UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE HUTTO FAMILY DETENTION CENTER, Plaintiffs, v. MICHAEL CHERTOFF, Secretary of U.S. Department of Homeland Security (DHS); JULIE L. MYERS, Assistant Secretary, U.S. Immigration and Customs Enforcement (ICE); JOHN P. TORRES, Director, Office of Detention and Removal Operations, ICE; MARC MOORE, ICE Field Office Director; GARY MEAD Assistant Director of Detention and Removal Operations at ICE; SIMONA COLON, ICE Officer in Charge; JOHN POGASH, ICE National Juvenile Coordinator, Defendants.	Civil Action No.: A-07-CA-164-SS **DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS TO ENABLE PARTIES TO DEVOTE FULL RESOURCES TO RESOLVING ALL CLAIMS BROUGHT UNDER PARAGRAPH 24 OF THE FLORES SETTLEMENT AGREEMENT**

INTRODUCTION AND BACKGROUND

This case began on March 6, 2007, when the American Civil Liberties Union (ACLU) filed ten separate lawsuits on behalf of detainees at the T. Don Hutto Family Residential Center (Hutto). The ACLU alleged that plaintiffs' detention at Hutto violated provisions of the Flores Settlement Agreement (FSA). It is undisputed that the ACLU filed these lawsuits before it reasonably engaged in discussions with the Government to determine whether the dispute could be resolved, and before the ACLU fully pursued alternate remedies for its clients. In the six weeks following the filing of the lawsuit, all ten original plaintiffs have been released from Hutto via alternate remedies such as bond or parole. Thus, and as explained more fully below,

plaintiffs' claims are moot, and this case should be dismissed.

Defendants recognize that the ACLU has additional client detainees who currently are in the informal resolution process that is required by Paragraph 24E of the FSA. The ACLU has not yet filed suit on behalf of these detainees, and defendants are seeking to resolve these detainees' complaints in good faith.

All of the ACLU's lawsuits are moot and should be dismissed. In the event the Court does not dismiss them, defendants respectfully request that the Court stay all proceedings to enable the parties to fully focus on informal resolution of the matters involving the ACLU's other clients without the impeding distractions of discovery and trial preparation.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED AS MOOT SINCE ALL TEN PLAINTIFFS HAVE BEEN RELEASED FROM DETENTION AT HUTTO

A. The Standard for Mootness

"[A] case becomes moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" Murphy v. Hunt, 455 U.S. 478, 481 (1982) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980)); see Rocky v. King, 900 F.2d 864, 867 (5th Cir. 1990). The present cases are moot because every plaintiff lacks a legally cognizable interest in the outcome. See Oliver v. Scott, 276 F.3d 736, 741 (5th Cir. 2002) ("The transfer of a prisoner out of an institution often will render his claims for injunctive relief moot."); Rocky, 900 F.2d at 867, 869 (inmate's claim for injunctive and declaratory relief with respect to field work conditions "clearly had . . . already become moot" once he was no longer a field worker). As ICE has released the plaintiffs from Hutto, none of

them continues to hold a legally cognizable interest in the outcome of litigation seeking their release and a change in Hutto's conditions.

The ACLU cannot litigate these cases as a class action. Paragraph 24B of the FSA states that, ". . . the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action." (Emphasis added). Thus, the Court does not have jurisdiction through the FSA to enter an order that affects non-plaintiff detainees who never brought an action. In any event, and despite the moot nature of this litigation, ICE has been making efforts to improve conditions at Hutto, including significant changes in policy, and is seeking to continue to address concerns by inviting the ACLU to tour the facility and make reasonable suggestions. See Exhibit A, Letter from Victor Lawrence to Vanita Gupta and Gouri Bhat dated April 17, 2007. ICE believes that the tour and its willingness to respond reasonably to the ACLU's suggestions will ameliorate even the complaints of possible future plaintiffs. Cf. Coliseum Square Assoc., Inc. v. Jackson, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue.")

