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 13 UNITED STATES DISTRICT COURT
 14 CENTRAL DISTRICT OF CALIFORNIA
 15 WESTERN DIVISION

17 JENNY LISETTE FLORES, *et al.*,
 18 Plaintiffs,
 19 v.
 20 WILLIAM BARR, Attorney General of
 21 the United States, *et al.*,
 22
 23 Defendants.

No. CV 85-4544-DMG-AGR_x
 NOTICE OF MOTION AND MOTION TO
 ENFORCE SETTLEMENT RE “TITLE 42”
 CLASS MEMBERS
 Hearing: Sept. 4, 2020
 Time: 11:00 a.m.
 Hon. Dolly M. Gee

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1 To Defendants and their attorneys of record:

2 Please take notice that on September 4, 2020, at 11:00 a.m. or as soon
3 thereafter as counsel may be heard, Plaintiffs will and do hereby move the Court
4 for a class-wide order requiring Defendants to cure breaches of the settlement
5 approved by this Court on January 28, 1997 (“Settlement”), as described in the
6 accompanying memorandum of law.

7 This motion is based upon the memorandum of law and exhibits filed
8 concurrently herewith, and all other matters of record; it is brought following a
9 meeting of counsel pursuant to Local Rule 7-3 and ¶ 37 of the Settlement on July
10 27, 2020, and the Court’s Order re August 7, 2020 Status Conference [Doc. #912].
11

12 Dated: August 14, 2020

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20 /s/ Carlos Holguín
21 Carlos Holguín
22 *One of the Attorneys for Plaintiffs*
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19 v.
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21 the United States, *et al.*,
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No. CV 85-4544-DMG-AGR_x
MEMORANDUM IN SUPPORT OF MOTION
TO ENFORCE SETTLEMENT RE “TITLE 42”
CLASS MEMBERS
Hearing: Sept. 4, 2020
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Hon. Dolly M. Gee

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1 I. INTRODUCTION

2 The class-wide Settlement in this action protects “all minors who are
3 detained in the legal custody of the INS” and expressly binds the INS and
4 Department of Justice, as well as “their agents, employees, contractors, and/or
5 successors in office.” Exs. in Support of Motion to Enforce Settlement, February
6 3, 2015 [Doc. # 101], Ex. 1 (“Settlement”), ¶¶ 1, 10.

7 The Settlement sets standards for the placement and release of detained
8 immigrant and asylum-seeking children, and generally requires Defendants
9 Department of Homeland Security (“DHS”) and the U.S. Department of Health
10 and Human Services (“HHS”) to minimize the detention of children. *Id.* ¶ 14. The
11 Settlement further provides that for howsoever long Defendants do detain
12 children, they must, except in exceptional circumstances, place them in non-
13 secure facilities holding a state license to care for dependent minors. *Id.* ¶ 19.

14 Defendants do not deny that they are detaining children as young as three,
15 four and five years old in hotels and other unlicensed placements for weeks at a
16 time before summarily expelling them pursuant to the COVID-19 border closure
17 order. Defendants excuse this prima facie violation of Settlement ¶¶ 12A and 19
18 by arguing that (1) unaccompanied children designated for Title 42 expulsion are
19 not in “immigration” custody, but are instead in the “legal custody” of HHS and
20 its subordinate entity, the Centers for Disease Control and Prevention (“CDC”);
21 and (2) even if the Settlement does cover Title 42 unaccompanied children,
22 Defendants may lawfully place them in hotels and other irregular, uninspected,
23 and unlicensed facilities while Defendants arrange for their summary expulsion.

24 Neither of Defendants’ arguments has any merit. First, the Settlement binds
25 HHS and requires that HHS and DHS house children in proper facilities, whether
26 they are detained pursuant to Title 8, Title 42, or any other statutory framework;
27 second, the Settlement requires that HHS and DHS do so as expeditiously as
28 possible. It falls to this Court, again, to remedy Defendants’ violations of the

1 Settlement. It should accordingly hold that children detained subject to Title 42
2 are *Flores* class members and order Defendants to place such children in licensed
3 facilities as expeditiously as possible, as Settlement ¶¶ 12A and 19 direct.

4 II. BACKGROUND TO THE COVID-19 BORDER CLOSURE

5 On March 21, 2020, President Trump announced that the CDC would issue
6 an order closing the northern and southern land borders of the United States as a
7 means of preventing the introduction of COVID-19. The CDC based its resulting
8 order principally on 42 U.S.C. §§ 265 and 268 (“Title 42”), statutes Congress last
9 visited in 1944 and 1953¹, respectively; that is, more than 50 years before the
10 Settlement and more than 60 years before Congress enacted the TVPRA. *See*
11 *Order Suspending Introduction of Certain Persons from Countries where a*
12 *Communicable Disease Exists*, 85 Fed. Reg. 17,060 (Mar. 26, 2020) (effective
13 March 20, 2020) (“Closure Order”).

14 Neither the Closure Order nor its accompanying regulations categorically
15 exempt accompanied or unaccompanied minors from its directive that CBP and
16 ICE interdict and summarily expel non-citizens who attempt to cross into the
17 United States over a land border. *Id.* Initially in place for 30 days, on April 22,
18 2020, the Administration extended the Closure Order for another 30 days and
19 then, on May 26, 2020, extended it indefinitely. Extension of Order Suspending
20 Introduction of Certain Persons from Countries where a Communicable Disease
21 Exists, 85 Fed. Reg. 22,424 (Apr. 22, 2020) (effective April 20, 2020);
22 Amendment and Extension of Order Suspending Introduction of Certain Persons
23 from Countries where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May
24 26, 2020) (effective May 21, 2020).²

25 _____
26 ¹ *See* Act July 1, 1944, ch 373, Title III, § 362, 58 Stat. 704; 1953 Reorg. Plan No.
1, §§ 5, 8, 67 Stat. 631.

27 ² The results of the Closure Order have been dramatic: in March, 2020, ORR took
28 custody of 1,852 children; in April, 62; in May, 39; and in June, 61. *See* Ex. G,
Declaration of Melissa Adamson ¶¶ 4-8 (“Adamson Decl.”). As of July 22, 2020,

1 On July 14, 2020, Plaintiffs requested that Defendants meet and confer
2 regarding their “[f]ailure to transfer class member designated for ‘Title 42 Return’
3 to licensed placements as expeditiously as possible” in violation of Settlement ¶¶
4 12A and 19. *See* Pls’ Response at 3 and Ex. A. Plaintiffs advised that DHS’s April
5 2020 ¶ 29 data report included 29 children listed as “Title 42 Return” whom
6 Defendants had “detained for three or more days in unlicensed placements such as
7 hotels, hold rooms, and MVM transport facilities.” *Id.*, Ex. A at 2.

8 On July 22, 2020, the Independent Monitor filed her Interim Report alerting
9 the Court to Defendants’ using unlicensed “temporary housing” to detain
10 unaccompanied children and families with children. *See* Interim Report on the Use
11 of Temporary Housing for Minors and Families under Title 42 by Independent
12 Monitor, July 22, 2020 [Doc. # 873] (“Interim Report”). The Interim Report noted
13 several concerns with this “temporary housing” practice, including (1) “lack of
14 formal oversight”; (2) “[n]o limits on facility census or length of stay”; (3) no

15 _____
16 ORR had only 823 children in its custody, amounting to a mere six percent of its
17 available beds in licensed shelters. ORR Juvenile Coordinator Interim Report, July
18 24, 2020 [Doc. # 882-2] (“ORR Report”) at 2 (98 percent of ORR shelter beds
19 unoccupied (10,491 available beds) as of July 22, 2020). Data reports Defendants
20 produced pursuant to Settlement ¶ 29, however, disclosed that they were detaining a
21 growing number of unaccompanied children pending Title 42 expulsion in hotels,
22 “hold rooms,” and “MVM Transport”; that such children were spending weeks in
23 such irregular placements, and that many children detained in hotels are very
24 young. *See* Pls’ Response to Objections to Independent Monitor’s Interim Report re
25 Temporary Housing for Minors and Families Under Title 42, July 25, 2020 [Doc. #
26 889] (“Pls’ Response”), Ex. C (Declaration of Melissa Adamson, July 25, 2020
27 (attaching summary of ¶ 29 data reports for April, May and June 2020)). On June
28 25, 2020, DHS Acting Commissioner Morgan testified that over 2,000 UACs have
been detained and summarily expelled pursuant to Title 42, while 300 have been
processed as Title 8. C-SPAN, *Senate Hearing on Customs and Border Protection
Oversight*, June 25, 2020, [www.c-span.org/video/?473378-1/senate-hearing-
customs-border-protection-oversight](http://www.c-span.org/video/?473378-1/senate-hearing-customs-border-protection-oversight) (statement of Mark Morgan, Cmm’r, U.S.
Customs and Border Protection at 00:54:51).

1 “formal lower age limit for UACs to be housed in hotels”; and (4) potentially
2 inadequate medical care and measures to prevent “hotelled” children from
3 contracting COVID-19 disease. *Id.* at 14-17.

4 On July 25, 2020, the Court ordered the Parties to “meet and confer
5 regarding the issues with ‘hoteling’ raised in the Monitor’s Interim Report . . . and
6 provide a status update on their efforts to resolve those issues at the August 7,
7 2020 hearing in this matter.” Order re Defs’ Ex Parte Application to Stay, July 25,
8 2020 [Doc. # 887] at 3. In this order, the Court stated that the Independent
9 Monitor’s “[m]onitoring of the possible hoteling issue” arose under court
10 authorization pursuant to the April 24, 2020 and June 26, 2020 orders. *Id.*

11 On July 27, 2020, the Parties and the Independent Monitor met and
12 conferred. Plaintiffs thereafter filed a report informing the Court of Defendants’
13 position that the Settlement does not cover unaccompanied children designated for
14 expulsion pursuant to the Closure Order. Pls’ Report on Parties’ Conference re
15 “Title 42” Class Members, July 29, 2020 [Doc. # 897] (“Pls’ Report”).³

16 On August 7, 2020, the Court found “Title 42 hotelling” to arise outside the
17 scope of prior motions to enforce and set an expedited briefing schedule for a new
18 motion to enforce on the “hotelling” issue. *See* Order re August 7, 2020 Status
19 Conference, August 7, 2020 [Doc. # 912] (“Aug. 7 Order”) at 3-4. In response to
20 the Court’s Aug. 7 Order, Plaintiffs file this Motion to Enforce.

