

1 MICHAEL J. STORTZ (SBN 139836)
mstortz@akingump.com
2 **AKIN GUMP STRAUSS HAUER & FELD LLP**
580 California Street, Suite 1500
San Francisco, CA 94104
3 Telephone: 415-765-9500
4 Facsimile: 415-765-9501

5 BRETT M. MANISCO (SBN 318351)
bmanisco@akingump.com
6 **AKIN GUMP STRAUSS HAUER & FELD LLP**
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067-6022
7 Telephone: 310.229.1000
8 Facsimile: 310.229.1001

9 **REFUGEE AND IMMIGRANT CENTER FOR**
10 **EDUCATION AND LEGAL SERVICES**
MANOJ GOVINDAIAH (*Pro Hac Vice Forthcoming*)
11 manoj.govindaiah@raicestexas.org

12 **ALDEA – THE PEOPLE’S JUSTICE CENTER**
BRIDGET CAMBRIA (*Pro Hac Vice Forthcoming*)
13 bridget@aldeapjc.org

14 Attorneys for Plaintiff-Intervenors
15 B.L.N., D.F.L.G., and W.B.

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18

19 JENNY L. FLORES, et al.,

21 Plaintiffs,

22 vs.

24 EDWIN MEESE, et al.,

25 Defendants.

Case No. 2:85-cv-04544-DMG-AGR_x

[Judge: Hon. Dolly M. Gee]

PROPOSED INTERVENORS’ EX
PARTE APPLICATION FOR LEAVE
TO INTERVENE

Date Action Filed: July 11, 1985

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** Proposed Plaintiff-Intervenors B.L.N., D.F.L.G., and
3 W.B. (“Proposed Plaintiff-Intervenors”) by and through their counsel, Aldea – The
4 People’s Justice Center and Refugee and Immigrant Center for Education and Legal
5 Services (“RAICES”), two of the three non-profit organizations that provide direct
6 representation to accompanied *Flores* Class Members¹ detained at the Family
7 Residential Centers (“FRCs”) will, and hereby do, move *Ex Parte* for an order granting
8 Proposed Plaintiff-Intervenors leave to intervene in this action for purpose of
9 enforcement of the *Flores* Settlement Agreement (the “Agreement”) as it pertains to
10 accompanied Class Members who are detained at FRCs, and appointment of co-counsel
11 to represent their interests going forward.

12 **GROUND FOR EX PARTE MOTION:** Proposed Plaintiff-Intervenors are
13 accompanied *Flores* Class Members who are detained by Immigration and Customs
14 Enforcement (“ICE”) together with their parents at the three FRCs, the Berks Family
15 Residential Center (“Berks”), Karnes County Residential Center (“Karnes”), and South
16 Texas Family Residential Center (“Dilley”), respectively. Under Rule 24(a)(2) of the
17 Federal Rules of Civil Procedure, Proposed Plaintiff-Intervenors are entitled to
18 intervene in this action as a matter of right for the purposes of protecting their rights in
19 the enforcement of the Agreement. Alternatively, permissive intervention is warranted
20 under F.R.C.P. Rule 24(b).

21 **BASIS FOR MOTION:** This Motion is based upon this Notice, the following
22 Memorandum of Points and Authorities, and upon the accompanying Declarations of
23 Manoj Govindaiah (“Govindaiah Decl.”), Andrea Meza (“Meza Decl.”) and Shalyn
24 Fluharty (“Fluharty Decl.”).

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¹ ALDEA – The People’s Justice Center and RAICES also represent the parents of the
accompanied Class Members being asked by the Government to sign any purported
consent to separate or waiver of *Flores* rights.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION/SUMMARY OF ARGUMENT

Proposed Plaintiff-Intervenors are: B.L.N., a child who will turn two years of age next month, who is detained at the Berks Family Residential Center with both of his parents; D.F.L.G., a one-year old child, who is detained at the Karnes County Residential Center with his parents; and W.B., an 8-year old child who is on her ninth week of treatment for Tuberculosis and experiencing side effects as a result of medication prescribed while detained at the South Texas Family Residential Center with her mother. Their interests, which are shared by other accompanied Class Members, are not adequately represented and irretrievably at odds with the inexplicable objective of class counsel to develop a protocol that waives their right to release under the Agreement and delays their release from a house ““on fire[.]” June 26, 2020 Order [Doc. # 834].

While any waiver protocol would likely violate due process rights of Proposed Plaintiffs-Intervenors and other accompanied Class Members, the current conditions at the FRCs present an intolerable risk of irreparable injury. *Id.* The Court has recognized that the FRCs are ““on fire”” as a result of the current COVID-19 pandemic, and that “there no more time for half measures.” *Id.* Proposed Plaintiffs-Intervenors therefore seek an order immediately granting them leave to intervene to protect their interests in full compliance with the Court’s orders and release from the FRCs, where those interests are not adequately presented – and indeed, have been repeatedly dismissed and ignored – by current class counsel.

Specifically, Proposed Plaintiff-Intervenors request that this Court grant them leave to intervene so that they may: (i) protect their interests in the enforcement of the Agreement; (ii) address the adequacy of class counsel and seek appointment of co-counsel to represent the interests of accompanied Class Members detained by the Government at the FRCs; (iii) address Proposed Plaintiffs-Intervenors’ request for

1 reconsideration of the extension of the July 17, 2020 release deadline, and to address
2 any requests for subsequent extension; and (iv) address any proposed waiver protocol.

3 **II. FACTUAL BACKGROUND**

4 **A. STATEMENT OF FACTS**

5 The *Flores* litigation is in an unusual procedural posture. The case was settled 23
6 years ago by consent decree (the “Agreement”) which now governs the treatment of
7 detained immigrant children by the United States government; however, the Defendants
8 have rarely, if ever, been in full compliance with all of its terms. As this Court is well
9 aware, class counsel has been litigating various motions to enforce different provisions
10 of the Agreement and the Defendants’ non-compliance for many years. The Defendants,
11 Acting Secretary of Homeland Security Chad Wolf, the U.S. Department of Homeland
12 Security and its subordinate entities, U.S. Immigration and Customs Enforcement and
13 U.S. Customs and Border Protection, as well as the U.S. Department of Health and
14 Human Services’ Office of Refugee Resettlement (collectively, the “Government”)
15 continue to be bound by the terms of the Agreement.

