

No. 25-820

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, *et al.*,
Plaintiffs-Appellees,

v.

PAMELA BONDI, *et al.*,
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEFENDANTS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The district court erred by extending the 2022 U.S. Customs and Border Protection (“CBP”) Settlement Agreement applicable to the Rio Grande Valley (“RGV”) and El Paso U.S. Border Patrol Sectors (“Settlement”). 2-ER-179–241. Under its unambiguous terms, the Settlement should have terminated on January 29, 2025—two-and-one-half years from its Effective Date. In the Opening Brief, the government showed that the Settlement was not a consent decree subject to equitable modification under Federal Rule of Civil Procedure 60(b). Moreover, the government demonstrated that, even if the Settlement were a consent decree, the district court abused its discretion in extending the Settlement’s term. The district court erred in its interpretation of the Settlement, misapplied the substantial-compliance standard, did not consider all the factors required by the Supreme Court in this context, and did not suitably tailor the modification ordered to the alleged noncompliance that it found.

In the Answering Brief, Plaintiffs-Appellees (“Plaintiffs”) largely repeat the district court’s errors. As a back-up, Plaintiffs ask this Court in the first instance to weigh competing evidence and make extensive factual findings about custodial conditions and Settlement compliance. Answering Br. 38–43. This Court should decline Plaintiffs’ invitation and reverse the district court’s decision.

II. ARGUMENT

A. The district court erred by concluding that the Settlement is a consent decree that the court can modify under Rule 60(b).

For a settlement agreement to become a consent decree, (1) the parties must consent to that treatment; and (2) the court must take some affirmative step to transform the private agreement into an order or judgment. *See O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995) (per curiam). Neither action occurred here. Plaintiffs suggest that perhaps no affirmative action by the court is required, pointing to *Waetzig v. Halliburton Energy Servs., Inc.*, 604 U.S. 305 (2025). Answering Br. 27. In *Waetzig*, the Supreme Court held that a voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a) counts as a final proceeding for the purpose of Rule 60(b). 604 U.S. at 307, 319. The holding in *Waetzig* is distinguishable from the situation here because Rule 41(a) provides that “the plaintiff may dismiss an action *without a court order* by filing: (i) a notice of dismissal before the opposing party serves either an Answer or a motion for summary judgment.” Fed. R. Civ. P. 41(a)(1)(A)(i) (emphasis added). In contrast, here, Plaintiffs point to no rule automatically transforming a settlement agreement into a consent decree. Plaintiffs do not show how a consent decree could exist without a court’s decreeing something.

Plaintiffs do not demonstrate that the district court took an action necessary to make the Settlement a consent decree. *See Kokkonen v. Guardian Life Ins. Co. of*

Am., 511 U.S. 375, 381 (1994). The Supreme Court in *Kokkonen* said that a settlement agreement may become part of an order either through incorporation or a separate provision retaining jurisdiction when the district court would otherwise lose jurisdiction. *See* Opening Br. 22–25 (discussing *Kokkonen*). Plaintiffs do not dispute that the district court never incorporated the whole Settlement into an order.

Though Plaintiffs argue that the district court retained jurisdiction over the Settlement, Plaintiffs do not show that the district court retained jurisdiction “by separate provision” that, in context, had “the same effect” as incorporating the Settlement into an order. *Kokkonen*, 511 U.S. at 381–82. Plaintiffs at most make a case for the more modest proposition that the district court continues to have jurisdiction over the 1997 *Flores* Settlement Agreement (“FSA”) and factually interrelated matters. But that the Court relied on an interpretive agreement between the parties in the context of the larger FSA that has been treated as a consent decree does not mean that the interpretive agreement itself becomes a consent decree. Plaintiffs do not rebut the government’s contention that the district court never took an action that made clear it was treating the entire Settlement, including the termination provision, as its own court order or judgment.