21 III. THE SETTLEMENT SQUARELY BINDS HHS AND DHS.

22 This Court has repeatedly affirmed its jurisdiction to enforce the Settlement
23

24 ³ Defendants subsequently filed a response to Plaintiffs’ report confirming their
25 view that the Settlement does not protect unaccompanied children designated for
26 Title 42 expulsion. Defs’ Response to Plaintiffs’ Report on Parties’ Conference re
27 “Title 42” Class Members, August 4, 2020 [Doc. # 900] (“Defs’ Response”).
28 Plaintiffs thereafter filed a reply rebutting Defendants’ response. Pls’ Reply to
Defendants’ Response to Report re “Title 42” Class Members, August 6, 2020
[Doc. # 906] (“Pls’ Reply”).

1 and set out the principles for doing so. *See, e.g., Flores v. Johnson*, 212 F. Supp.
2 3d 864, 869-70 (C.D. Cal. 2015) (citing Settlement ¶ 37; *Kokkonen v. Guardian*
3 *Life Ins. Co. of Am.*, 511 U.S. 375, 380-81 (1994); *Dacanay v. Mendoza*, 573 F.2d
4 1075, 1078 (9th Cir. 1978)).

5 “The Settlement is a consent decree, which, ‘like a contract, must be
6 discerned within its four corners, extrinsic evidence being relevant only to resolve
7 ambiguity in the decree.’” *See Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016)
8 (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005)); Defs’
9 Aug. 4 Response at 4-5 (same quotation). “Where the contract is clear, the plain
10 language of the contract governs.” *Flores v. Johnson*, 212 F. Supp. 3d at 870
11 (citing *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1998)), *aff’d in*
12 *relevant part, Flores v. Lynch*, 828 F.3d 898.⁴

13 The Settlement protects all minors detained in Defendants’ “legal custody.”
14 *Flores v. Lynch*, 828 F. 3d at 905. “Although the Agreement’s terms refer to
15 ‘INS,’ the Immigration and Naturalization Service’s obligations under the
16 Agreement now apply to the Department of Homeland Security and the
17 Department of Health and Human Services.” *Flores v. Barr*, 934 F.3d 910, 912
18 n.2 (9th Cir. 2019).

19 Defendants’ efforts to carve out children DHS designates for Title 42
20 expulsion is not the first time they have sought to shrink the Settlement’s class
21 definition to their preferences. Beginning in 2014, Defendants repeatedly argued
22 that *accompanied* children are beyond the Settlement’s protections; that argument
23 repeatedly failed. *See Flores v. Lynch*, 828 F.3d at 905 (“We agree with the
24 district court that ‘[t]he plain language of the Agreement clearly encompasses
25 accompanied minors.’”).

26
27 ⁴ The governing evidentiary standard on a motion to enforce the Settlement is a
28 preponderance of the evidence. *See, e.g., Order re Pls’ Motion to Enforce and*
Appoint a Special Monitor, June 27, 2017 [Doc. # 363] at 4.

1 Defendants once again seek to narrow the Settlement’s coverage by
2 designating children for expulsion pursuant to Title 42. This Court should reject
3 Defendants’ latest attempt to evade their well-established obligation to provide
4 children a safe, sanitary, and licensed placement for howsoever long they remain
5 in federal custody.

6 **A. Congress has charged HHS with the former-INS’s responsibilities**
7 **for the proper placement and treatment of all unaccompanied**
8 **children in federal custody.**

9 Defendants’ first argument for carving out unaccompanied children
10 designated for Title 42 expulsion from the Settlement is that such children are not
11 in DHS or immigration-related custody, but rather in HHS’s custody pursuant to
12 42 U.S.C. §§ 265 and 268, and the Closure Order. The short answer to
13 Defendants’ point is that whether unaccompanied children designated for
14 expulsion under Title 42 are in the legal custody of the HHS or DHS is irrelevant.
15 The Settlement protects “all minors who are detained in the legal custody of the
16 INS,” and binds the INS and Department of Justice, as well as “their agents,
17 employees, contractors, and/or *successors in office.*” Settlement ¶¶ 1, 10
18 (emphasis added).

19 The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135,
20 codified in pertinent part at 6 U.S.C. § 279 (“HSA”), transferred responsibility for
21 “the care of unaccompanied alien children” to “the Director of the Office of
22 Refugee Resettlement of the Department of Health and Human Services” 6
23 U.S.C. § 279(a).

24 The William Wilberforce Trafficking Victims Protection Reauthorization
25 Act of 2008, 110 Pub. L. 457, 122 Stat. 5044, codified in pertinent part at 8 U.S.C.
26 § 1232 (“TVPRA”), later specified that “the care and custody of all
27 unaccompanied alien children, *including responsibility for their detention*, where
28 appropriate, shall be the responsibility of *the Secretary of Health and Human*

1 *Services.*” 8 U.S.C. § 1232(b)(1) (emphasis added). The TVPRA specifically
2 charges HHS with responsibility for a child’s placement. *See* 8 U.S.C.
3 § 1232(c)(2)(A) (“Subject to section 279(b)(2) of title 6, an unaccompanied alien
4 child *in the custody of the Secretary of Health and Human Services* shall be
5 promptly placed in the least restrictive setting that is in the best interest of the
6 child.”) (emphasis added); *see also* § 1232(c)(3)(A) (“[A]n unaccompanied alien
7 child may not be placed with a person or entity unless the Secretary of Health and
8 Human Services makes a determination that the proposed custodian is capable of
9 providing for the child’s physical and mental well-being.”); § 1232(c)(3)(B)
10 (“Before placing the child with an individual, the Secretary of Health and Human
11 Services shall determine whether a home study is first necessary.”).

12 Inasmuch as the former INS had responsibility for placing class members in
13 appropriate facilities prior to the TVPRA, Settlement ¶¶ 12A and 19, it is clear
14 that HHS is the INS’s successor regarding the *placement and care* of
15 unaccompanied children.⁵ *See Flores v. Barr*, 934 F.3d at 912 n.2 (“[T]he
16 Immigration and Naturalization Service’s obligations under the Agreement now
17 apply to the Department of Homeland Security and the Department of Health and
18 Human Services”); *Flores v. Johnson*, 212 F. Supp. 3d at 885 (after an
19 unaccompanied child is transferred from CBP to HHS custody, “it is then HHS’s
20 responsibility to comply with the provisions” of the Settlement governing transfer
21 to a licensed program and release to sponsors).⁶

22 ⁵ There is no serious question that unaccompanied children designated for expulsion
23 under Title 42 are unaccompanied children. *See* 8 U.S.C. § 1232(g); 6 U.S.C. §
24 279(g)(2).

25 ⁶ Defendants themselves have repeatedly acknowledged HHS’s responsibility for
26 the care and custody of class members. *E.g.*, Defs’ Notice of Termination of *Flores*
27 Settlement Agreement [Doc. # 639] at 33 (“HHS is statutorily charged with custody
28 of unaccompanied minors”); *id.* at 47 (noting that HHS is bound by the
Agreement); *id.* at 53-54 (acknowledging that both the HSA and TVPRA
transferred responsibility for the care and custody of unaccompanied children to
HHS).

1 In sum, HHS is the former INS's successor insofar as the legal custody of
2 unaccompanied children is concerned. Nor is HHS's responsibility for the proper
3 placement of unaccompanied children confined to those whom DHS detains
4 pursuant to Title 8. To the contrary, it provides, "Except in the case of exceptional
5 circumstances, *any* department or agency of the Federal Government that has an
6 unaccompanied alien child in custody shall transfer the custody of such child to
7 the Secretary of Health and Human Services not later than 72 hours after
8 determining that such child is an unaccompanied alien child." 8 U.S.C. §
9 1232(b)(3) (emphasis added).

10 Even assuming, as Defendants contend, that "the individuals subject to
11 [Title 42 detention] processes are in the legal custody of HHS" pursuant to Title
12 42, Defs' Response at 8, such children would remain class members entitled to a
13 safe, sanitary, and licensed placement.

14 **B. DHS exerts complete control over the physical and legal custody of**
15 **children designated for Title 42 expulsion.**

16 Even assuming, *arguendo*, that the Settlement were not to cover
17 unaccompanied children in HHS custody, the fact would remain that DHS, and
18 not HHS, exerts plenary authority to detain "hotelled" children, to designate them,
19 or not, for Title 42 expulsion, and to determine where they will be placed for
20 howsoever long they remain in federal custody. DHS's authority is evident from
21 the plain text of the Closure Orders, DHS's own implementation of the Title 42
22 process, and the facts on the ground.

23 First, the relevant orders and regulations demonstrate that DHS has custody
24 over unaccompanied children designated for Title 42 expulsion. Although CDC
25 issued the Closure Order, DHS enjoys discretion to decide how it will coordinate
26 carrying out the order. *See* 42 C.F.R. § 71.40(d)(2). The Closure Order itself
27 acknowledges that CBP, and not CDC, "developed an operational plan for
28 implementing the order." 85 Fed. Reg. at 17,067.