16 In 2014, the Government increased the practice of detaining children with their
17 parents, and further litigation ensued with regard to enforcement of the Agreement and
18 the scope of the Class. On July 24, 2015, the Court found that the Agreement
19 encompasses both accompanied and unaccompanied minors. July 24, 2015 Order [Doc.
20 # 177]. As a result, the Court ordered the Government to release Class Members subject
21 to specific provisions of the Agreement while they await the results of their immigration
22 proceedings. This finding that accompanied children in immigration detention are
23 unambiguously Class Members was upheld by the United States Court of Appeals for
24 the Ninth Circuit. *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016). In its opinion, the
25 Ninth Circuit stated:

26 We agree with the district court that “[t]he plain language of the Agreement
27 clearly encompasses accompanied minors.” First, the Settlement defines
28

1 minor as “any person under the age of eighteen (18) years who is detained
2 in the legal custody of the INS”; describes its scope as setting “nationwide
3 policy for the detention, release, and treatment of minors in the custody of
4 the INS”; and defines the class as “[a]ll minors who are detained in the
5 legal custody of the INS.” Settlement ¶¶ 4, 9, 10. Second, as the district
6 court explained, “the Agreement provides special guidelines with respect to
7 unaccompanied minors in some situations” and “[i]t would make little
8 sense to write rules making special reference to unaccompanied minors if
9 the parties intended the Agreement as a whole to be applicable only to
10 unaccompanied minors.” *See id.* ¶ 12(A) (“The INS will segregate
11 unaccompanied minors from unrelated adults.”); *id.* ¶ 25 (“Unaccompanied
12 minors arrested or taken into custody by the INS should not be transported
13 by the INS in vehicles with detained adults except . . .”). Third, as the
14 district court reasoned, “the Agreement expressly identifies those minors to
15 whom the class definition would not apply”—emancipated minors and
16 those who have been incarcerated for a criminal offense as an adult; “[h]ad
17 the parties to the Agreement intended to exclude accompanied minors from
18 the Agreement, they could have done so explicitly when they set forth the
19 definition of minors who are excluded from the Agreement.” *See id.* ¶ 4.
20 *Id.* at 905-06. Proposed Plaintiff-Intervenors here seek only to have their own interests
21 in the rights that arise from the four corners of the Agreement represented before the
22 Court.

23 On June 27, 2017, the Court held that the Government was failing to comply with
24 its obligations under the Agreement due to the excessive length of detention of
25 accompanied Class Members with their parents in FRCs in undisputedly secure,
26 unlicensed facilities for up to eight months—well beyond the five-day time limit or the
27 exception of 20 days previously authorized in times of emergency or influx. June 27,
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1 2017 Order [Doc. # 363]. The Court ordered the Government to appoint a Juvenile
2 Coordinator to oversee compliance with the Agreement, but the Court warned that if
3 conditions did not improve to reach substantial compliance with the Agreement within
4 one year of the Juvenile Coordinator's appointment, the Court would reconsider the
5 Plaintiffs' request to appoint an Independent Monitor. *Id.* In its Order, the Court
6 reiterated and quoted its previous July 24, 2015 order, which stated, "[t]he fact that the
7 family residential centers cannot be licensed by an appropriate state agency simply
8 means that, under the Agreement, Class Members cannot be housed in these facilities
9 except as permitted by the Agreement.' July 24, 2015 Order, 212 F. Supp. 3d at 877." *Id.*
10 The Court further stated that, "[f]or the reasons already discussed in previous orders and
11 since Plaintiffs have satisfied their burden, the Court once again finds that because the
12 family residential centers are secure, unlicensed facilities, Defendants cannot be deemed
13 in substantial compliance with the Agreement." *Id.* The FRCs remain secure, unlicensed
14 facilities through the present day.

15 On July 9, 2018, the Court denied the Government's request to exempt family
16 detention centers from the requirement that facilities detaining children be licensed by
17 an appropriate state agency so that it could continue to detain accompanied children
18 together with their parents in violation of the Agreement and previous court rulings. July
19 9, 2018 Order [Doc. # 455]. Noting "persistent problems" with the Government's
20 compliance with the Agreement, on July 27, 2018 the Court issued the Minutes of a
21 Status Conference and Plaintiffs' Motion to Enforce, and called for the appointment of a
22 Special Master/Independent Monitor. July 27, 2018 Minutes [Doc. # 469]. On October
23 5, 2018, the Court appointed Andrea Sheridan Ordin as the Independent Monitor tasked
24 with ensuring the Government's compliance with the Court's orders and other
25 oversight. October 5, 2018 Order [Doc. # 494].

26 On March 26, 2020, Plaintiffs filed a request for a temporary restraining order
27 and preliminary injunction to enforce the Agreement on behalf of both unaccompanied
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1 Class Members in the custody of the Office of Refugee Resettlement (“ORR”) and
2 accompanied Class Members detained by ICE at the FRCs in light of the COVID-19
3 pandemic. Emergency Ex Parte Application for a Temporary Restraining Order [Doc. #
4 733]. Recognizing the risk of the emergent COVID-19 crisis to detained accompanied
5 Class Members, the Court issued a TRO on March 28, 2020 ordering the Government
6 to: (1) make every effort to promptly and safely release Class Members in accordance
7 with Paragraphs 14 and 18 of the Agreement and the Court’s prior orders; (2) submit to
8 inspections by the ICE Juvenile Coordinators; (3) provide evidentiary snapshots to the
9 Court, the Independent Monitor, and class counsel; and (4) show cause by April 10,
10 2020, why the Court should not grant Plaintiffs’ motion for preliminary injunction.
11 March 28, 2020 Order [Doc. # 740].