Plaintiffs contend that *Kokkonen* is distinguishable from the situation here because the Settlement did not end all litigation about enforcement of the FSA and did not terminate subject matter jurisdiction. Answering Br. 28. That factual

difference, however, undermines Plaintiffs’ position. Because the underlying case is continuing, the district court here needed to be even clearer that it intended to assert jurisdiction over the Settlement as a court order, instead of merely as a factually related matter. *See* Opening Br. 22–25. Plaintiffs do not rebut the government’s observation that a court has jurisdiction to enforce settlement agreements while the litigation is pending before it even when the settlement agreements plainly are not court orders. *See id.* at 24. As a result, the district court’s jurisdiction to enforce the Settlement does not transform that agreement into a consent decree.

While Plaintiffs emphasize the relationship between the Settlement and the FSA, they do not meaningfully refute that the Settlement had independent value to resolve a particular dispute for a certain time in certain places, and does not need to be a consent decree to have accomplished that purpose. Opening Br. 28. Moreover, though the parties could have stipulated to amending the FSA, they did not do so. *Id.* at 29. Nothing about the factual relationship between the FSA and the Settlement establishes that the Settlement operates as its own consent decree.

Plaintiffs also lean heavily on the idea of “judicial oversight.” Answering Br. 23. But Plaintiffs cite several cases in which the courts were not deciding the issue here—when does a settlement agreement become a consent decree. *See id.* Rather, the courts in the cited cases were merely describing features of consent decrees while resolving another issue. Plaintiffs include a quotation from *United States v. Oregon*,

but in that case, “all parties” agreed on appeal that “the plan is most like a consent decree.” 913 F.2d 576, 580 (9th Cir. 1990). Plaintiffs cite *Lackey v. Stinnie*, in which the Supreme Court contrasted preliminary injunctions with consent decrees but said nothing about when a settlement agreement becomes a consent decree. 604 U.S. 192, 207 (2025). Plaintiffs also mention *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court decided whether the term “prevailing party” in fee-shifting statutes “includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.” *Id.* at 600. While deciding that issue, the Supreme Court observed that consent decrees involve “judicial approval and oversight.” *Id.* at 604 n.7. But the Court did not hold that judicial approval and oversight are *sufficient* to make an agreement into a consent decree. Indeed, the Supreme Court and this Court have held that judicial approval is *not* sufficient to make the terms of a settlement agreement part of a court order. *Kokkonen*, 511 U.S. at 381; *In re Valdez Fisheries Dev. Ass’n, Inc.*, 439 F.3d 545, 549 (9th Cir. 2006); *O’Connor*, 70 F.3d at 532.

Contrary to Plaintiffs’ argument, the district court’s appointment of the Juvenile Care Monitor (“JCM”) cuts against finding that the entire Settlement was a court order subject to modification by the court. *See* Opening Br. 30 (citing 2-ER-

149–58). Plaintiffs argue that the incorporation of the JCM provisions into an order shows that the parties consented to treatment of the entire Settlement as an order. Answering Br. 24–26. But Plaintiffs do not explain why the parties did not simply ask the district court to enter the entire Settlement as a judgment, if that is really what the parties intended. That the parties specifically asked the court to incorporate the JCM provisions into an order, but did not similarly ask the court to incorporate the rest of the Settlement, instead demonstrates the parties’ intent that most of the Settlement not be a court order.

Whether something is a court order should be clear. Attempting to show that the Settlement is an order, Plaintiffs stitch together terms from the FSA, the Settlement, the July 29, 2022 order approving the Settlement as a class action settlement, and the August 3, 2022 order appointing the JCM. Answering Br. 26. But, as shown above and in the Opening Brief, Plaintiffs’ analysis does not work. The district court erred in holding that the Settlement was a consent decree that could be modified under Rule 60(b). This Court should reverse.

