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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

18 JENNY LISETTE FLORES, *et al.*,

19 Plaintiffs,

20 v.

21 WILLIAM P. BARR, Attorney General
22 of the United States, *et al.*,

23 Defendants.

24 Case No. CV-85-4544-DMG

25 CLASS ACTION

26 **RESPONSE BRIEF OF AMICI CURIAE TO
27 THE AUGUST 2020 INTERIM REPORT OF
28 THE INDEPENDENT MONITOR**

Judge: Hon. Dolly M. Gee

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RESPONSE BRIEF OF *AMICI CURIAE* TO THE AUGUST 2020 INTERIM REPORT OF THE INDEPENDENT MONITOR

I. Introduction

On August 26, 2020, pursuant to this Court’s August 7, 2020 and other prior orders, the *Flores* Independent Monitor and Dr. Paul Wise submitted an “Interim Report on the Use of Temporary Housing for Minors and Families under Title 42.” [Doc. # 938]. See *Flores v. Barr*, No. 2:85-cv-4544 (DMG) (C.D. Cal. Aug. 7, 2020) [Doc. # 912].

Amici are RAICES, Proyecto Dilley, and Aldea – the People’s Justice Center—the three legal services providers at the Family Detention Centers in Karnes City, Texas; Dilley, Texas; and Leesport, Pennsylvania. Pursuant to this Court’s August 7, 2020 Order [Doc. # 912] and August 26, 2020 In Chambers Order [Doc. # 937], *Amici* respectfully respond to the Independent Monitor and Dr. Wise’s report.¹

II. Summary of Argument

Amici agree with the Independent Monitor’s assessment that the Temporary Housing Program (THP) is “not fully responsive to the safe and sanitary requirements of young children,” and thus does not comply with the *Flores* Settlement Agreement (“FSA” or “Agreement”). *Amici* contend that this finding applies to *all* Class Members, such that all Class Members held in hotels should be afforded the same rights and protections under the FSA and immediately transferred to non-secure, state-licensed facilities as required by the FSA.

¹ *Amici* are grateful to the Independent Monitor and Dr. Wise’s investigation of conditions and the adequacy of medical care at the Family Residential Centers (FRCs) and hope to have the opportunity to respond to the Independent Monitor and Dr. Wise’s future interim report on that subject as well. See Interim Report on the Use of Temporary Housing for Minors and Families under Title 42 (“August 2020 Interim Report”) [Doc. # 938].

1 **III. Argument**

2 **A. The Agreement requires the Independent Monitor’s findings and**
3 **recommendations to apply to all Class Members, and not a**
4 **particular subset of Class Members.**

5 As the Independent Monitor explained in her July 2020 “Interim Report on the
6 Use of Temporary Housing for Minors under Title 42,” [Doc. # 873], Title 42 is a
7 program that places individuals entering the United States into “Title 42 expulsion
8 proceedings,” rather than the standard immigration proceedings pursuant to Title 8
9 of the U.S. Code. Children in Title 42 expulsions are therefore in a different legal
10 posture than those traditionally in the Department of Homeland Security’s (DHS)
11 custody but are nevertheless similarly under DHS’s custody and control.

12 The FSA applies equally to all children. The Agreement requires Class
13 Members be placed in non-secure, state-licensed facilities regardless of whether the
14 Class Member entered the United States with a family member or parent and
15 regardless of the child’s immigration status or posture. FSA ¶ 10 (defining Class
16 Members as “[a]ll minors who are detained in the legal custody of the INS”)
17 (emphasis added); FSA ¶¶ 12, 19; *Flores v. Johnson*, 212 F. Supp. 3d 864, 871–73
18 (C.D. Cal. 2015), *affirmed in relevant part, reversed in part, and remanded by* 898
19 F.3d 898 (9th Cir. 2016). There is no exception to the Government’s obligations.
20 Moreover, these obligations are not excused during a global pandemic; rather, the
21 terms of the Agreement and this Court’s orders require the Government to process
22 children for release with “all deliberate speed,” given Class Members’ right to safe
23 and sanitary conditions. FSA ¶ 12; *Flores v. Barr*, No. 2:85-cv-4544 (DMG), at *4
24 (C.D. Cal. June 26, 2020) [Doc. # 833].

