value to counter Plaintiffs' statements, and refused to consider it.[12]

The district court's blanket refusal to consider the Government's evidence was in error. CBP is entitled to a presumption of regularity with regard to its compliance with its own policies. *See Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of government agencies.") (internal citations omitted). Additionally, Chief Padilla's testimony that CBP follows its own policies in the RGV Sector has clear probative value as to the credibility and accuracy of the testimony of class members who allege that the government failed to follow its own policies with regard to their treatment. Notably,

[12] Notably, Defendants' evidence also would have included cross examining each of Plaintiffs' witnesses to determine whether their testimony was based on firsthand knowledge or not, or whether the witness was lying, or exaggerating, but Defendants were denied this opportunity by the district court. By failing to permit Defendants to cross-examine any of Plaintiffs' witnesses, or to present their own witness testimony, the district court further prohibited Defendants from meeting the already impossible evidentiary standard that the court applied.

the district court's wholesale rejection of such evidence means that the only way CBP could refute a declaration from any class member in the future is if the government can locate an eyewitness who can personally remember the precise conditions experienced by a particular class member. This is an unreasonable standard, particularly in light of the significant number of individuals who pass through CBP's custody.[13]

The district court also erred in refusing to consider the government's e3DM records for any purpose. *See* Order at 11, RE11 ("In short, the Court does not find that Defendants' e3DM records undermine the credibility of the detainee statements presented regarding the frequency and quality of the food Defendants served them.")); *id.* at 12, RE12 (failing to consider Defendants' records regarding the availability of working sinks and stating that "Defendants have not offered evidence based on records")); *id.* at 15, RE15 (refusing to rely on e3DM data that specifically contradicted assertions made by class members "for the same reasons already discussed above with regard to the e3DM forms' reliability issues"). The district court found that the e3DM records were unreliable because in some cases

[13] Moreover, when looked at in light of the district court's refusal to require in-person testimony from Plaintiffs' witnesses, and wholesale acceptance of the veracity of Plaintiffs' untested written testimonial evidence, the court's rejection of the evidence submitted by the government is particularly erroneous.

information appeared not to have been properly entered, *see id.* at 10, RE10, and because it found that Defendants do not monitor the accuracy of the records entered. *Id*. Rather than consider the reliability of the records as one factor in the balance of the consideration of all evidence in front of it, the district court simply rejected the consideration of the records for any purposes whatsoever—effectively finding that the records were entitled to *no* weight in the evidentiary assessment.

The district court's refusal to consider e3DM evidence was particularly problematic because CBP's use of the e3DM system should be entitled to a presumption of regularity, giving it at least some probative value with regard to the information recorded in that system. *See Gregory*, 534 U.S. at 10. Moreover, the district court's Order ignores the explanation in Chief Padilla's declaration regarding how the use of e3DM data was instituted, and that agents were instructed on its mandatory use. Padilla Decl. ¶¶ 25-37, RE196-99. To the extent that the records appear unreliable with regard to any particular piece of information, the district court could have found that particular piece of information to be less credible, but such perceived lack of reliability is not a basis to refuse to consider all e3DM evidence in its entirety. This error further compounded the harm to the Government resulting from the district court's refusal to hear in-person testimony from the parties' witnesses, which would have included Chief Padilla who could have explained the

manner in which his agents enter data into e3DM, as well as Associate Chief Justin Bristow from Border Patrol headquarters, who could have explained how e3DM works overall, how Border Patrol headquarters verifies the accuracy of e3DM data, and how Border Patrol headquarters decides to make any necessary enhancements to the data. Had the district court heard from those witnesses it could have judged their credibility on these issues, and weighed that consideration in determining the reliability of the e3DM evidence. Because the district court entirely failed to consider CBPs e3DM data, the court committed clear error with regard to its factual findings that CBP violated the Agreement.

II. The District Court Erred in Ordering ICE to Evaluate Minors for Parole Under 8 C.F.R. § 212.5(b) Based Only On Risk of Flight.

A vast majority of the minors in ICE family residential centers are subject to expedited removal ("ER"), a process that exists to swiftly remove certain aliens who are clearly removable: (1) aliens arriving at a port of entry who lack valid documentation or who seek to enter via fraud; and (2) certain other aliens who entered illegally without valid documentation or via fraud, have been present less than two years, and were designated by the Secretary for ER. 8 U.S.C. § 1225(b)(1)(A)(i) and (iii); *see* 69 Fed. Reg. 48,880 (Aug. 11, 2004) (designating aliens encountered within 14 days of the unlawful entry and 100 miles of the

border). Ordinarily, such aliens are ordered removed without a further hearing. 8 U.S.C. § 1225(b)(1)(A)(i).

