No. 20-55951

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WILLIAM P. BARR, ATTORNEY GENERAL, *et al.*,
Defendants-Appellants.

PLAINTIFFS-APPELLEES' OPPOSITION TO RENEWED EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL

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

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INTRODUCTION

On September 4, 2020, the district court properly held that the *Flores* Settlement Agreement (ECF 12-2) ("Settlement")[1] protects children the Government purports to detain pursuant to 42 U.S.C. § 265 and that such children must be transferred to licensed placements as expeditiously as possible. The district court rejected the Government's fiction that these children are not in the "legal custody" of the Department of Homeland Security ("DHS"). The Court lacks jurisdiction because the district court did not modify the Settlement.

Even if the Court had jurisdiction, the Government fails to establish that it is likely to prevail on this appeal, that it will be irreparably injured absent a stay, or that detaining children in hotels, rather than licensed facilities, would slow the spread of COVID-19. The district court's order allows the Government to detain children in hotels for short periods without cause and for longer periods if it has good cause to do so. The Government fails to rebut the Independent Monitor's and Plaintiffs' evidence that children will suffer irreparably if they are denied the Settlement's protections pending appeal. And it certainly has not demonstrated

[1] The Settlement provides "minimum standards for the detention, housing, and release of non-citizen juveniles who are detained by the government." *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017). The Settlement binds DHS and the Department of Health and Human Services ("HHS"). *Flores v. Barr*, 934 F.3d 910, 912 n.2 (9th Cir. 2019).

that the perpetuation of its haphazard, opaque, and dangerous practices would be in the public interest. A stay should be denied.

STANDARD OF REVIEW

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations and quotation marks omitted). The Court's "analysis is guided by four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769-70 (9th Cir. 2018) (quoting *Nken*, 556 U.S. at 433-34).[2] The Government bears the "burden of showing that the circumstances justify an exercise of [the Court's] discretion" to grant a stay, *Nken*, 556 U.S. at 434, and may not satisfy its burden to show irreparable harm with "conclusory factual assertions and speculative arguments . . .." *Doe # 1 v. Trump*, 957 F.3d 1050, 1059-60 (9th Cir. 2020).

[2] "'The first two factors . . . are the most critical,' and the 'mere possibility' of success or irreparable injury is insufficient to satisfy them." *East Bay Sanctuary Covenant*, 932 F.3d at 770 (quoting *Nken*, 556 U.S. at 434).

ARGUMENT

I. THE GOVERNMENT'S MOTION SHOULD BE DENIED BECAUSE THE COURT LACKS JURISDICTION.

The Court "has appellate jurisdiction over interlocutory district court orders 'granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.'" *Flores v. Barr*, 934 F.3d 910, 914 (9th Cir. 2019) (quoting 28 U.S.C.§ 1292(a)(1)). The district court did not modify the Settlement—it merely interpreted the Settlement's plain language to include children purportedly detained under Title 42 as class members and then enforced the Settlement's requirements that "minors detained in the legal custody of DHS or ORR" be afforded licensed placement and access to counsel. Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members [920], at 5-11, 17-18 (ECF 12-2) ("Sept. 4 Order"); *see Flores v. Barr*, 934 F.3d at 914-15. Consistent with the Settlement, the district court permitted unlicensed placements of less than 3 days. Sept 4 Order at 17; Order re Defendants' Ex Parte Application to Stay [985], at 5 (ECF 12-2) ("Sept. 21 Order"); Settlement ¶ 12.A.

II. THE GOVERNMENT IS NOT LIKELY TO SUCCEED ON THE MERITS.

The district court held the Settlement protects children DHS purports to detain under Title 42 and requires placement in licensed facilities expeditiously. Sept. 4 Order at 17. In this fourth attempt at defending its legal position, the Government again fails to show likelihood of success.