25 The Court has repeatedly denied the Government’s invitation to create
26 exemptions to the Agreement’s terms for categories of Class Members, and to apply
27 its terms discriminatorily to differing groups of children. *See Flores*, 212 F. Supp. 3d
28

1 at 871–73. Just as this Court has found that unaccompanied and accompanied
2 children have the same rights under the FSA, so too do single minors, children who
3 arrive as a part of a family group, and children who travel with a parent or legal
4 guardian. *Id.*

5 Defendants now seek to distinguish a Class Member’s legal rights under the
6 Agreement based upon the detention scheme utilized by the government. *See* Def’s
7 Response in Opp. to Pls.’ Mot. to Enforce, ECF No. 920 [Doc. # 925]. Currently, the
8 Government holds Class Members in the custody of the Office of Refugee
9 Resettlement (ORR), Customs and Border Protection (CBP) custody (in CBP
10 facilities and processing centers), Immigration and Customs Enforcement (ICE)
11 custody (at the FRCs), and ICE when children are detained in hotels pursuant to the
12 Title 42 program. Regardless of the detention system in which a child is placed, this
13 Court should rest upon its ongoing and consistent conclusion: Class Members have
14 equal rights under the FSA regardless of where they are detained. *See, e.g. Flores*,
15 212 F. Supp. 3d at 871–72.

16 The Independent Monitor’s August 2020 Interim Report noted that the
17 Government’s hoteling program has been applied to both unaccompanied children
18 and families and noted various deficiencies with the THP as it relates to single
19 minors. August 2020 Interim Report [Doc. #938]. Many of the deficiencies noted in
20 the report as to unaccompanied children (or “single minors”) apply equally to
21 accompanied children in the THP as well as to accompanied children in the FRCs.
22 Although accompanied children—both in the THP and the FRCs—have the benefit
23 of being with a parent, the protections these Class Members are entitled to under the
24 *Flores* Settlement Agreement remain the same. *See Flores*, 212 F. Supp. 3d at 871–
25 73.

26 The Independent Monitor’s report crystalizes the importance of assessing
27 whether conditions are safe and sanitary in consideration of a child’s age and stage
28

1 of development. *See* FSA ¶ 12. While age is a useful distinction when assessing
2 whether conditions of confinement are appropriate and comply with the Agreement’s
3 requirement to provide safe and sanitary conditions, FSA ¶ 12, the Court need not
4 engage in such a detailed analysis to determine whether the Government is compliant
5 with the FSA. The Agreement requires that children be placed in non-secure, state-
6 licensed facilities. FSA ¶¶ 12, 19. Hotels are not state-licensed, and MVM third-party
7 contractors do not have child welfare experience or training. *See* Interim Report on
8 the Use of Temporary Housing for Minors and Families Under Title 42 by
9 Independent Monitor (July 22, 2020) [Doc. # 873].

10 As the Independent Monitor concluded, the THP is “not fully responsive to the
11 safe and sanitary requirements of young children”—whether or not they are
12 accompanied by a parent. August 2020 Interim Report, at 15 [Doc. # 938]. Thus,
13 while the Agreement may require more for particularly vulnerable children in order
14 to honor its terms, it *does not* permit exemptions to its foundational, contractually
15 obligated protections. Children—whether accompanied or not—are Class Members
16 and entitled to the benefits of the *Flores* Settlement Agreement. For this reason,
17 *Amici* urge the Court to apply the Independent Monitor’s recommendations equally
18 to *all* Class Members in the THP: all children placed in hotels, regardless of their
19 immigration status and age, should be transferred to FSA-compliant facilities, as
20 should accompanied children who remain detained in non-FSA compliant FRCs.

21 **B. *Amici* recommend additional information-gathering to clarify the**
22 **significance and reliability of the data provided by ICE to the**
23 **Independent Monitor.**

24 As noted by the Independent Monitor, there are deficiencies in ICE’s data
25 regarding the THP. August 2020 Interim Report, at 6, 11 n.9 [Doc. # 938]. *Amici*
26 agree that critical information was not provided to the Independent Monitor that
27 would be beneficial for this Court’s review of the THP. Accordingly, *Amici* urge the
28

1 Court to require additional reporting from ICE to clarify (1) the length of time Class
2 Members subjected to Title 42 program are detained, (2) the numbers of Class
3 Members subjected to Title 42 who are held in hotels, and (3) the number of Class
4 Members currently designated as parts of a “family unit” or “family group” who are
5 in fact, unaccompanied children, as defined by the Trafficking Victims Protection
6 Reauthorization Act (“TVPRA”). 6 U.S.C. § 279(g) (2012).

7 The data provided by ICE fails to clarify critical information necessary for this
8 Court to fully consider the Motion to Enforce filed by Class Counsel. *See* Mem. in
9 Support of Mot. to Enforce Settlement re “Title 42” Class Members [Doc. # 920-1].
10 First, it is unclear whether the data provided to the Independent Monitor documents
11 the total amount of time children are held at a hotel, or the total amount of time
12 children have been in Government custody. *Amici’s* experience indicates that ICE
13 reports regarding length of stay for children detained at the FRCs include only the
14 amount of time each Class Member was held at the FRC, and does not include the
15 time a child was held in CBP custody at the border or in a hotel under the THP.² This
16 time can be significant, and should be counted towards the total “length of detention”
17 for any Class Member. For example, some family units, particularly those who have
18 been subjected to the Humanitarian Asylum Review Process (“HARP”) or Prompt
19 Asylum Claim Review (“PACR”) programs³, are held at the border in CBP
20 processing centers for approximately one month prior to their transfer to an FRC. As

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22 ² *Amici* note—as the Independent Monitor reported in July 2020—that families
23 detained at the FRCs have often been held in a hotel prior to their placement at an
24 FRC, particularly in Karnes. *See* Interim Report on the Use of Temporary Housing
for Minors under Title 42, at 13 [Doc. # 873].