B. Plaintiffs Fail to Meet the Exception to Mootness

The Supreme Court has "recognized an exception to the general rule [of mootness] in cases that are 'capable of repetition, yet evading review.'" Murphy, 455 U.S. at 482.

> [I]n the absence of a class action, the capable of repetition yet evading review doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. "[A] mere physical or theoretical possibility" is insufficient to satisfy the test; [r]ather, . . .

there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." Id. The Court has "generally . . . been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Honig v. Doe, 484 U.S. 305, 320 (1988) (citing Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, and would resist arrest if stopped); Murphy, 455 U.S. at 484 (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws); cf. Hernandez v. Cremer, 913 F.2d 230, 234-35 (5th Cir. 1990) (reasonable to expect United States citizen from Puerto Rico would again exercise right to travel to Mexico, creating possibility for repetition of facts giving rise to claim).

In this case there is no reason to believe plaintiffs and their families either will violate the conditions of their parole or that they again would attempt to enter the country illegally, and then ICE would place them in Hutto. There is no "reasonable expectation" or "demonstrated probability" that meets the standard for plaintiffs' claims to be considered capable of repetition. Accordingly, plaintiffs cannot satisfy the second prong of the "capable of repetition yet evading review" exception. As there is no longer a "live" controversy affecting plaintiffs, they lack a legally cognizable interest in the outcome. Plaintiffs' claims are moot, and the ten cases should

be dismissed.[1]

II. IF THE COURT DOES NOT DISMISS THIS CASE AS MOOT, IN THE ALTERNATIVE, THIS COURT SHOULD STAY THE CURRENT PROCEEDINGS TO PERMIT THE PARTIES TO ATTEMPT TO MEDIATE ISSUES AS ENVISIONED BY PARAGRAPH 24 OF THE FSA.

A. The Release of All Ten Plaintiffs Make this an Ideal Time to Mediate the Dispute As Envisioned Under the FSA.

If the Court does not dismiss this case as moot, the current posture of this litigation makes this an ideal time to stay proceedings and aggressively mediate all disputes in accordance with Paragraph 24 of the FSA. No plaintiffs currently are placed at Hutto, although the ACLU has identified five additional persons for whom it intends to file suit if negotiations fail. Defendants want to mediate these additional claims and are actively exploring alternatives for the five additional detainees identified by the ACLU. Plaintiffs' filing of additional lawsuits at this time would violate the exhaustion requirements of Paragraph 24E of the FSA.

On April 17, 2007, defendants wrote ACLU counsel seeking a stay in discovery to mediate the remaining claims. See Exhibit A. Defendants advised the ACLU that defendants were making sincere, good faith efforts to improve family detention generally and Hutto specifically. Id. In addition to creating the Juvenile and Family Residential Management Unit within Immigration and Customs Enforcement (ICE), ICE no longer will place families who are not in INA § 235(b) (8 U.S.C. § 1225(b)) expedited removal proceedings in Hutto. Id. These changes will significantly decrease the average detention time for families at Hutto. Id.

ICE also is working with Williamson County, Texas, to investigate licensure for Hutto.

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[1] In making this argument, defendants do not concede that plaintiffs satisfy the first prong of the "capable of repetition" exception, and note that both prongs are necessary to meet the test. .

Id. The licensing process takes time, but defendants believe that active mediation attempts on other issues regarding conditions, at the same time as ICE is working with the State of Texas, will be beneficial for everyone. These beneficial efforts would be severely impeded if defendants were required to respond to onerous discovery and prepare for trial at the same time they are negotiating with the ACLU.

B. Continuing to Litigate Moot Claims Will Hamper the Efforts to Mediate the Dispute.

The ACLU has demanded onerous discovery from defendants. See Exhibit B, ACLU's Production Requests. The ACLU seeks disclosure of information that requires a great amount of resources to identify, locate, and organize for release. The ICE resources involved in the discovery process are the same ICE resources involved in negotiating the claims. Requiring ICE to participate in the discovery process while attempting to negotiate claims not yet filed would unnecessarily impede both processes. Thus, a stay of the current litigation is required to permit the parties the unfettered opportunity to negotiate the dispute.