A. Children designated for expulsion under Title 42 are in DHS's legal custody.

The Settlement covers "all minors who are detained in the legal custody of the INS." *Flores v. Lynch*, 828 F.3d 898, 902 (9th Cir. 2016). The Settlement's plain text covers all minors in the "legal custody" of the successors of the Immigration and Naturalization Service ("INS"). *Id*. at 905-06, 910.[3]

The district court correctly held the Settlement uses "legal custody" as that term is used in family law: that is, as referring to the entity with decision-making authority over a child's life. Sept. 4 Order at 5-6 (citing Settlement ¶¶ 14-16, 19; Black's Law Dictionary (11th ed. 2019); Cal. Fam. Code §§ 3003, 3006).[4]

The Government does not contest that DHS exercises plenary decision-making power over children it purports to detain under Title 42, including control

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[3] "The Settlement is a consent decree, which, 'like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.'" *Flores v. Lynch*, 828 F.3d at 905 (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005)).

[4] The Government's argument that the district court's "reading makes the word 'legal' superfluous, and ignores that a minor's parent may retain custody as well," is without merit. Motion for Stay at 11 (ECF 12-1). The district court's interpretation is consistent with the distinction between legal and physical custody in family law, including the concept of joint legal custody, and the use of legal custody in the Settlement. *See* Sept. 4 Order at 5-6, 8; Settlement ¶¶ 14-16, 19-20. The Government acknowledged that when the parties entered into the Settlement the "distinction between legal custody and physical custody was clearly understood in California," with "legal custody" referring to "the power to make major decisions affecting the life of the child." Defs' Response to Pls' Report on Parties' Conference re "Title 42" Class Members, at 5-6 n.2 (D. Ct. Dkt. 900) (citing *In re Jennifer R.*, 17 Cal. Rptr. 2d 759, 763 (Ct. App. 1993)).

over their apprehension, detention, medical care, release, and the choice whether to expel children under Title 42 or process them under Title 8.[5] *See* Sept. 4 Order at 6-8; *see also* Ex. 4, Declaration of Mellissa Harper, August 21, 2020, ¶¶ 1-2, 11 (D. Ct. Dkt. 925-1) ("Aug. 21 Harper Decl."). This is precisely the decision-making authority the INS exercised under the Settlement. *See* Settlement ¶¶ 19-20. Neither the Department of Health and Human Services ("HHS"), nor its subordinate entity, the Centers for Disease Control and Prevention ("CDC"), plays any discernable role in DHS's control over children nominally detained under Title 42. Sept. 4 Order at 6-8.

The Government fails to offer *any* authority for its assertion that "[t]he term 'legal custody' refers to the source of law that gives rise to the government's custody of the child." Motion for Stay at 11 (ECF 12-1) ("Mot. for Stay"); *see also* Sept. 21 Order at 2. The Settlement nowhere limits its coverage to children taken into custody under Title 8. Sept. 4 Order at 8-9.[6] Congress has provided that

[5] It is undisputed that DHS and its component entities, CBP and ICE, are among the INS's successors for purposes of the Settlement. *See* Mot. for Stay at 12.

[6] Notably, the CDC's order covers *only* non-citizens whom DHS would otherwise detain in Border Patrol facilities under Title 8 and excludes, among others, U.S. citizens, green card holders, and individuals with valid travel documents. *See* Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists, 85 Fed. Reg. 31,503, 31,507 (May 26, 2020) ("Closure Order"); *see also* Sept. 4 Order at 9 (addressing Government's argument regarding customs officers). The Closure Order nowhere intimates that the CDC will assume legal custody of anyone. Neither 42 U.S.C. § 265 nor its implementing regulation, 42 C.F.R. § 71.40, includes any reference to

the Settlement remain binding even as it has itself enlarged the legal framework governing the Government's detention of children. *Flores v. Sessions*, 862 F.3d 863, 870-871, 879 (9th Cir. 2017).

