

No. 25-820

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

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

**v.**

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

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**PLAINTIFFS-APPELLEES' ANSWERING BRIEF**

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ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA  
CASE NO. 2:85-CV-04544-DMG-AGRX

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CARLOS R. HOLGUÍN  
BARDIS VAKILI  
SARAH E. KAHN  
Center for Human Rights  
& Constitutional Law  
1505 E 17th St. Ste. 117  
Santa Ana, CA 92705  
Tel: (909) 274-9057

LEECIA WELCH  
Children's Rights  
2021 Fillmore Street  
San Francisco, CA 94115  
Tel: (415) 602-5202

*Attorneys for Plaintiffs-Appellees*

MISHAN WROE  
DIANE DE GRAMONT  
National Center for Youth Law  
1212 Broadway, Suite 600  
Oakland, California 94612  
Tel: (510) 835-8098

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## I. INTRODUCTION

The district court correctly extended the duration of a 2022 settlement agreement clarifying the obligations of U.S. Customs and Border Protection (“CBP”) under a 1997 consent decree, the *Flores* Settlement Agreement (“FSA”). The 2022 Settlement (“Settlement”) resolved a motion for a temporary restraining order that arose out of violations of the FSA causing deplorable conditions for migrant children in CBP custody in the El Paso and Rio Grande Valley Sectors. The 2022 Settlement clarifies CBP’s obligations in these sectors to comply with the FSA’s requirement to hold children at the border in “safe and sanitary” conditions with “special concern for their particular vulnerability as minors” and provides for a court-appointed monitor. The Settlement was intended to remain in place for 2.5 years.

As the 2022 Settlement’s termination date neared, children in the El Paso and Rio Grande Valley Sectors continued to report many of the same FSA violations that led to the original motion for a temporary restraining order and eventual Settlement. These violations included: being separated from their parents and siblings; wearing dirty and wet clothes; shivering at night from the cold; waiting in a cell with nothing to do for days or weeks on end; and lacking access to legal services and phone calls. Moreover, CBP had yet to fulfill its obligation under the 2022 Settlement to implement a robust internal monitoring system to

enable the agency to self-monitor compliance with the *Flores* requirements. Given CBP's lack of substantial compliance on multiple core aspects of the 2022 Settlement and the FSA, Plaintiffs moved to modify the termination date and extend the term of the Settlement.

The district court properly determined that it retained jurisdiction to enforce the FSA and the 2022 Settlement, that it could modify the 2022 Settlement under Federal Rule of Civil Procedure 60(b), and that extending the Settlement by 18 months was a suitably tailored response to CBP's failure to substantially comply. The district court's ruling on substantial compliance relied on CBP's unfulfilled commitment to develop internal monitoring protocols and did not reach Plaintiffs' arguments about detention conditions. The court noted, however, that Plaintiffs had submitted substantial evidence that conditions in CBP facilities violated the FSA. Contrary to Defendants' assertions, CBP's compliance with the majority of the 2022 Settlement was very much in dispute.

Plaintiffs respectfully request this Court affirm the district court's holding that CBP failed to substantially comply with the 2022 Settlement and that an extension of 18 months was a suitably tailored response to this significant change in factual circumstances. In the alternative, to the extent this Court believes the district court should conduct additional fact finding, this Court should remand to

allow the district court to address Plaintiffs’ evidence of noncompliant conditions at CBP facilities.

## II. JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331 and paragraph 35 of the *Flores* Settlement Agreement approved on January 28, 1997. 2-SER-463 (FSA ¶ 35).<sup>1</sup> Plaintiffs agree with Defendants’ statement regarding the date of the district court’s orders and the timeliness of the notice of appeal.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court order modified or continued an injunction.

## III. QUESTIONS PRESENTED

1. Was the 2022 Settlement, which clarified the Parties’ understanding of the meaning of Paragraphs 11 and 12.A of the *Flores* Settlement Agreement, subject to modification under Federal Rule of Civil Procedure 60(b), where

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<sup>1</sup> As Defendants acknowledge, they did not argue below that the district court lacked jurisdiction to enforce the *Flores* Settlement under 8 U.S.C. § 1252(f)(1). Appellants’ Brief (“Appellants’ Br.”) at 21 n.3 This argument is waived because Defendants did not raise it below or brief it before this Court. *See Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). Additionally, 8 U.S.C. § 1252(f)(1) does not affect the court’s subject-matter jurisdiction. *See Biden v. Texas*, 597 U.S. 785, 798 (2022) (“[S]ection 1252(f)(1) withdraws a district court’s ‘jurisdiction or authority’ to grant a particular form of relief. It does not deprive the lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA.”).

the 2022 Settlement was subject to continued judicial oversight, and the district court retained jurisdiction over the *Flores* Settlement Agreement?

2. Did the district court correctly hold that CBP failed to substantially comply with the 2022 Settlement, where CBP had not fulfilled its obligation to create and implement internal monitoring protocols?
3. Was the extension of the 2022 Settlement a suitably tailored modification in light of the significant changed circumstance of CBP failing to substantially comply with the Settlement?

#### **IV. STATEMENT OF THE CASE**

##### **A. The district court granted multiple motions to enforce the *Flores* Settlement Agreement against Defendant CBP because it found CBP facilities to be unsafe and unsanitary.**

For decades, the district court has overseen the government’s compliance with the 1997 *Flores* Settlement Agreement, an agreement Defendants entered with a class of children in federal immigration custody. *See* 2-SER-463 (FSA ¶ 35) (“Until such dismissal, the court shall retain jurisdiction over this action.”). The consent decree requires the federal government to hold migrant children in their custody “in facilities that are safe and sanitary.” 2-SER-450 (FSA ¶ 12A). It also requires the government to treat children in its custody “with dignity, respect, and special concern for their particular vulnerability as minors.” 2-SER-450 (FSA ¶ 11).

In 2015, the district court held that CBP had “wholly failed to meet even that minimal standard” of providing “safe and sanitary” conditions for children in holding cells at the border. *Flores v. Johnson*, 212 F. Supp. 3d 864, 881 (C.D. Cal. 2015), *clarified on denial of reconsideration sub nom. Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015) (reversed in part on other grounds). Plaintiffs presented evidence of children being held in “extreme cold,” of being placed in overcrowded and dirty cells with 100 or more people, of being underfed, and of the lights being kept on all night. *Id.* at 880–82. The district court ordered Defendants to monitor compliance with their standards for detaining children consistent with the FSA. *Flores v. Lynch*, 212 F. Supp. 3d at 917.

In 2017, the district court once again held that CBP was continuing to violate the *Flores* Settlement Agreement, specifically in the Rio Grande Valley Sector. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1053–61 (C.D. Cal. 2017), *appeal dismissed*, *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019). CBP failed to provide children with adequate food and water or basic hygiene items. *Id.* at 1053, 1055–56. Children reported that they could not wash their hands, shower, or brush their teeth for multiple days in a row. *Id.* at 1056. Children were held in extreme cold, with “dismal” sleeping conditions in overcrowded and dirty cells. *Id.* at 1059–60. This Court dismissed Defendants’ appeal, agreeing with the district court that the FSA requires CBP to provide children with basic hygiene items and protect

them from illness under the “safe and sanitary” standard. *Flores v. Barr*, 934 F.3d at 915–16, 916 n.6.

**B. Plaintiffs moved for a temporary restraining order to remedy conditions for children in CBP custody.**

In 2019, Plaintiffs moved for a temporary restraining order against CBP, alleging that CBP continued to hold children “for weeks in deplorable conditions,” in the El Paso and Rio Grande Valley Sectors, despite the district court’s 2015 and 2017 orders. 2-SER-379. Children attested that CBP did not allow them to take a shower, brush their teeth, or wash their hands with soap for days or weeks. 2-SER-405–08. CBP frequently denied children access to the toilet when they asked to go or forced children to use toilets that were out in the open with no privacy. 2-SER-410–11.

CBP made it extremely difficult for children to sleep by keeping bright lights on 24 hours a day and placing children in overcrowded cells, where some children were forced to sleep sitting up, on the concrete, or crammed onto mats together. 2-SER-422-26. Children were forced to wear dirty and wet clothes, and they reported being extremely cold and not having adequate blankets or garments for warmth. 2-SER-408–09; 2-SER-419–22; *see also id* at 2-SER-420–21 (mother describing covering 3-month-old baby with spare diapers to attempt to keep him warm).