1 The Closure Order also cedes to DHS discretion to exempt noncitizens from
2 Title 42 expulsion “based on the totality of the circumstances.” 85 Fed. Reg. at
3 17,061. The Closure Order contains no standards or procedures DHS must follow
4 in exercising that discretion. *See id.* Instead, it provides that DHS “customs”
5 officers may, in their discretion, determine that a noncitizen “should be excepted
6 [from the Closure Order] based on the totality of the circumstances, including
7 consideration of significant law enforcement, officer and public safety,
8 humanitarian, and public health interests.” 85 Fed. Reg. at 17,061. The Closure
9 Order itself establishes that for all legal and practical purposes, *DHS* is the agency
10 charged with maintaining custody over unaccompanied children designated for
11 Title 42 expulsion, not CDC.⁷

12 Second, news reports have published CBP implementation guidance, called
13 the “Operation Capiro” memo (“Capiro Memo”).⁸ The Capiro Memo makes clear that
14 DHS, including CBP, is the agency responsible for apprehending noncitizens
15 subject to Title 42 expulsion, and is also responsible for their detention while they
16 await expulsion. The Capiro Memo similarly contemplates that CBP officers can
17 make case-by-case decisions to take noncitizens out of the Title 42 process and
18 instead “process [them] under existing statutory authorities” under Title 8. Capiro
19 Memo at 2. The Capiro Memo states that “[t]he authority to make this determination
20 resides with the Chief Patrol Agent.” *Id.* Nowhere does the Capiro Memo say that
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22

23
24 ⁷ And while Defendants have previously cited various passages from the CDC
25 orders that state that DHS is responsible for “implement[ing]” its orders, those
26 passages merely confirm DHS’s significant legal and material role in overseeing
27 Title 42 expulsions. They do not stand for the proposition that CDC is the legal
28 custodian of *Flores* class members.

⁸ U.S. Customs & Border Protection, *COVID-19 Capiro Memo*,
<https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html>
 (“Capiro Memo”).

1 CDC officers have any role in these determinations, nor any custodial role over
2 those subject to expulsion.⁹

3 Third, DHS’s own data reports, the Independent Monitor’s Interim Report,
4 and the experiences of lawyers who have represented unaccompanied children
5 subject to Title 42 expulsion confirm that DHS exercises plenary authority to
6 “reclassify” children as Title 8 at any point during the child’s detention. As DHS
7 April, May, and June ¶ 29 reports show, DHS readily transfers Title 42 children
8 between CBP, ICE and ORR custody in accordance with criteria known only to
9 themselves. *See* Pls’ Response at 5 and Ex. C.¹⁰ Children’s legal services providers
10 report having persuaded CBP and ICE to transform Title 42 to Title 8 children,
11 whom the DHS agencies then dutifully send off to licensed ORR placement. Again,
12 Defendants alone know if any actual principal accounts for such caprice, but legal
13 service providers note that Defendants’ decision to abandon their Title 42 charade
14 in individual cases does not appear to be based on any reasoning other than the fact
15 that the child has someone advocating on their behalf. One attorney states:

16 Indeed, since a stay of removal was entered for one of our clients on June 24,
17 in *J.B.B.C. v. Wolf*, every time we have contacted the government about a
18 specific child who had not yet been removed, the government has removed
19 that child from the Title 42 Process. As of July 24, 2020, the U.S.

21 ⁹ The only passing reference to HHS officers is in a section stating that “ICE/ERO
22 will take custody of any subject cleared by HHS or other appropriate personnel...”
23 Capio Memo at 3. And even that reference clearly states that ICE/ERO is the
24 agency that has custody, not HHS.

25 ¹⁰ Acting Commissioner Morgan has testified that *CBP, and not CDC*, exercises
26 discretion “case-by-case” to “exempt any alien from the CDC Order on a
27 humanitarian basis.” U.S. Dep’t Homeland Security, *Testimony of Mark A. Morgan,*
28 *Chief Operating Officer and Senior Official Performing the Duties of the*
Commissioner U.S. Customs and Border Protection, Before the U.S. Senate
Committee on Homeland Security and Governmental Affairs, June 25, 2020, at 3,
[www.hsgac.senate.gov/imo/media/doc/Testimony-Morgan-2020-06-25-](http://www.hsgac.senate.gov/imo/media/doc/Testimony-Morgan-2020-06-25-REVISED.pdf)
[REVISED.pdf](http://www.hsgac.senate.gov/imo/media/doc/Testimony-Morgan-2020-06-25-REVISED.pdf) (“Morgan Testimony”).

1 government has transferred at least 18 unaccompanied children out of the
2 Title 42 process and into ORR care as a direct result of our efforts.
3 Pls’ Report, Ex. B (Declaration of Daniel Galindo), at ¶¶ 5-6; *see also*, Ex. C,
4 Declaration of Jennifer Nagda ¶ 32 (“Nagda Decl.”) (“We are not aware of any
5 reason for the children’s ‘re-designation’ other than our efforts to notify DHS that
6 we were aware of the children’s presence in DHS custody.”).

7 Once they have transformed a Title 42 unaccompanied child into a Title 8
8 unaccompanied child, DHS typically transfer the child to a licensed ORR shelter
9 and give them full opportunity to seek asylum and otherwise contest removal. For
10 example, DHS’s June ¶ 29 report notes that 16-year-old B.B.C. “was reprocessed
11 [sic] from a T42 to T8” and then “placed in ORR Custody pending Immigration
12 Hearing.” Adamson Decl. at ¶ 10. During his stint in Title 42 custody, B.B.C was
13 first detained at a hotel for four days, sent to a different hotel for one day, returned
14 back to the original hotel for 19 days, and finally transferred to a licensed ORR
15 placement on the day DHS “reprocessed” him from Title 42 to Title 8. *Id.*; *see also*
16 Morgan Testimony, *supra*, at 3 (Acting CBP Commissioner testifies that
17 unaccompanied children whom CBP undesignates for Title 42 removal are
18 “processed as unaccompanied alien children under our Title 8 authorities and will
19 be transferred to the custody of HHS’s Office of Refugee Resettlement (ORR).”).

20 Children’s legal services providers confirm that DHS is clearly calling the
21 shots with regard to Title 42 custodial decisions. When lawyers intervene, DHS
22 nearly always transforms Title 42 children into Title 8 children. *See* Ex. B,
23 Declaration of Maria Odom ¶ 19 (“Odom Decl.”) (“In almost every case, our
24 intervention has succeeded in officials reprocessing the children under Title 8,
25 rather than Title 42, meaning that the child is transferred to ORR custody instead of
26 being placed on a flight for removal.”); Ex. F, Declaration of Daniel Galindo ¶¶ 3-4
27 (“Galindo Decl.”) (“As of August 13, 2020, the U.S. government has transferred at
28 least 44 unaccompanied children out of the Title 42 process and into ORR care as a

1 result of our efforts. Additionally, we have identified to the U.S. government at
2 least 17 families (adults with children) who we understood were in the Title 42
3 process. The government subsequently informed us that those families would be
4 processed under Title 8.”); Nagda Decl. ¶¶ 32-33 (describing success in advocating
5 for specific children to be transferred from Title 42 to Title 8); Ex. A, Declaration
6 of Karla Marisol Vargas ¶¶ 16-21 (“Vargas Decl.”). “Hotelled” children’s legal
7 services providers communicate solely with DHS officials regarding re-classifying
8 clients from Title 42 to Title 8. *See id.*; *see also* Odom Decl. Attachment B (Email
9 correspondence from ICE Deportation Officer stating that a child “will be placed in
10 title 8 proceedings and placed in ORR care as soon as his case is reprocessed.”) and
11 ¶ 24 (“This correspondence demonstrates that it is ICE and CBP, not CDC, making
12 decisions as to how a child will be processed.”).¹¹

13 Multiple legal services providers confirm that the CDC is wholly uninvolved
14 in DHS’s decisions to classify their clients as Title 42 children or to re-classify
15 them as Title 8 children. Vargas Decl. ¶ 17 (“We are not aware of any role that the
16 CDC has played in cases involving Title 42 children.”); Nagda Decl. ¶ 33 (same);
17 Odom Decl. ¶ 20 (same); Ex. D, Declaration of Andrew Seaton ¶ 16 (“Seaton
18 Decl.”) (same). In fact, legal services providers report never having interacted with
19 a single CDC representative in the course of representing children designated for
20 Title 42 expulsion. *See* Nagda Decl. ¶ 33; Seaton Decl. ¶ 16.

21 In sum, DHS exercises complete control over the designation, re-designation,
22 detention, and placement of unaccompanied children. There is neither rhyme nor
23

24 ¹¹ Legal services providers and advocates report needing to contact multiple
25 officials within DHS in order to locate and advocate for children designated as Title
26 42. *See* Nagda Decl. ¶ 30 (describing efforts to contact multiple CBP and ICE
27 officials to locate each child); Ex. E, Declaration of Linda Corchado ¶ 8
28 (“Corchado Decl.”) (same); Vargas Decl. ¶¶ 17, 19, 21 (same); Odom Decl. ¶¶ 20-
24 (same); Seaton Decl. ¶¶ 6-16 (same).

1 reason apparent to whether DHS chooses to “hotel” a child or place him or her in a
2 licensed facility as the Settlement commands.

3 **C. Defendants lack any rational basis for denying identically situated**
4 **unaccompanied children the Settlement’s protections.**

5 Even were the Settlement’s covering “hotelled” children at all doubtful, the
6 doctrine of constitutional avoidance would counsel resolving any such doubt in
7 favor of requiring Defendants to comply with the Settlement’s licensed placement
8 provisions. Indeed, construing the Settlement otherwise would raise substantial
9 equal protection concerns, running afoul of the axiom of constitutional
10 avoidance. *See* Order re Plaintiffs’ Motion to Enforce, Jan. 20, 2017 [Doc. # 318],
11 at 7, *aff’d*, *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (“Under the canon of
12 constitutional avoidance, if it is ‘fairly possible’ for a court to interpret a statute in a
13 way that avoids raising serious constitutional problems, it must do so. *Nadarajah v.*
14 *Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (citing *INS v. St. Cyr*, 533 U.S. 289,
15 299-300 (2001)).”).