B. The Settlement protects all children in HHS and DHS custody.

Even assuming arguendo that children designated under Title 42 were in HHS's legal custody through the CDC, unaccompanied non-citizen children would still be class members. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") transferred responsibility for the care and custody of unaccompanied children to HHS. *See* 8 U.S.C. §§ 1232(b)(1), (c)(2)(A), (c)(3). Insofar as the placement of non-citizen unaccompanied children is concerned, HHS is now the INS's successor in interest and is accordingly bound by the Settlement. *See Flores v. Barr*, 934 F.3d at 912 n.2. The CDC, of course, is part of HHS, and whether children are in DHS's or HHS's custody, the Settlement protects them all the same.[7]

"detention" or "custody." That the parties did not specifically anticipate the Government's novel interpretation of 42 U.S.C. § 265 to justify the detention of non-citizen children says nothing about whether such children lack protection under the Settlement. *See Flores v. Lynch*, 828 F.3d at 906.

[7] The district court did not reach this issue because it concluded that DHS has legal custody. Sept. 4 Order at 11 n.8. This Court, however, may affirm on alternative grounds. *W. Ctr. for Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000).

C. The Government could simultaneously comply with the Settlement, the TVPRA's placement provisions, and Title 42.

The Government's motion is founded on a false premise: *i.e.,* that providing children appropriate placement and carrying out the Closure Order are zero-sum propositions. The district court properly harmonized the two.

To begin, the Government has yet to explain how licensed placement "introduces" a child into the United States under 42 U.S.C. § 265 any more than detaining them in a Phoenix or San Antonio hotel open to the general public does. Sept. 21 Order at 2; Sept. 4 Order at 10, 12.[8] That the Government summarily expels children before it has time to comply with the Settlement's release provisions does not mean that children are not class members. *See Flores v. Johnson*, 212 F. Supp. 3d 864, 884-85 (C.D. Cal. 2015) (the Settlement's release provision does not interfere with removal), *aff'd in relevant part*, *Flores v. Lynch,* 828 F.3d 898 (9th Cir. 2016).

Further, there is no conflict between providing children licensed placement and the Closure Order, which mentions neither ORR nor Immigration and Customs Enforcement ("ICE") facilities. *See* 85 Fed. Reg. at 31,507. Instead, the Closure

[8] DHS regularly sends children whom it initially purports to detain pursuant to Title 42 to licensed placements whenever it wishes and entirely without CDC involvement. Sept. 4 Order at 11. All the district court's order requires, therefore, is that DHS properly place children as the Settlement requires and as the TVPRA directs, rather than only when it wishes.

Order is based on factual findings regarding the difficulties of screening, isolating, and social distancing at Customs and Border Protection ("CBP") holding facilities. *Id.*[9] By all indications from the CDC, there is simply no comparison between the capacity to screen and isolate children in properly licensed and inspected dependent care facilities and cramped CBP facilities. *Compare* Ex. 6, Declaration of Dr. Amanda Cohn, March 27, 2020, ¶¶ 8, 20, 23, 26-27 (D. Ct. Dkt. 736-11) ("Cohn Decl."), *with* 85 Fed. Reg. at 31,507.

DHS's "hoteling" practice, by contrast, plainly conflicts with the TVPRA, which both (1) preserves the Settlement; and (2) directs *all* federal agencies to transfer the custody of unaccompanied minors to "the Secretary of Health and Human Services not later than 72 hours . . . ," who must then "promptly" place them "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. §§ 1232(b)(3), (c)(2)(A); *accord Flores v. Sessions*, 862 F.3d at 871.[10]

The Government again fails to answer the district court's finding that detention in hotels conflicts with Congress's having directed *all* federal agencies to transfer unaccompanied children to HHS within 72 hours for proper placement.

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[9] The CDC extended its order to coastal Ports of Entry and Border Patrol stations only after finding that such facilities are "substantially similar in all respects relevant to the public health analysis" to land stations. 85 Fed. Reg. at 31,507.

[10] The Government has not disputed that unaccompanied children designated under Title 42 meet the statutory definition of an "unaccompanied alien child." *See* 6 U.S.C. § 279(g)(2).