CBP frequently provided children food that was undercooked, lacked nutrition, or was inedible. 2-SER-413–15. Babies and toddlers lost weight in CBP custody because of the lack of age-appropriate food. 2-SER-415–18. These children, lacking access to appropriate nutrition, were “at imminent risk of becoming dehydrated and malnourished, which worsens [their] immunological state and furthers [their] susceptibility to contracting infectious disease.” 2-SER-435 (declaration of pediatric expert). Children and breastfeeding mothers also had inadequate access to clean drinking water. 2-SER-411–13. Mothers with babies drinking formula had to risk giving their infants spoiled formula because they could not access water to wash formula bottles. 2-SER-412–13.

CBP did not provide children sufficient access to emergency medical care, despite reports from children and their parents that illness was widespread. 2-SER-426–29. Physicians and public health professionals warned that the conditions endangered children’s health and safety. *See* 2-SER-380–81; 2-SER-388–89; 2-SER-431–38.

Children also reported being separated from their family members after entering CBP custody, in violation of the FSA. *See* 2-SER-390; *see also id.* (citing child’s description of being separated: “I was very frightened and scared. I cried. I have not seen my father again . . . . I have been at this facility for several days. I

have not been told how long I have to stay here. I am frightened, scared, and sad.”).

**C. The district court approved the 2022 Settlement, appointed the Juvenile Care Monitor, and ordered multiple extensions of the Monitor’s term.**

After the district court ordered the Parties to engage in mediation discussions, the Parties had numerous meetings over the course of several years. The Special Master/Independent Monitor for the FSA supervised the meetings, which were also attended by Dr. Paul Wise (who was later appointed as the Juvenile Care Monitor), Defendants’ operational personnel, and medical experts from both sides. *See* Order re Pls.’ *Ex Parte* Appl. for Temporary Restraining Order, *Flores v. Barr*, No. 85-CV-4544, ECF No. 576, at 3 (C.D. Cal. June 28, 2019); Joint Mot. for Prelim. Approval of Settlement, *Flores v. Garland*, No. 85-CV-4544, ECF No. 1254, at 4 (C.D. Cal., May 21, 2022). The Parties reached an agreement “for the purpose of clarifying the Parties’ understanding of the meaning of certain provisions of the [FSA], as they apply to conditions of CBP detention in the RGV and El Paso Sectors of the U.S. Border Patrol.” 2-ER-181 (2022 Settlement). The 2022 Settlement’s termination provision provided that the “Agreement shall terminate two and one half years from its Effective Date, or upon the termination of the Flores Settlement Agreement, whichever is sooner.” 2-ER-184 (2022 Settlement § II n.2).

In the district court’s order granting final approval of the 2022 Settlement under Federal Rule of Civil Procedure 23, the court explained that the parties had reached an agreement “regarding the manner in which the Government will comply with the requirements of paragraphs 11 and 12A of the *Flores* Settlement Agreement.” 2-ER-159–160. The court summarized some of the 2022 Settlement’s requirements as follows:

[T]he Government shall ensure that CBP facilities in the Rio Grande Valley and El Paso Sectors provide class members access to toilets, sinks, showers, hygiene kits, drinking water, age-appropriate meals and snacks, medical evaluations and appropriate medical treatment, clothing and blankets, caregivers in certain facilities, adequate supervision to protect minors from others, and adequate temperature control and ventilation. It further provides that class members apprehended with adult family members (including non-parents or legal guardians) remain with those adult family members, or if remaining together is not operationally feasible, have contact with their family members during their time in CBP custody.

2-ER-160. The court further noted that “an independent Juvenile Care Monitor who is agreed to by the parties shall be given authority by the Court to monitor compliance with the FSA and the Agreement in the Rio Grande Valley and El Paso CBP Sectors as detailed in the Agreement.” *Id.*

The district court explained that the Settlement resolved Plaintiffs’ 2019 *Ex Parte* Application for a Temporary Restraining Order and denied it with prejudice as moot, except as to certain claims not resolved by the Settlement. 2-ER-159–61.

Upon the Parties’ joint motion, the court appointed Dr. Paul H. Wise “to oversee compliance with the [2022] Agreement” as the Juvenile Care Monitor

(“JCM” or “Monitor”). 2-ER-143. Pursuant to the 2022 Settlement, the court ordered that the Monitor “will have access to CBP documents and records, may conduct announced and unannounced visits to U.S. Border Patrol facilities in the RGV and El Paso Sectors, may conduct interviews with class members and accompanying adult family members, and may conduct interviews with CBP employees and the employees of its contractors.” 2-ER-144–45. The Monitor was ordered to “prepare quarterly reports for the Court” and was made responsible for “monitoring overcrowding, in addition to monitoring compliance with all terms of the [2022] Agreement.” 2-ER-145–46.

The court’s appointment order detailed the procedure for the transfer of monitoring functions to CBP “[a]t the completion of the Juvenile Care Monitor’s term.” 2-ER-147. The court ordered CBP to provide the Monitor with monitoring protocols it developed for the Monitor’s review and feedback. 2-ER-147–48. As provided by the Settlement, “the Juvenile Care Monitor will work with the CBP Juvenile Coordinator to ensure an effective transition of monitoring functions,” and prior to that transition, “the Juvenile Care Monitor shall approve CBP’s final monitoring protocols.” 2-ER-147; *see also* 2-ER-199 (2022 Settlement §§ IX.12-13).

The court appointed the Monitor to a single term of 16 months but has extended the term three times because of a need for continued monitoring. 2-ER-

147; 2-ER-125–30; 2-ER-131–36; 2-ER-137–42. Prior to the first extension, the Monitor reported “significant overcrowding,” highly variable hygiene practices due to overcrowding, continued family separation, and a continued lack of age-appropriate food for young children. 1-SER-136–38; 1-SER-168–69; *see also* 2-ER-137. At the end of the next term, the Monitor reported that several violations persisted, including: family separation and a lack of visitation; a lack of age-appropriate food; poor communication regarding the availability of warm clothing; a need for training in the Caregiver program; failures to advise unaccompanied children of the right to make phone calls; and a system for conveying medical information to CBP that was still in transition. 1-SER-110–113; 1-SER-115–117; 1-SER-122. The district court extended the Monitor’s term again. 2-ER-131.

In September 2024, the Monitor reported that several of these same violations persisted and raised additional concerns. As a result, the district court granted another extension. 2-ER-125; 1-SER-76–78; 1-SER-80–82; 1-SER-88–89. The court explained that “an extension is necessary under the agreement and will assist the efforts of the Parties and the Court to ensure completion of CBP’s internal monitoring protocols.” 2-ER-126.

The Juvenile Care Monitor submitted the final report of its term in December 2024 because the 2022 Settlement was set to expire at the end of January 2025. 2-ER-094–124. The report identified several areas of concern and

noncompliance, including concerns regarding family separation, CBP’s “Caregiver” program, and enhanced medical support. 2-ER-100–01; 2-ER-103–05; 2-ER-106–14. The Monitor also noted numerous concerns with procedures relating to referrals to local health systems. 2-ER-106–14; *see also* 2-ER-188 (2022 Settlement §§ VII.3.B.2–3 requiring CBP to “rely heavily on referrals to local health systems [and]... promptly . . . refer class members to the local health system”). These included: (1) resistance from CBP agents to transfer a child to a local medical facility (2-ER-112); (2) inadequate communication with hospitals regarding a child’s medical information, and “no process requiring notification [to] the parent of results of medical examinations or procedures” (2-ER-111–12); (3) a “system for conveying medical information to CBP personnel [that is still] in transition” (2-ER-109); and (4) custodial policies that fail to protect children’s privacy during “gynecological or other sensitive examinations” (2-ER-112–13).

Despite CBP’s improvements in some areas, the Monitor’s report also raised concerns about other aspects of CBP’s medical systems, such as the inappropriate use of small isolation rooms for prolonged periods when not medically required (2-ER-110–11), insufficient protocols for medication administration (2-ER-111), incorrect medical information provided to the Office of Refugee Resettlement (2-ER-113–14), and the lack of standard protocol to ensure referrals for children who require specialized care after release into the United States (2-ER-114). As for

CBP’s internal monitoring of medical services provided to children, the Monitor “[could not] provide an assessment of the ‘efficacy’ of [that system], as many of the most important components of the system are still being implemented or have had only minimal operational experience in actual facility settings.” 2-ER-123.