B. Even if the Settlement were a consent decree, the district court abused its discretion in modifying the Settlement.

Should the Court determine it necessary to reach the issue, the Court should reverse the district court’s order extending the Settlement because the district court abused its discretion where the decision was based on a misinterpretation of the Settlement, a misunderstanding of the “substantial compliance” standard, and a

misapplication of the conditions required for modification. *Lab./Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1119 (9th Cir. 2009). And, as noted in the Opening Brief, the government doubts that Rule 60(b) can be used to *impose* a consent decree on an institutional defendant where Rule 60(b) instead addresses when a court may “*relieve* a party . . . from a final judgment.” Fed. R. Civ. P. 60(b)(5) (emphasis added).

1. The district court erred in finding that the Settlement required CBP to implement its monitoring protocols to the satisfaction of the JCM before the Settlement terminates.

In faulting CBP for insufficiently “implementing” its monitoring protocols to the satisfaction of the JCM, the district court read an additional requirement into the Settlement that does not exist. The district court therefore erred in extending the Settlement based on CBP’s alleged failure to comply with a nonexistent provision.

Nothing in the plain language of the Settlement requires the JCM’s approval of CBP’s monitoring protocols prior to termination. *See United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005) (“A consent decree, like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.”). By placing an obligation on CBP that does not exist in the Settlement, the district court erred in misinterpreting the Settlement provisions. *Id.* Specifically, the district court found that “the 2022 Settlement *explicitly* requires the JCM’s approval of CBP’s monitoring procedures prior to the termination of

monitoring by the JCM, and yet certain monitoring procedures are still being planned by CBP but have not been implemented.” 1-ER-11. Significantly, in their Answering Brief, Plaintiffs do not meaningfully dispute that the plain language of the Settlement does not require CBP to “implement” its monitoring protocols such that the JCM must issue an explicit approval as a condition precedent to termination of the Settlement. Answering Br. 34–35. Plaintiffs instead point to the Settlement’s requirement for an “effective transition of monitoring functions,” 2-ER-199 (Settlement § IX.12), as impliedly requiring the JCM’s approval of CBP’s implementation of monitoring protocols prior to termination. Answering Br. 35. In support of this contention, Plaintiffs cite to various recommendations in the JCM’s January 2025 report and preceding reports indicating a need for further monitoring as to some aspects of the Settlement. *Id.* at 34–35. But the JCM’s assessments cannot be substituted for the plain language of the Settlement.

Plaintiffs further contend that Defendants voluntarily agreed to “the requirement that the [JCM] approve CBP’s final monitoring protocols” and “to the appointment and selection of the independent and neutral [JCM].” Answering Br. 37. While Defendants acknowledge that the Settlement provides that the JCM would approve the monitoring protocols, Defendants *did not* agree that the JCM’s approval was required for termination of the Settlement. Rather, the Settlement merely states that it will terminate two-and-one half years after its effective date but is silent as to

the JCM's approval of monitoring protocols prior to termination. The district court thus read in a nonexistent condition precedent to the Settlement, which otherwise provides no explicit mechanism for extension. *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1043 (9th Cir. 2020) ("Courts will neither infer nor construe a condition precedent absent language plainly requiring such construction." (citation modified)); *see also Asarco*, 430 F.3d at 981 ("[M]odification of a consent decree invariably hinges on interpretation of the very terms of the decree.").

Though Plaintiffs frame the implementation and approval of monitoring protocols as a "fundamental purpose" of the Settlement, Plaintiffs do not cite sections of the Settlement itself to prove that assertion. Answering Br. 31–33. That makes sense because the Settlement arose out of a dispute about the meaning of Paragraphs 11 and 12 of the FSA, paragraphs that do not discuss monitoring. 2-ER-181–82; 2-SER-450–51. Paragraphs 28 through 30 of the FSA establish monitoring provisions for the FSA, but those paragraphs do not apply to the Settlement and were not at issue in its formulation. Indeed, those paragraphs would remain in force even after termination of the Settlement.

The district court thus erred in conditioning termination of the Settlement upon the JCM's approval of CBP's implementation of the monitoring provisions.