See Sept. 4 Order at 10. "The Court need not force a construction that would render the Agreement and the TVPRA incompatible with Title 42 when a perfectly reasonable interpretation that harmonizes them is available." Sept. 4 Order at 10 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

D. The Government is not placing children in licensed facilities as expeditiously as possible.

The Settlement generally requires that the Government place children in a licensed, non-secure facility within 72 hours or, in the case of an "emergency or influx," "as expeditiously as possible." Sept. 4 Order at 12; Settlement ¶¶ 6, 12.A, 19. The district court recognized that "the COVID-19 pandemic presents an 'emergency' situation that could slow down the rate of placements" and that "exigent circumstances" may "necessitate future hotel placements," but found that the Government makes no effort at all to afford Title 42 children licensed placement no matter how long it detains them.[11] Sept. 4 Order at 12-13, 17; Sept. 21 Order at 2-4.

The Government did not argue to the district court in its merits briefing why it should have any difficulty giving children a licensed placement within three

[11] The Government's assertion that the district court "ignor[ed]" paragraph 12 and disregarded its prior rulings providing additional time for transfer is plainly inconsistent with the record. Mot. for Stay at 14; *see* Sept. 4 Order at 12-13.

days. *See* Defs' Opp. to Mot. to Enforce (D. Ct. Dkt. 925).[12] Any new evidence and arguments raised for the first time on appeal are not relevant to the Government's likelihood of success on the merits. *See Greisen v. Hanken,* 925 F.3d 1097, 1115 (9th Cir. 2019); *Lowry v. Barnhart*, 329 F.3d 1019, 1024-26 (9th Cir. 2003).

III. THE GOVERNMENT FAILS TO DEMONSTRATE IRREPARABLE INJURY.

The Government has also failed to carry its burden of demonstrating that "irreparable injury is likely to occur during the period before the appeal is decided." *Doe # 1*, 957 F.3d at 1059; *see also Nken*, 556 U.S. at 434 ("[S]imply showing some possibility of irreparable injury fails to satisfy the second factor.").

First, the district court *did not* "require[] that all minors and families who would have been held in individual hotel rooms before expulsion must now instead be placed into congregate settings." Mot. for Stay at 17. The district court's order requires transfer to *licensed facilities*. It also permits DHS to detain children in

[12] Although the Government alluded in a footnote to potential "downstream consequences" of an order requiring licensed placement, Defs' Opp. at 19 n.8, it cited a March 2020 declaration from a CDC official, who stated, "*ORR has adequate space within its facilities to isolate any UAC suspected of or confirmed to be infected with COVID-19*" because it is "operating at approximately 30% capacity." Cohn Decl. ¶ 23 (emphasis added). Given that ORR shelters were operating at 3% capacity as of August 22, 2020, with over 10,000 vacant beds, the CDC's declaration posits no obstacle whatsoever to licensed placement, but instead confirms that the Government could easily afford children it detains more than three days proper placement. *See* Sept. 4 Order at 13.

unlicensed hotels for up to 72 hours, Sept. 4 Order at 17-18; Sept. 21 Order at 5 ¶ 2, and specifically contemplates that "exigent circumstances [may] arise that necessitate future hotel placements." Sept. 4 Order at 17-18; Sept. 21 Order at 3-4, 5 ¶ 2. Given this flexibility, the Government's claim of irreparable harm strains credulity.[13]

Moreover, despite the Government's assertions that licensed placement would threaten public health, neither the CDC nor the Closure Order has addressed the safety of hotel detention or of ORR or ICE residential facilities. *See* 85 Fed. Reg. at 31,507; Sept. 21 Order at 3.[14] Nor does the Government deny that DHS, and not public health officials, unilaterally decides when to transfer children to ORR or ICE facilities, including some who *test positive for COVID-19*. *See* Sept. 4 Order at 11; Ex. 2, Interim Report by Independent Monitor, July 22, 2020, at 17 (D. Ct. Dkt. 873) ("July Interim Report"); *see also East Bay Sanctuary Covenant*, 932 F.3d at 778 (noting evidence "that the Government itself is undermining its own goal").