16 Distinctions between classes of immigrants “must be reasonable not arbitrary
17 and must rest upon some ground of difference having *a fair and substantial relation*
18 *to the object of the legislation, ...*” *Francis v. Immigr. Naturalization Serv.*, 532
19 F.2d 268, 272 (2d Cir. 1976) (emphasis added). Here, the fortuity of whether
20 Defendants designate an unaccompanied minor for Title 42 expulsion bears no
21 rational relationship to placing them for days or weeks in unlicensed and
22 uninspected hotels, “hold rooms,” or “MVM transport” facilities. This Court’s
23 construing the Settlement to condone such arbitrarily disparate treatment would
24 needlessly raise substantial questions of equal protection and should accordingly be
25 avoided.

26 **IV. DETAINING CHILDREN AT HOTELS AND OTHER UNLICENSED PLACEMENTS**
27 **BLATANTLY VIOLATES THE SETTLEMENT.**

28 The Settlement requires Defendants to place all children in their custody in

1 safe, sanitary, and licensed facilities. Settlement ¶¶ 10, 12, 19. Absent an “influx,”
2 Settlement ¶ 12 generally requires Defendants to transfer a minor to a non-secure
3 licensed placement within three days. In the event of influx, transfer must occur
4 “as expeditiously as possible.” Settlement ¶ 12A3. Given the high vacancy rate at
5 licensed ORR shelters, there is simply no reason Defendants should not provide
6 all children in immigration custody with a licensed placement within three days.¹²

7 **A. Class members have been detained in hotels and other unlicensed**
8 **placements for prolonged periods of time.**

9 Nevertheless, Defendants’ own data reports confirm they are simply not
10 providing class members licensed placement “as expeditiously as possible.” The
11 reports instead establish that Defendants have detained over 200 children
12 designated for Title 42 expulsion in hotels and other unlicensed placements during
13 April, May, and June of 2020, and that the rate at which they are placing children
14 in such unlicensed placements only appears to be growing.¹³ *See* Pls’ Response at
15 5, Ex. C. The number of children that Defendants are detaining in hotels and
16 unlicensed placements has increased rapidly each month. *Id.* Many of these

17
18 ¹² Similarly, the TVPRA requires all federal agencies to transfer the custody of
19 unaccompanied minors to “the Secretary of Health and Human Services not later
20 than 72 hours. . . ,” who must then “promptly” place them “in the least restrictive
21 setting that is in the best interest of the child.” 8 U.S.C. §§ 1232(b)(3), (c)(2)(A).

22 ¹³ Mindful of the Court’s directive that “[b]riefing on a motion to enforce regarding
23 the Title 42 hotelling issue shall be accompanied by data regarding, inter alia, how
24 many minors are affected, whether they are accompanied or unaccompanied, the
25 minors’ ages, and where they were hotelled,” Aug. 7 Order at 4, Plaintiffs wrote
26 Defendants on August 10, 2020, to request that they produce ¶ 29 reports for July
27 such that Plaintiffs could provide the Court with the information it requested in the
28 instant filing. On August 12, 2020, Defendants’ counsel advised, “The data teams
are working on getting the monthly reporting as quickly as possible and I will send
as soon as I have them but I do not think they can expedite the production at this
stage.” Ex. H, Email Correspondence, Aug. 12, 2020. On August 14, 2020, at 2:17
p.m., Defendants forwarded their July reports, but Plaintiffs have had insufficient
time to analyze the July data appearing therein. Plaintiffs will apprise the Court of
the results of their analysis of this data in their reply brief.

1 children are very young, and as the Interim Report notes, “inherently vulnerable in
2 an extended expulsion process.” Interim Report at 16.¹⁴

3 Defendants’ characterizing their “hotelling” children for “brief period[s]”
4 only, Defs’ Response at 3 n.1, does not square with their own data or with the
5 Independent Monitor’s report. *See* Pls’ Response, Ex. C; Interim Report at 8
6 (“[S]ince implementation of the CBP-issued expulsion protocols, unaccompanied
7 minors and families routinely spend multiple days temporarily housed in hotels.”).

8 According to Defendants’ data, in April, they detained 29 Title 42 children
9 for three to ten days in unlicensed hotels, hold rooms, and MVM transport
10 facilities. Pls’ Response, Ex. C at 1. In May, that number more than doubled to 71,
11 and Defendants held some of these children in unlicensed placement for over two
12 weeks. *Id.* at 2-3 (indicating that Defendants held 7-year-old J.E.L. and 1-year-old
13 M.E.L., likely siblings, in a hotel for 15 days, then in an unlicensed MVM
14 transport facility for one day, before finally expelling them).

15 In June, the number of children detained in unlicensed placements increased

16
17 ¹⁴ Defendants’ ¶ 29 data reports also reveal that they have detained multiple
18 unaccompanied children in unlicensed hotels, ICE hold rooms, and MVM transport
19 facilities for prolonged periods after removing them from licensed ORR placement.
20 *See* Pls’ Response at 5-6 (“In May, ICE detained eight unaccompanied children in
hotels after ORR had removed them from licensed placements.

21 Of these children, two were held for eight days, one for 10 days, another for 11
22 days, and three for 12 days. . . . This pattern continued into June, during which
23 Defendants removed 10 children from licensed ORR placements and dispatched
24 them to hotels, MVM transport, or ICE field offices.”); *see also* Nagda Decl. ¶¶ 37-
25 41 (detailing experiences of unaccompanied children removed from licensed ORR
placements and held in hotels by ICE officials prior to removal, including a girl
under 9 years old detained for seven nights in a hotel with strangers).

26 During the Parties’ July 27, 2020 conference, Defendants agreed this should not be
27 happening and agreed to take unspecified corrective steps. Defendants declined to
28 disclose to Plaintiffs what steps they would take or when they would take them but
did agree to share that information with the Independent Monitor.

1 again: Defendants detained 120 Title 42 children in hotels and unlicensed
2 placements before expelling them. *See id.* at 5-6. Approximately 80 percent of
3 these children were detained for between 4 and 19 days. *Id.* Defendants also
4 continued to detain very young children in hotels and others unlicensed facilities
5 for extended periods, including —

- 6 • 5-year-old D.J.S., held at a hotel for 19 days.
- 7 • 4-year-old B.P.B., held at a hotel for 14 days.
- 8 • 6-year-old S.V., held at a hotel for 13 days.
- 9 • 9-year-old N.P.J. and 8 month old H.P.J., likely siblings, held at a hotel for
10 12 days.

11 *Id.* at 6.

12 At the close of the June reporting period (June 30, 2020), Defendants were
13 still detaining another 20 children in hotels, including —

- 14 • 2-month-old B.E.F., 1-year-old M.E., 5-year-old H.E., and 8-year-old H.E.,
15 likely siblings, whom Defendants had already held at a hotel for three days.
- 16 • 13-year-old J.M.A., whom Defendants had already held at a hotel for six
17 days.

18 *Id.* at 6-7; Adamson Decl. ¶¶ 11-12.

19 The unambiguous command of the Settlement is that Defendants promptly
20 provide children safe and proper placement. The Settlement requires Defendants
21 to treat “all minors in [their] custody with dignity, respect and special concern for
22 their particular vulnerability as minors.” Settlement ¶ 11. Defendants own data
23 confirms they are detaining children designated for Title 42 expulsion, some for
24 prolonged periods, in hotels and other unlicensed facilities. This practice
25 constitutes a clear violation of Settlement ¶¶ 12A and 19 and harms vulnerable
26 children whom Congress has assiduously sought to protect.

1 **B. Class members are harmed by prolonged detention in hotels and**
2 **other unlicensed placements.**

3 In contrast to licensed, regularly monitored facilities, the treatment and
4 conditions children experience in hotels and other unlicensed placements is
5 largely shrouded in secrecy. DHS holds children all but incommunicado, denying
6 Plaintiffs’ counsel access to “hotelled” children in violation of Settlement ¶¶ 32
7 and 33.

8 Legal services providers are often unaware of unaccompanied children
9 detained under Title 42 until a parent or family member calls, desperate for help in
10 locating their child. Odom Decl. ¶¶ 17-18; Corchado Decl. ¶ 7; Nagda Decl. ¶¶
11 27, 29. As one attorney notes:

12 Having not heard from their children in days or weeks, [families] fear
13 whether their children are even alive. Although these children are in DHS
14 custody, DHS provides no notice to the children’s families that it has their
15 children. In the few cases where DHS did notify the families of their
16 children’s apprehension, DHS provided no information about the child’s
17 location and did not allow the child to speak with their family.

18 Vargas Decl. ¶ 14.

19 Once legal services providers do learn of a child being held in a hotel or
20 other unlicensed facility, they report extreme difficulty in locating the child. *See*
21 Vargas Decl. ¶ 25; Odom Decl. ¶ 21; Corchado Decl. ¶ 5. Defendants refuse to
22 issue “Alien Registration Numbers,” or “A-Numbers,” to children detained under
23 Title 42, which only compounds the difficulty legal services providers experience
24 in locating and assisting such children. *See* Corchado Decl. ¶ 8; Odom Decl. ¶ 22;
25 Nagda Decl. ¶ 28.