The Monitor’s final report also noted that it was unable to report data on children’s length of stay in CBP custody because of questions as to the accuracy of CBP’s data. 1-ER-5–6; 2-ER-099. Although the Monitor had raised these data concerns months earlier, CBP did not provide corrected data until December 2024. 1-ER-5. The corrected data indicated “‘significantly higher’ percentages of accompanied minors” in CBP custody over 72 hours than was previously reported. 1-ER-6. In an updated status report, the Monitor recommended continued review and clarification of CBP’s data reports. 1-ER-6.

**D. Plaintiffs moved to extend the 2022 Settlement based on CBP’s failure to substantially comply.**

In December 2024, Plaintiffs moved the district court to modify the 2022 Settlement based on a significant change in factual circumstances: CBP had failed to substantially comply with the 2022 Settlement’s terms. Plaintiffs argued that CBP did not substantially comply with the 2022 Settlement provisions requiring: (1) family unity and visitation; (2) dry, clean, and warm clothing; (3) a child-appropriate environment; (4) access to phones and legal counsel; and (5) implementation of self-monitoring policies and protocols. 1-SER-14–26.

**First**, Plaintiffs argued that CBP consistently breached the 2022 Settlement requirements regarding family unity. 1-SER-14–19; *see also* 2-ER-194–95 (2022 Settlement § VII.8.B). The Juvenile Care Monitor identified unjustified, routine separation of children from their family members in every report to the district court. *See* 2-SER-367–68; 1-SER-292; 1-SER-199; 1-SER-216–223; 1-SER-136–37; 1-SER-109–11; 1-SER-76–78; 2-ER-100–01. As of September 2024, CBP continued to routinely separate children aged 12 and older from their parents and other family members, regardless of gender, in the Rio Grande Valley Sector. 1-SER-15–16. Plaintiffs alleged that CBP violated the 2022 Settlement and FSA requirements requiring visitation between children and family members in the same facility, as supported by the Monitor’s reports and declarations by children and their relatives. 1-SER-17–19. Children in the Rio Grande Valley Sector in September 2024 attested to having no contact with their family members—including siblings and parents—for days at a time. *Id.*; *see also, e.g.*, 1-SER-32 ¶ 5 (15-year-old boy not allowed to see his mother for 6 days).

**Second**, Plaintiffs alleged that CBP had not complied with its obligations to provide children with “clean, dry clothing if their clothing is wet or soiled” and additional blankets and warm clothing when needed, as required by the 2022 Settlement. 1-SER-20–21; 2-ER-192–93 (2022 Settlement §§ VII.5.B, VII.6.2, VII.7.6). Children and their family members in the El Paso Sector attested to being

forced to wear their dirty clothes for over a week. 1-SER-20; *see also, e.g.*, 1-SER-56 ¶ 8; 1-SER-51 ¶ 11. In both sectors, children reported being cold and having insufficient clothing. 1-SER-21; *see also, e.g.*, 1-SER-38 ¶ 13; 1-SER-46 ¶ 15. As of late 2024, the Juvenile Care Monitor reported that many children still felt cold at night and that CBP did not properly communicate the availability of extra warm clothing to children and families. 2-ER-102–03.

**Third**, Plaintiffs argued that CBP failed to substantially comply with the 2022 Settlement requirements to provide a “child-appropriate environment.” 1-SER-21–25; 2-ER-194 (2022 Settlement § VII.8). Plaintiffs presented evidence that CBP did not provide “age-appropriate toys [and] activities” or make reasonable efforts to provide outdoor recreation, even when children were detained for weeks. 1-SER-22–23; *see also* 2-ER-195 (2022 Settlement § VII.8.C); 2-ER-197 (2022 Settlement § VIII.7). Children were scolded for playing and reported not seeing sunlight. 1-SER-23; *see also, e.g.*, 1-SER-57 ¶¶ 11-12 (4-year-old not permitted to go outside for several days scolded for playing with ball of paper).

Plaintiffs also argued that CBP had not complied with the 2022 Settlement’s requirements regarding the Caregiver program. 1-SER-24–25. The 2022 Settlement required the development of a Caregiver program to help meet children’s needs while in custody. *See* 2-ER-195–97. The Monitor’s December 2024 report observed serious deficiencies with the Caregiver program. *See* 2-ER-

103–04. For example, Caregivers appeared to be unaware of their responsibility to watch for and act on children’s signs of medical or emotional distress and were unclear about their responsibilities when children or families wished to use the telephone, seek medical attention, or obtain warm clothes. 2-ER-103. Caregivers did not provide any assistance to children in families in either sector. 2-ER-104. The Juvenile Care Monitor observed how the Caregiver program in practice differed from the protocols on paper and noted the “persistent need” for “[c]larification of the Caregiver role and [] enhanced training and supervision.” *Id.*

**Fourth**, Plaintiffs alleged that CBP did not substantially comply with the 2022 Settlement provisions requiring CBP to provide children with a list of free legal services and an advisal of the right to make phone calls. 1-SER-19–20; *see also* 2-ER-195, 2-ER-200, 2-ER-213 (2022 Settlement §§ VII.8.B.8, XI, Ex. 3). Children consistently reported that they did not receive lists of legal service providers. *See* 1-SER-19. Regarding phone calls, the rules “vary significantly depending on the facility” and staff, according to the Juvenile Care Monitor, who recommended to CBP that they reevaluate the phone call system. 2-ER-106. As of late 2024, children attested to not knowing they could make phone calls and the Monitor even observed that “[o]n the posted *Flores* poster, the section regarding rights to phone access was crossed out.” *Id.*; 1-SER-19.

**Fifth**, Plaintiffs argued that CBP had not complied with the requirement to develop and transition to an internal monitoring system, based on the Monitor’s December 2024 report explaining that CBP was still in the process of developing self-monitoring protocols. *See supra*, Section IV.C.

Plaintiffs requested an extension of the 2022 Settlement in its entirety for two and a half years “to provide Plaintiffs with the promised-for compliance period in service of the larger stated purposes of the agreement.” 1-SER-27 (citing *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016)). Plaintiffs also requested a 6-month extension of the Monitor’s term. 1-SER-26.

**E. The district court extended the 2022 Settlement by 18 months.**

The district court ruled on Plaintiffs’ request for an extension of the 2022 Settlement in January 2025. 1-ER-2–13. First, it determined that it had authority to modify the 2022 Settlement based on its retention of jurisdiction of the *Flores* Settlement Agreement and because the 2022 Settlement is a consent decree itself. 1-ER-7–10. Next, it held that CBP did not substantially comply. The district court found that CBP had not met its obligations under the 2022 Settlement to implement self-monitoring protocols. 1-ER-11. The district court noted that the 2022 Settlement requires the Juvenile Care Monitor’s approval of CBP’s internal monitoring procedures “and yet certain monitoring procedures are still being planned by CBP but have not been implemented.” *Id.* “Because the JCM has not

been able to ‘adequately assess the functional capabilities’ of these monitoring systems, CBP cannot be found to be in compliance with that portion of the 2022 Settlement.” *Id.* The district court held that noncompliance with that portion of the Settlement alone showed that CBP had not substantially complied. *Id.*

Given its findings with regard to CBP’s monitoring protocols, the district court did not reach the issue of “the potentially noncompliant conditions and amenities at CBP facilities.” *Id.* The district court did note, however, that “Plaintiffs submitted substantial evidence, in the form of declarations of class members and their family members, that the conditions at CBP facilities are in violation of the FSA,” and thus necessarily the 2022 Settlement. 1-ER-4. The district court found that “[c]hildren housed in CBP facilities regularly complained of being refused clean clothing or extra layers, unreasonably cold temperatures in their rooms, being separated from their family members, having little to no outside time, being refused toys or activities other than coloring, and receiving cold, or even frozen, food.” 1-ER-4–05 (citing declarations submitted in support of Plaintiffs’ motion). Defendants “[did] not offer any specific evidence rebutting the class members’ descriptions of the conditions.” 1-ER-5.

The district court granted an 18-month extension of the 2022 Settlement and a 6-month extension of the Monitor’s term. 1-ER-13. It rejected Plaintiffs’ request to extend the 2022 Settlement for two and a half years, but remarked that “CBP is

not yet capable of wholly fulfilling its responsibilities under the Settlement and the FSA without additional support provided by the JCM and the Court.” 1-ER-12. It held that “an 18-month extension is a suitably tailored modification to the 2022 Settlement to effectuate its and the FSA’s terms.” 1-ER-12–13.