12 On April 10, 2020, the Court extended the TRO for an additional 14 days, and
13 ordered the Government to Show Cause by April 24, 2020 why a preliminary injunction
14 should not issue requiring the Government to make and record continuous efforts to
15 release Class Members and enjoining the Government from keeping minors who have
16 suitable custodians in congregate custody “due to ICE’s unexplained failure to release
17 these minors within 20 days, especially given the emergent circumstances and the
18 Court’s prior orders requiring the same (*see, e.g.*, July 24, 2015 Order [Doc. # 177],
19 June 27, 2017 Order [Doc. # 363], July 9, 2018 Order [Doc. # 455], July 30, 2018 Order
20 [Doc. # 470]).” April 10, 2020 Order [Doc. #768]. The Court further ordered that the
21 Government “shall make every effort to promptly and safely release Class Members in
22 accordance with Paragraphs 14 and 18 of the FSA and the Court’s prior orders (*see, e.g.*,
23 July 24, 2015 Order [Doc. # 177], June 27, 2017 Order [Doc. # 363], July 9, 2018 Order
24 [Doc. # 455], July 30, 2018 Order [Doc. # 470]).”

25 On April 24, 2020, the Court found *inter alia* that “Plaintiffs have raised
26 significant concerns by a preponderance of the evidence about each FRC’s ability to
27 provide safe and sanitary conditions.” April 24, 2020 Order [Doc. #784] at 6. Moreover,
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1 the Court found “that ICE did not seek or obtain formal waivers from detained parents
2 of their children’s *Flores* rights” during ICE’s “binary choice” interviews in mid-May
3 2020. May 22, 2020 Order [Doc. # 799]. However, the Court specifically noted “those
4 conversations caused confusion and unnecessary emotional upheaval and did not appear
5 to serve the agency’s legitimate purpose of making continuous individualized inquiries
6 regarding efforts to release minors.” *Id.* The Court ordered continued heightened
7 monitoring of the FRCs based on ICE’s lack of compliance with Paragraph 12 and
8 Exhibit 1 of the Agreement, and ordered ICE to “continue to make every effort to
9 promptly and safely release Class Members who have suitable custodians in accordance
10 with Paragraphs 14 and 18 of the FSA and the Court’s prior orders, including those
11 categorized as “MPP,” participants in class litigation, “pending IJ hearing/decision” or
12 “pending USCIS response,” absent a specific and individualized determination that they
13 are a flight risk or a danger to themselves or others, or a proper waiver of *Flores* rights
14 (see, e.g., July 24, 2015 Order [Doc. # 177], June 27, 2017 Order [Doc. # 363], July 9,
15 2018 Order [Doc. # 455], July 30, 2018 Order [Doc. # 470]).”

16 On May 22, 2020, the Court noted that ICE in particular “continues to show lack
17 of compliance with Paragraph 18 of the FSA, which requires Defendants to “make and
18 record the prompt and continuous efforts on its part toward family reunification and the
19 release of the minor.’ *Flores* Agreement at ¶ 18 [Doc. # 101],” and further that ICE’s
20 report “fails to show how ICE has cured the deficiencies already identified by the Court
21 in its April 24, 2020 Order.” May 22, 2020 Minutes [Doc. # 799] The Court expressed
22 its concern with the implementation of public health guidances at the Family Residential
23 Centers (FRCs), given the declarations submitted by Plaintiffs showing that there are
24 minors in custody with pre-existing medical conditions and that conditions remain
25 unsafe and crowded—despite reduced populations—at each FRC. *Id.* The Court
26 ordered, *inter alia*, that the “ICE Juvenile Coordinator shall provide *specific*
27 explanations for the continued detention of each minor detained at an FRC beyond 20
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1 days and review each explanation with the Independent Monitor, Andrea Ordin, before
2 submitting the updated report to the Court,” and ordered the parties to “meet and confer
3 regarding the adoption and implementation of proper written advisals and other
4 protocols to inform detained guardians about minors’ rights under the Agreement and
5 obtain information regarding available sponsors.” *Id.* The Court further ordered
6 enhanced monitoring of the FRCs by Dr. Paul Wise and Independent Monitor Andrea
7 Ordin. *Id.*

8 On June 26, 2020, after receiving interim reports from the Special Monitor and
9 court-appointed medical expert, Dr. Paul Wise, Juvenile Monitors, and an *amicus curiae*
10 brief filed by Aldea – The People’s Justice Center, Proyecto Dilley, and RAICES,² the
11 Court entered an order stating that “[a]lthough progress has been made, the Court is not
12 surprised that COVID-19 has arrived at both the FRCs and ORR facilities, as health
13 professionals have warned all along that individuals living in congregate settings are
14 more vulnerable to the virus” concluding that “[t]he FRCs are ‘on fire’ and there is no
15 more time for half measures.” June 26, 2020 Order [Doc. # 833.]

16 The Court ordered that:

17 given the severity of the outbreak in the counties in which FRCs are
18 located and the Independent Monitor’s and Dr. Wise’s observations of non-
19 compliance or spotty compliance with masking and social distancing rules,
20 renewed and more vigorous efforts must be undertaken to transfer Class
21 Members residing at the FRCs to non-congregate settings through one of
22 two means: (1) releasing minors to available suitable sponsors or other
23

24 ² The non-profit organizations directly representing accompanied Class Members and
25 their parents filed a joint *amicus curiae* brief with evidence that counsel for amici
26 believed was vital for the Court’s consideration, after determining that they could no
27 longer work directly with *Flores* class counsel given Mr. Schey’s advocacy for and
28 insistence on implementing a coercive family separation process. See Declaration of
Andrea Meza, ¶¶ 25-26.

1 non-congregate settings with the consent of their adult guardians/parents;
2 or (2) releasing the minors with their guardians/parents if ICE exercises its
3 discretion to release the adults or another Court finds that the conditions at
4 these facilities warrant the transfer of the adults to non-congregate settings.

5 *Id.* The Court emphasized that “the foregoing efforts shall be undertaken **with all**
6 **deliberate speed**[.]” *Id.* (emphasis in original). The Court further ordered that “ICE
7 must also urgently *implement* the protocols recommended by the CDC, rather than
8 hiding behind unevenly implemented written protocols, in order to comply with its
9 obligation to provide safe and sanitary conditions for Class Members.” *Id.* (emphasis in
10 original).