26 Even when they succeed in identifying and locating Title 42 children, legal
27 services providers report that DHS obstructs them from seeing and representing
28 them. For example, on July 23, 2020, “[u]nidentified men, who appeared to be

1 contractors of DHS” physically blocked attorneys from the Texas Civil Rights
2 Project from offering legal assistance to minor class members detained at the
3 Hampton Inn in McAllen, Texas. Vargas Decl. ¶ 22. Legal services providers
4 report that children detained in hotels are not told that they have the right to speak
5 to a lawyer and not permitted phone calls to attorneys. *See* Odom Decl. ¶ 27 (“The
6 secrecy around the process prevents meaningful access to a lawyer: children have
7 reported to KIND attorneys that while they were held in hotels or other unlicensed
8 placements subject to Title 42, they were not told that they had a right to speak to
9 a lawyer.”); Vargas Decl ¶ 23 (“Our understanding is that the children are not
10 permitted to make phone calls other than those authorized to relatives by DHS . . .
11 .”). In short, DHS does everything in its power to ensure that “hotelled” children
12 never see a lawyer. *See* Corchado Decl. ¶ 11 (“[T]here were delays of several days
13 before children were able to speak to a lawyer, because DHS limited the phone
14 calls that a child could make to family, which necessarily delays either the child or
15 family being able to learn about legal assistance and reach out to any lawyer.”).

16 Despite DHS’s determination to conceal the treatment and conditions
17 children experience in hotels and other irregular placements, there is little doubt
18 that licensed ORR placement differs qualitatively from unlicensed DHS
19 placement. Licensed placements must “comply with all applicable state child
20 welfare laws and regulations” and be “licensed by an appropriate State agency to
21 provide residential, group, or foster care services for dependent children”
22 Settlement Ex. 1, ¶ 6. As this Court has held, “[t]he purpose of the [Settlement’s]
23 licensing provision is to provide class members the essential protection of regular
24 and comprehensive oversight by an *independent* child welfare agency.” *Flores v.*
25 *Barr*, 407 F. Supp. 3d 909, 919 (C.D. Cal. 2019) (quoting *Flores v. Johnson*, 212
26 F. Supp. 3d 864, 879 (C.D. Cal. 2015).

27 Licensed programs must provide children with, among other services, an
28 individualized needs assessment, educational services appropriate for the child’s

1 level of development, appropriate routine medical and dental care, legal services
2 information and orientation, a minimum of two hours of recreation per day,
3 weekly individual and group counseling sessions, and visitation and contact with
4 family members. Settlement Ex. 1. The Settlement also requires that Defendants
5 permit Plaintiffs' counsel access to class members such that the treatment and
6 conditions they experience may be monitored, *id.* at ¶¶ 32A, 33, something
7 Defendants have indicated they will not permit with respect to children placed in
8 hotels and other unlicensed placements.

9 In addition to being unlicensed and unmonitored, the conditions and
10 treatment children experience during "hotelling" do not and could not meet the
11 Settlement' requirements for safe and appropriate placement. As noted in the
12 Interim Report, "hotelled" children are rarely permitted outdoor recreation, nor
13 does DHS provide them education or counseling. Interim Report at 9.¹⁵

14 Children and families detained in hotels are constantly surveiled by
15 contracted "Transportation Specialists," who are not required to have experience
16 or training in caring for children. Interim Report at 8-9. In addition, "there appears
17 to be a lack of formal oversight of the performance of [such] Specialists." *Id.* at
18 14. The lack of licensed childcare professionals as well as absence of any
19 meaningful oversight exposes already vulnerable children to "high risks" of harm.
20 *See* Odom Decl. ¶ 30; Nagda Decl. ¶ 45 ("When children are secreted in private
21 rooms, with only a single adult or a small group of adults who are not experts in
22 child welfare or child development watching over them, they are at heightened
23 risk of improper treatment, including physical or sexual abuse.")

24 Defendants are detaining very young children in such conditions, some for
25 up to three weeks. *See* Pls' Response, Ex. C. As the Monitor notes, Defendants

26 ¹⁵ Defendants have denied Plaintiffs' counsel access to class members who are
27 being "hotelled," and Plaintiffs are therefore unable to provide additional evidence
28 of Settlement violations.

1 place no limit on the number of children detained in hotels, Interim Report at 16,
2 and especially young children appear to endure unusually long stints in these
3 irregular placements. *See* Pls’ Response, Ex. C. There “does not seem to be any
4 formal lower age limit for UACs to be housed in hotels” and it is “important to
5 recognize that a detention experience need not require mistreatment to be
6 traumatic for a young child.” Interim Report at 16.

7 The American Academy of Pediatrics has stated that Defendants’ practice
8 of detaining children in hotels is “traumatizing” for vulnerable immigrant
9 children.¹⁶ Children have felt “confus[ed] and terrif[ied]” by their transfers
10 between CBP processing centers and hotels, and in at least one instance, “the
11 trauma [a] child endured as a trafficking victim was compounded by DHS’s
12 treatment of the child and her placement in Title 42 proceedings.” Vargas Decl. ¶¶
13 19-20. J.B.B.C., a 16-year-old boy detained for weeks a hotel in El Paso, stated “I
14 felt locked up. I felt alone and isolated . . . I didn’t know what time of day it was. I
15 didn’t know what day it was. I felt utterly disconnected from society. I just felt
16 anxiety and depression.”¹⁷ As an attorney from the Texas Civil Rights Project
17 articulated:

18 The harm that children experience under this Title 42 process is
19 profound and multi-faceted. Amongst other things, children are being
20 denied their right to licensed placements under *Flores*, the ability to be

21
22 ¹⁶ Sally Goza, *AAP Statement on Media Reports of Immigrant Children Being*
23 *Detained in Hotels*, Am. Acad. Pediatrics, July 23, 2020,
24 [https://services.aap.org/en/news-room/news-releases/aap/2020/aap-statement-on-](https://services.aap.org/en/news-room/news-releases/aap/2020/aap-statement-on-media-reports-of-immigrant-children-being-detained-in-hotels/)
25 [media-reports-of-immigrant-children-being-detained-in-hotels/](https://services.aap.org/en/news-room/news-releases/aap/2020/aap-statement-on-media-reports-of-immigrant-children-being-detained-in-hotels/) (“This practice is
26 traumatizing to children who have already endured so much, who are not old
27 enough to have made their own decisions about how to arrive at our border, and
28 who cannot communicate their fears and needs.”).

¹⁷ Hamed Aleaziz, “*I Felt Alone*”: *The Story Of How An Immigrant Teenager*
27 *Fought To Stay In The US While Under Guard In A Texas Hotel*, BUZZFEED, July
28 24, 2020, [https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-](https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-teenager-successfully-fights-to-stay-in-us)
[teenager-successfully-fights-to-stay-in-us.](https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-teenager-successfully-fights-to-stay-in-us)

1 located by their family through the immigration detention tracker,
2 access to attorneys, and the ability to apply for asylum. The far-reaching
3 and potentially life altering implications of this harm cannot be
4 overstated.

5 Vargas Decl. ¶ 27.

6 There is no justification for exposing vulnerable children to unlicensed and
7 unmonitored detention in hotels and other settings, regardless of the statutory
8 justification for their detention, particularly because as of July 22 Defendants had
9 access to over 10,000 vacant beds in licensed ORR facilities. *See* ORR Report at
10 2; *see also* Nagda Decl. ¶ 46 (“The children we have come into contact with who
11 were held in hotels . . . were held in parts of the country where ORR operates
12 state-licensed facilities and which at this time we believe to be well under capacity
13 and able to house children with appropriate protections in place.”) Defendants
14 should not be detaining children in hotels or other unlicensed placements for any
15 longer than 72 hours, and certainly not for weeks on end.

16 V. CONCLUSION

17 The Settlement plainly protects all children in DHS’s *and* HHS’s legal
18 custody and clearly forecloses Defendants’ unlicensed, unregulated, and
19 uninspected “hotelling” practices. Plaintiffs respectfully request that the Court
20 grant this motion and order Defendants to comply with the Settlement with respect
21 to placement and monitoring of class members designated for Title 42 expulsion.¹⁸

22 ///

23 ///

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27 ¹⁸ Plaintiffs will separately move the Court to award them attorney’s fees and costs
28 incurred in the prosecution of this motion.

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Dated: August 14, 2020

CENTER FOR HUMAN RIGHTS AND
CONSTITUTIONAL LAW
Carlos R. Holguín

NATIONAL CENTER FOR YOUTH LAW
Leecia Welch
Neha Desai
Poonam Juneja
Freya Pitts

/s/ Carlos Holguín
Carlos Holguín
One of the Attorneys for Plaintiffs

EXHIBIT A

**DECLARATION OF KARLA MARISOL VARGAS, SENIOR STAFF ATTORNEY,
RACIAL AND ECONOMIC JUSTICE PROGRAM, TEXAS CIVIL RIGHTS PROJECT**

I, Karla Marisol Vargas, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct. If called as a witness, I could and would testify as follows.

1. I am an attorney licensed to practice law in Texas. Since November 2018, I have been employed at the Texas Civil Rights Project (“TCRP”) as a senior staff attorney in its Racial and Economic Justice Program. As part of my employment, I engage in the direct representation of noncitizen children and supervise attorneys and other staff at TCRP who represent immigrants, including children, whose civil rights have been violated.

2. I have been practicing law since 2011. I focus my practice on civil rights law, with a focus on immigrants and the violation of the rights of children. Prior to joining TCRP, I worked as an attorney at various Texas nonprofits, including the Refugee and Immigrant Center for Education and Legal Services (“RAICES”) where I represented individuals, including children, in affirmative and defensive requests for immigration relief.

TCRP’s Mission and Scope

3. TCRP is a nonprofit legal and advocacy civil organization with offices throughout Texas. TCRP believes that legal advocacy and litigation are critical tools to protect and advance the civil rights of everyone in Texas, particularly our State’s most vulnerable populations, and to effect positive and lasting change to law and policy. We believe that by serving the rising social justice movement in Texas with excellent legal representation and bold strategies, we can respond to the needs of the communities we serve.

