

No. 17-55208

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

EMERGENCY MOTION TO STAY DISTRICT COURT ORDER

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

BACKGROUND..... 2

I. The Original *Flores* Litigation 2

II. Relevant Provisions of the *Flores* Settlement Agreement 4

III. Relevant Changes in the Legal Framework For The Custody of Minors
Since the Flores Agreement 6

 A. The Homeland Security Act of 2002 6

 B. Trafficking Victims Protection Reauthorization Act of 2008 7

IV. Present Litigation 10

ARGUMENT 11

I. Standard of Review 11

II. The Government has a Reasonable Probability of Success on the Merits
and, Alternatively, Raises Serious Legal Questions. 12

III. Absent a Stay, the Order Will Cause Irreparable Harm by Impairing the
Effective Enforcement and Efficient Administration of the Immigration Laws.
18

IV. The Balance of Hardships and the Public Interest Favor the Government.
22

V. The Public Interest Favors a Stay Pending Appeal..... 23

INTRODUCTION AND SUMMARY

Defendants-Appellants (hereinafter “Defendants” or “the Government”) respectfully request a stay of the district court’s January 20, 2017 minute order granting Plaintiffs’ August 12, 2016 motion to enforce (“Order”), pending appeal. *See* Exhibit A, January 20, 2017 Order. The district court’s extraordinary ruling, requiring immigration judges to hold bond hearings for unaccompanied alien children (“UACs,” or “unaccompanied minors”) in the care and custody of the Department of Health and Human Services (“HHS”), significantly infringes upon HHS’s express statutory directive and implementing guidance, places serious, statutorily unauthorized administrative burdens on the Executive Office of Immigration Review (“EOIR”) and its immigration judges, and conflicts with lawful statutes, regulations, and Ninth Circuit and Board of Immigration Appeals (“BIA”) precedent.

By imposing this requirement, the Order changes the status quo and irreparably harms the Government by: (1) interfering with the comprehensive statutory framework and corresponding policies and procedures governing HHS’s care and custody of UACs; (2) requiring the development of processes and standards to govern these newly mandated bond hearings, which are burden-intensive for the government to implement, given the uncertainties that abound (for example, the

Government must determine how a UAC in HHS custody can submit a request for a bond hearing, who represents the Government in such bond hearings, what the appropriate standard of review would be, and how HHS would incorporate the results of any such bond hearing into its statutory mandates for the reunification of UACs); and (3) improperly burdening immigration judges with responsibilities that are not authorized under statute or regulation, which raises fundamental questions about the authority of EOIR over UACs in HHS custody. For all of these reasons, and the ones that follow, a stay is warranted.

BACKGROUND

I. The Original Flores Litigation

The original complaint in this action was filed on July 11, 1985. At issue were the practices of the legacy Immigration and Naturalization Service¹ (“INS”) regarding unaccompanied minors subject to removal in the INS’s Western Region who were eligible for discretionary release from detention but who could not be released because there were no immediately available custodians to whom the INS could release them. *See Reno v. Flores*, 507 U.S. 292, 294–95 (1993). The

¹ In the Homeland Security Act of 2002, Congress abolished the legacy INS, and the immigration functions of the INS relevant here were, with limited exception, assigned to the newly-formed DHS and its components, as well as to HHS (regarding unaccompanied children). Pub. L. No. 107-296, 116 Stat. 2135. One such exception is the immigration courts, operated by the Department of Justice’s Executive Office of Immigration Review (“EOIR”).

Government could not “simply send them off into the night on bond or recognizance [but] must assure itself that someone will care for those minors pending resolution of their deportation proceedings.” *Id.* at 295. To address this problem, the INS’s Western Regional Office “adopted a policy of limiting the release of detained minors to a parent or lawful guardian, except in unusual and extraordinary cases, when the juvenile could be released to a responsible individual who agrees to provide care and be responsible for the welfare and well-being of the child.” *Id.* at 295–96 (quoting *Flores v. Meese*, 934 F.2d 991, 994 (9th Cir. 1990), *vacated*, 942 F.2d 1352 (9th Cir. 1991) (en banc)) (internal quotations omitted).

Plaintiffs’ lawsuit challenged this policy and sought to compel the release of unaccompanied minors to non-parental guardians or private custodians. *Id.* at 302. Their lawsuit was brought on behalf of a certified class of minors “who have been, are, or will be denied release from INS custody because a parent or legal guardian failed to personally appear to take custody of them.” *See also Reno*, 507 U.S. at 296. The original complaint asserted two claims challenging the INS’s release policy related to unaccompanied minors, and five claims challenging detention conditions for unaccompanied minors not released. *Reno*, 507 U.S. at 296. In 1993, the Supreme Court rejected Plaintiffs’ facial challenge to the constitutionality of INS’s regulation concerning care of juvenile aliens. *Id.* at 305.

II. *Relevant Provisions of the Flores Settlement Agreement*

In 1996, the parties entered into the Agreement to resolve the case, and it was approved by the district court in 1997. The Agreement, in large part, addressed the procedures and practices that—unless an exception applies, such as an emergency or influx—the parties agreed should govern the release or detention of these unaccompanied minors, and to whom they should or may be released. The “general policy favoring release” provision of the Agreement provides the order of preference for the persons into whose custody these unaccompanied minors should be released provided ICE determines detention is not required to secure their appearance or to ensure their safety or the safety of others.²

² Specifically, paragraph 14 of the Agreement states:

Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to: A) a parent; B) a legal guardian; C) an adult relative (brother, sister, aunt, uncle, or grandparent); D) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor’s well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant’s paternity or guardianship; E) a licensed program willing to accept legal custody; or F) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

The Agreement also addresses what to do in a situation where a minor cannot be released and must remain in the custody of the INS. See Agreement ¶¶ 19–24. In such a situation, the Agreement states that the minor be placed in a licensed facility, unless an exception applies. Agreement ¶ 19. In certain situations where a minor has committed certain crimes, or otherwise been determined to be a danger or an escape risk, the Agreement further allows that he or she “may be held in or transferred to a suitable State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility, having separate accommodations for minors” Agreement ¶¶ 21–22. A secure facility should not be used, however, if there is a less restrictive alternative such as a medium-security facility or another licensed program that is “available and appropriate in the circumstances” Agreement ¶ 23. The Agreement provides that for minors in “deportation” proceedings, a bond redetermination hearing should be provided in all cases unless waived by the minor. Agreement ¶ 24A.

Agreement ¶ 14.

III. Relevant Changes in the Legal Framework For The Custody of Minors Since the Flores Agreement

A. The Homeland Security Act of 2002

In 2002, Congress enacted the HSA. Pub. L. No. 107-296, 116 Stat. 2135. The HSA created the U.S. Department of Homeland Security (“DHS”), transferring most immigration functions formerly performed by the legacy INS to the newly-formed DHS and its components, including U.S. Citizenship and Immigration Services (“USCIS”), U.S. Customs and Border Protection (“CBP”), and U.S. Immigration and Customs Enforcement (“ICE”). *See also* Department of Homeland Security Reorganization Plan Modification of January 30, 2003, H.R. Doc. No. 108-32 (2003) (also set forth as a note to 6 U.S.C. § 542).

Notably, Congress also transferred to HHS, Office of Refugee Resettlement (“ORR”), the responsibility for the *care* of UACs “who are in Federal custody by reason of their immigration status.” HSA § 462(a), (b)(1)(A); 6 U.S.C. § 279(a), (b)(1)(A). The HSA defined an “unaccompanied alien child” as:

a child who-

(A) has no lawful immigration status in the United States;

(B) has not attained 18 years of age; and

(C) with respect to whom-

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2). The HSA transferred to ORR the responsibility for making all placement decisions for UACs, and required ORR to coordinate these placement

decisions with DHS. 6 U.S.C. § 279(b)(1)(C), (D). The HSA also prohibited ORR from releasing UACs on their own recognizance.³ 6 U.S.C. § 279 (b)(2)(B).