Congress added special protections, however, for aliens who are subject to ER but seek asylum or claim a fear of persecution or torture. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) and (B); see also 8 U.S.C. § 1158, 1231(b)(3). In such cases, a U.S. Citizenship and Immigration Services ("USCIS") asylum officer will interview the alien to determine whether the asserted fear is credible. 8 U.S.C. § 1225(b)(1)(A)(ii). If the alien's fear is found credible, he is placed into removal proceedings before an immigration judge to consider whether to grant asylum or similar relief. 8 C.F.R. § 208.30(e)(5), 235.6(a); *see* 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer finds it is not credible, however, he must inform the alien that he can request a review by an immigration judge, which must occur "as expeditiously as possible" and within seven days. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); see 8 C.F.R. § 235.3(b)(4)(i)(C). If the asylum officer's decision stands, the alien is to be removed forthwith through ER. 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

Congress has imposed a uniquely strict detention mandate on aliens in ER who have not had a credible-fear determination or who have been found to lack a credible fear: Congress specified that such aliens "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear,

until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). In accordance with the intent of Congress, DHS has provided that aliens in this category may be released into the United States on parole only in very narrow circumstances: when parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. *See* 8 C.F.R. § 235.3(b)(4)(ii) ("Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."); *see also* 62 Fed. Reg. 10,312, 10,320 (1997) ("[B]ecause section 235(b)(1)(B)(iii)(IV) of the Act requires that an alien in expedited removal proceedings 'shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed,' the Department feels that parole is appropriate only in the very limited circumstances specified in § 235.3(b)(4). The interim rule has been amended, however, to clarify that *aliens found to have a credible fear* will be subject to the generally applicable detention and parole standards contained in the Act. Although parole authority is specifically limited while a credible fear determination is pending under § 235.3(b)(4), those found to have a credible fear and referred for a hearing under section 240 of the Act will be subject to the rule generally applicable to arriving aliens in § 235.3(c).") (emphasis added).

The district court overlooked these provisions of the INA and DHS's implementing regulations, and specifically rejected Defendants' argument that DHS's parole authority for class members who have not been found to have credible feat is limited to "detainees experiencing a medical emergency or for legitimate law enforcement objections." Order at 25 n.18, RE25. Instead, the court required that *all* minors in ICE family residential centers be evaluated for release on parole on a case-by-case basis under the considerations laid out in 8 C.F.R. § 212.5(b). Order at 25, RE25. This conclusion was in error.

As an initial matter, this Court has jurisdiction over this issue on appeal because in reaching its conclusion, the district court read the Agreement in a manner that conflicts with the requirements of the INA, and refused to modify the Agreement in order to eliminate this conflict. This refusal to modify the Agreement gives this Court jurisdiction over the Government's appeal. *See* 28 U.S.C. § 1292(a)(1).

Further, the court erred in reaching this conclusion because, in so doing, the court ignored the clear provisions of the INA and DHS's regulations. The language and structure of the ER statute demonstrates Congress's clear intent that individuals in ER proceedings, who have not been found to have a credible fear, "shall be detained . . . until removed" from the United States, except in the most narrowly limited circumstances. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The Secretary still retains

some discretion to release such aliens on parole, based on a case-by-case determination that parole is for an "urgent humanitarian need or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). But DHS's regulations establish that, for aliens in this specific category, release on parole can only satisfy that standard when there is medical necessity or law-enforcement need. 8 C.F.R. § 235.3(b)(4)(ii). The Order provides no basis to find that, by entering into the Agreement, the Government intended to subvert the intent of Congress with regard to the detention of aliens in this category, allowing their release into the United States simply based on a determination that they are not a flight risk.

As a result of its incorrect reading of this regulation, the district court erroneously concluded that the INA and its supporting regulations give DHS the authority to parole a minor from an ICE family residential center solely by making an "individualized determination[] regarding a minor's flight risk . . . ." Order at 25, RE25. And the district court then further erred because it concluded that by failing to make such individualized determinations, ICE is in violation of the Agreement.

The Agreement's requirement that ICE must to exercise its parole authority for minors who are awaiting a final credible fear determination based only on an individualized determination of flight risk, without first considering whether "parole is required to meet a medical emergency or is necessary for a legitimate law

enforcement objective," puts ICE in conflict with the requirements of 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) and 8 C.F.R. § 235.3(b)(4)(ii). Thus the district court's Order is in error because it requires that in order to comply with the Agreement, ICE must ignore Congress's plain intent with regard to the availability of parole to aliens in expedited removal proceedings and in some instances will force ICE to consider parole for individuals subject to final orders of removal.

Accordingly, this Court should find that the district court's reading of the Agreement's requirements was incorrect, and should reverse the district court's order to the extent that it requires ICE to exercise its parole authority based only on an individualized determination of flight risk without first considering whether "parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."

III. The District Court Erred to the Extent That it Concluded that ICE Is Required to Assess the Suitability of Potential Custodians and Release Minors to Custodians Other than the Minor's Parent or Legal Guardian.