4. For thirty years, TCRP has been dedicated to upholding the human and civil rights of all persons in Texas. The Racial and Economic Justice Program routinely represents immigrant and asylum-seeking families and unaccompanied children.

5. A central part of TCRP's mission is providing free consultations and legal services to immigrant families and unaccompanied children detained in the Rio Grande Valley in South Texas. Until recently, this work has involved assisting families who were separated under the Zero Tolerance Policy, representing immigrant families and unaccompanied children who have been harmed while held in federal immigration detention, and, when necessary, representing separated families throughout the process of obtaining medical care in detention and family reunification.

6. TCRP also represents immigrant children in other settings, such as in connection with complaints to the Office of Civil Rights and Civil Liberties regarding their treatment in detention and, when necessary, representing them throughout the process of obtaining relief from the federal government for violations of their rights in detention.

7. In addition to our legal team, TCRP leverages its expertise by working directly with pro bono attorneys on many cases to ensure that unaccompanied children and immigrant families have access to representation. In the last year, TCRP has assisted over one hundred immigrant families by securing pro bono representation in their asylum and related immigration proceedings.

8. In addition to free legal services, TCRP also advocates for its clients outside of the courts. Through advocacy, education, and outreach, TCRP aims to ensure the safety and fairness of the immigration and asylum system. TCRP often conducts "Know-Your-Rights" presentations for immigrants and their families and engages in research and fact finding related to the systemic rights violations that deny families and children the right to safely apply for asylum in the United States.

9. In the last two years, more than half of my legal cases have been on behalf of immigrants and their families, including unaccompanied children whose rights have been violated.

10. Our goal in all our work on behalf of immigrants is to ensure that every person has a fair opportunity to establish their eligibility for protection and ensure no one is wrongfully removed to a place where they may face persecution or torture. Reaching and effectively representing unaccompanied children is essential to our mission of ensuring that they have a chance to fully develop and present their claims.

Our Work Defending Children Facing Expulsion under Title 42

11. On March 26, 2020, the Centers for Disease Control and Prevention (“CDC”) issued an order citing the public health provisions of Title 42 of the U.S. Code “to suspend the introduction of all individuals seeking to enter the U.S. without proper travel documentation”¹ across the northern and southern borders. The CDC has since extended the order indefinitely.

12. Since this order was issued, the Department of Homeland Security (“DHS”) and its subcomponents Customs and Border Protection (“CBP”) and U.S. Immigration and Customs Enforcement (“ICE”) have held unaccompanied children who cross the southern border in hotels.

13. As part of our work to protect the rights of unaccompanied children, TCRP is currently counsel for G.Y.J.P., an unaccompanied minor who was expelled to El Salvador under this practice, in the lawsuit captioned *G.Y.J.P. v. Wolf, et al.*, 1:20-CV-01511-TNM, in the District of Columbia.

14. In the few instances where TCRP has learned of a child being held for expulsion under Title 42, it has only been because the child has a family member in the United States who contacts us for help. These family members reach out to us as they desperately attempt to find their children. Having not heard from their children in days or weeks, they fear whether their children are even alive. Although these children are in DHS custody, DHS provides no notice to the

¹ 85 FR at 16,563; *see* 42 C.F.R. § 71.40(a).

children's families that it has their children. In the few cases where DHS did notify the families of their children's apprehension, DHS provided no information about the child's location and did not allow the child to speak with their family. DHS has simply informed the family that their child would be removed, even when the child has directly stated to DHS that they would be killed if returned to their country. DHS has ignored family's pleas to not remove children and has summarily placed the children in Title 42 proceedings.

15. The families that have reached out to TCRP are desperate and terrified, especially after having been informed their children would be removed. In some instances, the families have noted clear and visible medical concerns that were ignored by DHS, who still removed the children while in need of medical attention. The burden has fallen on the families to find their children and find legal support to ensure their children's rights are protected.

16. Whenever we have identified a child in the United States who we have reason to believe is being held subject to Title 42, we have advocated with DHS and the Department of Justice ("DOJ") on their behalf in a number of ways, always racing against the clock to try to get to the children before they are expelled.

17. In some cases, we either contacted counsel for CBP in the Rio Grande Valley Sector, requesting that the child be removed from Title 42 or filed a Temporary Restraining Order on their behalf. In other cases, we have asked the American Civil Liberties Union ("ACLU") to contact DOJ attorneys requesting the same. In all of the cases that we have been involved with, it has been DHS—not CDC—that has made the determinations about whether to classify the children as Title 42 or reclassify children from Title 42 to Title 8. We are not aware of any role that the CDC has played in cases involving Title 42 children.

18. In one recent case, we advocated on behalf of three Guatemalan children who were about to be expelled. The children's mother contacted TCRP in a desperate attempt to prevent the removal of her children back to harm's way. The mother was in distress and terrified for her children. She despaired over not knowing what the fate of her children would be, where they were, if they were appropriately cared for, and over the trauma that she knew her children were experiencing.

19. These three children fled their home country and, upon apprehension by DHS, were immediately facing expulsion. The children were shuffled between CBP processing centers and hotels, further confusing and terrifying the children. We contacted officials within DOJ and DHS, who agreed to process these three siblings under Title 8. We were able to prevent this expulsion, we were told, on the day these children were scheduled to be expelled. As in previous cases, we were not aware of any involvement by any CDC personnel in this entire process; it was handled by DHS and DOJ officials.

20. In another recent case, we worked on behalf of a Honduran teenager who was trafficked and raped for months during her attempt to seek safety in the United States. The months of sexual trafficking resulted in a pregnancy, for which the child requires medical attention. Despite her ordeal and her eligibility for relief under U.S. law, she was about to be expelled when we became involved in her case. Upon apprehension, the child was placed in a CBP processing center and DHS notified the child's mother that she was in their custody, but did not allow the child to speak with her mother. The mother was distraught and wanted to speak with her child, as she had not heard from her daughter throughout the months the child was trafficked. The call from DHS was the first time the mother heard that her child was still alive. Despite the mother's pleas, DHS planned to summarily remove this child. We were able to advocate with DHS and DOJ officials

on the child's behalf and prevent her imminent expulsion. However, the trauma the child endured as a trafficking victim was compounded by DHS's treatment of the child and her placement in Title 42 proceedings. The child's mother notes that her child is experiencing severe trauma and has lost her ability to speak.

21. In the last two weeks, we have received an increasing number of requests for assistance with Title 42 cases from immigration attorneys and service providers in South Texas. Some days, we receive more than one request per day. In every instance, we ask the ACLU to contact the DOJ attorneys, and at the same time we contact DHS officials, usually counsel for CBP and ICE, and request that the child or children not be expelled under Title 42 and instead be processed under Title 8 and sent to ORR.

22. On July 23, 2020, TCRP attorneys sought to offer free legal services to children who DHS was holding at the Hampton Inn Hotel in McAllen, Texas. Unidentified men, who appeared to be contractors of DHS, refused to permit TCRP attorneys to offer any legal services to these children. In one instance, after a TCRP attorney attempted to offer legal representation to the children, these men shoved and removed a TCRP attorney using force. These men did not wear any identification and refused to identify themselves, ignoring repeated requests and thwarting TCRP's ability to identify those individuals who are responsible for guarding the children in their custody.

23. Because TCRP was not allowed to directly offer legal services to the children, we were forced to stand on the sidewalk outside of the hotel and hold up a banner with a hotline. Our understanding is that the children are not permitted to make phone calls other than those authorized to relatives by DHS; indeed, no unaccompanied child has contacted us since we began holding up these banners outside the hotel.

24. There is no way for us to know with certainty whether the Hampton Inn is the only unlicensed, non-official site in the Rio Grande Valley Sector in which DHS is holding children prior to expulsion. Additionally, there is no way to know whether DHS will transfer a child to another site before expelling the child. We have reason to believe that children are being held under Title 42 at other undisclosed sites in McAllen. We do know, however, that there are thousands of empty state-licensed beds available through the ORR network. The result is that, even if TCRP is able to contact a child, it is uncertain whether TCRP will be able to continue to know the location of the child or accurately be able to report that location to a family member.

25. Our experience suggests that it will be virtually impossible for TCRP to identify most children prior to their removal under Title 42—even children who have family in the United States and face severe risk of harm in their countries of origin.

26. DHS's decision to hold children in hotels under Title 42 and deny attorneys access to the hotel thwarts the children's ability to raise their asylum and protection claims and denies them the protections that the Flores Settlement Agreement affords. Again, based on TCRP's understanding, this Title 42 decision is entirely within the purview of DHS and CDC plays no role in this decision-making.

27. The harm that children experience under this Title 42 process is profound and multi-faceted. Amongst other things, children are being denied their right to licensed placements under *Flores*, the ability to be located by their family through the immigration detention tracker, access to attorneys, and the ability to apply for asylum. The far-reaching and potentially life altering implications of this harm cannot be overstated.



Karla Marisol Vargas

Executed this 13th day of August 2020

EXHIBIT B

DECLARATION OF MARIA ODOM

1. I, Maria Odom, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct. If called as a witness, I could and would testify as follows.

2. I am an attorney licensed to practice law in the State of Georgia. Since 2017, I have been Vice President for Legal Programs (formerly named Legal Services) at Kids in Need of Defense (KIND). I previously served as the U.S. Department of Homeland Security (DHS) Citizenship and Immigration Services Ombudsman (2012-2017), as Executive Director of the national legal services organization Catholic Legal Immigration Network, Inc. (CLINIC) (2009-2012), and as an immigration attorney in private practice.

3. In my role, I lead KIND's Legal Programs Team, comprising approximately 203 attorneys, social service professionals, and support staff across KIND's Headquarters and ten field offices.

About KIND

4. Kids in Need of Defense (KIND) is a national non-profit organization, founded in 2008 by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie, to provide free legal services to refugee and immigrant children who arrive in the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court.