These lawsuits are about conditions at Hutto, and the parties' best efforts should be spent focusing on conditions rather than litigating moot claims. At the March 23, 2007 evidentiary hearing, defendants formally invited the Court to tour Hutto to observe the conditions. See Transcript of March 23, 2007 Hearing, page 30, lines 4-7 ("We would invite your Honor to come and look at this facility to see what's done there because I guarantee you that it has changed dramatically since the time that you were sending [pre-trial detainees] there from your position on the bench.") Defendants made the same offer to the ACLU in correspondence dated April 12, 2007 and April 17, 2007, but, to date, the ACLU has not acted on it.

The ACLU should take a tour of Hutto for at least two reasons. First, defendants genuinely believe that a tour of the facility would satisfy any remaining concerns about conditions at Hutto. Second, the information gained by the ACLU during the tour would provide a rational basis for suggestions, if any, to improve conditions which it believes are not in compliance with Exhibit 1 of the FSA. The tour would be particularly helpful to the negotiation process so that defendants can fully understand ACLU's concerns, and make adjustments where reasonable and/or necessary.

Onerous discovery and tours during an expedited period for discovery and trial only impede the parties' ability to resolve this litigation through informal resolution as Paragraph 24E of the FSA requires. Moreover, the ACLU's requested discovery is burdensome, and not rationally tailored to develop evidence about the prevailing conditions at Hutto. See Exhibit B, ACLU Production Requests. The ACLU even demands that the agency search all its e-mail files for various information, none of which is designed to elicit responsive information regarding prevailing conditions at Hutto. See Exhibit C, ACLU April 16, 2007 Correspondence Regarding E-mails. The e-mail demands alone would likely take an untold amount of hours to search, to read, and to redact. If discovery were to proceed, defendants would assert objections to the ACLU's discovery demands where they are overly burdensome, not reasonably calculated to lead to admissible evidence concerning prevailing conditions, and/or protected from disclosure by privilege.

If the Court is not inclined to dismiss these ten cases as moot, defendants respectfully request that the Court stay all proceedings to give the parties time to fully pursue good faith negotiations as required by the FSA. Defendants believe that six weeks of good faith

negotiations, where the ACLU and the Court can tour Hutto and express concerns or suggestions, and where ICE can make reasonable efforts to address the concerns, would be beneficial to all parties involved.[2]

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[2] Shortly before filing this document, the ACLU responded to defendants' April 17, 2007 correspondence. See Exhibit B, April 18, 2007 Correspondence from ACLU. Although the ACLU expressed some limited interest in a stay, the ACLU made a stay contingent on numerous "provisos" that defendants find unacceptable such as continued discovery, and ACLU's expressed need to "have active cases on file for at least a handful of children at the facility." These provisos defeat the purpose of the stay as envisioned by the Government. The Government wants to negotiate pursuant to Paragraph 24 of the FSA outside of litigation, an opportunity it has never had.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action as moot. In the alternative, the Court should stay all proceedings for six weeks to enable the parties to negotiate over Hutto's conditions as required by the FSA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of April 2007 a true and correct copy of the foregoing Defendants' Motion to Dismiss, and In the Alternative, Motion to Stay Proceedings To Enable Parties to Devote Full Resources To Resolving All Claims Brought Under Paragraph 24 of the Flores Settlement Agreement was served by ECF Filing on all counsel of record, along with all exhibits, and through agreement of the parties,[3] has been e-mailed to the following counsel of record:

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/s/ Victor M. Lawrence

U.S. Department of Justice

[3] The parties have an agreement that, because of the large number of counsel on the case, all service pleadings may be served via ECF to registered attorneys and an additional e-mail to Vanita Gupta.