Defendants’ appeal followed.

## **V. SUMMARY OF THE ARGUMENTS**

First, the district court correctly held that it could extend the termination date of the 2022 Settlement under Federal Rule of Civil Procedure 60(b). The 2022 Settlement explicitly contemplated continued judicial oversight of its terms, including through a court-appointed monitor, regular reporting to the district court, and dispute resolution procedures providing for court enforcement. The district court did not need to expressly retain jurisdiction in a new order because it has jurisdiction to enforce and modify the *Flores* Settlement Agreement. The FSA is indisputably a consent decree, and the court’s oversight of the decree includes the power to enter remedial orders to address FSA violations. It is also undisputed that the 2022 Settlement exists only to lay out the manner in which the federal government will comply with the FSA’s requirements in two CBP sectors. Therefore, the 2022 Settlement was a consent decree subject to the district court’s authority to modify pursuant to Rule 60(b).

Second, the district court correctly held that CBP did not substantially comply with the 2022 Settlement because CBP failed to implement self-monitoring protocols. The court's conclusion that this failure alone meant CBP had not substantially complied was correct for at least two reasons: (1) because CBP's failure to implement self-monitoring protocols affects compliance with *all* terms of the 2022 Settlement; and (2) because ensuring CBP's long-term ability to self-monitor *Flores* compliance in the El Paso and Rio Grande Valley Sectors is a fundamental purpose of the 2022 Settlement. Moreover, contrary to Defendants' assertion that most areas of compliance were undisputed, Plaintiffs provided extensive evidence that CBP failed to substantially comply with numerous other provisions of the 2022 Settlement.

Third, the district court correctly applied the legal standard from *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) to determine that the 2022 Settlement should be modified under Rule 60(b). It is settled Ninth Circuit precedent that a party's failure to substantially comply with a consent decree is a significant change in factual circumstances warranting extension of a consent decree. *See, e.g., Kelly*, 822 F.3d at 1098. The district court properly determined that an 18-month extension was a suitably tailored modification in response to CBP's failure to substantially comply, considering that "CBP is not yet capable of

wholly fulfilling its responsibilities under the 2022 Settlement and the FSA without the additional support provided by the JCM and the Court.” 1-ER-12.

This Court should affirm.

## **VI. STANDARD OF REVIEW**

This Court reviews modification of a consent decree pursuant to Rule 60(b) for abuse of discretion. *United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005). Additionally, this Court reviews the district court’s interpretation of a consent decree de novo, but it “must ‘give deference to the district court’s interpretation based on the court’s extensive oversight of the decree from the commencement of the litigation to the current appeal.” *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (quoting *Officers for Just. v. Civil Serv. Comm’n of City and Cnty. of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991)). “A court of appeals will uphold a district court’s ‘reasonable’ interpretation of a consent decree.” *Nehmer v. Veterans’ Admin. of Gov’t of U.S.*, 284 F.3d 1158, 1160 (9th Cir. 2002) (quoting *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995)). Moreover, this Court must accept the district court’s findings of fact unless they are “clearly erroneous.” *Gates*, 60 F.3d at 530.

Finally, this Court “may affirm on any basis supported by the record, whether or not relied upon by the district court.” *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007). “If the decision below is correct, it must be

affirmed, even if the district court relied on the wrong grounds or wrong reasoning.” *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019) (quoting *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998)).

## VII. ARGUMENT

The 2022 Settlement is a consent decree which the court has the authority to modify pursuant to Federal Rule of Civil Procedure 60(b). Plaintiffs proved that CBP failed to substantially comply with the 2022 Settlement and it is well established in the Ninth Circuit that “[t]he failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree’s temporal extension.” *Lab./Cmt. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120–21 (9th Cir. 2009); *see also, e.g., Kelly*, 822 F.3d at 1097–98 (extending settlement in its entirety based on defendant’s noncompliance). The district court correctly extended the 2022 Settlement.

### **A. The district court correctly held that it has authority to modify the 2022 Settlement under Rule 60(b).**

This Court should affirm the district court’s holding that the 2022 Settlement was a consent decree subject to modification under Rule 60(b). There has never been any dispute that the 2022 Settlement was subject to continued judicial

oversight under the terms of the Settlement itself and the court’s continued jurisdiction over the *Flores* Settlement Agreement. The 2022 Settlement exists to clarify the Parties’ understanding of the FSA and set out CBP’s FSA obligations in specific sectors where Plaintiffs alleged noncompliance. Several provisions of the 2022 Settlement and the district court’s subsequent appointment of a Juvenile Care Monitor to monitor compliance with the 2022 Settlement terms demonstrate that it was subject to continued judicial oversight and modification if warranted.

**1. The district court correctly interpreted the 2022 Settlement to be a modifiable consent decree.**

“A consent decree is ‘essentially a settlement agreement subject to continued judicial policing.’” *United States v. State of Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (quoting *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). As the district court explained, “[w]hether a settlement agreement is titled an ‘agreement’ or a ‘consent decree’ is not dispositive—‘it is the reality, not the nomenclature which is at issue.’” 1-ER-8 (quoting *Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009)). “Private settlements do not entail the judicial approval and oversight involved in consent decrees.” *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Hum. Res.*, 532 U.S. 598, 604 n.7 (2001); *see also Lackey v. Stinnie*, 145 S.Ct. 659, 671 (2025) (“[A] consent decree is like a final judgment in the relevant ways: It conclusively resolves the claim, bears a judicial *imprimatur*,

and may grant enduring relief that materially alters the legal relationship between the parties.”).

Judicial oversight is the touchstone of a consent decree, and the 2022 Settlement and the district court’s subsequent orders demonstrate the Parties’ intent for judicial oversight of CBP’s implementation of the 2022 Settlement. It is undisputed that the FSA is a consent decree over which the district court has jurisdiction. 1-ER-8. It is also undisputed that the 2022 Settlement “came to fruition solely to clarify the parties’ understanding of, and ensure CBP’s compliance with, certain portions of the FSA.” 1-ER-8.

Additionally, the Parties “agree[d] to request that a Juvenile Care Monitor who is agreed to by the parties *shall be given authority by the Court to monitor compliance*” with the 2022 Settlement. 2-ER-197 (2022 Settlement § IX.1) (emphasis added); *see also* 2-ER-143–48 (order). The Juvenile Care Monitor was to be “appointed to a single term of sixteen months,” with Plaintiffs retaining the ability to “petition the Court” for an extension of the term if the Parties cannot reach an agreement to extend the term. 2-ER-199 (2022 Settlement § IX.10); *see also* 2-ER-147 (order). The Monitor was also required to prepare quarterly reports for the court. 2-ER-198 (2022 Settlement § IX.2); 2-ER-145 (order). After granting final approval of the 2022 Settlement, the court appointed the Juvenile Care Monitor. 2-ER-159–161; 2-ER-143–48. In its order, the court explained that “such

appointment is necessary under the Agreement and will assist the efforts of the parties *and the Court* to ensure compliance with the Agreement.” 2-ER-143 (emphasis added). The Appointment Order incorporated the 2022 Settlement terms pertaining to the Juvenile Care Monitor, including the required reporting to the court. 2-ER-143–48.

Defendants unpersuasively attempt to downplay the 2022 Settlement’s monitoring provisions as evidence that the parties only “created a discrete area for the district court’s involvement.” Appellants’ Br. at 30. But as the Parties agreed, the court vested authority in the Monitor to “monitor[] compliance with *all* terms of this Agreement.” 2-ER-198 (2022 Settlement § IX.5) (emphasis added); 2-ER-146 (order). The Parties clearly intended for the district court to oversee compliance with all terms of the Settlement, which is consistent with the court’s continued jurisdiction to monitor compliance with all terms of the FSA.