5. KIND is headquartered in Washington, D.C., and serves children through its ten field offices, located throughout the country in Atlanta, GA; Baltimore, MD; Boston, MA; Houston, TX; Los Angeles, CA; New York, NY; Newark, NJ; San Francisco and Fresno, CA; Seattle, WA; and Washington, DC and Northern Virginia, and through additional staff in El Paso, TX and San Diego, CA. These field offices serve children through a combination of direct representation and the recruiting, training, and mentoring of pro bono counsel.

6. Since 2009, KIND has received referrals for more than 20,400 children from 74 countries, and has trained and mentored pro bono attorneys at more than 660 law firms, corporate legal departments, law schools, and bar associations. In 2019, 2,643 children were referred to KIND for legal services.

7. KIND's services include conducting screenings and know-your-rights presentations to unaccompanied children in government custody; educating parents and sponsors of unaccompanied children on the children's legal rights and obligations with respect to their removal proceedings; providing direct representation of children in their immigration-related proceedings, including in immigration court and before federal and state agencies; and connecting immigrant children with pro bono lawyers for representation in immigration-related matters.

8. It is central to KIND's mission to ensure children's access to the full measure of substantive and procedural protections that the law affords. KIND also advocates for laws, policies, and practices to enhance protections for unaccompanied immigrant children in the United States, and is working to build a stronger regional protection framework throughout Central America and Mexico. KIND educates policymakers, the media, and the broader public about the violence and persecution that drive children to migrate and seek safety in the United States, and about their needs for legal protection.

9. Many children served by KIND and its partners have endured serious harms, and many request and receive protection under United States law. When KIND staff identify a child as potentially eligible for lawful immigration status or other relief from removal, the child may be matched with a free attorney on KIND's staff or with pro bono counsel to assist in preparing a request for such status or relief to the appropriate adjudicator(s).

10. A growing share of KIND's cases involve representation of unaccompanied children held in the custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). As a subcontractor to ORR, KIND provides know-your-rights presentations and legal representation to children in detention, long-term foster care, and other custodial programs through our Seattle, Houston, San Francisco, New York, and Boston offices. For example, since beginning a detained program at the Cayuga Centers in the Bronx, New York in 2019, KIND has served over 465 children there.

11. In 2019, KIND expanded its legal and advocacy work in Mexico and along the U.S.-Mexico border. We work closely with Mexican child welfare agencies on cases of vulnerable unaccompanied children in their custody. KIND provides training to a number of Mexican stakeholders on U.S. legal protections and custody protocols for unaccompanied children. We have provided legal orientations to children in Mexico who have subsequently presented at a U.S. port of entry seeking asylum. KIND tracks these cases and, after children are released from ORR shelters, we either represent the children in their immigration cases or refer them to legal service providers in the areas where they go to live, if outside our service areas. In exceptional cases—where a child we meet in Mexico has significant medical needs or is particularly vulnerable—we coordinate with the U.S. government to ensure the child receives appropriate services in U.S. custody.

Title 42 Expulsions Raise Profound Concerns

12. In March 2020, the Centers for Disease Control and Prevention (CDC) issued an interim final rule and a related order¹ invoking, for the first time, decades-old public health

¹ Centers for Disease Control and Prevention, *Control of Communicable Diseases; Foreign Quarantine, Suspension of Introduction of Persons into the United States from Designated*

authorities and purporting to direct U.S. Customs and Border Protection (CBP) to expel nearly all asylum seekers who reach the U.S.-Mexico border, purportedly to avoid “introduction” of the pandemic infectious disease Covid-19.

13. KIND has articulated its objections to this Title 42 Process in a number of public statements, including a comment letter on the CDC interim final rule and a statement for the record for a Senate oversight hearing.² We have noted that, “by stripping children of vital legal protections and any meaningful opportunity to seek humanitarian relief before being returned,” the CDC order, and CBP’s implementation of it, expose children to “a heightened risk of human trafficking and persecution,” in contravention of the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA).³

14. KIND works with children involved in the Title 42 process in multiple ways. The two most immediate effects of the Title 42 process concern our ORR detention work, and our work along the U.S. southern border and with children who have been deported or expelled to Central America.

Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (Mar. 24, 2020); Centers for Disease Control and Prevention, *Notice of Order Under Sections 362 and 365 of the Public Health Service Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 17060 (Mar. 26, 2020).

² Letter to Kyle McGowan, Re: CDC-2020-033, Control of Communicable Diseases, etc., RIN 0920-AA76 (April 23, 2020), available at https://supportkind.org/wp-content/uploads/2020/04/CDCRuleFinal_4.23.20.pdf; Statement for the Record by Kids in Need of Defense (KIND), “CBP Oversight: Examining the Evolving Challenges Facing the Agency,” Senate Committee on Homeland Security and Governmental Affairs (June 25, 2020), available at <https://supportkind.org/wp-content/uploads/2020/06/KINDs-Statement-for-the-Record-June-25-2020.pdf> and attached hereto as Attachment A.

³ Statement for the Record, Attachment A, at 1.

15. KIND's programs at ORR shelter facilities have received very few new clients since the order went into effect, as the shelter facilities have largely ceased receiving new asylum-seeking children from the border. According to ORR data, the average number of UACs referred to ORR in fiscal year 2020 has plummeted from 60-80 per day from October 2019 through March 2020, to just 2 per day in April, 1 per day in May, and 2 per day in June.⁴

16. Ordinarily, those children would be referred to the custody of ORR, where they would be placed into regular removal proceedings before an immigration judge. KIND, along with other organizations and lawyers, would then represent the children in their immigration-related matters and help them seek humanitarian protection in the United States. Because children in the Title 42 process never reach ORR they can never access these services.

KIND's Work with Children in the Title 42 Process

17. Since the Title 42 Process began, the nature of our work with unaccompanied children in the United States has changed fundamentally. Because the vast majority of children subject to the Title 42 Process never reach ORR custody, we only hear of those rare cases where a parent or relative in the United States learns that a child has been detained and will be returned to the home country and is independently able to seek help in time. Even then, the parent or relative is not always informed about the risk that their child will be rapidly expelled, and, unlike in ORR, neither children nor their parents are provided with information about how to seek help or resources for legal assistance.

18. Sometimes a parent or relative reaches out to lawyers they know, and those lawyers refer the relatives to us. In other instances, desperate parents have called KIND's main

⁴ HHS, Latest UAC Data – FY2020, at <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html> (last visited July 23, 2020).

phone number. In some other cases, other non-profit organizations become aware of the cases and have reached out to KIND for support. Due to the speed of the expulsions, and the secrecy concerning where the children are held, by the time we hear of the child's case, in some instances the child has already been deported before we can intervene. In one case, a girl who had fled her country after being attacked and raped was expelled from the United States, where she was seeking safety, before KIND could locate her.

19. For the first months the Title 42 Process was in operation, we heard of no children who were in the course of a Title 42 expulsion while they were still in the United States. But in a number of recent instances, we have managed to have contact with the child's family while the child is still in the country. In almost every case, our intervention has succeeded in officials re-processing the children under Title 8, rather than Title 42, meaning that the child is transferred to ORR custody instead of being placed on a flight for removal.

20. In each of these cases, our communication has been with the immigration agencies CBP and/or U.S. Immigration and Customs Enforcement (ICE). To the best of KIND's knowledge and belief, these classification and reclassifications decisions are made by DHS. In fact, we are not aware of CDC's direct involvement in making any custodial decision concerning a child in the Title 42 process, or any decision to take a specific child out of the Title 42 process and put them into regular Title 8 removal proceedings. As far as we can tell, the entire process is administered and operated by DHS, and DHS officers are the ones we interface with when we advocate for children in the Title 42 process.

21. When KIND first hears of a child facing expulsion, typically via a family member who has been able to communicate with the child by phone, our first step is to attempt to gather basic information about the child and the child's whereabouts. It has been extremely difficult to

locate children in government custody in many instances. After gathering preliminary information from a family member or other contact, a KIND attorney then coordinates the signing of a DHS G-28, Notice of Entry of Appearance as Attorney or Accredited Representative form, on behalf of the child via their parent or family member. The KIND attorney then emails the Notice of Appearance to contacts at CBP and ICE, putting DHS on notice that the child is an unaccompanied minor and should be subject to protections afforded under the TVPRA, and contacts DHS to try to verify the child's location.

22. Children processed under Title 42 are not provided with an "Alien Registration Number," or "A-number," which makes them more difficult to locate and track throughout the system. Instead, they are provided with a "Subject ID" number. On the Notice of Appearance form, and in communications with ICE and CBP, for example, the attorney sends the child's name and date of birth, but locating the child quickly would likely be a more streamlined process in these fast-moving cases if unique A-numbers were assigned.

23. The KIND attorney will also contact other DHS points of contact, depending on the child's suspected geographic location. For example, in the Harlingen, Texas sector, we work with CBP, which will reprocess our clients under Title 8, while in Arizona, we contact CBP as well as ICE, as the children have often been transferred to ICE for expulsion under Title 42 and are transferred back to CBP to be reprocessed under Title 8. These contacts may involve repeated emails and telephone calls to CBP facilities and our known points of contact in CBP and ICE.

24. In one such case, on July 23, a KIND attorney emailed a Deportation Officer in charge of juveniles in the ICE Phoenix Field Office. The Deportation Officer replied to the message confirming that the child "will be placed in title 8 proceedings and placed in ORR care as soon as his case is reprocessed." A redacted copy of this email correspondence is attached to

this Declaration as Attachment B. This correspondence demonstrates that it is ICE and CBP, not CDC, making decisions as to how a child will be processed.

25. In addition to contacting DHS officials, KIND may work with other attorneys litigating issues involving Title 42; those attorneys have, in some cases, flagged our clients' cases for the government.