Next, despite alleging that "the ORR system would likely come under significant stress if ORR were to begin to receive on a regular basis approximately

[13] In the event of exigency, the Government need only "alert Plaintiffs and the Independent Monitor, providing good cause for why such unlicensed placements are necessary." Sept. 4 Order at 17.

[14] None of the Government's declarants who now suggest otherwise are either public health officials or experts.

75 to 100 referrals of UAC per week," Declaration of Jallyn Sualog, September 17, 2020, ¶ 9 (ECF 12-2 at 182) ("Sept. 17 Sualog Decl."), the Government chose to "except" at least 155 children from Title 42 detention between September 11 and September 13 and instead "refer[] [them] . . . to HHS." Declaration of Anthony Porvaznik, September 17, 2020, ¶ 5 (ECF 12-2 at 76-77) ("Porvaznik Decl."). The Government has neither explained its reasons for excepting these children, nor has it provided any reason why children who spend over three days in custody cannot also be afforded a licensed placement.[15]

Further still, the Government has *repeatedly* asserted that ORR could safely detain children in congregate facilities during the pandemic provided its facilities are at no more than 30% capacity.[16] *See, e.g.*, Declaration of Jallyn Sualog, March

[15] Additionally, the district court's order neither requires nor permits DHS to detain children in Border Patrol facilities. *Cf.* Declaration of Raul L. Ortiz, September 11, 2020, ¶¶ 8-10 (ECF 12-2 at 69-70) ("Ortiz Decl.") (stating that "increased numbers of minors are likely to spend longer time in USBP facilities"). Neither hotels nor CBP facilities are licensed placements, and children must be transferred out of both as expeditiously as possible.

[16] The Government criticizes Plaintiffs for opposing extended hotel placement given Plaintiffs discouraging the use of congregate care placements during the COVID-19 pandemic. *See* Mot. for Stay at 17. Plaintiffs' positions are consistent. Plaintiffs remain concerned about potential risks of congregate care placement and the psychological harm of isolation during the pandemic, which is why Plaintiffs encourage the Government to release children without unnecessary delay to parents and other available custodians and to utilize the non-congregate placement options when prompt release is not practicable. However, as the district court held, open-ended *unlicensed* and *unmonitored* placement is simply not safer than placement in ORR's vastly depopulated congregate facilities.

27, 2020, ¶¶ 13-31 (ECF 12-2 at 211-14) ("March 27 Sualog Decl."). As of August 22, 2020, ORR's congregate shelters were *97%* empty, with over 10,000 beds available. *See* Sept. 4 Order at 13; Ex. 1, ORR Juvenile Coordinator Report, August 24, 2020, at 2 (D. Ct. Dkt. 932-2) ("Aug. JuvCo Report").[17]

The Government has also repeatedly assured that ORR has the ability to test and quarantine children in congregate settings, even when detaining far more children than it is now. *See* March 27 Sualog Decl. ¶¶ 13-31, 42 (ORR is highly "experience[d] with the identification, mitigation, and treatment of contagious diseases," and has implemented "rigorous" COVID-19 protocols in shelters); *id*. ¶ 13 (ORR "ha[d] additional capacity and more opportunity to ensure social distancing and isolation within the care provider network" because of its "28% occupancy rate"); Cohn Decl. ¶¶ 23, 26 ("ORR ha[d] adequate space within its facilities to isolate any UAC suspected of or confirmed to be infected with COVID-19, given that the ORR network of grantee care-provider facilities is currently operating at approximately 30% capacity . . ."). With 13,373 shelter and foster home beds, ORR could accommodate some 4,000 children before exceeding the 30% occupancy rate it has repeatedly represented as safe.[18]

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[17] As of September 8, 2020, there were only 515 children in ORR congregate settings and 139 children in transitional foster care. Declaration of Jallyn Sualog, Sept. 11, 2020, ¶ 42 (ECF 12-2 at 202) ("Sept. 11 Sualog Decl.").