B. Trafficking Victims Protection Reauthorization Act of 2008

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (“TVPRA”), was signed into law on December 23, 2008. The TVPRA codified protections related to the processing, custody, and detention of UACs that encompass several material terms of the Agreement. “The intricate web of statutory provisions relating to UACs reflects Congress’s unmistakable desire to protect that vulnerable group.” *D.B. v. Cardall*, 826 F.3d 721, 738 (4th Cir. 2016). The TVPRA built on the HSA, and further required that “the *care and custody* of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.” 8 U.S.C. § 1232(b)(1) (emphasis added). Further, the TVPRA requires that:

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

³ The HSA also contained the following “[r]ule of construction”: “Nothing in paragraph (2)(B) may be construed to require that a bond be posted for an unaccompanied alien child who is released to a qualified sponsor.” 6 U.S.C. § 279(b)(4). HHS does not charge bond when children are released, and does not have any mechanism for charging or collecting bond. See de la Cruz declaration at ¶ 9.

8 U.S.C. § 1232(b)(3).

The TVPRA further makes clear that HHS, and not DHS or its components, is responsible for all placement decisions for UACs in its custody, and provides guidelines for the reunification of UACs by HHS, including dictating the requirements for HHS to evaluate the suitability of any placement. 8 U.S.C. § 1232(c)(3). The TVPRA prohibits releasing to a proposed custodian:

unless [HHS] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

8 U.S.C. § 1232(c)(3)(A). In some instances, HHS must conduct a home study for certain UACs before placing the UAC with a proposed custodian. 8 U.S.C. § 1232(c)(3)(B). In the event that the proposed custodian is found to be a suitable custodian to whom an unaccompanied child may be released, the custodian receives a legal orientation presentation addressing their responsibility to ensure the juvenile's appearance at all immigration proceedings, and to protect the child from mistreatment, exploitation, and trafficking. *See* 8 U.S.C. § 1232(c)(4). Finally, when reunification is complete, HHS must conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted. 8 U.S.C. § 1232(c)(3)(B).

The statute further requires that UACs who remain in HHS custody must be “promptly placed in the least restrictive setting that is in the best interest of the child.” 8 U.S.C. § 1232(c)(2). It delegates to the Secretary of HHS the authority to make such placement decisions, considering “danger to self, danger to the community, and risk of flight.” *Id.*

For children placed in a secure environment, such as a juvenile detention facility, the TVPRA also explicitly delegated to the Secretary of HHS the authority to create review “procedures” to be used when a UAC is placed in a secure facility.⁴ Specifically, secure placements “shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.”⁵ 8 U.S.C. § 1232(c)(2)(A).

⁴ Notably, the TVPRA contains a more restrictive requirement for “secure” custody than did the *Flores* Agreement, providing another example of how the TVPRA in many respects superseded such Agreement. The Agreement permits placement in a juvenile detention facility if a minor is an escape risk. Agreement ¶ 21. By contrast, the TVPRA limits a secure facility placement to a child who “poses a danger to self or others or has been charged with having committed a criminal offense.” 8 U.S.C. § 1232(c)(2)(A).

⁵ In any case where HHS denies the release of a child to a parent or legal guardian, HHS offers an internal appeal process, recently revised in January of 2017. Under such process, the parent or legal guardian may request a review and independent reconsideration of the denial, first by the ORR Director, and then by an independent Reconsideration Officer. See ORR Guide: Children Entering the United States Unaccompanied § 2.78, U.S. Department of Health and Human Services, Office of Refugee Resettlement, last revised Jan. 9, 2017, available at:

IV. Present Litigation

On August 12, 2016, Plaintiffs' counsel filed a motion to enforce the Agreement, challenging HHS's position that the TVPRA requires HHS to serve as the final administrative decision-maker regarding the care and custody of UACs such that UACs are not entitled to bond hearings before immigration judges as otherwise required under Paragraph 24A of the Flores Agreement. Defendants argued that the TVPRA supersedes Paragraph 24A of the Agreement and created a statutory scheme that did not include review of HHS's custody decisions by an immigration judge; rather, the statute precludes the agency from releasing a UAC unless HHS determines, according to the specific procedures outlined in the statute, that the proposed custodian is capable of providing for the child's physical and mental well-being. Further, Defendants contended that Congress provided no authority for an immigration judge to hold a bond hearing for, or to order HHS to release, a minor in ORR's care and custody.

On January 20, 2017, the court granted Plaintiffs' motion to enforce. The court found that the bond hearing provision of the Agreement was not superseded by

<http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied> (last visited February 6, 2017). Under such procedures, a child whose denial is for the sole reason that the unaccompanied child is a danger to himself/herself or the community also receives such a review and independent reconsideration.

operation of law because (1) both the TVPRA and the HSA, in relevant part, are silent on the subject of bond hearings, (2) the Flores Agreement remains consistent with federal immigration laws requiring bond hearings for immigrant detainees and poses no irreconcilable conflict with the TVPRA's safety and placement provisions, and (3) Defendants' construction of the TVPRA so as to preclude UACs in ORR custody from bond hearings should be rejected under the canon of constitutional avoidance because it could result in the indefinite detention of UACs without the due process protection offered to adult detainees through a bond hearing.

ARGUMENT

I. Standard of Review

In considering motions for stays pending appeal, this Court has adopted the factors enumerated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987): “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Golden Gate Rest. Ass’n v. City of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton*, 481 U.S. at 776) (internal quotations omitted).

The first two factors “are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court analyzes the first two factors on a “sliding scale in which the required degree of irreparable harm increases as the probability of success

decreases.’” *Golden Gate*, 512 F.3d at 1116. Consequently, a party may also establish the first two *Hilton* factors by showing (1) that there are serious legal questions regarding the merits, and (2) the balance of hardships tips sharply in the moving party’s favor. *Golden Gate*, 512 F.3d at 1115–16.⁶

II. *The Government has a Reasonable Probability of Success on the Merits and, Alternatively, Raises Serious Legal Questions.*

To prevail on the first prong of the *Hilton* analysis, the government must show either “a reasonable probability or fair prospect of success” on the merits, or that the appeal raises “serious legal questions.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966–67, 971 (9th Cir. 2011). The government satisfies both tests here.

First, the district court committed legal error by finding that the comprehensive statutory scheme created in the TVPRA for the care and custody of UACs did not supersede Paragraph 24A of the *Flores* Agreement. Second, the district court committed legal error in requiring immigration judges to hold bond hearings for UACs, where immigration judges lack the authority under the regulations applicable to bond hearings to conduct such hearings. Accordingly,

⁶ This sliding scale approach remains viable after *Winter v. NRDC*, 555 U.S. 7 (2008), in which the Supreme Court clarified the “irreparable harm” standard. See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (explaining that “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the [moving party] can support issuance of a preliminary injunction” so long as the [moving party] also establishes irreparable injury and that the injunction is in the public interest).

because the government has both a reasonable success on the merits and raises serious legal questions, this Court should grant the motion to stay.

Paragraph 24A of the Agreement has been superseded by Congress's actions, as expressed in the HSA and the TVPRA, which placed all authority for custody and placement decisions for UACs in the hands of HHS, the agency that has developed expertise and experience over the past fourteen years in determining the placement that is in the best possible interest of UACs in federal custody. 6 U.S.C. § 279(a), (b)(1)(A); (b)(1)(C), (b)(1)(D), (b)(2), (g)(2); 8 U.S.C. § 1232(b)(1), (b)(3), (c)(2), (c)(3), (c)(4).

Moreover, the TVPRA's comprehensive statutory framework governing the care and custody of UACs, contains clear statutory language preventing HHS from releasing a UAC unless the agency determines that a proposed custodian is capable of caring for the physical and mental well-being of the minor, and creates no authority for immigration judges to hold bond hearings for UACs. 8 U.S.C. § 1232(c)(3).

Specifically, when Congress created DHS, through the HSA, it also transferred the care of UACs from the legacy Immigration and Naturalization Service ("INS") to HHS. 6 U.S.C. § 279(a), (b)(1)(A). Then, in 2008, the TVPRA further established that "***the care and custody*** of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the

responsibility of the Secretary of Health and Human Services.” 8 U.S.C. § 1232(b)(1) (emphasis added). In the TVPRA, Congress expressly authorized the Secretary of HHS to make placement decisions for UACs, and to prescribe review procedures for those placement decisions. 8 U.S.C. § 1232(c)(2)(A). This eliminated any existing authority held by DHS to make custody decisions for UACs, and placed it solely in the hands of HHS. It also placed the responsibility for developing procedures to review those decisions with the Secretary of HHS, and not with the immigration courts of the Department of Justice’s EOIR. This statutory requirement that any review of placement decisions for UACs be conducted by the Secretary of HHS, specifically under “procedures” developed by the Secretary, clearly superseded the bond hearing requirement of Paragraph 24A.