11 **B. CURRENT STATUS**

12 The Court’s most recent order instructed the Government to do three things: 1)
13 Release all Class Members by July 17, 2020; 2) “**with all deliberate speed**”; and 3)
14 implement increased protections, as recommended by the CDC, the Independent
15 Monitor, and Dr. Wise. *Flores v. Barr*, June 26, 2020 Order [Doc. # 833]. Since the
16 filing of Plaintiffs’ initial Motion to for Preliminary Injunction in March 2020 due to the
17 COVID-19 pandemic, this Court has ordered the Government on three separate
18 occasions to release Class Members “without unnecessary delay,” and has made clear
19 that the Government violates the Agreement through the unnecessary delay in their
20 release without reason. *Flores v. Barr*, Order Granting TRO, (March 28, 2020) [Doc. #
21 740]. Despite the increasing urgency of COVID-19’s spread, including the at least 79
22 positive COVID-19 cases of detainees and staff at the FRCs as of July 15, 2020³, and
23 the clear demonstration of the Government’s inability to prevent the spread of infectious
24

25 ³ The government has been required to file notices of positive COVID-19 cases for all 3 FRCs in
26 *O.M.G. v. Wolf*, No. 1:20-cv-786-JEB (D.D.C. March 2020). The count of at least 79 detainees and
27 staff testing positive is a cumulative total based on the following notices filed in O.M.G.: Doc. 93,
28 Doc. 90, Doc. 86, Doc. 82, Doc. 81, Doc. 80, Doc. 79, Doc. 77, Doc. 75, Doc. 73, Doc.
70, and Doc. 69.

1 diseases in the FRCs in general, the Government has neither complied with the Court's
2 order to release Class Members nor has it complied with its regulatory requirement to
3 evaluate release of family units together. *See* 8 C.F.R. § 1236.3(b)(2). Further, there is
4 no evidence that the Government has even attempted to comply with the Court's order
5 to "urgently enforce its existing COVID-19 protocols." June 26, 2020 Order at 4. To the
6 contrary, the evidence that the Government is failing to comply with the Court's order
7 has only grown. The South Texas Family residential Center violated its own COVID-19
8 protocols regarding social distancing and the use of PPE during an all-facility Fourth of
9 July Party. *See* Declaration of Shalyn Fluharty, ¶ 43. As COVID-19 spreads unchecked
10 through the FRCs, the Government continues to refuse to explain its failures to comply
11 with the Court's repeated orders either to release the Class Members or to implement
12 adequate safety procedures.

13 The Court has made clear in each of its orders that its primary concern is for the
14 children confined to the FRCs who are in imminent danger of infection with COVID-
15 19. The purpose of the Court's previous orders since the pandemic outbreak has been to
16 prevent "irreparable harm" to the lives and safety of children in the Government's care
17 as well as to the communities surrounding the FRCs, finding that mere "financial and
18 administrative concerns" are not sufficient justification for the Government's failures to
19 promptly release or otherwise take action to protect Class Members when "public health
20 and safety in the midst of pandemic" are at stake. *Flores v. Barr*, Order Granting TRO,
21 (March 28, 2020) [Doc. # 740].⁴ In defiance of this finding, the Government, rather than
22 working to release Class Members in an orderly manner or addressing ongoing failures
23 to implement basic safety measures to prevent the spread of COVID-19, has instead

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25 ⁴ Proposed Plaintiffs-Intervenors submit herewith the Declaration of Catherine
26 Troisi, Ph.D., Associate Professor in the Department of Management, Policy and
27 Community Health and Department of Epidemiology, Human Genetics, and
28 Environmental Sciences and Center for Infectious Diseases at the University of Texas
Health Science Center. As set forth in full therein, any additional time in FRCs will
increase the probability that a child will be exposed to the SARS-Cov-2 virus and
become infected.

1 engaged class counsel to focus their time and energy on drafting administrative
2 protocols for the waiver of Class Members' rights, a process which: (1) is certain to
3 further unnecessary delay of the release of Class Members beyond this Court's July 17,
4 2020 deadline, as no agreed-upon waiver protocol has yet been presented to Class
5 Members, their parents, or legal counsel; (2) has not been shown to comply with the
6 existing Agreement and applicable portions of the INA; and (3) has not been shown to
7 afford Class Members and their parents due process of law.

8 There has been no explanation from the Government for its decision to disregard
9 the Court's mandate of prompt and orderly release with immediate implementation of
10 existing safety protocols at the FRCs, in favor of advocating for the first-time
11 implementation of a completely untested and unvetted waiver protocol during a
12 pandemic. Any reason the Government could put forward would not outweigh the
13 urgent requirements of public health and safety. Moreover, this waiver protocol, the
14 terms of which are secret as of Saturday, July 18, 2020, with no input from child welfare
15 advocates, or experts on the profound harm of separation, and over the objections of the
16 the Plaintiff-Intervenors to the coercive and involuntary nature of any consent to
17 separate or waiver of rights under the Agreement.

18 On July 17, 2020, 94 child welfare, health, and safety experts including the
19 American Academy of Child and Adolescent Psychiatry, the Buffett Early Childhood
20 Institute at the University of Nebraska, the Child Welfare League of America, the
21 Children's Defense Fund, the National Association for Children's Behavioral Health,
22 National Association of Pediatric Nurse Practitioners, and many more organizations
23 signed on to a letter to ICE Acting Director Matthew Albence to call upon the
24 Government to safely and immediately release all children together with their families
25 from the FRCs.⁵ Also, on July 17, 2020, 120 non-governmental organizations, including

26
27 ⁵ <https://www.childrensdefense.org/wp-content/uploads/2020/07/Free-the-Families-and-Promote-Family-Unity-Letter.pdf>
28

1 Amnesty International, the Women’s Refugee Commission, Physicians for Human
2 Rights, National Youth Law Center and many others signed a letter signed a letter to
3 Acting DHS Secretary Chad Wolf and Acting ICE Director Matthew Albence calling for
4 accompanied Class Members detained at FRCs to be released with their parents, citing
5 the dangers of COVID-19 and the harm of family separation.⁶

6 Separate and apart from the Agreement itself, the Government has an affirmative
7 obligation pursuant to applicable federal regulations to evaluate the simultaneous
8 release of the Plaintiff-Intervenors (accompanied Class Members) and their parent(s) in
9 its discretion. *See* 8 U.S.C. § 1182(d)(5)(A) (providing for parole “for urgent
10 humanitarian reasons or significant public benefit”); 8 C.F.R. § 1236.3(b)(2). It is clear
11 that the Government has already decided, with no reasoned explanation, that it has no
12 intention of exercising its discretion to release Proposed Plaintiff-Intervenors together
13 with their parents. The Court specifically included in its June 26, 2020 Order its concern
14 that Class Members remain detained “for arbitrary and inconsistent reasons” due to
15 “incomplete, infrequent, and at times, inaccurate, parole determinations.” June 26, 2020
16 Minute Order at 2. Despite the expressed concerns of the Court, independent legal and
17 medical monitors, and Class Members themselves, the Government and class counsel
18 remain engaged in an administrative exercise to develop a waiver protocol.