[18] Of course, the Government now backpedals, arguing that its confidence in the safety of depopulated congregate detention was misplaced because it pre-dated

In any event, the district court's order nowhere requires the Government to place children in congregate facilities, and the Government has hundreds of vacant transitional foster care ("TFC") beds at its disposal. Sept. 17 Sualog Decl. ¶ 14 (ORR has "approximately 1900 TFC beds as of September 16, 2020"). ORR's assertion that such placements "*could* prove too risky for foster parents to accept," *id*. ¶ 16-17, is both patently speculative and evidence that ORR has not even tried to secure non-congregate placements for Title 42 children.[19]

"ORR's current COVID-19 protocols." Sept. 17 Sualog Decl. ¶ 7. The Government offers no evidence—much less anything from public health officials—as to how many children it now thinks ORR can safely place. Meanwhile, as has been seen, DHS takes it upon itself to dispatch hundreds of children to ORR facilities according to criteria of its own choosing. To say that the harm the Government would experience absent a stay is speculative is palpable understatement. *See id*. at ¶ 8 ("This process … *has the potential* to create a bottleneck *if a sufficient number* of incoming UAC need to be placed in quarantine/isolation." (emphasis added)).

[19] Further, even if ORR has experienced "a drop in available foster families," *id*. ¶ 17, hundreds of its remaining foster care placements remain unused. *See* Aug. JuvCo Report at 2 (TFC is 95% vacant). Finally, ORR's insisting that such beds are "reserved" for "children under the age of 12, pregnant and parenting teens, children with disabilities and/or sibling groups" does not square with its own Policy Guide, which states that "ORR gives priority" to these groups. *Compare* Sept. 17 Sualog Decl. ¶ 14, *with* ORR Policy Guide § 1.2.2, available at www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.2. In any event, the Government may not shirk its legal obligations under the Settlement and TVPRA by choosing to "reserve" non-congregate placements for a subset of children of its own selection. Even assuming that foster care beds are primarily for younger children, ORR has not explained why such placements are not being utilized for this population. *Cf.* Sept. 17 Sualog Decl. ¶ 9 ("[F]actors outside of ORR's control—such as a material shift in the demographics of UAC towards younger children, which would limit the number of licensed facilities capable of caring for such children—would likely worsen the situation").

Finally, the Government has "failed to demonstrate how hotels, which are otherwise open to the public and have unlicensed staff coming in and out, located in areas with high incidence of COVID-19, are any better for protecting public health than licensed facilities would be."[20] Sept. 4 Order at 10; *see also id.* at 12, 15; Sept. 21 Order at 2, 5. To the contrary, the district court, as well as its independent medical expert and monitor, all found that hotels pose significant safety concerns. Sept. 4 Order at 14-15; *see also* Ex. 3, Interim Report by Independent Monitor and Dr. Paul Wise, August 26, 2020, at 16-17 (D. Ct. Dkt. 938) ("Aug. Interim Report") at 16-17 (DHS lacks formal protocols for children who test positive for COVID-19 at hotels). Although the Government disagrees with the district court's finding, it has offered no coherent evidence to rebut it.

The Government has also offered seriously inconsistent data regarding the number of children held in hotels and how many it will need to place in licensed facilities under the district court's order. *See* Sept. 21 Order at 3 & n.2.[21] Further,

[20] Moreover, the Government has failed to explain how placement in CBP congregate care prior to placement in hotels is safer than transfers from CBP to licensed facilities. In July, there were 41 children who spent three or more days in CBP custody prior to their transfer to ICE custody. *See* Ex. 7, Declaration of Melissa Adamson, "Ex. 1 Title 42 Data Summary," Aug. 28, 2020, at 19-20 (D. Ct. Dkt. 960-1 at 27-28) ("Adamson Decl. Data Summary").