In addition, “[i]mmigration judges only have the authority to consider matters that are delegated to them by the Attorney General and the Immigration and Nationality Act.” *Matter of A-W-*, 25 I. & N. Dec. 45, 46 (BIA 2009) (citing 8 C.F.R. § 1003.10(b) (2009); *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (A.G. 2003); *Matter of Cazares*, 21 I. & N. Dec. 188, 193 (BIA 1996)). The authority of an immigration judge to re-determine custody status under 8 C.F.R. § 1236.1(d) is also limited to custody decisions made by DHS. See 8 C.F.R. § 1003.19(a); *Matter of A-R-* (BIA June 18, 2016). Because DHS does not set custody conditions for UACs, under current law, the immigration judges have nothing to review. Thus, although the

TVPPRA does not explicitly reference bond hearings, it clearly supersedes any provision requiring bond hearings be held for UACs because custody reviews before an immigration judge are not possible or even feasible under the existing statutory and regulatory scheme.

Second, the district court improperly applied the canon of constitutional avoidance. Under the canon of constitutional avoidance, a court will “read [a challenged] statute to eliminate” any constitutional doubt “so long as such a reading is not plainly contrary to the intent of Congress.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 60 (2010) (internal quotations omitted). Constitutional avoidance applies when a statute can be construed in more than one way using ordinary interpretive methods, with the canon instructing selection of the constitutionally permissible construction. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 237–38 (1998); *United States v. Rumely*, 345 U.S. 41, 45 (1953). As a result, a court is bound not only to choose a construction that is consistent with the plain text of the statute, *see, e.g., Carcieri v. Salazar*, 555 U.S. 379, 387 (2009), but also one that is consistent with the larger statutory scheme of which the provision is part, *see, e.g., Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989); *see also United States v. Broncheau*, 645 F.3d 676, 686 (4th Cir. 2011) (“[T]he district court erred by invoking the canon of constitutional avoidance to justify creation of its alternative commitment scheme. This canon has no

application to the construction of a statute in a manner that is incompatible with its plain terms.”). At bottom, constitutional avoidance “is an interpretive tool, counseling that *ambiguous statutory language* be construed to avoid serious constitutional doubts.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). It is not intended to “limit the scope of authorized executive action.” *Id.*

Here, the district court erroneously applied the canon of constitutional avoidance in disregarding Defendants’ construction of the TVPRA on the basis that it could result in the indefinite detention of unaccompanied children without the due process protection offered to adult detainees through a bond hearing.

To reach its conclusion that the TVPRA must be construed to require bond hearings for UACs, the district court read the TVPRA as ambiguous and susceptible of more than one meaning; it ignored the comprehensive framework for the care and custody of UACs set forth under that statute; and it ignore the immigration judges’ lack of authority to hold a bond hearing for a UAC. The district court did exactly that which the Supreme Court has stated that courts may not do. “The fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction ‘to the point of disingenuous evasion’ to avoid a constitutional question.” *Jean v. Nelson*, 472 U.S. 846, 855 (1985) (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)).

Further, in the alternative, the Government contends that even if the Court does not find that the Government has a reasonable probability of success on the merits, the Court should grant a stay of the district court's decision because Defendants have raised "serious legal questions" concerning the district court's unprecedented findings regarding the relationship between the HSA, the TVPRA, and the *Flores* Agreement. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 432 (1855) ("[S]ince the decree, this right has been modified by [Congress], so that . . . it is quite plain the decree of the court can not be enforced"); *Harvey v. Johanns*, 462 F. Supp. 2d 69, 71–72 (D. Me. 2006), *aff'd*, 494 F.3d 237 (1st Cir. 2007); *cf. Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 656 (1st Cir. 1997); *e.g., Mohamed v. Uber Technologies, et al*, 115 F. Supp. 3d 1024, 1029 (N.D. Cal. 2015) ("a serious legal issue or 'substantial case' is 'one that raises genuine matters of first impression within the Ninth Circuit.'") (citations omitted); *Gray v. Golden Gate Nat'l Rec. Area*, No. C 08-00722 2011 U.S. Dist. LEXIS 149232, at *5 (N.D. Cal. Dec. 29, 2011) (finding matter of "first impression" to be a "serious legal question"). Because the district court's order would require substantial changes to the existing operations of multiple federal agencies based on a 1997 settlement agreement that never anticipated the existing statutory scheme, there are serious legal questions raised by the Order that should be considered by this Court before the district court's order is implemented.

Accordingly, the first factor of the standard supports the grant of a stay.

III. Absent a Stay, the Order Will Cause Irreparable Harm by Impairing the Effective Enforcement and Efficient Administration of the Immigration Laws.

Defendants also satisfy the second, or “irreparable harm,” prong of the *Hilton* test. *See Golden Gate*, 512 F.3d at 1115. Complying with the Order requires the Government and Plaintiffs’ counsel to “forthwith comply with Paragraph 24A of the *Flores* Agreement.” Ex. A, at 8. In doing so, the Order changes the status quo and irreparably harms the Government in three ways.

First, the Order interferes with the comprehensive statutory framework of the TVPRA, and with corresponding policies and procedures governing HHS’s care and custody of UACs. Given the presumptive constitutional validity of an act of Congress, enjoining implementation of a statute as written irreparably injures the government and itself constitutes sufficient grounds for a stay. *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1306 (1993) (O’Connor, J., in chambers) (staying district court injunction interfering with the federal government’s execution of immigration statute, noting that injunction was “an improper intrusion by a federal court into the workings of a coordinate branch of the Government”); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of

irreparable injury.”); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people ... is enjoined.”); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers). Because the district court order essentially rewrites the TVPRA to require the government to implement new policies, standards and processes to accord UACs bond hearings in immigration court, it causes the government irreparable harm.

Second, the Order creates uncertainty over the contours of these newly-mandated bond hearings that will be burden-intensive for the government to resolve, such as how requests for such bond hearings can be submitted through HHS to the immigration courts, who represents the Government in such bond hearings, what the appropriate standard of review would be, and how HHS can incorporate the results of any such hearing into its reunification decisions under the TVPRA.⁷ Ex. C, Decl. of James De La Cruz, ¶¶ 10–14, ¶¶ 17, 18. Further, the Order significantly impacts HHS’s operational resources, given the number of UACs potentially impacted by the Order and especially given the fact that UACs could essentially receive two administrative hearings - one before an immigration judge to determine danger to community, and another, potentially, to review any reunification denial based upon

⁷ Further, DHS believes it lacks any statutory or regulatory authority to represent HHS’s interests at any such hearing.

the suitability of a potential sponsor to act as custodian upon release of the UACs. *Id.* ¶¶ 2–5, 17, 19, 21.

Third, the Order improperly burdens immigration judges with responsibilities that are not authorized under any statute or regulation, and raises fundamental questions about the authority of EOIR over UACs in HHS custody. *E.g.*, *Matter of A-W-*, 25 I. & N. Dec. 45, 46 (BIA 2009) (“Immigration judges only have the authority to consider matters that are delegated to them by the Attorney General and the Immigration and Nationality Act.”) (citing 8 C.F.R. § 1003.10(b) (2009)). *Cf.* *Heckler v. Lopez*, 463 U.S. 1328, 1336–37 (Rehnquist, Circuit Justice 1983) (granting a stay of a class-wide preliminary injunction where implementation of the district court’s order would “significantly interfere with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established.”); Ex. D, Decl. of Print Maggard ¶¶ 5–6. The Order appears to require immigration judges to hold what are likely to be complex hearings for potentially thousands of individuals a year, weighing further on their already strained dockets. Maggard Decl. ¶¶ 12–15. At the same time, it is unclear how—or even whether—the results of any such hearings can effectively be incorporated into HHS’s reunification decisions under the TVPRA. Thus, these hearings may, at best, have limited impact on any release decisions for UACs. As such, the harm to the government in conducting such hearings would far outweigh any harm to Plaintiffs.