The plain language of the 2022 Settlement and the district court’s order appointing the Juvenile Care Monitor demonstrate that the district court correctly interpreted it as an enforceable and modifiable consent decree. Under basic contract interpretation principles, it is irrelevant that Defendants now claim they did not intend for the 2022 Settlement to be a consent decree. “It is not the parties’ subjective intent that matters, but rather their ‘objective intent, as evidenced by the words of the contract.’” *Block v. eBay, Inc.*, 747 F.3d 1135, 1138 (9th Cir. 2014)

(quoting *Reilly v. Inquest Tech., Inc.*, 160 Cal. Rptr. 3d 236, 249 (Cal. App. 4th 2013)); *see also Flores v. Garland*, 3 F.4th 1145, 1155 n.7 (9th Cir. 2021) (applying California contract principles to interpret the FSA). “The unambiguous words of the agreement are the end of the story.” *McKnight v. Torres*, 563 F.3d 890, 893 (9th Cir. 2009).

Deference is due to the district court’s interpretation of its own orders, especially where, as here, the district court has overseen the *Flores* consent decree for decades. *Cf. Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992).<sup>2</sup> The district court examined the *Flores* Settlement Agreement’s continuing jurisdiction, the terms of the 2022 Settlement, the approval order, and the appointment of the Juvenile Care Monitor to correctly determine that the 2022 Settlement was a consent decree.

**2. The district court did not need to expressly retain jurisdiction over the 2022 Settlement because the court’s jurisdiction stems from the *Flores* Settlement Agreement.**

Defendants have already acknowledged that a court can make a settlement part of a court order through either of two means: (1) retention of jurisdiction or (2)

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<sup>2</sup> The district court has exercised caution to ensure its relief falls strictly within the scope of the *Flores* Settlement Agreement and has, on several occasions, declined to provide relief it does not think it has authority to provide under the purview of the FSA. *See, e.g., Flores v. Sessions*, No. CV-854544, 2018 WL 10162328, at \*2 (C.D. Cal. July 30, 2018); *Flores v. Garland*, No. CV 85-4544, 2024 WL 3051166, at \*7 (C.D. Cal. Apr. 3, 2024).

incorporation into the order. 2-ER-031–32 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380–81 (1994)); *see also Kokkonen*, 511 U.S. at 381–82 (“[T]he court is authorized to embody the settlement contract in its dismissal order or, *what has the same effect, retain jurisdiction* over the settlement contract[] if the parties agree.”) (emphasis added).

Here, there is no dispute the district court retained jurisdiction over the 2022 Settlement. Appellants’ Br. at 23. Defendants appear to argue that what matters is not whether the district court in fact had jurisdiction but whether it took “an affirmative act” to assert its continued jurisdiction. *Id.* at 25–26. The Supreme Court’s holding in *Waetzig* undermines Defendants’ cramped reading of Federal Rule of Civil Procedure 60(b). *See Waetzig v. Halliburton Energy Servs., Inc.*, 145 S. Ct. 690, 696, 700 (2025) (holding that voluntarily dismissal without prejudice falls within Rule 60(b)’s scope covering “final judgment[s], order[s], or proceeding[s]” even though it was effective “without any court action”). But even accepting Defendants’ premise, the district court here *did* take affirmative steps to assert continued jurisdiction. The district court expressed its intention to continue to monitor the Settlement, including through explicit recognition that the 2022 Settlement prescribed how the government would comply with provisions of the FSA within the court’s jurisdiction and by appointment of a Juvenile Care Monitor. 2-ER-159–161; 2-ER-143–48.

The district court’s continuing jurisdiction over the FSA distinguishes the 2022 Settlement from the facts of *Kokkonen* and other cases relied upon by Defendants, which involved standalone settlement agreements that terminated the underlying litigation and therefore terminated federal subject matter jurisdiction. *See* Appellants’ Br. at 18–26 (citing *Kokkonen*, 511 U.S. at 381 and *O’Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995)). The district court has the power to enforce and modify the 2022 Settlement because it has jurisdiction over the FSA. Defendants’ attempt to reduce the relationship between the 2022 Settlement and the FSA to merely a “factual relationship” is unconvincing. Appellants’ Br. at 27. In its order approving the 2022 Settlement, the district court explained the Parties had reached an agreement “regarding the manner in which the Government will comply with” the *Flores* Settlement. 2-ER-159–60. The approval of the 2022 Settlement, appointment of the Juvenile Care Monitor, and all reporting of the Monitor have occurred under the *Flores* docket—not a separate case. *See* 2-ER-159–61; 2-ER-143–48; *see also, e.g.*, 2-ER-096–124. The court denied Plaintiffs’ 2019 Application for a Temporary Restraining Order, which was filed to enforce the FSA and resulted in the 2022 Settlement, as moot only because the 2022 Settlement provided alternative relief. 2-ER-161. Further, the existence of the 2022 Settlement depends on the existence of the *Flores* Settlement; the 2022 Settlement states that if the *Flores* Settlement terminates, it necessarily terminates as well. 2-

ER-184 (2022 Settlement § II.8 n.2). “Rather than being an isolated agreement between the parties, the 2022 Settlement, by its nature is tied to the FSA.” 1-ER-9.

As the district court noted, “until the *Flores* action is dismissed pursuant to Paragraph 35 of the FSA, the Court need not include in every single one of its orders that it retains jurisdiction because its retention of jurisdiction is explicitly set forth in the FSA.” 1-ER-10. The district court’s continuing jurisdiction over the *Flores* consent decree is what distinguishes the 2022 Settlement from run-of-the-mill class action settlements that a court approves and then relinquishes jurisdiction over. *Contra* Appellants’ Br. at 26–27.

Defendants concede the *Flores* Settlement is the source of the court’s subject matter jurisdiction over the 2022 Settlement, and that the district court had authority to enforce the 2022 Settlement terms. Appellants’ Br. at 26, 30. Yet, they *still* argue the district court, after approving the settlement, was required to include superfluous language stating that it retains jurisdiction. *See id.* at 25. This Court should reject the proposition that a court must include surplusage to later exercise its inherent authority codified in Rule 60(b).

Defendants unsuccessfully attempt to distinguish a court’s authority to enforce a settlement over which it retains jurisdiction from its authority to modify that settlement. *See id.* at 22. The court’s power to modify stems from Rule 60(b), which codifies the court’s “traditional authority . . . to modify or vacate the

prospective effects of their decrees.” *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999).<sup>3</sup> The power to modify a final order, judgment, or proceeding is not one conferred by the consent of the parties, it is always retained by the district court pursuant to the Federal Rules of Civil Procedure. A court with subject matter jurisdiction may exercise that power, and the court’s jurisdiction is undisputed here. Defendants cite no authority to the contrary.

The district court correctly interpreted the 2022 Settlement as a consent decree because the court retains jurisdiction over the *Flores* Settlement and oversees compliance with the 2022 Settlement through the Juvenile Care Monitor it appointed. The court has federal subject matter jurisdiction and the authority stemming from the Federal Rules to modify the Settlement under Federal Rule of Civil Procedure 60(b) as a “final judgment, order, or proceeding.” *See Waetzig*, 145 S. Ct. at 700 (holding that Rule 60(b) applies to final orders and judgments and all final proceedings, i.e., “all steps taken in the action” that are final). Nothing more was required.

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<sup>3</sup> There is no question that courts have authority under Rule 60(b) to extend a consent decree. *Contra* Appellants’ Br. at 16; *see also, e.g., Kelly*, 822 F.3d at 1097–98; *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*, 404 F.3d 821, 834 (4th Cir. 2005); *David C. v. Leavitt*, 242 F.3d 1206, 1212–13 (10th Cir. 2001).

**B. The 18-month extension of the 2022 Settlement was a suitably tailored response to Defendants’ lack of substantial compliance.**

The district court correctly held that CBP’s noncompliance with the 2022 Settlement’s monitoring protocols requirement precluded a finding of substantial compliance. The monitoring protocols affect compliance with all other terms and one *fundamental purpose* of the Settlement is to ensure CBP can effectively self-monitor. Moreover, beyond the monitoring protocols, Plaintiffs proved that CBP failed to substantially comply with numerous settlement requirements, including providing sufficient clean and warm clothing, access to phones and legal counsel, and allowing for children to be held together with their family members.

The district court applied the correct legal test in determining that CBP’s noncompliance was a significant changed circumstance warranting modification of the 2022 Settlement. The district court’s 18-month extension of the entire 2022 Settlement—a shorter extension than what Plaintiffs requested—was a suitably tailored modification to ensure CBP can meet its obligation to effectively self-monitor and provide safe and sanitary conditions for children in its custody.