19 Proposed Plaintiff-Intervenors are currently awaiting the decision of United States
20 District Court Judge James E. Boasberg sometime this week as to whether that court
21 will order the release of the detained families together based on the Constitutional rights
22 of the parents and their children.

23 Plaintiff-Intervenors have made their positions clear to both the Government and
24 class counsel throughout the duration of this crisis. Plaintiff-Intervenors’ concern tracks
25 exactly with that of the Court’s—maintaining public health and safety and ensuring that
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27 ⁶ [https://www.amnestyusa.org/press-releases/leading-ngos-call-on-ice-to-stop-](https://www.amnestyusa.org/press-releases/leading-ngos-call-on-ice-to-stop-family-separation/)
28 [family-separation/](https://www.amnestyusa.org/press-releases/leading-ngos-call-on-ice-to-stop-family-separation/)

1 childrens' lives are not endangered. Class Members' concerns regarding the
2 Government's and class counsel's blind focus on developing a waiver protocol, while
3 failing to simultaneously implement strict and stringent safety procedures at the FRCs
4 or prompt release, have remained consistently unaddressed. It is unclear why class
5 counsel is advocating for consent to separate the Plaintiffs-Intervenors from their
6 accompanying parents or a waiver of their rights under the Agreement that would
7 inevitably lead to indefinite detention in unsafe, unsanitary, and unlicensed conditions
8 during a pandemic as the sole alternative. It is the Government's obligation to comply
9 with the Agreement. At no time, to the Plaintiff-Intervenors knowledge or that of their
10 counsel, has the Government considered any other avenues for it to be in compliance
11 with the Agreement other than forcing a binary choice between family separation or
12 exposure to COVID-19 upon them. For example, the Government could come up with a
13 plan to transfer the Plaintiff-Intervenors and their accompanying parents to non-
14 congregate facilities that are licensed and non-secure. The Government has had 23 years
15 to create and develop such facilities and numerous recommendations from this Court to
16 do so.

17 For the longest detained accompanied Class Members at the FRCs, the
18 Government has had up to eleven months to come up with a solution, and even since the
19 beginning of the pandemic, they have had five months – far in excess of the 20 days
20 which they are permitted to detain children. They have not even tried to do so, and the
21 Plaintiff-Intervenors should not pay the price for the Government's failure with their
22 lives or their health.⁷

23 Most recently, in a filing submitted after hours on Wednesday, July 15, 2020,
24 without consultation with or the consent of any of the accompanied Class Members
25

26 ⁷ See *Flores v. Barr*, June 26, 2020 Order [Doc. #363] (“This purported lack of
27 institutional resources to screen is no excuse for non-performance. Defendants entered
28 into the Flores Agreement and now they do not want to perform—but want this Court to
bless the breach. That is not how contracts work.”)

1 detained with their parents at the three FRCs, class counsel stipulated with the
2 Government to extend the July 17, 2020 deadline for release ordered by the Court. Thus,
3 **class counsel has sought, jointly with the Government, the extension of his own**
4 **clients' detention at facilities with active COVID-19 outbreaks.** Proposed Plaintiff-
5 Intervenor therefore request intervention for the limited purpose of ensuring that that
6 their interests are protected, that their rights are advocated for, that orders given to
7 preserve their lives and well-being are enforced, and that their concerns are not ignored
8 to the detriment of their own health and safety and that of the public. The emergent
9 nature of these warnings cannot be understated as with each update by government
10 counsel more children, more parents, and more detention staff become infected with
11 COVID-19.

12 **III. ARGUMENT**

13 Plaintiff-Intervenors, three accompanied Class Members detained with their
14 parents at the three FRCs, respectfully request that the Court grant them leave to
15 intervene so that they may: (i) protect their interests in the enforcement of the
16 Agreement; (ii) address the adequacy of class counsel and seek appointment of co-
17 counsel to represent the interests of accompanied Class Members detained by the
18 Government at the FRCs; (iii) address Proposed Plaintiffs-Intervenors' request for
19 reconsideration of the extension of the July 17, 2020 release deadline, and to address
20 any requests for subsequent extension; and (iv) address any proposed waiver protocol.

21 **A. LEGAL STANDARD**

22 In order "to protect class members and fairly conduct the action[,]" Rule
23 23(d)(1)(B)(iii) expressly authorizes the Court to issue orders providing class members
24 "the opportunity to signify whether they consider the representation fair and adequate,
25 to intervene and present claims or defenses or to otherwise come into the action. Rule
26 24 provides one such procedural vehicle for class members to address their concerns.
27 "[M]embers of a class have a right to intervene if their interests are not adequately
28

1 represented by existing parties[.]” *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345,
2 1349 (2013) (quoting Newberg on Class Actions).

3 Rule 24 provides that intervention may be allowed as of right or permissively;
4 here, proposed Plaintiff-Intervenors request intervention on both grounds. The Ninth
5 Circuit has held that a district court must grant a motion to intervene as of right pursuant
6 to Rule 24(a)(2), “if four criteria are met: timeliness, an interest relating to the subject of
7 the litigation, practical impairment of an interest of the party seeking intervention if
8 intervention is not granted, and inadequate representation by the parties to the action.”
9 *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). These factors are
10 construed broadly in favor of intervention. *See id.*; *see also Donnelly v. Glickman*, 159
11 F.3d 405, 409 (9th Cir. 1998); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d
12 1297, 1302 (9th Cir. 1997); *Nw. Forest Res. Counsel v. Glickman*, 82 F.3d 825, 836
13 (9th Cir. 1996).⁸

14 Timeliness is a threshold requirement for application to intervene as a matter of
15 right. *League of United Latin Am. Citizens*, 131 F.3d at 1302; *see also NAACP v. New*
16 *York*, 413 U.S. 345, 369, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973). If a motion to
17 intervene is not timely, the court need not consider the other factors in
18 denying intervention. *Washington*, 86 F.3d at 1503. The United States Supreme Court
19 has stated that “[t]imeliness is to be determined from all the circumstances. And it is to
20 be determined by the court in the exercise of its sound discretion; unless that discretion
21 is abused, the court’s ruling will not be disturbed on review.” *NAACP v. New York*, 413
22 U.S. at 366.