In short, the Order will cause significant immediate harm to the government by undermining and impeding Defendants’ efforts to oversee the care and custody of UACs in accordance with the TVPRA, and to enforce federal immigration laws and efficiently adjudicate cases in immigration court. The Order places a significant burden on the Government, requiring Defendants to expend considerable time, resources, and personnel to implement new standards and procedures that not only would potentially impact HHS’s ability to conduct its duties under the TVPRA and tax the already limited resources of the immigration courts, but may very well be reversed on appeal. Courts routinely find that such burdens satisfy the irreparable harm prong of the stay analysis, and the Court should do so here. *Cf. Schweiker*, 452 U.S. at 130 (1981) (“The cost of providing Administrative Law Judge hearings to dissatisfied claimants will be substantial even if a small percentage of claimants seek such appeals. Indeed, Administrative Law Judges are already overloaded with cases arising under other statutory provisions in which Congress has provided for Administrative Law Judge hearings.”). *See, e.g., Gray*, 2011 U.S. Dist. LEXIS 149232, at *6-8 (finding irreparable harm where “substantial time and resources” are expended in response to an order that may be reversed on appeal); *Pokorny v. Quixtar*, No. 07-00201, 2008 U.S. Dist. LEXIS 91951, at *6 (N.D. Cal. April 17, 2008) (finding risk that “Respondents could spend substantial time and resources”

complying with an order “only to have the appellate court reverse the Order” to satisfy the irreparable harm prong).

IV. The Balance of Hardships and the Public Interest Favor the Government.

The balance of hardships also tips sharply in the Government’s favor. See *Alliance for the Wild Rockies*, 632 F.3d at 1135. While it is apparent that the Government will suffer irreparable harm if it is required to comply with the Order before the Ninth Circuit has acted on the appeal, Plaintiffs would suffer no comparable harm if the Court stays proceedings pending resolution of the appeal.

While Plaintiffs may possess limited liberty interests, they have not demonstrated such interest would actually be furthered by operation of the district court’s order. Given the clear statutory language prohibiting HHS from releasing a UAC on his or her own recognizance, 6 U.S.C. § 279(b)(2)(B), and from releasing a UAC to a potential custodian unless HHS determines that the custodian is capable of caring for the UAC’s physical and mental well-being, 8 U.S.C. § 1232(c)(3)(A), a bond hearing cannot materially alter the terms of a UAC’s custody because an immigration judge has no authority to override HHS’s express statutory obligations and order HHS to release a UAC under conditions that do not comply with 8 U.S.C. § 1232(c)(3)(A). See 8 C.F.R. § 1003.10(b) (2009)).

Accordingly, because, by enjoining the government from enforcing congressional directives, the Order encroaches on the discretion Congress granted

to immigration officials while providing little benefit to UACs, the balance of harms tips sharply for the government.

V. *The Public Interest Favors a Stay Pending Appeal.*

Finally, because the “public interest” favors a stay pending appeal, Defendants also satisfy the last prong of the *Hilton* analysis, justifying a stay. As explained in *Golden Gate*, the Court’s “consideration of the public interest is constrained in this case, for the responsible public officials . . . have already considered that interest” and made evident their conclusion regarding where the public interest lies in the legislation they enacted. *Golden Gate*, 512 F.3d at 1126-27 (“The public interest may be declared in the form of a statute”) (internal quotation marks omitted); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 327 (1982) (observing that the “public interest” is “reflected in an Act of Congress”). In enacting the TVPRA’s “intricate web of statutory provisions,” *D.B.*, 826 F.3d at 738. Congress essentially declared that the public had a compelling interest consolidating authority over the care and custody of UACs in HHS.

Moreover, because the government is a party to this case, its interest is presumed to be the “public’s interest” in this motion. As the Supreme Court has stated, “harm to the opposing party” and “the public interest” “merge when the Government is the opposing party,” because harm to the government is harm to the public interest. *See Nken*, 556 U.S. at 420. For that reason, the Court “should pay

particular regard for the public consequences” in considering whether to stay the district court’s use of “the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24. There can be no dispute that the public’s interest is substantial, where the Order requires the government to expend significant resources to immediately develop and implement new procedures, guidelines and instructions. The Order unquestionably diverts the agencies’ time, resources, and personnel away from the reunification process provided in the TVPRA, and away from the already-burdened operations of the immigration courts thus interfering with pressing immigration adjudication and enforcement priorities. Accordingly, a stay is warranted under these circumstances.⁸

CONCLUSION

For the foregoing reasons, the Court should grant a stay pending appeal of the Order entered on January 20, 2017.

//

⁸ Even assuming *arguendo* that, after analyzing the factors under *Hilton v. Braunskill*, 481 U.S. 770, this Court does not find a stay is warranted here, the Court should nevertheless issue a temporary stay to maintain the status quo existing prior to the injunction. Such stays are appropriate when an injunction alters the status quo in a way that “itself is causing one of the parties irreparable injury.” *Golden Gate*, 512 F.3d at 1117. Here, a stay would “simply suspend[] judicial alteration of the status quo” while this appeal is resolved, preventing irreparable harm to the public interest and the effective administration and enforcement of duly enacted laws of Congress. *See Nken*, 556 U.S. at 429.

Dated: February 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2017, I electronically filed the foregoing 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 further certify that on February 17, 2017, I caused a copy of this emergency stay motion to be served on the following counsel via electronic mail:

Carlos Holguín (Cal. Bar No. 90754) Peter A. Schey (Cal. Bar No. 58232) CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW 256 South Occidental Boulevard Los Angeles, CA 90057 Telephone: (213) 388-8693 Email: crholguin@centerforhumanrights.org pschey@centerforhumanrights.org	Holly S. Cooper Director, Immigration Law Clinic University of California Davis School of Law One Shields Ave. TB 30 Davis, CA 95616 Telephone: (530) 754-4833 Email: hscooper@ucdavis.edu
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/s/ Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGR_x)** Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.*** Page **1 of 8**

Present: The Honorable **DOLLY M. GEE, UNITED STATES DISTRICT JUDGE**

KANE TIEN

Deputy Clerk

NOT REPORTED

Court Reporter

Attorneys Present for Plaintiff(s)
None Present

Attorneys Present for Defendant(s)
None Present

**Proceedings: IN CHAMBERS - ORDER RE PLAINTIFFS' MOTION TO ENFORCE
[239]**

**I.
INTRODUCTION**

On August 12, 2016, Plaintiffs Jenny L. Flores and other class members filed a motion to enforce the parties' 19-year-old consent decree¹ ("the *Flores* Agreement") against Defendants Loretta Lynch and the U.S. Department of Homeland Security ("DHS") and its subordinate entities, U.S. Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP"). ("Mot.") [Doc. # 239.] Plaintiffs contend that the *Flores* Agreement "guarantee[s] children whom the Government refuses to release the right to a bond redetermination hearing . . . as a procedural check against wrongful detention." Mot at 1.

After having duly considered the parties' written submissions and oral argument, the Court **GRANTS** Plaintiffs' motion to enforce the *Flores* Agreement.

**II.
FACTUAL BACKGROUND**

A. Paragraph 24A of the *Flores* Agreement

The *Flores* Agreement arose out of a settlement between class members—accompanied and unaccompanied immigrant minors detained by federal authorities at the United States' southern border—and Defendants in an action originally filed on July 11, 1985. *See generally* July 24, 2015 Order at 1-2 [Doc. # 177]; *see also Flores v. Lynch*, 828 F.3d 898, 901-904 (9th

¹ *See* Plaintiffs' First Set of Exhibits in Support of Motion to Enforce Settlement, Exh. 1 ("*Flores* Agreement"). [Doc. # 101.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGR_x)** Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.*** Page **2 of 8**

Cir. 2016) (providing history of the *Flores* litigation and affirming this Court’s finding that the *Flores* Agreement applies to accompanied and unaccompanied minors).

Paragraph 24A of the *Flores* Agreement states: “A minor in deportation proceedings² shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.”³ *Flores* Agreement ¶ 24A.