**1. CBP failed to substantially comply with the 2022 Settlement.**

The district court correctly held that CBP’s noncompliance with the monitoring protocols requirement precluded a finding of substantial compliance. This Court must uphold the district court’s conclusion that CBP failed to substantially comply, unless it rests “on a clearly erroneous finding of material

fact.” *Rouser v. White*, 825 F.3d 1076, 1082 (9th Cir. 2016) (citing *Jeff D.*, 643 F.3d at 283). Additionally, Plaintiffs proved CBP’s failure to substantially comply with numerous other obligations in the Settlement. Although the district court declined to reach other areas of noncompliance, this Court “may affirm on any basis supported by the record, whether or not relied upon by the district court.” *Hall*, 476 F.3d at 686.

**i. CBP’s noncompliance with the monitoring protocols requirement alone demonstrated a lack of substantial compliance.**

“[D]istinct provisions of consent decrees are independent obligations, each of which must be satisfied” to achieve substantial compliance. *Rouser*, 825 F.3d at 1081. Substantial compliance also requires that “the larger purposes of the decrees have been served.” *Jeff D.*, 643 F.3d at 288. Even where a party has complied with some terms of a settlement, “there can be no ‘substantial performance’ where the part unperformed touches the fundamental purpose of the contract and defeats the object of the parties.” *Id.* (internal citation omitted). “[M]erely taking significant steps toward implementing the decree falls far short of ‘substantial compliance.’” *Rouser*, 825 F.3d at 1082 (internal citations omitted).

Ensuring CBP can effectively self-monitor its ability to provide basic standards of care to children in its custody is a “fundamental purpose” of the Settlement. *Jeff D.*, 643 F.3d at 288. CBP’s self-monitoring capabilities are central

to the purpose of the Settlement because they pertain to compliance with all the Settlement's terms. As the Juvenile Care Monitor explained, the monitoring systems required under the Settlement "fall into two general [] categories: (A) monitoring general custodial conditions, amenities, and procedures; and (B) monitoring medical systems." 2-ER-019. The systems under the first category "must ensure" that youth are "consistently provided" with "adequate nutrition and water, temperature regulation, garments, sleep conditions, [] hygiene and sanitation" and ensure appropriate housing of families and young unaccompanied children. 2-ER-019. The monitoring systems under the second category "must ensure that children do not suffer preventable medical harm or death while in custody." 2-ER-020. Far from constituting "non-essential provision[s]," as Defendants claim, these go to the heart of the Settlement's purpose to protect children's welfare. Appellants' Br. at 42.

CBP's ability to self-monitor affects compliance with *all* the Settlement terms. *See, e.g.*, 1-SER-67–68 (identifying "Settlement components critical to future monitoring protocols"); 2-ER-120–21 ("[P]urposeful and consistent monitoring of housing and visitation practices in the JPFs will be required to ensure compliance with the Agreement's child-appropriate environment provisions."). Thus, CBP failing to meet its obligation to implement monitoring protocols is "not technical," but rather "serious and consequential." *See Coleman v.*

*Newsom*, 131 F.4th 948, 959 (9th Cir. 2025) (explaining that noncompliance with requirement regarding medical staffing rates in prisons demonstrated lack of substantial compliance because staffing rates directly affected patient health).

Contrary to Defendants’ assertion, the Settlement does require CBP to implement monitoring protocols. As previously explained, CBP will still be required under the *Flores* Settlement to provide safe and sanitary conditions for children after the 2022 Settlement terminates. The 2022 Settlement lays out a process to ensure CBP can effectively self-monitor compliance with the *Flores* standards into the future, at least with respect to the Rio Grande Valley and El Paso Sectors. 2-ER-197–200 (Settlement § IX). As is clear from the language of the Settlement, throughout the term of the 2022 Settlement, three things were required to occur: the Juvenile Care Monitor appointed by the court would monitor compliance with all Settlement terms; CBP would develop internal monitoring protocols; and the Monitor would review and provide feedback on the protocols. 2-ER-197–199 (Settlement §§ IX.5, 12, 13). At the end of the Monitor’s term, the Settlement provides for an “effective transition of monitoring functions” from the Monitor to CBP, once the Monitor has approved of CBP’s internal monitoring protocols. 2-ER-199–200 (Settlement §§ IX.12, 13). Thereafter, CBP “shall rely on such approved monitoring protocols, but retain discretion to update and amend such monitoring protocols, as appropriate.” 2-ER-199–200 (Settlement § IX.12).

Defendants admit that “[t]he Settlement required CBP to develop a robust monitoring system,” but implausibly argue that CBP does not need to “implement” monitoring protocols. Appellants’ Br. at 36. The Settlement provides for an “effective transition of monitoring functions.” 2-ER-199 (Settlement § IX.12). The Parties clearly did not intend for an effective transition of monitoring functions to be nothing more than putting blind faith in CBP’s written protocols without monitoring how they are implemented and whether they work in operation. It has never been the understanding of the Parties, the district court, or the Monitor that the Monitor’s role in CBP’s self-monitoring procedures would cease as soon as the written protocols were complete. This is made clear in the many of the Monitor’s reports and the court’s orders extending the Monitor’s term. *See, e.g.*, 1-SER-261 (“Quality assurance activities will remain a high priority for JCM monitoring. The fundamental focus will continue to be the ability of the new systems . . . to actually translate into a higher standard of medical care.”); 1-SER-121–23 (explaining that further monitoring is required to ensure full implementation of protocols in use regarding children at elevated medical risk); 2-ER-137 (“The Court agrees that an extension is necessary under the Agreement and will assist the efforts of the Parties and the Court to ensure completion of CBP’s internal monitoring protocols . . . .”); 2-ER-132 (“A three-month extension will enable the JCM to make a judgment about whether the existing and new internal protocols are sufficiently robust so that

the monitoring terms of the JCM, Medical Advisor and Medical Expert can be transferred to [CBP] . . . .”). Beyond that, contrary to Defendants’ assertions, Plaintiffs did dispute whether CBP had fulfilled its obligation to “develop a robust monitoring system . . . and to provide the monitors with its protocols.” Appellants’ Br. at 36. As explained in more detail below, some procedures were “still being planned.” 1-ER-11.

The district court correctly found that CBP had not fulfilled the Settlement’s monitoring protocol requirements, as exemplified by the preceding Juvenile Care Monitor reports. Regarding conditions and amenities monitoring, the Monitor’s December 2024 report explained that “questions remain concerning CBP’s ability to regular monitor general conditions and amenity provision in CBP facilities holding large numbers of children.” 2-ER-119. The Monitor’s “primary concern [was] the relative infrequency” of CBP self-monitoring visits, noting that: “Without a monitoring capability that can conduct regular visits or respond in a timely manner to emerging concerns in a particular sector or facility, it remains unclear how general conditions and amenities will be monitored appropriately.” 2-ER-119. Regarding medical monitoring, the Monitor could not “provide an assessment of the ‘efficacy’ of the CBP medical monitoring system, as many of the most important components of the system are still being implemented or have had only minimal operational experience.” 2-ER-123. At the time of the underlying

motion, the Monitor was still in discussions with CBP regarding protocol development in several different categories of the medical monitoring systems required by the Settlement. 2-ER-121–22.

Accordingly, the district court found that CBP had not complied with the monitoring requirements of the Settlement because “certain monitoring procedures are still being planned by CBP but have not been implemented.” 1-ER-11; 1-ER-6. This thwarted the Monitor’s ability to “adequately assess” CBP’s self-monitoring capabilities and prevented an “effective transition of monitoring functions.” 1-ER-6. Defendants take issue with the district court’s focus on the requirement that the Monitor approve CBP’s final monitoring protocols. Appellants’ Br. at 36–38. But Defendants voluntarily agreed to this requirement and to the appointment and selection of the independent and neutral Juvenile Care Monitor. *See* 2-ER-197–200 (2022 Settlement § IX); 2-ER-143–48. Regardless, the Monitor’s approval of the monitoring protocols is not a “condition precedent” to termination as Defendants claim the court treated it. Appellants’ Br. at 37. Clearly the Monitor could not approve of monitoring protocols that CBP was still in the process of developing. The lack of approval of CBP monitoring protocols was a product of CBP’s failure to meet its Settlement obligations to develop a robust monitoring system that would enable an “effective transition of monitoring functions” from the Monitor to CBP. 2-ER-199 (Settlement § IX.12).