2. The district court erred by requiring perfect compliance with the Settlement.

Plaintiffs next aver that the district court “simply applied the standard in this Circuit for substantial compliance.” Answering Br. 38. To the contrary, the district court erred in its application of the “substantial compliance” standard by focusing on one non-essential provision of the Settlement—regarding the monitoring protocols—rather than assessing CBP’s general compliance with the Settlement overall. 1-ER-11; *see* 2-ER-199 (Settlement § IX.12); *see Lab./Cmt. Strategy Ctr.*, 564 F.3d at 1122 (“[T]he question is whether there was substantial compliance, a less precise standard that cannot be satisfied by reference to one particular figure Instead, we must determine, using a holistic view of all the available information, whether MTA’s compliance with the Decree overall was substantial, notwithstanding some minimal level of noncompliance.”). Plaintiffs compound this error by relying primarily on the discussions of substantial compliance in *Rouser v. White*, 825 F.3d 1076, 1080 (9th Cir. 2016), and *Jeff D. v. Otter*, 643 F.3d 278, 280–81 (9th Cir. 2011). In those cases, the defendants were seeking to terminate agreements early and had the burden to show substantial compliance, which is not the circumstance here. Rather, the most on-point case here is *Labor/Community Strategy Center*, where this Court noted the flexibility of the substantial-compliance standard and held that an agreement should not have been extended even though the defendant had failed to meet one of the decree’s “essential” and “core” requirements. 564 F.3d at 1121–22.

Rather than meaningfully disputing that the district court required Defendants to demonstrate perfect compliance based on one provision of the Settlement, Plaintiffs instead take issue with other portions of the Settlement not discussed by the district court. Plaintiffs contend that they demonstrated CBP did not substantially comply with various other obligations in the Settlement, including “(1) ensuring family unity and visitation; (2) providing clean, dry, and warm clothing; (3) providing a child-appropriate environment, including by developing a Caregiver program; and (4) providing children a list of free legal services and advising them of their right to make phone calls.” Answering Br. 38–43. The district court credited none of these claims in extending the Settlement. Moreover, as before the district court, most of Plaintiffs’ allegations of noncompliance either overstate the alleged noncompliance or rest on misinterpretations of the Settlement while ignoring CBP’s general compliance with a majority of the Settlement’s more than 100 different “independent obligations.” Notably, Plaintiffs do not dispute that CBP complied with numerous essential provisions outlined in Defendants’ opening brief, including:

- a. Transferring of juveniles to Juvenile Priority Facilities (§ VII.1.1)
- b. Ensuring safety and security of class members and maintaining adequate supply of items (§ VII.1.4, 1.6)
- c. Providing age-appropriate meals and snacks that meet class members’ caloric needs (§ VII.4)

- e. Maintaining an ambient temperature and stock of warm clothing and blankets (§ VII.5)
- f. Providing class members with sufficient space, a mat, and a blanket for sleeping (§ VII.6.)
- g. Providing showers and hygiene kits immediately upon arrival and at 48-hour intervals thereafter (§ VII.7).

Further, the parties agree that the Settlement’s enhanced medical support provisions are “essential” or “core” requirements, yet Plaintiffs vaguely point to “deficiencies with procedures regarding referring children to local health systems.” Answering Br. 42. However, Plaintiffs still do not (and cannot) allege that CBP failed to generally comply with this “essential” provision of the Settlement because, in fact, the JCM’s report showed CBP was generally complying with the enhanced medical support provisions and making continued improvements. *Id.*; see 2-ER-106–14, 187–90. And notably, the parties anticipated in the Settlement that at times CBP “may be able to only partially comply with certain provisions of the Agreement.” 2-ER-186. Thus, by the parties’ own agreement, minor instances of partial compliance cannot be the basis for a finding of substantial noncompliance. Plaintiffs did not show, and the district court erred in finding, that CBP failed to substantially comply with the Settlement.