Paragraph 24A of the *Flores* Agreement appears to be consistent with the Immigration and Nationality Act. Section 236 of the INA gives the Attorney General authority to exercise discretion to release a detained alien on bond. 8 U.S.C. § 1226(a)-(b). This authority has been expressly delegated to immigration judges. See 8 C.F.R. §§ 1003.19; 1236.1(d). Thus, immigration judges may “exercise the authority in 236 of the [INA] . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released[.]” 8 C.F.R. § 1236.1(d). Among other requirements, an alien in a custody determination must establish that he or she does not present a danger to persons or property and is not a flight risk. See, e.g., *Matter of Guerra*, 24 I & N Dec. 37, 38 (BIA 2006).

B. Post-*Flores* Agreement Statutes

According to Defendants, Paragraph 24A no longer applies to unaccompanied minors because it has been superseded by two federal statutes enacted after the 1997 *Flores* Agreement:

² According to Plaintiffs, administrative proceedings to determine a non-citizen’s right to remain in the United States have generally been re-designated as “removal,” rather than “deportation” proceedings. Mot. at 2 n.3 (citing Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div C, § 309(a), 110 Stat. 3009 (1996)). Defendants do not challenge this characterization. The Court will therefore treat “deportation proceedings” as written in the *Flores* Agreement as synonymous with “removal proceedings.”

³ Generally, “bond redetermination hearings” refer to an immigration judge’s review of any bond set by DHS or ICE shortly after it detains an undocumented immigrant. See 8 C.F.R. §§ 1003.19, 1236.1. The parties appear to use the terms “bond hearing” and “bond redetermination hearing” interchangeably, likely in part because Plaintiffs contend most affected class members never received a bond hearing to begin with. See Oral Tr. at 9/16/16 (Defense counsel stating that the Department of Health and Human Services (“HHS”) generally does not issue bonds to unaccompanied minors) [Doc. # 259]. Defendants use only the term “bond hearing” throughout their opposition brief. See, e.g., Opp. at 5 (“The [Flores] Agreement provides that for minors in immigration proceedings, a bond hearing should be provided in all cases unless waived by the minor.”). While there is at least one example in the record of an unaccompanied minor receiving a \$20,000 bond upon detention, see Declaration of Megan Stuart (“Stuart Decl.”) ¶ 17 [Doc. # 239-2], the Court will use the terms “bond hearing” and “bond redetermination hearing” interchangeably.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGR_x)**Date **January 20, 2017**Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.***Page **3 of 8**

the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008.

Under the Homeland Security Act, Congress transferred functions relating to the care and placement of unaccompanied children from the INS⁴ to the Director of Office of Refugee Resettlement (“ORR”) of the Department of Health and Human Services (“HHS”). 6 U.S.C. § 679(a). This includes functions like “coordinating and implementing the care and placement of unaccompanied alien children,” making placement determinations, and overseeing the facilities where certain unaccompanied children may reside. *Id.* § 679(b)(1). When it comes to making placement determinations, however, the Homeland Security Act requires ORR to coordinate efforts with other government entities (i.e., Bureau of Border Security and Bureau of Citizenship and Immigration Services). *Id.* § 679(b)(2). It also mandates that ORR “shall not release [unaccompanied alien] children upon their own recognizance.” *Id.*

Like the Homeland Security Act, the TVPRA creates rules for how the government should handle unaccompanied alien children. For instance, under the TVPRA, “the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services,” consistent with the Homeland Security Act. *See* 8 U.S.C. § 1232(b)(1) (citing 6 U.S.C. § 279). The TVPRA requires HHS to promptly place unaccompanied children in the “least restrictive setting that is in the best interest of the child,” and consider “danger to self, danger to the community, and risk of flight.” *Id.* § 1232(c)(2)(A). Moreover, the TVPRA states children shall not be placed in secure facilities “absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” *Id.*

C. Class Plaintiffs

Plaintiffs submit declarations from class members or their attorneys illustrating how unaccompanied children have been denied bond hearings even though Defendants have commenced removal proceedings against them. For example, Hector Estiven Boteo Fajardo entered the United States when he was 15 or 16 years old and was arrested in San Ysidro, California. Declaration of Hector Estiven Boteo Fajardo (“Boteo Decl.”) ¶¶ 9-10 [Doc. # 239-3]; Declaration of Helen Lawrence (“Lawrence Decl.”) ¶ 3, 23 [Doc. # 253.] Originally from Guatemala, his past experiences include being kidnapped by a coyote, suffering physical abuse

⁴ With passage of the Homeland Security Act, Congress abolished the INS and formed the Department of Homeland Security and the Immigration and Customs Enforcement (“ICE”), which, among other governmental entities, assumed the INS’s former immigration functions. 6 U.S.C. §§ 111, 251, 291.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGRx)** Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.*** Page **4 of 8**

from his extended family, and being exposed to gang violence and threats. Boteo Decl. ¶¶ 2-8. Boteo has a mother residing in Los Angeles. Lawrence Decl. ¶ 6. Yet, he is currently in a secure juvenile detention facility in Yolo County, California that is not licensed to care for dependent children. *Id.* ¶ 3; Mot., Ex. 15 at 4 (May 26, 2016 letter from Plaintiffs to Defendants) [Doc. # 239-3]. The ORR has not provided Boteo's attorney with an explanation for his ongoing detainment, which has now exceeded 13 months. Lawrence Decl. ¶¶ 3, 8-9. To date, as far as the Court is aware, Boteo has not been provided with a bond hearing. *Id.* ¶ 23; Ex. 15 at 3.

According to class counsel, there are roughly 200 or 300 unaccompanied children currently detained by HHS/ORR in secure facilities nationwide. *See* Oral Tr. at 9/16/16.

II. LEGAL STANDARD

The Court incorporates the legal standard that it articulated in its July 24, 2015 Order and need not repeat it here. [Doc. # 177.]

III. DISCUSSION

A. Savings Clause

The Homeland Security Act contains the following savings clause:

Savings provisions. Subsections (a), (b), and (c) of section 1512 [6 USCS § 552] shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this Act to the Department of Homeland Security.

6 U.S.C. § 279(f)(2) (brackets in original). Section 1512 in turn states:

(a) Completed administrative actions.

(1) Completed administrative actions of an agency shall not be affected by the enactment of this Act or the transfer of such agency to the Department, but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGRx)** Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.*** Page **5 of 8**

(2) For purposes of paragraph (1), the term “completed administrative action” includes orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges.

6 U.S.C. § 552(a).

Plaintiffs contend that these savings provisions, which the TVPRA incorporated, preserve Paragraph 24A of the *Flores* Agreement. Mot. at 11; 8 U.S.C. 1232(b)(1) (setting out standards for the care and custody of unaccompanied children “[c]onsistent with section 462 of the Homeland Security Act of 2002 (6 U.S.C. § 279)”). The Court agrees. The savings provisions expressly preserve the effect of existing “completed administration actions.” The *Flores* Agreement falls under this category—it is an agreement or contract. See 6 U.S.C. § 552(a)(2). Indeed, Defendants “do not dispute that the savings clause maintained the [*Flores*] Agreement in effect as a consent decree (for example, in creating a hierarchy for release to certain sponsors).” Opp. at 15 n.11.

The next question then becomes whether Congress amended, modified, superseded, terminated, set aside, or revoked Paragraph 24A of the *Flores* Agreement by operation of law. See 6 U.S.C. § 552(a)(1). As discussed below, the Court finds that it did not.

B. Plain Language of Homeland Security Act and TVPRA

Defendants argue that the savings clause “applies only to the extent it was not superseded or in conflict with subsequent laws” and “should not be viewed as rigidly freezing in place provisions aimed at the now defunct INS, or as creating free-standing authority for actions Congress did not authorize in either [the Homeland Security Act or the TVPRA].” Opp. at 15 n.11. In essence, Defendants contend that because the TVPRA created an entirely new immigration framework for unaccompanied children—by, among other things, giving HHS the authority to evaluate custodial adults before releasing minors to them—it superseded Paragraph 24A, such that unaccompanied children in HHS/ORR custody need not be provided with bonding hearings. See *id.* (describing the “different, child-welfare related function” served by HHS that is “not a part of the immigration enforcement scheme”).