[21] The Government has yet to explain the glaring inconsistencies in its data. Given the Government's data that 577 unaccompanied minors *total* were detained in hotels from mid-March through July, Aug. 21 Harper Decl. ¶ 24, it is difficult to

the Government's declarants base their claims of harm on a patently false premise: *i.e.*, that the district court's order requires them to place *all* children designated under Title 42 in congregate facilities. *See* Declaration of Russell Hott, Sept. 10, 2020, ¶ 7 ("Hott Decl.") (ECF 12-2 at 81); Declaration of Raul L. Ortiz, Sept. 11, 2020 ¶ 7 ("Ortiz Decl.") (ECF 12-2 at 68). Nonetheless, the district court made clear that should placing children in licensed facilities "create a 'bottleneck," the Government is free to implement "an orderly and safe system of staged transfers that considers public health needs as well as logistical issues." Sept. 21 Order at 3-4. Any harm the Government might experience absent a stay "is not irreparable [because] it can be avoided while still complying with the Court's order." *Id* 4.

IV. A STAY WOULD HARM HUNDREDS OF CHILDREN RELEGATED TO UNLICENSED AND UNMONITORED PLACEMENTS.

The Independent Monitor's reports and Plaintiffs' evidence establish that children will suffer irreparably if DHS continues to detain them for days or weeks in hotels. *See* Sept. 4 Order at 12, 15-16. DHS has detained unaccompanied children in hotels for as long as 28 days, and more recent data indicate it has detained accompanied children in hotels for up to 38 days. *See* Sept. 4 Order at 11;

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understand how CBP "anticipates that it may need to refer approximately 60-140 additional single minors to HHS per week as a result of the order." Ortiz Decl. ¶ 9; *see also* Adamson Decl. Data Summary at 1-6 (D. Ct. Dkt. 960-1 at 9-14) (436 unaccompanied children were detained in hotels for three or more days from April 18 to July 31). ORR offers no explanation of how it determines whether a child has been exposed to COVID-19. *See* Sept. 17 Sualog Decl. ¶ 18.

Supplemental Declaration of Mellissa Harper, Attachment A, at 7 (under seal) (D. Ct. Dkt. 972-1) ("Harper Supp. Decl.").[22]

The Government nowhere contests the district court's finding that hotels "do[] not meet a number of requirements of licensed programs under the Agreement, including providing an individualized needs assessment, education services, daily outdoor activity, and counseling sessions, among others." Sept. 4 Order at 12; *see also* July Interim Report at 9 ("Children and families are not usually taken outside during their time in hotels.").[23] "Children as young as 10 are left alone with an adult who has no qualifications or training in child care," "[t]here appear to be no separate standards for how 10-year-olds are cared for compared to 17-year-olds," and "oversight of the hoteling program is vague and minimal." Sept. 4 Order at 14.

[22] According to the Government's corrected data submission, minors S.V. and A.P.V., both under 10 years of age, were detained at a hotel from 6/9/2020 to 7/17/2020. *See* Harper Supp. Decl., Attachment A, at 7.

[23] "For over thirty years, [this Court has] emphasized that 'some form of regular outdoor exercise is extremely important to the psychological and physical well–being of the inmates.'" *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th Cir. 2010) (quoting *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979))). If anything, children deprived of outdoor recreation are even more vulnerable to psychological harm. *See* July Interim Report at 18 ("[I]solating a child alone in a hotel room for 10-14 days can have a more harmful emotional impact than that seen in adults.").

MVM contractors "receive a mere two days of training, only a fraction of which are dedicated to child development and care." Sept. 21 Order at 2.[24] According to the Government's statement of work, MVM is expected to provide *transportation services*, not care for children in hotel rooms for weeks at a time. *See* Declaration of Mellissa Harper, September 17, 2020, ¶ 3 (ECF 12-2 at 87) ("Sept. 17 Harper Decl."); *id.* at Att. A at 67 § 3.a.iii ("In limited cases, overnight housing may be required.").[25]

Children report feeling "confus[ed] and terrif[ied]" in hotels, and in at least one instance, "the trauma [a] child endured as a trafficking victim was compounded by DHS's treatment of the child and her placement in Title 42 proceedings." Ex. 8, Declaration of Karla Marisol Vargas, August 13, 2020, ¶¶ 19-20 (D. Ct. Dkt. 920-2).[26] DHS frequently moves children "from facility to facility without warning. . ." and "these frequent transfers, without notice or explanation,

[24] MVM "Transportation Specialists" receive 16 hours of training that is meant to cover 15 different topics ranging from "self-defense" to "bloodborne pathogens." Hott Decl. ¶ 12. Repeated assertions that MVM employees are specialists "in the . . . care of this vulnerable population," Mot. for Stay at 8, 18, have no basis in fact.