The district court correctly held that CBP’s noncompliance with the internal monitoring procedures alone demonstrated a lack of substantial compliance. Defendants mistakenly argue the court held CBP to a “perfect compliance” standard. Appellants’ Br. at 38. But the district court simply applied the standard in this Circuit for substantial compliance. 1-ER-11 (“Like terms in a contract, distinct provisions of consent decrees are independent obligations, each of which must be satisfied before there can be a finding of substantial compliance.”) (quoting *Rouser*, 825 F.3d at 1081). Moreover, as discussed above, the monitoring protocols go beyond a single settlement obligation because they affect compliance with *all* Settlement terms, and they touch on the “fundamental purpose” of ensuring effective self-monitoring of FSA compliance into the future. *Jeff D.*, 643 F.3d at 288. The district court applied the appropriate legal standard and correctly held that CBP failed to substantially comply with the 2022 Settlement.

**ii. CBP’s violations of numerous other Settlement obligations also demonstrated its failure to substantially comply.**

Apart from the monitoring protocols requirement, Plaintiffs proved that CBP did not substantially comply with many other obligations in the 2022 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. *See supra*, Section

IV.D. Defendants incorrectly assert that CBP’s record of compliance is undisputed and improperly state as fact that CBP substantially complied with certain provisions of the 2022 Settlement. *Contra* Appellants’ Br. at 9–10, 39, 41–42, 45. As discussed below, Plaintiffs presented significant evidence of CBP’s noncompliance in a number of these areas.

First, Defendants’ brief notably omits any discussion of CBP’s obligation to hold children together with their family members absent an articulable operational reason and similarly ignores Plaintiffs’ evidence of CBP’s noncompliance with this requirement. *See* 2-ER-194–95 (Settlement § VII.8.B). As the Monitor has explained, “[s]eparating a child from a parent can be profoundly traumatic for children and can have lasting, harmful effects.” 1-SER-221. Conversely, “[t]here is likely no greater contributor to the well-being of children in custody than holding them together with a parent or trusted adult.” 2-SER-367. Plaintiffs provided significant evidence showing that CBP routinely separated children from their family members and failed to provide the required opportunities for visitation. *See supra*, Section IV.D. The Monitor’s reports corroborate Plaintiffs’ evidence of this practice and show that CBP often failed to document justifications for separations. *See id.*; *see also, e.g.*, 1-SER-76 (“There was no documentation available which explained the necessity for separating the two girls from their grandmothers.”); 2-SER-368 (no justifications for separations of 7-year-old from aunt or another child

from grandmother). Plaintiffs proved that CBP failed to substantially comply with the family unity requirements in the 2022 Settlement and the FSA.

Second, Plaintiffs proved that CBP did not substantially comply with its obligation to provide children clean, dry, and warm clothing, as required by the 2022 Settlement. *See supra*, Section IV.D; *see also* 2-ER-192 (Settlement § VII.5). CBP denied children clean clothes even when they had been detained for more than two weeks. *E.g.*, 1-SER-55–56 ¶¶ 6, 8 (4-year-old boy forced to wear the same dirty shirt for 16 days in custody); 1-SER-51 ¶ 11 (15-year-old forced to wear the same clothes for 15 days despite multiple requests). CBP denied infants and toddlers more than one layer of clothing despite them being extremely cold. *E.g.*, 1-SER-38 ¶ 13; 1-SER-46 ¶ 15. It is simply incorrect for Defendants to assert that there was “no dispute [] that CBP complied” with Section VII.5 of the 2022 Settlement. Appellants’ Br. at 41.<sup>4</sup>

Third, CBP failed to substantially comply with the 2022 Settlement requirement to provide a “child-appropriate environment.” *See* 2-ER-194–95 (Settlement § VII.8). As the Juvenile Care Monitor explained, separating children from their parents—as CBP has done consistently in violation of the Settlement—

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<sup>4</sup> To the extent Appellants’ Brief refers only to the requirements in Section VII.5 to *maintain* a stock of warm clothing and blankets, that requirement is a precondition to Section VII.5’s other requirements that class members actually be provided with clean, dry, and warm clothing. 2-ER-192.

defeats the Settlement’s requirement that CBP “take a trauma-informed approach.” *See* 2-ER-190 (Settlement § VII.3.D); 1-SER-203; 1-SER-22. Children and families also reported being detained for weeks without sufficient activities or recreation for children. *See supra*, Section IV.D. The December 2024 monitoring report explained that CBP’s “persistent failure” to address the lack of “basic child-friendly materials, such as coloring books, crayons, [and] games . . . undermines the implementation of trauma-informed elements of CBP custodial care.” 2-ER-106.

CBP also did not comply with the requirements for the Caregiver program, a core component of the “child-appropriate environment” provisions. *See* 2-ER-195–97 (Settlement § VII.9). The Monitor’s December 2024 report alone demonstrates CBP’s failure to substantially comply: Caregivers appeared untrained and unaware of their responsibilities to be alert to children’s well-being or respond to children’s needs. *See supra*, Section IV.D (citing 2-ER-103–04). Thus, contrary to Defendants stating otherwise, Appellants’ Br. at 9–10, CBP did not substantially comply with the 2022 Settlement mandates to provide a child-appropriate environment and implement a Caregiver program.

Fourth, the record below shows that CBP did not substantially comply with the 2022 Settlement requirements to provide children with a list of free legal service providers and an advisal of the right to make phone calls. 2-ER-195; 2-ER-

200; 2-ER-213 (2022 Settlement §§ VII.8.B.8, XI, Ex. 3). *See supra*, Section IV.D. Regarding access to counsel, Defendants admitted that children can review a list of legal service providers during processing but are not able to keep the list or other paper on them. 2-ER-060. This policy—which requires children to memorize a list of legal service organizations and phone numbers if they wish to contact counsel—defeats the purpose of requiring CBP to provide children with a list of legal service providers that they can use to contact a lawyer while in custody. *See* 2-ER-213 (2022 Settlement § XI, Ex. 3). Defendants’ purported explanation for this policy—that “paper often ends up getting lost or damaged” in the pods—in no way justifies depriving children of their right to access counsel. 2-ER-060. Defendants incorrectly state that they substantially complied with the Settlement obligations to “giv[e] certain legal notices” to children. Appellants’ Br. at 9-10.

Additionally, the final Juvenile Care Monitor report contradicts Defendants’ assertion that CBP “undisputably complied” with the medical support requirements of the Settlement. Appellants’ Br. at 41-42. The report pointed out numerous deficiencies with procedures regarding referring children to local health systems, for example. *See supra*, Section IV.C. Defendants correctly characterize the enhanced medical support provisions as “essential” or “core” requirements, Appellants’ Br. at 41, but they are wrong about CBP’s record of compliance.

Plaintiffs met their burden to prove that CBP did not substantially comply with many core settlement obligations beyond the self-monitoring protocols. CBP did not substantially comply with requirements to provide family unity and visitation; clean, dry clothing and additional garments for warmth; a child-appropriate environment, including a Caregiver program; a list of free legal services and advisal of the right to make phone calls; and enhanced medical support. CBP has persistently failed to comply with these provisions, and its noncompliance has not been “minor or trivial.” *Rouser*, 825 F.3d at 1082 (quoting *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964)). These breaches “frustrated the purpose of the consent decree” to ensure that CBP provided safe and sanitary conditions and with concern for children’s particular vulnerability, in accordance with the FSA. *Jeff D.*, 643 F.3d at 288. The violations Plaintiffs identified, coupled with CBP’s lack of effective self-monitoring protocols, create reason to “doubt[] [Defendants’] compliance in other respects,” which further supports finding a lack of substantial compliance. *Kelly*, 822 F.3d at 1098.

This Court should affirm the district court decision extending the 2022 Settlement because CBP failed to substantially comply with numerous settlement obligations. Alternatively, to the extent that this Court believes the district court should conduct additional fact finding regarding CBP’s record of noncompliance at the time of Plaintiffs’ motion, this Court should remand for that purpose.

**2. The district court correctly applied *Rufo* in holding that an 18-month extension of the 2022 Settlement was a suitably tailored response to CBP’s noncompliance.**

“A party seeking modification of a consent decree may meet its initial burden by showing [] a significant change either in factual conditions or in law.” *Rufo*, 502 U.S. at 384. “Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance.” *Id.* at 391. “[A] modification of a court order is ‘suitably tailored to the changed circumstance’ when it ‘would return both parties as nearly as possible to where they would have been absent’ the changed circumstances.” *Kelly*, 822 F.3d at 1098 (citations omitted).