The problem with Defendants’ argument is that the TVPRA (as well as the Homeland Security Act) is silent on the subject of bond hearings or whether the safety and placement provisions replace bond hearing requirements. This silence is in stark contrast to federal immigration laws and regulations, which explicitly reference bond hearings. See 8 USC § 1226(a)(2) (immigrant detainee may be released on “bond of at least \$1,500 with security

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGRx)**

Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.***

Page **6 of 8**

approved by, and containing conditions prescribed by, the Attorney General”); 8 C.F.R. 1003.19 (describing applications for an “initial bond redetermination” and “for the exercise of authority to review bond determinations”); 8 C.F.R. 1236.1(d)(1) (“After an initial custody determination by the district director, including the setting of a bond, the respondent may . . . request amelioration of the conditions under which he or she may be released.”). The Court will not presume Congress intended to silently abrogate the *Flores* Agreement’s bond hearing provision in the absence of actual or express language relating to bonds. *See Redmond-Issaquah R.R. Pres. Ass’n v. Surface Transp. Bd.*, 223 F.3d 1057, 1062 (9th Cir. 2000) (“Under established canons of statutory construction, ‘it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.’”) (quoting *Finley v. United States*, 490 U.S. 545, 554 (1989)); *In re Mark Anthony Const., Inc.*, 886 F.2d 1101, 1107 (9th Cir. 1989) (stating that the rule articulated in *Finley* which “bars a court from construing a statute to have abrogated the common law, or to have established a new rule of law, without clear evidence in favor of such a construction . . . is firmly and sensibly entrenched in federal jurisprudence”); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (“It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.”) (internal quotation marks and citation omitted).

To be sure, the TVPRA addresses the safety and secure placement of unaccompanied children. *See* 8 U.S.C. § 1232(c)(2). In particular, Defendants hone in on the TVPRA provision requiring HHS to evaluate a proposed custodian’s ability to provide for the child’s physical and mental well-being before placing an unaccompanied child with that person or entity. *Id.* § 1232(c)(3). But identifying appropriate custodians and facilities for an unaccompanied child is not the same as answering the threshold question of whether the child should be detained in the first place—that is for an immigration judge at a bond hearing to decide. *See* 8 U.S.C. § 1226; 8 C.F.R. §§ 1003.19; 1236.1(d). Assuming an immigration judge reduces a child’s bond, or decides he or she presents no flight risk or danger such that he needs to remain in HHS/ORR custody, HHS can still exercise its coordination and placement duties under the TVPRA.⁵ The Court sees no conflict between the TVPRA’s requirements and Paragraph 24A of the *Flores*

⁵ Defendants argue that the TVPRA’s provisions involving review of potential custodians are “inconsistent with the scheme proposed by Plaintiffs in which an immigration judge could order [an unaccompanied alien child] released even where HHS has determined that no suitable custodian is available to take custody of the [child].” Opp. at 16. Not so. If the initial proposed custodian is unfit to care for the unaccompanied child under the TVPRA, Defendants should follow Paragraph 14 of the *Flores* Agreement, which outlines an order of preference for the minor’s release, in order to effectuate the least restrictive form of detention. *Flores* Agreement ¶ 14 (order of preference begins with the parent, followed by a legal guardian, an adult relative (brother, sister, aunt, uncle, grandparent), an adult individual or entity designated by the parent or legal guardian, a licensed program willing to accept legal custody, and ending with an adult individual or entity seeking custody).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 85-4544 DMG (AGRx)** Date **January 20, 2017**

Title ***Jenny L. Flores, et al. v. Loretta E. Lynch, et al.*** Page **7 of 8**

Agreement. *Cf. Radzanower*, 426 U.S. at 154 (recognizing repeal by implication occurs when the legislature’s intent is “clear and manifest” and where either “provisions in the two acts are in irreconcilable conflict” or where “the later act covers the whole subject of the earlier one and is clearly intended as a substitute”). What is more, nothing in the text of the TVPRA suggests it is intended to cover the whole immigration scheme for unaccompanied minors. In fact, the TVPRA specifically states that the care and custody of unaccompanied children must be consistent with the Homeland Security Act. *See supra*, section III.A.

In short, the bond hearing provision of the *Flores* Agreement was not superseded by operation of law because both the TVPRA and the Homeland Security Act are silent on the subject of bond hearings. Moreover, the *Flores* Agreement remains consistent with federal immigration laws requiring bond hearings for immigrant detainees, and poses no irreconcilable conflict with the TVPRA’s safety and placement provisions.

C. Canon of Constitutional Avoidance

Under the canon of constitutional avoidance, if it is “fairly possible” for a court to interpret a statute in a way that avoids raising serious constitutional problems, it must do. *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (citing *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)). “It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

Here, Defendants ask the Court to construe the TVPRA in a way that could run afoul of the Constitution. That is, Defendants want this Court to construe the TVPRA in a way that could result in the indefinite detention of unaccompanied children without the due process protection offered to adult detainees through a bond hearing. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1081-84 (9th Cir. 2015) (adults in immigration custody may not be subjected to prolonged detention (more than six months) without a bond hearing), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016). Indeed, as Boteo’s case illustrates, there is evidence that minors have been languishing in secured, unlicensed detention facilities for over a year without a bond hearing and with no requirement that ORR/HHS justify the detainment. *Cf. Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011) (due process requires the government prove by clear and convincing evidence in a bond hearing that a detainee presents a flight risk or danger to the community). Boteo is looking forward to his 18th birthday, but not so that he can enjoy the newfound freedoms that traditionally come with casting off the shackles of adolescence. Rather,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 85-4544 DMG (AGRx) Date January 20, 2017

Title Jenny L. Flores, et al. v. Loretta E. Lynch, et al. Page 8 of 8

for him, entering adulthood means he will be eligible for a bond hearing, a process afforded only to adults under Defendants' proposed construction. See Lawrence Decl. ¶ 23; see also Declaration of Bryan Ortiz Vela ¶¶ 3, 17, 19 (spending two or three months in a secure ORR detention facility without a bond hearing but transferred to ICE custody on his 18th birthday and subsequently released on bond after a hearing before an immigration judge).

Given this anomalous result, the Court will not construe the TVPRA in the way that Defendants suggest. An alternative construction exists that avoids the due process problems discussed above. See *supra*, sections III.A and III.B.

**IV.
CONCLUSION**

In light of the foregoing, the Court finds that Defendants are in breach of the *Flores* Agreement by denying unaccompanied immigrant children the right to a bond hearing. Plaintiffs' motion to enforce Paragraph 24A of the *Flores* Agreement is **GRANTED**. Defendant Office of Refugee Resettlement of the Department of Health and Human Services shall forthwith comply with Paragraph 24A of the *Flores* Agreement.

IT IS SO ORDERED.

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JENNY LISETTE FLORES, et al.,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General
of the United States; et al.,

Defendants.

Case No.: CV 85-4544-DMG (AGRx)

**ORDER DENYING *EX PARTE*
APPLICATION FOR A STAY
PENDING APPEAL
AUTHORIZATION [322]**

The Court has reviewed and considered the written submissions in support of and in opposition to Defendants' *ex parte* application for a stay pending appeal of the Court's January 20, 2017 Order re Plaintiffs' Motion to Enforce. [Doc. ## 318, 322, and 331.]

As Defendants point out, the Court must consider the following factors in evaluating their stay application:

- (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the requesting party] if preliminary relief is not granted, (3) a balance of hardships favoring [the requesting party], and (4) advancement of the public interest (in certain cases).

Natural Resources Defense Council, Inc. v. Winter, 502 F.3d 859, 862 (9th Cir. 2007) (italics omitted).

1 Having duly considered Defendants' stay application in light of the relevant
2 standard, the Court finds that Defendants have not met their burden of demonstrating
3 good cause for a stay. To the contrary, the Court's review of the circumstances
4 underlying its January 20, 2017 Order strongly militate against the imposition of a stay.

5 Accordingly, Defendants' *ex parte* application for a stay of the Court's January
6 20, 2017 Order pending appeal is DENIED.

7
8 DATED: February 3, 2017

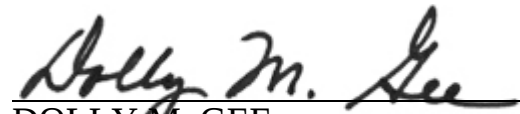

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

EXHIBIT C

2. In Calendar Year 2016, 54,471 unaccompanied alien children (“UAC”) were referred to ORR for care and custody.

3. In Calendar Year 2016, the average overall length of care for UAC was 42 days. 36,629 UAC were released within this average length of care.