25 ³ The HARP and PACR programs are two programs implemented by DHS which
26 require asylum-seekers—including families—to complete all or part of their credible
27 fear process while in CBP custody. *See* CBP Responds to Letter Regarding Concerns
Over Truncated Asylum Programs Being Piloted in El Paso, TX, AILA (Feb. 28,
28 2020), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/cbp-responds-to-letter-regarding-concerns>.

1 this Court evaluates whether a child’s custody in non-FSA compliant facilities
2 exceeds the three-to-five day period allowed by the FSA, it must determine whether
3 a child was held in government custody prior to placement at a hotel, and if so, for
4 how long.⁴ FSA ¶ 12A.

5 Second, *Amici* agree with the Independent Monitor’s assessment that the total
6 number of Class Members in the THP is unclear. August 2020 Interim Report, at 6
7 [Doc. # 938]. A “family unit” or “family group” may include multiple children.
8 Additional clarity regarding the total number of Class Members affected by
9 Defendants’ placement of children in hotels under the Title 42 program will empower
10 the Court to more meaningfully assess the significance of Defendants’ non-
11 compliance.

12 Third, to the extent the Court is inclined to adopt the Independent Monitor’s
13 recommendations for a particular subset of Class Members, based upon the
14 vulnerability of a child who is not accompanied by their parent or legal guardian,
15 *Amici* contend ICE’s “single minor” data included in the Independent Monitor’s
16 report impedes the Court’s ability to take all necessary action to protect this uniquely
17 vulnerable group of children.

18 Defendants have regularly classified Class Members as “unaccompanied” or
19 “accompanied” as defined by the TVPRA and reported information to the Court and
20 Independent Monitor consistent with these definitions. 6 U.S.C. § 279(g) (2012).
21 Similarly, ICE has previously defined a “family unit” in its reports to the Court as a
22 parent or legal guardian joined by one or more minor children. Defendants now

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24 ⁴ *Amici* note that the Independent Monitor’s report indicates that high numbers of
25 Class Members are apprehended along the border, particularly in the Rio Grande
26 Valley, which is five or more hours away from San Antonio and Houston. August
27 2020 Interim Report, at 5–7 [Doc. # 938]. This suggests that there may be an
28 intervening period between apprehension and placement in the THP where
unaccompanied and accompanied Class Members may be held in CBP or other
facilities.

1 apparently present data based upon new definitions, reporting that children are a part
2 of a “family unit” if they are accompanied by any adult relative. August 2020 Interim
3 Report, at 7 n.5 (“Family Unit represents the number of individuals (either a child
4 under 18 years old, parent, or legal guardian) apprehended *with a family member* by
5 the U.S. Border Patrol.”) (emphasis added).

6 The unique vulnerabilities of “single minors” articulated in the Independent
7 Monitor’s report extend to minor children who are not in the care of their parents or
8 legal guardians. For example, a two-year-old Class Member accompanied by his or
9 her eighteen-year-old cousin would currently fall under Defendants’ new definition
10 of “family unit.” This Class Member would likely be just as vulnerable as a “single
11 minor” in the care of MVM security guards. For this reason, the data provided by
12 ICE regarding “family units” lacks sufficient detail to allow the Court to assess how
13 many Class Members, and particularly, children under ten years of age, remain
14 detained without appropriate care to ensure safe conditions. To the extent the “family
15 unit” data reported by ICE does not include statistics for Class Members who have
16 been designated members of a “family group,” *Amici* urge the Court to require such
17 data be provided to the Independent Monitor and the Court to facilitate additional
18 monitoring.

19 **IV. Conclusion**

20 The Independent Monitor is correct: the THP is not an appropriate “system of
21 care” for Class Members. August 2020 Interim Report, at 17 [Doc. # 938]. *Amici*
22 urge this Court to apply the Independent Monitor’s recommendation *equally* to all
23 Class Members, and afford all children in the THP the rights and protections required
24 under the FSA, beginning with the Agreement’s obligation that they be detained—if
25 such a justification is found—in non-secure, state-licensed facilities.

1 DATED: September 2, 2020

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2 */s/ Gabriel S. Barenfeld*

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