23
24
25 ⁸ Moreover, Courts in this circuit approve intervention motions without a pleading
26 where they are otherwise apprised of the grounds for the motion. *Beckman Indus., Inc.,*
27 *v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Westcherster Fire Ins. Co. v.*
28 *Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009)(“the failure to comply with the Rule 24(c)
requirement for a pleading is a ‘purely technical’ defect which does not result in the
‘disregard of any substantial right.’”)

1 In determining whether a motion to intervene is timely, the Ninth Circuit
2 considers three factors: (1) the stage of the proceedings at the time the applicant seeks
3 to intervene; (2) the prejudice to the other parties if the motion is granted; and (3) the
4 reason for and length of the delay. *League of United Latin Am. Citizens*, 131 F.3d
5 at 1302; *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). Post-judgment
6 motions to intervene are not necessarily untimely, and have been allowed under certain
7 circumstances. See *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d
8 1391, 1394-95 (9th Cir.1992); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96,
9 (1977). In general, post-judgment interventions are tolerated when a party with interests
10 similar to the applicant's fails to take further action. *United States ex rel. McGough*,
11 967 F.2d at 1393. In *Pellegrino v. Nesbit*, the Ninth Circuit stated that "[i]ntervention
12 should be allowed even after a final judgment where it is necessary to preserve some
13 right which cannot otherwise be protected." *Pellegrino v. Nesbit*, 203 F.2d 463, 465 (9th
14 Cir. 1953).

15 A party's interests are "practically impaired" absent a grant of intervention if they
16 "would be substantially affected in a practical sense by the determination made in an
17 action." Fed. R. Civ. P. 24 advisory comm. nn. (Am. 1966). This requirement "is
18 primarily a practical guide to disposing of lawsuits by involving as many apparently
19 concerned persons as is compatible with efficiency and due process." *County of Fresno*
20 *v. Andrus*, 622 F.2d 436 (9th Cir. 1980) (quoting *Nuesse v. Camp*, 385 F.2d 694 (D.C.
21 Cir. 1967)). Intervention as of right is appropriate in order to afford affected parties the
22 "opportunity to argue the propriety of, or limit the scope of, the injunctive relief sought
23 by plaintiffs." *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1498
24 (9th Cir. 1995).

25 The prospective intervenor's burden to show that existing representation is
26 inadequate is "minimal: it is sufficient to show that representation *may* be inadequate."
27 *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1498 (9th Cir. 1995).
28

1 Even if the Court finds that the Proposed Plaintiff-Intervenors who are
2 accompanied Class Members are not entitled to intervene as of right, they should
3 nonetheless be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b).
4 The Court may allow ““permissive intervention where the applicant for intervention
5 shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the
6 applicant’s claim or defense, and the main action, have a question of law or a question
7 of fact in common.”” *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir.
8 2002) (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir.
9 1996)). In considering whether to grant permissive intervention, the Court “must
10 consider whether the intervention will unduly delay or prejudice the adjudication of the
11 original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

12 **B. INTERVENTION SHOULD BE GRANTED UNDER RULE 24(A).**

13 **1. The Motion to Intervene is timely.**

14 Timeliness with respect to motions to intervene “is a flexible concept,” *United*
15 *States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). The circumstances
16 surrounding this litigation are unusual. *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843
17 (9th Cir. 2016). When evaluating the timeliness of a motion, the “[m]ere lapse of time
18 alone is not determinative.” *Id.* at 854 (citing *United States v. State of Oregon*, 745 F.2d
19 550, 552 (9th Cir. 1984)). Where a change of circumstances occurs, and that change is
20 the “major reason” for the motion to intervene, the stage of proceedings factor should be
21 analyzed by reference to the change in circumstances, and not the commencement of the
22 litigation. *See id.* In this case, the Government and class counsel have stipulated to
23 delay implementation of the Court’s orders in order to develop a protocol for
24 accompanied Class Members to be given the “option” of forced separation from their
25 parents, or else face imminent exposure to a deadly virus, over the objections of
26 accompanied Class Members and in disregard of their interests. This action by the
27 Government and counsel seeking to extend the detention of accompanied Class
28

Members at facilities with COVID-19 outbreaks (79 positive cases as of July 19, 2020) occurred only recently and constitutes changed circumstances. Further, the terms of any waiver protocol developed jointly by the Government and class counsel have not even been disclosed to accompanied Class Members. The proposed intervention by the accompanied Class Members detained at the FRCs is thus timely.

2. The Proposed Intervenorors have an interest relating to the subject of the litigation.

The Plaintiff-Intervenors, accompanied children detained with their parents at the FRCs, are already Class Members and Plaintiffs. Therefore, it is clear that the Proposed Intervenorors have an interest relating to the subject of the litigation and the enforcement of the Agreement (the minimal standards for the treatment of detained immigrant children by the United States government). The Proposed-Intervenors seek to intervene in the enforcement of the Agreement to ensure that their legal positions and arguments are known and articulated to the Court, to ensure that the Court has all necessary factual information, and to seek reconsideration of the Government's and class counsel's stipulation to an extension of their already impermissibly lengthy detention in congregate settings during a pandemic.

3. The interests of the Proposed Intervenorors will be practically impaired if intervention is not granted.

Plaintiff-Intervenors' interests in enforcing the previously-issued orders from this Court and ensuring their prompt and orderly release from detention, as well as their detention in safe and sanitary conditions pending their release, will be practically impaired absent a grant of intervention. Plaintiff-Intervenors' specific arguments regarding the propriety and scope of proposed injunctive relief, actions to enforce orders of the Court, and the safeguarding of their existing rights against undue infringement, will go unheard before this Court absent a grant of intervention. This Court has found ICE to be in violation of the Agreement's requirements that Class Members may not be

1 detained in secure, unlicensed facilities at all three of the FRCs, even before the onset of
2 the current crisis brought on by the pandemic. The Government's failure to comply with
3 their responsibilities to promptly release the Plaintiff-Intervenors and to provide safe
4 and sanitary conditions in licensed, non-secure facilities even outside of the threat
5 brought on by COVID-19 has not been properly enforced or addressed by class counsel,
6 who instead has unilaterally pursued an uncertain process of developing a protocol to
7 waive their right to release under the Agreement, which Plaintiff-Intervenors aver may
8 violate the due process and other legal rights of both parents and their Class Member
9 children.