4. Of those with lengths of care beyond 42 days, 13,115 UAC were released within three months; 3,638 more were released within 6 months; and 728 more were released within one year. 361 UAC were released after a length of care of 360 days or greater.

5. In Calendar Year 2016, 92 UAC were admitted to secure care, 373 were admitted to staff-secure care, and 273 were admitted to long-term foster care. The average length of care for UAC in secure care was 169 days; the average length of care for UAC in staff-secure care was 119 days; the average length of care for UAC long-term foster care was 456 days. The term “admitted” includes both UAC who were referred directly to secure, staff-secure, and long-term foster care during Calendar Year 2016; and UAC previously referred to ORR care and transferred to secure, staff-secure, and long-term foster care during Calendar Year 2016.

6. Paragraph 24A of the Flores Settlement Agreement states: “A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.”

7. Assuming ORR allowed for bond redetermination hearings for each child beyond the average length of stay in Calendar Year 2016, this would have meant 17,842 bond redetermination hearings before immigration judges for UAC.

8. ORR does not fund attorneys to appear at bond redetermination hearings, as the Department of Homeland Security does. Indeed, ORR generally works with only one attorney in

HHS Office of the General Counsel (“OGC”). The Division that advises ORR, the Children, Families, and Aging Division within OGC currently has 11 attorneys (including two supervisors) who advise all of ACF, all of the Administration for Community Living, and the Office of Faith-Based Partnerships within HHS.

9. ORR does not charge bond when children are released, and does not have any mechanism for charging or collecting bond.

10. Even if bond redetermination hearings were limited to children in secure custody under 8 U.S.C. § 1232(c)(2)(A), allowing for bond hearings before immigration judges would likely lead to confusion and uncertainty for both children and their sponsors.

11. ORR is prohibited from releasing children to sponsors unless it determines that the “proposed custodian is capable of providing for the child’s physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.” 8 U.S.C. § 1232(c)(3)(A).

12. In certain statutorily required cases, home studies “shall be conducted,” “before placing the child with an individual.” 8 U.S.C. § 1232(c)(3)(B).

13. Further, ORR is prohibited from releasing children on their own recognizance. 6 U.S.C. § 279(b)(2)(B).

14. In addition to statutory requirements, ORR has developed detailed policies for evaluating the suitability of a sponsor. These policies, part of the ORR Guide to Children Entering the United States Unaccompanied, are attached.

15. As one example, the policies at section 2.4.1 of the attached Guide explain the factors ORR considers in evaluating family members and other sponsors:

- The nature and extent of the sponsor's previous and current relationship with the child or youth and the unaccompanied child's family, if a relationship exists.
- The sponsor's motivation for wanting to sponsor the child or youth.
- The unaccompanied child's parent or legal guardian's perspective on the release to the identified potential sponsor (for cases in which the parent or legal guardian has designated a sponsor).
- The child or youth's views on the release and whether he or she wants to be released to the individual.
- The sponsor's understanding of the unaccompanied child's needs, as identified by ORR and the care provider.
- The sponsor's plan to provide adequate care, supervision, access to community resources, and housing.
- The sponsor's understanding of the importance of ensuring the unaccompanied child's presence at all future hearings or proceedings, including immigration court proceedings.
- The linguistic and cultural background of the child or youth and the sponsor, including cultural, social, and communal norms and practices for the care of children.
- The sponsor's strengths, resources, and mitigating factors in relation to any risks or special concerns of the child or sponsor, such as a criminal background, history of substance abuse, mental health issues, or domestic violence and child welfare concerns.
- The unaccompanied child's current functioning and strengths in relation to any risk factors or special concerns, such as children or youth who are victims of human trafficking; are a parent or are pregnant; have special needs, disabilities or medical or mental health issues; have a history of criminal, juvenile justice, or gang involvement; or a history of behavioral issues.

16. Section 2.5 of the attached Guide explains the criteria on background checks, while section 2.7 explains when ORR may deny release to a sponsor. As shown in the attached Guide, the majority of release denial criteria involve the sponsor – not the UAC.

17. Children and sponsors may not fully understand that even if they prevail in a bond redetermination hearing, this does not necessarily result in release, if ORR cannot locate a suitable sponsor. Further, sponsors may believe that they may seek a bond redetermination to

result in an ordered release, thereby overriding ORR's process and statutory mandate to determine the sponsor's suitability. Sponsors may believe that the bond redetermination hearing automatically starts a reunification process, or cease working on their reunification applications once a bond redetermination has been filed. Immigration judges also may not understand the limits of their authority, and believe they may assess the suitability of sponsors, thereby resulting in appeals to the Board of Immigration Appeals or further confusion on reunification and release. Immigration judges may begin to subpoena testimony or documents from ORR employees, thereby taking Federal field specialists or others away from their day-to-day tasks, and interfering with the care and custody of UAC.

18. If ICE attorneys continue to represent the Federal government in bond redetermination hearings, given the lack of HHS attorneys available for such function, this could result in ICE attorneys becoming involved in HHS custody. HHS does not as a routine matter share UAC case files with ICE attorneys involved in the removal of UAC. Private psychological or other information may need to become part of the administrative record placed before an immigration judge as part of explaining why the child has not been released, and public immigration judge decisions might infringe on the privacy of a UAC.

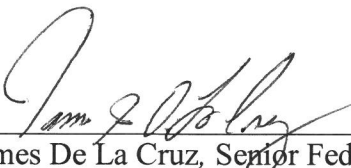
19. Finally, ORR recently modified its review and reconsideration policy for release denials. Under such policy (see section 2.7.8 of the attached Guide), a parent or legal guardian whose reunification application is denied can first seek review by the ORR Director, and then may seek an independent reconsideration before an independent reconsideration officer ("RO"), with or without a hearing. If a hearing is requested, the "RO will schedule a teleconference or video conference, per the requester's preference, at which time the requester (or the requester's representative) may explain the reasons why he or she believes the denial was erroneous. The

RO will consider the testimony and evidence presented at the hearing, in addition to the original denial letter and information referenced therein, to make a determination. The RO will notify the requester and of the decision in writing within 30 business days following the hearing.” Please refer to the attached section 2.7.8 for additional information.

20. Under ORR’s policy, “If the sole reason for denial of release is concern that the unaccompanied child is a danger to himself/herself or the community, the unaccompanied child may seek review and/or reconsideration of the denial as described [for parents/legal guardians].” “If the child expresses a desire to seek review and/or reconsideration, ORR shall appoint a child advocate to assist the unaccompanied child in seeking review and/or reconsideration. The unaccompanied child may seek such review and/or reconsideration at any time after denial of release while the child is in ORR custody.” See section 2.7.8 of the attached Guide.

21. ORR’s unified policy on reconsideration will allow ORR to offer a process for both sponsors and children, without the confusion potentially faced by children, sponsors, and immigration judges were a bifurcated bond hearing/sponsor suitability process to exist.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
February 3, 2017.



James De La Cruz, Senior Federal Field
Specialist Supervisor

EXHIBIT D

JENNY LISETTE FLORES; et al.,
Plaintiffs,

vs.

LORETTA LYNCH, U.S. Attorney
General, *et al.*,
Defendants.

) Case No. CV 85-4544
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) **DECLARATION OF THE**
) **HONORABLE PRINT MAGGARD**
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4. On January 20, 2017, the District Court granted Plaintiffs' August 12, 2016 motion to enforce Paragraph 24A of the Flores Settlement Agreement by requiring Immigration Judges to hold bond hearings for unaccompanied alien children in the care and custody of the Department of Health and Human Services ("HHS"). *Id.* I make this declaration in support of the Government's application to stay the District Court's Order pending the

1 Ninth Circuit Court of Appeals' resolution of the Government's appeal.

2 5. Normally, aliens detained under section 236(a) of the Immigration and Nationality
3 Act ("INA"), 8 U.S.C. § 1226(a), are assessed for bond eligibility at the outset by DHS. If
4 the respondent disagrees with the initial determination of the DHS, the respondent has the
5 right to seek a redetermination, including where no bond has been set. 8 C.F.R.
6 236.1(d)(1), 1236.1(d)(1). Custody redetermination hearings under § 236(a) are
7 adversarial and the government is represented by an attorney from the Department of
8 Homeland Security's ("DHS") Office of Immigration and Customs Enforcement ("ICE").
9 During that hearing an alien must establish to the satisfaction of the Immigration Judge
10 that he or she does not present a danger to others, a threat to national security, or a flight
11 risk. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). The Immigration Judge assesses
12 whether the alien presents a danger or a flight-risk by relying on evidence or testimony
13 presented by the alien and ICE.