The Order suggests that the Court may have rejected ICE's argument that it should not be required to release a minor to an individual other than the minor's parent or guardian. Order at 26-27, RE26-27. This is because the court appeared to conclude that where ICE determines that a minor should be paroled from an ICE family residential center to a sponsor other than a parent or legal guardian, ICE

should consider the suitability of "non-parent/guardian custodians" for releasing the minor. Order at 26, RE26. To the extent the court's order would require ICE to conduct its own suitability analysis of a proposed sponsor who is not a parent or legal guardian, and to release the minor to that sponsor, the court's order would be in conflict with the TVPRA, 8 U.S.C. § 1232(b)(3), and therefore is in error. Moreover, to the extent this Court believes that the district court has read the Agreement in this manner, this Court has jurisdiction over the appeal on this issue because by doing so the court has effectively refused to modify the Agreement to ensure that it complies with the TVPRA. *See* 28 U.S.C. § 1292(a)(1).

Any requirement the district court seeks to impose that ICE must screen a proposed custodian to facilitate the release of a minor on parole is plainly in conflict with the explicit requirement of the TVPRA that a minor in an ICE family residential center, who is separated from his or her parent or legal guardian and is therefore a UAC under the statute, *see* 6 U.S.C. § 279(g)(2), must be transferred to HHS within seventy-two hours, *see* 8 U.S.C. § 1232(b)(3). The district court, however, relied on the order of release provisions in 8 C.F.R. § 212.5(b), and in the Agreement itself, in seeming to find that ICE has the authority to effectuate the release to a non-parent or legal guardian sponsor itself.

Both the Agreement and the regulation cited by the district court predated the enactment of the TVPRA. Thus, those provisions cannot be read to overcome this subsequently-enacted statutory requirement, and the Order provides no explanation for how ICE could comply both with the TVPRA and with the district court's Order, to the extent that it requires ICE to effectuate the release of a UAC to a proposed sponsor. Therefore, to the extent the district court's Order requires DHS to release minors to a non-parent or legal guardian custodian, it would require DHS to act in conflict with the mandates of the TVPRA and should be reversed.

IV. The District Court Erred in Concluding that ICE Family Residential Facilities Are "Secure" and "Unlicensed" in Violation of the Agreement.

The district court's finding that ICE is in breach of the Agreement because all three of the existing ICE family residential centers are "secure" and "unlicensed" should be reversed and remanded to the district court for further evaluation. The district court found that this issue was properly before it because Plaintiffs asserted in their Motion that "Class Members are detained in secure facilities (also not licensed for the care of dependent children) for weeks and months on end." Order at 28, RE28. But the district court's Order setting an evidentiary hearing provided no indication that the court intended to rule on this issue, Minute Order, ECF No. 274, at 1, and after Plaintiffs first identified this as a separate issue to be ruled on in their December 6, 2016 Supplemental Brief, ECF No. 287, Defendants requested the

opportunity to brief this issue if the district court intended to rule on it; however, the district court provided no such opportunity. Because Defendants were not sufficiently put on notice that this issue would be decided by the district court in conjunction with the Motion, the ruling was in error and should be reversed and remanded to allow for briefing and a new determination by that court.

Moreover, the district court erred in asserting that Defendants do not dispute that the ICE family residential facilities are unlicensed. Order at 28, RE28. In fact, Defendants note that there are ongoing state proceedings concerning licensure of all three ICE family residential facilities.[14]

The district court also erred in finding that ICE has not disputed that ICE family residential centers are secure facilities. Order at 29, RE29; *see* ECF NO. 217-4, at p. 12, ¶ 21 ("[Berks] is an un-secured facility."); *id.* at 18, ¶ 26 ("[Berks] is an un-secured facility; there are no physical impediments to a resident departing the facility."). Because the district court entirely failed to acknowledge or consider this

[14] With regard to Berks, the Pennsylvania Department of Human Services was ordered to rescind its revocation of the license for Berks. *See* Commonwealth of Pa., Dep't of Human Servs., Adjudication and Order, BHA Docket No. 061-16-0003 (Apr. 20, 2017).With regard to Karnes and Dilley, Karnes was granted a license but the validity of the regulation under which Karnes obtained that license is being challenged in state court. Thus, the availability of a license for these facilities is a question of state law that is still being considered by state courts. Ultimately, if the state courts decides that no license is available, then Defendants likely have a defense of impossibility to claims of breach relating to this provision.

evidence, its finding that Berks is a secure facility is clearly erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, where this Court finds that the district court has read into the Agreement terms that modify, or refuse to modify, the terms of the Agreement, the Government requests that this Court take jurisdiction over the appeal and reverse the decision of the lower court.

DATED: January 5, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation

/s/ Sarah B. Fabian
SARAH B. FABIAN
Senior Litigation Counsel
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Fax: (202) 305-7000
Email: sarah.b.fabian@usdoj.gov

Attorneys for Defendants-Appellants

STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

By: /s/ Sarah B. Fabian

SARAH B. FABIAN
Senior Litigation Counsel
U.S. Department of Justice

Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2017, I electronically filed the foregoing BRIEF FOR APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sarah B. Fabian

SARAH B. FABIAN
Senior Litigation Counsel
U.S. Department of Justice

Attorney for Defendants-Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-56297

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [13900] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Sarah B. Fabian

Date: Jan 5, 2018

("s/" plus typed name is acceptable for electronically-filed documents)