10 Current *Flores* class counsel Peter Schey, Center for Human Rights &
11 Constitutional Law, has refused multiple requests by attorneys with the non-profits
12 directly representing accompanied Class Members and their parents that he present their
13 arguments to the Court that neither a consent to separate nor a waiver of accompanied
14 Class Members' *Flores* rights not to be indefinitely detained could be *voluntary* under
15 the coercive circumstances of the COVID-19 pandemic. Attorneys and non-profits
16 directly representing accompanied Class Members and their parents have also
17 repeatedly informed class counsel that consent to separation cannot be *knowing* when
18 there is no information about the terms of the consent or waiver, much less the legal
19 consequences of such a choice available to the decision-makers – the parents of
20 accompanied children who are detained at the FRCs. Without the Court's order granting
21 accompanied Class Members detained at the FRCs leave to intervene, their interests will
22 be impaired as a practical matter as none of these positions will even be mentioned,
23 much less argued, before the Court.

24 **4. Current representation of the Plaintiff-Intervenors' interests is**
25 **inadequate.**

26 The position and interests of the Plaintiff-Intervenors, as those of all accompanied
27 Class Members detained at the FRCs, are not currently adequately represented before
28

1 this Court with regard to the immediate and urgent issue of their unlawfully lengthy
2 detention amid the COVID-19 pandemic. Specifically, the positions of the accompanied
3 Class Members detained by ICE in the FRCs that are not being adequately pleaded and
4 articulated to the Court are:

- 5 a) Plaintiff-Intervenors will seek reconsideration of the July 17, 2020 deadline,
6 given the already excessive length of their detention and the rapidly escalating
7 numbers of the positive COVID-19 cases at the FRCs.

8 The Plaintiff-Intervenors strongly object to the agreed Stipulation for a 10-day
9 extension of the Friday, July 17, 2020 release deadline (filed after hours on Wednesday,
10 July 15, 2020), and will seek reconsideration of that extension. *Flores* class counsel did
11 not consult with Plaintiff-Intervenors or any other accompanied Class Members
12 detained at the FRCs, their parents, or their counsel in agreeing to this stipulation.
13 Further, it is abundantly clear, that during this time of extension, and indeed the period
14 which has run subsequent to each order from this Court following the commencement of
15 the pandemic, no party is heeding the warnings of this Court and the independent
16 monitors by advocating and ensuring continuing and strict implementation of the *basic*
17 health and safety policies necessary to protect accompanied children who remain
18 languishing in the FRCs.

- 19 b) The detention of accompanied Class Members at secure, non-licensed
20 facilities continues to violate the Flores Settlement Agreement such that no
21 accompanied class member may be held at any of the three FRCs for any
22 length of time, but Flores class counsel has declined multiple requests to make
23 this argument.

24 As detailed above, this Court has repeatedly ordered the Government to comply
25 with the Agreement, and has held more than once that the three FRCs do not comply
26 with the Agreement's requirements that Class Members may be detained only in non-
27 secure, licensed facilities. Plaintiff-Intervenors' prolonged detention in unlicensed,
28

1 secure facilities violates Paragraphs 11 and 19 of the Agreement and its requirement that
2 children be detained in the “least restrictive setting.”

3 Pursuant to the Agreement, children who are determined to be a flight risk or a
4 danger to themselves or others under Paragraph 14 may be “placed temporarily in a
5 licensed program until such a time as release can be effected in accordance with
6 Paragraph 14 above or until the minor’s immigration proceedings are concluded,
7 whichever occurs earlier.” FSA, ¶ 19. Even under those circumstances, ICE “shall place
8 each detained minor in the least restrictive setting appropriate to the minor’s age and
9 special needs, provided that each setting is consistent with its interests to ensure the
10 minor’s timely appearance before the [Department] and the immigration courts and to
11 protect the minor’s well-being and that of others.” FSA, ¶ 11.

12 As noted above, in 2015, the Court determined that “according to the language of
13 the Agreement, [ICE] must house children who are not released in a non-secure facility
14 that is licensed by the appropriate state agency to care for dependent children.” *Flores*
15 *v. Johnson*, 212 F. Supp. 3d at 877. “The fact that the family residential centers cannot
16 be licensed by an appropriate state agency simply means that, under the Agreement,
17 Class Members cannot be housed in these facilities except as permitted by the
18 Agreement.” *Id.* In 2017, Judge Gee “once again [found] that because the family
19 residential centers are secure, unlicensed facilities, [ICE] cannot be deemed in
20 substantial compliance with the Agreement.” *Flores v. Sessions*, 394 F. Supp. 3d at
21 1070.

22 It is undisputed that the three Family Detention Centers in Berks, Dilley, and
23 Karnes continue to be secure and unlicensed and therefore do not comply with the
24 Agreement. *See id.* at 1068–69 (“Defendants do not dispute that the family residential
25 centers continue to be unlicensed”; “Defendants do not dispute that the facilities are
26 secure”). For Plaintiff-Intervenors and all accompanied children detained at the FRCs
27 that have never been determined to be a flight risk or a danger to themselves or others,
28

1 detention in a secure, unlicensed facility is not the “least restrictive setting appropriate
2 to the minor’s age and special needs.” FSA, ¶ 11. As a result, the Government’s choice
3 to detain Plaintiff-Intervenors at the FRCs has been and continues to be unlawful. Yet,
4 for unknown reasons, class counsel has failed to adequately represent the interests of
5 Plaintiff-Intervenors by seeking an injunction to prevent the Government from detaining
6 Class Members at the FRCs and has not zealously advocated for their release based on
7 the Government’s continuing non-compliance with the orders of this Court.