14 6. Neither the statute nor the regulations provide any jurisdiction for Immigration
15 Judges to redetermine the conditions of custody set by HHS for a juvenile. In the context
16 of bond proceedings, the authority of an Immigration Judge to reconsider conditions of
17 custody is clearly limited to those imposed by ICE, not HHS. 8 C.F.R. 1003.19(a); 8
18 C.F.R. 1236.1(a)-(d).

19 7. The Court's Order appears to contemplate that Immigration Judges will follow the
20 same standards and procedures discussed in paragraph 5 above when conducting a
21 custody redetermination hearing for unaccompanied children in the care and custody of
22 HHS. However, EOIR will need to develop new procedures and issue new guidance and
23 instructions (and potentially provide training) to immigration court personnel and
24 Immigration Judges nationwide in order to implement the Order. For the reasons
25 discussed below this will be a particularly burdensome endeavor.

26 8. First, an expansive reading of the Order could require Immigration Judges to
27 conduct automatic bond hearings for all unaccompanied children in the care and custody
28 of HHS as soon as the minor is issued a notice to appear and transferred to HHS custody

1 and regardless of whether the unaccompanied child has filed a request for a custody
2 redetermination hearing. *See* Minute Order, ECF No. 318 at 2 (“A minor in deportation
3 proceedings shall be afforded a bond redetermination hearing before an immigration judge
4 in every case, unless the minor indicates on the Notice of Custody Determination form
5 that he or she refuses such a hearing.”). This will create a number of administrative
6 problems for EOIR.

7 9. As described above, an alien must file a request asking an Immigration Judge for a
8 custody redetermination hearing. 8 C.F.R. 1236.1(d)(1). There is no nationwide process in
9 place for EOIR to identify and provide automatic bond hearings to aliens who have not
10 filed a motion requesting a custody redetermination. If EOIR is required to provide
11 automatic bond hearings, then the agency will need to design a process to identify
12 children in the care and custody of HHS and schedule them for a custody redetermination
13 hearing before an Immigration Judge.

14 10. Moreover, EOIR currently has no way to identify unaccompanied children in HHS
15 custody until the notice to appear (the charging document that commences removal
16 proceedings against a respondent) is filed by DHS with the Immigration Court. ICE
17 currently has a policy of delaying the filing of notices to appear with the immigration
18 courts by up to 60 days after an unaccompanied child is apprehended in order to allow
19 HHS time to reunite the child with a family member or release the child to a suitable
20 sponsor. Therefore, EOIR (in coordination with HHS and DHS) may need to develop a
21 new system to identify unaccompanied children who are not yet in EOIR removal
22 proceedings in order to provide them with automatic bond hearings under the Order. ¹

23 11. Generally a bond hearing is held by the immigration court that has jurisdiction over
24 the location where the alien is detained by DHS, and often these hearings are conduct by
25 immigration courts that are physically located at or near the DHS detention center. *See* 8
26 C.F.R. 1003.19(c)(1). In order to conduct bond hearings for children who are in the care

27 ¹ The filing of a notice to appear is not a prerequisite to bond hearing jurisdiction. An
28 Immigration Judge may conduct a bond hearing for any alien who has formally requested such a
hearing and who is in DHS custody, regardless of whether DHS has filed the charging document
with the Immigration Court. *See Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).

1 and custody of HHS, EOIR will need to devise a new system to determine which
2 immigration courts are most appropriately situated to conduct bond hearings for children
3 located in HHS facilities.

4 12. In addition to these scheduling complications, it is not clear who will represent the
5 Government in bond hearings involving unaccompanied children. As discussed above,
6 bond hearings before Immigration Judges are adversarial and during those hearings the
7 Government is represented by an attorney from ICE. If the Government is not represented
8 (either by ICE or HHS) during these bond hearings, then Immigration Judges will not
9 have adequate information to properly make an assessment of “whether the child should
10 be detained in the first place.” Minute Order, ECF No. 318 at 6.

11 13. The hearings are likely to be complex, particularly in the cases of children held in
12 secure facilities, due to potential allegations of abuse and neglect. These could require
13 full evidentiary hearings on issues that Immigration Judges may not have experience in
14 resolving, including whether an Immigration Judge has the authority to order an
15 unaccompanied child released during a bond hearing when HHS has determined that the
16 child cannot be released because there is no suitable sponsor for the child, and whether the
17 child’s proposed sponsor or other family members are capable of providing the structure
18 and supervision necessary to ensure that the child does not pose a danger to the
19 community and appears for all immigration court hearings. Consequently, it may be
20 necessary to provide intensive training and guidance on these (and other) issues.

21 14. Finally, the sheer number of children in the care and custody of HHS who might
22 qualify for a bond hearing under an expansive reading of this Order would overwhelm the
23 nation’s immigration courts and could interfere with the timely scheduling and completion
24 of other cases. According to information obtained from HHS, in Calendar Year 2016,
25 there were 54,471 unaccompanied children referred to the Office of Refugee Resettlement
26 (ORR) for care and custody. If EOIR is required to conduct bond hearings for all of these
27 children it will nearly double the number of bond hearings that EOIR conducts each year.
28 *See* EOIR FY 2015 Statistics Yearbook (April 2016) *available at* <https://www.justice.gov/eoir/page/file/fysb15/download> (stating that EOIR conducted 59,178 bond hearings in FY

1 2015) and it would strain the agency's resources and require EOIR to reschedule and
2 delay other matters.

3
4 I declare under penalty of perjury of the laws of the California and the United States that
5 the foregoing is true and correct to the best of my knowledge and belief.

6 Executed this 7th day of February, 2017 in San Francisco, California.

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8 A handwritten signature in blue ink, appearing to read 'Print Maggard', written over a horizontal line.

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10 Print Maggard

11 Deputy Chief Immigration Judge
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CIRCUIT RULE 27-3 CERTIFICATE

(i) The contact information for the attorneys for the parties is as follows:

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(ii) Facts Showing the Existence and Nature of the Emergency

As set forth more fully below, on January 20, 2017, the district court granted the Plaintiffs-Appellees' motion to enforce Paragraph 24A of a 1997 settlement agreement reached in this case by providing unaccompanied minors ("UACs") in the care and custody of the U.S. Department of Health and Human Services' Office of Refugee Resettlement ("HHS" / "ORR") with a bond hearing in front of an immigration judge. *See* Exhibit A, Minute Order. As explained in more detail in this motion and the attached agency declarations, the district court's Order raises serious legal questions and, if not stayed immediately, will cause significant immediate harm to the government by infringing upon HHS's express statutory directive and implementing guidance, placing serious, statutorily unauthorized administrative burdens on the Executive Office of Immigration Review ("EOIR") and its immigration judges, and conflicting with lawful statutes, regulations, and Ninth Circuit and Board of Immigration Appeals ("BIA") precedent. Accordingly, because the government must act immediately to effectuate compliance with the district court's Order, Defendants bring this as an emergency – rather than urgent – motion under Circuit Rule 27-3.

Defendants respectfully request that the Court enter an immediate administrative stay of the district court's January 20, 2017 Order. Granting a stay

would maintain the status quo that prevailed prior to entry of the district court's Order while this Court considers Defendants' appeal.

(iii) Notification to Plaintiffs' Counsel

Counsel for Plaintiffs were notified of this emergency motion on February 6, 2017, by electronic mail, and were served with copies of this motion on February 17, 2017, by electronic mail.

(iv) District Court

In an *ex parte* application filed on January 25, 2017, Defendants requested a stay of the district court's January 20, 2017, Order, pending appeal authorization and the resolution of any such appeal filed. The district court denied the government's *ex parte* application for a stay pending appeal on February 3, 2017. See Exhibit B, Order on *Ex Parte* Application for Stay.

/s/ Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
Trial Attorney
United States Department of Justice