“The failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree’s temporal extension.” *Lab./Cmtty. Strategy Ctr.*, 564 F.3d at 1120–21; *see also, e.g., Thompson*, 404 F.3d at 834; *David C.*, 242 F.3d at 1211–12. Extending the termination date of a consent decree is a common modification when a party has failed to substantially comply. *See e.g., Kelly*, 822 F.3d at 1097–98; *Thompson*, 404 F.3d at 834; *David C.*, 242 F.3d at 1211–12. Extension of a settlement can be a suitably tailored remedy to provide Plaintiffs with the original bargained-for period of compliance. *Kelly*, 822 F.3d at 1097–98.

The district court applied the correct legal test in determining that CBP’s noncompliance was a changed circumstance that warranted modifying the 2022 Settlement. *See* 1-ER-7 (citing *Rufo*, 502 U.S. at 380); 1-ER-11 (citing *Kelly*, 822 F.3d at 1098). The district court articulated the *Rufo* test the same way this Court previously has. *See e.g., Asarco Inc.*, 430 F.3d at 979 (applying *Rufo*’s “two-prong standard”); *Nat’l Lab. Rels. Bd. v. Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Loc. 433*, 891 F.3d 1182, 1186 (9th Cir. 2018) (“We apply the two-part test established in *Rufo*.”).<sup>5</sup> It is irrelevant that the court did not explicitly state CBP’s failure to substantially comply was unforeseen and that enforcing the original termination date would be detrimental to the public interest. *See, e.g., Kelly*, 822 F.3d at 1098 (extending settlement agreement based on noncompliance without addressing whether the noncompliance was unforeseen or the original termination date would harm the public interest). Moreover, as discussed below, Plaintiffs satisfied this burden.

A party’s failure to substantially comply with a settlement is inherently an unanticipated change in circumstances. *See Thompson*, 404 F.3d at 828–29

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<sup>5</sup> Defendants cite *Labor/Community Strategy Center* to support their argument that the *Rufo* test rigidly contains “four elements,” but in that case, this Court repeated how the language of the consent decree itself articulated the test for modification. Appellants’ Br. at 43; *see Lab./Cmt. Strategy Ctr.*, 564 F.3d at 1120. As noted, *Asarco Inc.*, cited by *Labor/Community Strategy Center*, describes the *Rufo* test as a “two-prong standard.” 430 F.3d at 979; *Lab./Cmt. Strategy Ctr.*, 564 F.3d at 1120.

(“[P]laintiffs would not have given up their claims in exchange for an agreement that they anticipated would not be followed.”); *David C.*, 242 F.3d at 1213 (“[I]t would defy logic for [Plaintiffs] to agree to include the four-year Termination Provision in the Agreement if they actually foresaw that [the Defendant] would not be in substantial compliance with the terms of the Agreement at the end of the four-year period.”).<sup>6</sup>

Plaintiffs also established that the 2022 Settlement’s original termination date had become “detrimental to the public interest” in light of CBP’s noncompliance. *Rufo*, 502 U.S. at 384. The district court has previously noted that “[t]he public has an interest in protecting the welfare of children.” *Flores v. Barr*, 2020 WL 5666550, at \*3 (C.D. Cal. Sept. 21, 2020) (citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)). This Court’s decisions repeatedly upholding the district court’s enforcement of the *Flores* Settlement reflect the importance of ensuring children’s health and safety by holding the government to its specific settlement obligations. *See, e.g., Flores v. Barr*, 934 F.3d at 916

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<sup>6</sup> The 2022 Settlement acknowledging the possibility of limited noncompliance does not mean that the Parties anticipated CBP’s failure to substantially comply. *See* 2-ER-186 (2022 Settlement § VI); *contra* Appellants’ Br. at 43–44. Examples of these limited situations of noncompliance “include, for instance, one malfunctioning toilet or sink in a particular facility . . . a computer system outage that is rectified within several hours.” 2-ER-186 (2022 Settlement § VI). These provisions do not mean that the Parties anticipated serious, ongoing noncompliance in numerous essential areas of the 2022 Settlement.

(“Assuring that children eat enough edible food, drink clean water, are housed in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and are not sleep-deprived are without doubt essential to the children’s safety.”).

The 2022 Settlement’s original termination provision had become detrimental to the public interest, even considering that the underlying *Flores* Settlement will still bind CBP’s conduct. Without sufficient internal monitoring protocols, releasing CBP from the 2022 Settlement risks affecting CBP’s compliance with all the Settlement terms. As previously discussed, the provisions governing the development of internal monitoring protocols exist to ensure CBP will provide “safe and sanitary” conditions for children after the oversight of the court-appointed monitors ends. Plaintiffs’ counsel’s ability to enforce the FSA does not change that it would be detrimental to the public interest to release CBP from incomplete obligations to ensure, in the long term, the health and safety of children in its custody. Defendants’ argument to the contrary ignores the reason the Settlement became necessary in the first place—CBP’s repeated failure to comply with the FSA despite multiple court orders. *See supra*, Section IV.A.

The 18-month extension of the 2022 Settlement was suitably tailored to CBP’s noncompliance. First, Defendants’ own evidence and the Monitor’s reports about CBP’s incomplete monitoring protocols supported this extension. Defendants presented evidence to the district court admitting that CBP needed at

least six additional months to implement medical monitoring protocols. 2-ER-048 (citing 2-ER-085); 2-ER-081. The recent Juvenile Care Monitor reports also indicated that CBP required more time to implement—and in some instances, create—parts of the self-monitoring systems. 2-ER-020–21; 2-ER-119; 2-ER-123. The court rejected Plaintiffs’ request of a 2.5-year extension (the original settlement duration) because of CBP’s progress in some areas. 1-ER-12–13. But it determined that “CBP is not yet capable of wholly fulfilling its responsibilities under the 2022 Settlement and the FSA without the additional support provided by the JCM and the Court,” and properly granted an 18-month extension. *Id.*

Second, the court appropriately extended the Settlement in its entirety because the self-monitoring protocols, as previously discussed, deal with compliance with *all* terms of the Settlement. *See supra*, Section VII.B.1. This Court has recognized that it is appropriate to extend a consent decree in its entirety where areas of proven noncompliance may reasonably “affect [the defendant’s] ability to comply with the settlement agreement’s other requirements.” *Kelly*, 822 F.3d at 1098; *see also, e.g., Dep’t of Fair Emp. & Hous. v. L. Sch. Admission Council Inc.*, No. 12-CV-01830, 2018 WL 1156605, at \*26 (N.D. Cal. Mar. 5, 2018) (holding that extension of entire consent decree was warranted where settlement requirements “support and depend on one another,” and observing that “[i]t would make little sense . . . to extend the recordkeeping and reporting

requirements without also requiring the substantive compliance that those provisions are intended to monitor”).

Finally, Plaintiffs proved CBP’s failure to substantially comply with numerous other areas of the 2022 Settlement, which further supports affirming the extension of the entire Settlement. Alternatively, to the extent that this Court believes the district court should conduct additional fact finding regarding CBP’s record of noncompliance, this Court should remand for that purpose.

### **VIII. CONCLUSION**

The district court properly determined that it could modify the 2022 Settlement under Federal Rule of Civil Procedure 60(b). Plaintiffs’ evidence and the Juvenile Care Monitor reports strongly support the district court’s conclusion that CBP had not substantially complied with the 2022 Settlement and required additional support from the court and the Monitor. The district court correctly applied the test from *Rufo* and *Kelly* in holding that CBP’s noncompliance was a significant change in facts warranting extension of the 2022 Settlement. The court suitably tailored the modification by granting an extension of 18 months. This Court should affirm.

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s/ Mishan Wroe  
MISHAN WROE  
DIANE DE GRAMONT  
National Center for Youth Law  
1212 Broadway, Suite 600

Oakland, California 94612  
Tel: (510) 835-8098

CARLOS R. HOLGUÍN  
BARDIS VAKILI  
SARAH E. KAHN  
Center for Human Rights  
& Constitutional Law  
1505 E 17th St. Ste. 117  
Santa Ana, CA 92705  
Tel: (909) 274-9057

LEECIA WELCH  
Children's Rights  
2021 Fillmore Street  
San Francisco, CA 94115  
Tel: (415) 602-5202

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FOR THE NINTH CIRCUIT**

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