8 c) Plaintiff-Intervenors doubt the validity of any waiver because there can be no
9 voluntary consent to separate from parents under the coercive circumstances
10 of the pandemic with active COVID-19 outbreaks at two out of the three
11 FRCs.⁹

12 The attorneys at the non-profit organizations directly representing accompanied
13 *Flores* Class Members detained at the FRCs have voiced their strong objections
14 repeatedly and directly to *Flores* class counsel on multiple occasions to class counsel’s
15 focus on developing a waiver protocol, rather than on enforcing the existing orders, and
16 have expressed their doubt that a “voluntary” waiver of Class Members’ *Flores* rights or
17 parental consent to separate is possible under the current, dire conditions of pandemic.
18 Plaintiff-Intervenors are being offered the “option” of either separating from their
19 parents, which is well-documented as causing life-long trauma or extended detention,
20 which is also well-documented as causing life-long-trauma, in addition to exposure to a
21 deadly virus. See Govindaiah Decl., ¶¶ 3-4; Exs. B, C.

22 d) Plaintiff-Intervenors object to any protocol whereby the terms and legal
23 consequences of a waiver are completely unknown, and where counsel for
24 accompanied Class Members will be informed after the “choice” between
25 separation and indefinite detention is made.

26
27 ⁹ Accompanied Class Members do not concede that there can be any voluntary waiver of *Flores* rights against
28 indefinite detention under threat of family separation or vice versa as a general, but the instant motion is focused
on the extreme and urgent circumstances that exist specific to the coronavirus pandemic.

1 No “knowing” consent to separate or to waive their rights under the Agreement
2 can be given when neither counsel nor decision-makers for accompanied Class
3 Members have been provided with any information whatsoever as to the legal
4 consequences of that choice. The non-profits providing direct representation to
5 accompanied Class Members and their parents are not in any position to advise them
6 properly. Counsel for the Plaintiff-Intervenors have received no information from either
7 the Government or class counsel regarding the terms and/or the legal consequences of
8 any purported waiver. Moreover, class counsel, in a telephone call update, stated that it
9 was unclear whether parents would be able to consult with counsel, would meet with
10 ICE alone/unrepresented, and that ICE would advise counsel for the accompanied Class
11 Members of the parents’ “choice” after the parents make their decision.

12 **C. INTERVENTION SHOULD BE GRANTED UNDER RULE 24(B).**

13 The standard for permissive intervention is easily satisfied here, as all that is
14 required is “a common question of law or fact.” *Kootenai Tribe of Idaho v. Veneman*,
15 313 F.3d 1094, 1111 (9th Cir. 2002). Proposed Plaintiff-Intervenors do not raise any
16 novel or additional questions of law and fact. Rather, they seek to protect the
17 substantive rights of all Class Members under the Agreement and ensure that the
18 Government comply with the Court’s order to release all Class Members with all
19 deliberate speed and implement increased protections from COVID-19. Where, as here,
20 current class counsel has ignored the objections of the Proposed Plaintiff-Intervenors
21 and failed to adequately advocate on their behalf, permissive intervention is appropriate.
22 *Newberg on Class Actions* § 9:36 (5th ed., 2020) (observing that courts are more
23 amenable to permissive intervention “when intervention would strengthen the adequacy
24 of the representation.”).

25 **IV. CONCLUSION**

26 For all the foregoing reasons, Proposed Plaintiff-Intervenors, B.L.N, D.F.L.G. and
27 W.B., accompanied Class Members detained with their parents at the three Family
28

1 Residential Centers respectfully request that this Court enter the Proposed Order
2 submitted herewith, which will grant them leave to intervene so as to: (i) protect their
3 interests in the enforcement of the Agreement; (ii) address the adequacy of class counsel
4 and appointment of co-counsel to represent the interests of accompanied Class Members
5 detained by the Government at the FRCs; (iii) address Proposed Plaintiffs-Intervenors'
6 request for reconsideration of the extension of the July 17, 2020 release deadline, and to
7 address any request for any extension; and (iv) address any proposed waiver protocol;
8 and that the Court grant such other and further relief as it may deem just and proper.
9

10 Respectfully submitted,

11 Dated: July 20, 2020

AKIN GUMP STRAUSS HAUER & FELD LLP
Michael J. Stortz
Brett M. Manisco

**REFUGEE AND IMMIGRANT CENTER FOR
EDUCATION AND LEGAL SERVICES**
Manoj Govindaiah (*Pro Hac Pending*)

ALDEA – THE PEOPLE’S JUSTICE CENTER
Bridget Cambria (*Pro Hac Pending*)

17 By /s/ Michael J. Stortz
18 Michael J. Stortz
19 Attorneys for Plaintiff-Intervenors
B.L.N., D.F.L.G., and W.B.

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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 JENNY L. FLORES, et al.,
13 Plaintiffs,

14 vs.

15
16 EDWIN MEESE, et al.,
17 Defendants.

Case No. 2:85-cv-04544-DMG-AGR_x

**[PROPOSED] ORDER GRANTING
PROPOSED INTERVENORS' EX
PARTE APPLICATION FOR LEAVE
TO INTERVENE**

Action Filed: July 17, 1985

1 **WHEREAS**, the Court, having considered Proposed Plaintiff Intervenor's Ex
2 Parte Application For Leave To Intervene together with the supporting Declarations of
3 Manoj Govindaiah, Andrea Meza, Shalyn Fluharty and Catherine Troisi, as well as the
4 record and proceedings to date in the above-captioned action, and good cause having
5 been shown:

6 **IT IS HEREBY ORDERED THAT** Proposed Plaintiff Intervenor's *Ex Parte*
7 Motion is **GRANTED**. Proposed Plaintiff Intervenor is granted leave to intervene so
8 that they may: (i) protect their interests in the enforcement of the Agreement; (ii)
9 address the adequacy of class counsel and appointment of co-counsel to represent the
10 interests of accompanied Class Members detained by the Government at the FRCs; (iii)
11 address their anticipated request for reconsideration of the extension of the July 17,
12 2020 release deadline, and any request for further extension of that deadline; (iv)
13 address any proposed waiver protocol that may be presented; and (v) for any other
14 appropriate relief under the Agreement or the Court's orders in this action.

15
16 **SO ORDERED** this _____ day of July, 2020.

17
18 _____
19 The Honorable Dolly M. Gee
20 United States District Judge
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