In any event, CBP submitted evidence disputing many of Plaintiffs' allegations. *See* 2-ER-55–65; 2-ER-67–73; 2-ER-75–85. The district court declined to resolve the contested evidentiary issues, and this Court should not do so in the first instance.

In sum, by requiring CBP to comply with “each independent obligation” of the Settlement while disregarding CBP’s general and substantial compliance, including with the Settlement’s “essential” and “core” provisions, the district court erred in requiring “full” compliance, and thus abused its discretion. *Lab./Cmty. Strategy Ctr.*, 564 F.3d at 1122.

3. The district court erred in failing to apply all four factors to determine whether modification was warranted.

The district court was required to address all four conditions under *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992), before extending the Settlement’s obligations on the government. Instead, the district court only assessed two of the four required conditions when CBP contested all four. This was legal error amounting to abuse of discretion.

Plaintiffs contend that the *Rufo* standard can be appropriately stated as a “two-prong,” rather than a four-part, test. Answering Br. 45. But Plaintiffs do not contest that establishing an *unforeseen* change in circumstances and proving that the unforeseen change in circumstances makes compliance detrimental to the public interest are required under the *Rufo* standard. *See Rufo*, 502 U.S. at 385 (“Ordinarily,

however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.”); *Lab./Cnty. Strategy Ctr.*, 564 F.3d at 1120 (noting that the changed circumstance must make compliance with the consent decree “more onerous, unworkable, or detrimental to the public interest” (quoting *Asarco*, 430 F.3d at 979)). The district court did not engage with CBP’s arguments on these issues. This was an error.

4. The district court did not suitably tailor the modification based on the alleged noncompliance that it found.

Finally, even if modification were warranted, the district court abused its discretion in crafting the scope of the modification by extending the entire Settlement rather than targeting specific provisions of concern.

As explained *supra*, Section B.2., and in the Opening Brief, the Settlement—consisting of 21 pages of single-spaced text—contains over 100 different obligations. Plaintiffs identified to the district court, at best, potential noncompliance with a limited number of provisions of the Settlement. However, the district court only focused on one (the monitoring protocols) while also expressing concern about “potentially noncompliant conditions and amenities at CBP facilities.” *See* Answering Br. 38–43; 1-ER-11. The district court accordingly erred by issuing a sweeping ruling extending the entire Settlement, rather than focusing on the specific provisions of concern “tailored to resolve the problems created by the change in circumstances.” *Rufo*, 502 U.S. at 391.

Plaintiffs contend that the district court’s extension was suitably tailored because CBP’s monitoring protocols “deal with compliance with *all* terms of the settlement” and areas of noncompliance may affect compliance with the other requirements in the Settlement. Answering Br. 48. But if the monitoring protocols were the primary provision of concern, the district court should have issued a tailored ruling permitting the JCM to review implementation of the new monitoring protocols over a limited six-month period, as Defendants requested. Instead, the district court erred by providing much broader relief. This was an abuse of discretion and the Court should reverse the district court’s decision with instructions to narrowly tailor any modification of the Settlement specific to the monitoring protocols.

III. CONCLUSION

For all the foregoing reasons, this Court should reverse.

Dated: September 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 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 ACMS system on September 22, 2025.

I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

s/ Joshua C. McCroskey

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 25-820

The undersigned attorney or self-represented party states the following:

☐ I am unaware of any related cases currently pending in this court.

☐ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

☒ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

- *Bondi v. Flores*, No. 24-3656. This appeal arises out of the same case in the district court. However, the issues on appeal are distinct.
- *Bondi v. Flores*, No. 25-5443. This appeal arises out of the same case in the district court and challenges the district court's June 23, 2025 Order, which further extended the Juvenile Care Monitor's term.

Signature s/ Joshua C. McCroskey

Date: September 22, 2025

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 25-820

I am the attorney or self-represented party.

This brief contains 3,438 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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