[25] MVM's statement of work includes three mentions of "hotel rooms," which appear to contemplate no more than the short stays the district court's order permits. *See* Sept. 17 Harper Decl. Att. A at 68 § 3.c.

[26] The American Academy of Pediatrics has stated that DHS's practice of detaining children in hotels is "traumatizing" for vulnerable immigrant children. Sally Goza, *AAP Statement on Media Reports of Immigrant Children Being Detained in Hotels*, Am. Acad. Pediatrics, July 23, 2020, https://services.aap.org/en/news-room/news-releases/aap/2020/aap-statement-on-media-reports-of-immigrant-children-being-detained-in-hotels/ (as cited in D. Ct. Dkt. 920-1).

cause the children to feel scared and anxious." Ex. 5, Declaration of Taylor Levy, August 20, 2020, ¶ 7 (D. Ct. Dkt. 988-1) ("Levy Decl.").[27]

Children detained in hotels are also held virtually incommunicado.[28] *See* Sept. 21 Order at 2 n.1. Children's lawyers and families report immense obstacles even to discover children's whereabouts. Sept. 4 Order at 15-16; *see also* Levy Decl. ¶¶ 8-9 (children prohibited from disclosing their location to family members). Cut off from the outside world, children have no ability to defend themselves. The few children who have managed to secure counsel, by contrast, typically succeed in having DHS re-designate them as Title 8 detainees, whereupon they are promptly transferred to licensed facilities. *See* Sept. 4 Order at 7. Staying the district court's order would extend children's isolation, leaving the conditions and treatment they experience to the unbridled discretion of DHS and its unlicensed contractor.[29]

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[27] An unaccompanied 17-year-old girl, whom DHS detained for over 15 nights at a hotel before transferring her to a licensed placement, told her attorney that she was "rarely allowed outside of her room," lacked "any schooling or ability to attend religious services," and felt "isolated and anxious while she was detained in a hotel room" by strangers who "watched her at all times." Levy Decl. ¶ 9.

[28] MVM's contract gives it unfettered discretion to deny children access to counsel. *See* Sept. 17 Harper Decl., Att. A at 84.

[29] Settlement paragraph 32 requires the Government to allow Plaintiffs' counsel access to detained children to monitor compliance with the agreement. Presented with voluminous evidence that DHS has systematically violated the Settlement, the district court appointed the Independent Monitor to bolster compliance oversight. *See* Order Appointing Special Master/Independent Monitor, October 5, 2018 (D. Ct. Dkt. 494).

V. A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST.

In 2008, Congress enshrined in federal law the public's interest in placing children in safe and appropriate facilities. 8 U.S.C. § 1232; *see also Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (emphasizing "the interests of society to protect the welfare of children"); *Flores v. Sessions*, 862 F.3d at 881 ("[T]he HSA and TVPRA were intended to address the unique vulnerability of minors who enter this country unaccompanied, and to improve the treatment of such children while in government custody."). The Government has failed to demonstrate that detaining children in hotels furthers public health, Sept. 21 Order at 5, and permitting it to circumvent the Settlement and the TVPRA is contrary to the public's interest "in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *East Bay Sanctuary Covenant*, 932 F.3d at 779 (internal citations and alterations omitted).

CONCLUSION

For the foregoing reasons, the Government's motion should be denied.[30]

[30] To the extent the Court is inclined to grant the Government's motion to stay, it should stay no more than paragraphs 2 and 3 of the district court's Sept. 4 Order, such that monitoring of children held in hotels may proceed. Nothing in the Government's motion suggests it would suffer irreparably should monitoring proceed pending disposition of their instant appeal.

Dated: September 25, 2020

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