26. In the approximately nineteen cases in which KIND became aware of a child facing Title 42 expulsion and intervened by taking the steps outlined above, DHS moved the children to Title 8 processing and the children were transferred to ORR custody. In one case, KIND found out about a child too late and the child had already been expelled on a flight earlier in the day that KIND contacted the government.

27. Even though we have achieved limited success in these cases, the operation of the Title 42 Process prevents us from reaching the vast majority of children subject to it. The secrecy around the process prevents meaningful access to a lawyer: children have reported to KIND attorneys that while they were held in hotels or other unlicensed placements subject to Title 42, they were not told that they had a right to speak to a lawyer. Until recently, there was very little public information concerning where DHS was holding children, meaning that lawyers did not even know where to go to offer their services. News stories published only in the past few weeks and the *Flores* Monitor's report revealed that unaccompanied children were being held in hotels in different cities along or near the U.S.-Mexico border.⁵ In some cases that KIND was involved with, children were in DHS custody for approximately eight days, but we understand from these reports that other children are held in motels for weeks.

⁵ *E.g.*, Nomaan Merchant, Associated Press, "Migrant kids held in US hotels, then expelled" (July 22, 2020), available at <https://apnews.com/c9b671b206060f2e9654f0a4eaeb6388> (last visited July 23, 2020).

28. If KIND were able to access children currently being detained in motels or DHS processing stations, attorneys from our and other organizations could screen them for relief and conduct the advocacy and representation that I describe above, including advocating for the children to be taken out of the Title 42 process, reclassified as Title 8, and sent to ORR. After the children are sent to ORR custody, provided they were sent to the facilities we staff, we would then either represent the children themselves in their immigration matters, or secure them other pro bono or legal services lawyers who could represent them. But if children are deported or moved to other unknown locations, it is essentially impossible for us to provide them with legal services.

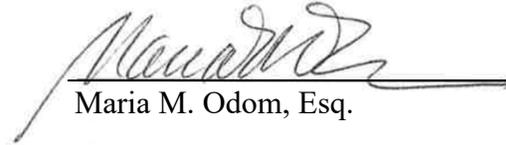
Prolonged Hotel Detention is Inappropriate

29. It is particularly striking that these children we could be serving are being detained in motels, given the current availability of over 10,000 state licensed beds within the ORR network.

30. As Congress recognized in assigning custody of unaccompanied children to ORR rather than DHS, highly vulnerable children traveling alone should be placed in licensed care facilities, not at motels under the watch of government contractors, who likely have little to no expertise or training in child welfare. This situation carries high risks that a child could be harmed, and there is no apparent oversight to ensure that will not happen. Moreover, remaining in a motel or processing station with contractors could be highly traumatizing to children who have fled dangerous conditions in their countries of origin.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: August 13, 2020


Maria M. Odom, Esq.

ATTACHMENT A



Statement for the Record by Kids in Need of Defense (KIND)

“CBP Oversight: Examining the Evolving Challenges Facing the Agency”

Senate Committee on Homeland Security and Governmental Affairs

June 25, 2020

Kids in Need of Defense (KIND) is the leading national organization working to ensure that no child faces immigration court alone. KIND was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie. We have served more than 20,000 unaccompanied children in removal proceedings, trained over 50,000 attendees on the pro bono representation of these children, and formed pro bono partnerships with more than 650 corporations, law firms, law schools, and bar associations. KIND also helps children who are returning to their home countries to do so safely and to reintegrate into their home communities. In addition, we seek to change law and policy to improve the protection of unaccompanied children in the United States and to build a stronger regional protection framework throughout Central America and Mexico.

KIND strongly opposes the Department of Homeland Security (DHS)’s illegal expulsions of unaccompanied children and Customs and Border Protection (CBP)’s role in implementing them. Under indefinite Centers for Disease Control and Prevention (CDC) and DHS entry restrictions, DHS has summarily returned to Mexico and Central America over 2,000 unaccompanied children who arrived at the U.S. southern border.¹ These expulsions violate the bipartisan Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)² by stripping children of vital legal protections and any meaningful opportunity to seek humanitarian relief before being returned. As a consequence, expelled children face a heightened risk of human trafficking and persecution—precisely the outcomes that the TVPRA was intended to prevent. Though DHS has used the COVID-19 pandemic as a pretext for its actions, medical experts have made clear that this policy lacks a valid public health rationale and that the U.S. government is fully capable of upholding our laws and humanitarian values while also protecting public health and safety.³

By helping carry out these expulsions, CBP bears direct responsibility for contravening the TVPRA. Under the Act, the U.S. government must screen unaccompanied children to determine whether they are at risk of trafficking or fear return to their home countries. The TVPRA further requires that DHS transfer unaccompanied children from noncontiguous countries, as well as unaccompanied children from contiguous countries who are at risk of trafficking, fear return, or are unable to make an independent decision about withdrawing their application for admission, into ORR care and custody and place them into full immigration court proceedings. Yet CBP is flouting these requirements by summarily returning children to their country of origin or pushing

¹ See, e.g., Lauren Villagran, “Despite coronavirus, children are still arriving at the border. They’re being turned away” *El Paso Times* (Jun. 10, 2020); <https://www.elpasotimes.com/story/news/2020/06/10/border-patrol-rejects-migrant-children-cdc-authority-covid-19/5274691002/>.

² P.L. 110-457.

³ Priscilla Alvarez, “Health experts slam Trump administration’s use of public health law to close border” *CNN* (May 18, 2020); <https://www.cnn.com/2020/05/18/politics/border-closure-public-health/index.html>.

them back into Mexico without any consideration of their safety. In fact, of the more than 1,000 unaccompanied children encountered by DHS at the U.S. southern border in May, only 39 were referred to ORR.⁴

CBP's disregard for these statutory protections is squarely linked to the enhanced danger—not least of human trafficking—to which arriving unaccompanied are now exposed. By omitting screenings of these children for trafficking concerns, for instance, CBP fails to observe and respond to any evidence that they were trafficked into the United States for commercial sex or forced labor or would be returned into trafficking situations if expelled. Moreover, because CBP has refused to apply the legal definition of “unaccompanied alien child” provided for in the Homeland Security Act—as addressed in more detail below—it has incentivized the rapid return of children to Mexico together with unscreened adults who could pose a danger to them. Additionally, expelled children are not benefitting from the skilled and protective screenings performed by attorneys and social workers specially trained to identify protection needs among this vulnerable population. CBP's website states that it is “uniquely situated to deter and disrupt human trafficking,”⁵ but the bureau's contributions to the expulsions of unaccompanied children makes clear that it has abdicated any such ‘unique’ position. Ultimately, CBP's defiance of Congress's anti-trafficking requirements does not deter or disrupt human traffickers at all—it emboldens them.

No less troubling, CBP has elected not to adopt a readily available measure that would shield unaccompanied children from these harmful expulsions. The CDC and DHS orders underlying expulsions limit entry at the U.S. southern border to “essential travel.” Notably, however, the orders allow for exceptions when appropriate. DHS has already designated a host of traveler populations, including students and truck drivers, “essential” and thereby exempt from the entry restrictions, while also expressly authorizing CBP to designate additional populations in this manner.⁶ Yet CBP has failed to deem unaccompanied children “essential.” CBP's refusal to follow the TVPRA and exercise its authority to exempt unaccompanied children from expulsions is wrong and dangerous for children. The TVPRA, after all, reflects a bipartisan determination that unaccompanied children's often life-and-death pursuit of protection is so imperative as to warrant a unique array of due process safeguards. In the strongest terms, then, KIND rejects CBP's position that the safety of unaccompanied children is “non-essential.”

Alarming, a leaked CBP memorandum guiding agents and officers' implementation of expulsions reveals that CBP has gone so far as to fashion the term “unaccompanied juvenile”—one that appears nowhere in relevant statute—in order to bypass the existing definition of an “unaccompanied alien child” in the Homeland Security Act of 2002 (HSA)⁷ and the corresponding legal obligations in the HSA and the TVPRA. On an immediate level, this invented term facilitates DHS's expulsion of unaccompanied children under the pretext of returning family units. More

⁴ Camilo Montoya-Galvez, “Just 39 unaccompanied migrant children avoided Trump's border expulsions in May” *CBS News* (Jul. 18, 2020); <https://www.cbsnews.com/news/unaccompanied-migrant-children-trump-expulsion-border-policy/>.

⁵ Customs and Border Protection, “Human Trafficking” (Jan. 9, 2020); <https://www.cbp.gov/border-security/human-trafficking>.

⁶ DHS Order, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico” (May 19, 2020); https://www.dhs.gov/sites/default/files/publications/20_0519_as1_frn_us-mexico-border.pdf.

⁷ 6 U.S.C. 279(g)(2).

fundamentally, by seeking to administratively limit application of the “unaccompanied alien child” definition codified by the legislative branch, CBP is aiming to effectively extinguish bipartisan statutes core to the protection of unaccompanied children.

In view of these grave concerns, KIND calls upon CBP to: (1) exempt unaccompanied children from the CDC and DHS entry restrictions by declaring them “essential” and cease summary removals of children under the CDC order; and (2) fully conform to all TVPRA and HSA requirements by, among other actions, performing full protection screenings and making referrals to ORR as mandated under the TVPRA, and by adhering to the HSA’s definition of “unaccompanied alien child.” CBP, and DHS as a whole, can and should process children’s protection claims in accordance with the law while still safeguarding the health of these children and of the public at large.

ATTACHMENT B

From: [REDACTED]
To: [Nicholas Stefaniak](#); [REDACTED]
Cc: [REDACTED]; [Florence Chamberlin](#); [Lisa Frydman](#)
Subject: Re: Imminent removal of an unaccompanied child
Date: Thursday, July 23, 2020 3:28:58 PM
Attachments: [image003.png](#)

[External Email]

This individual is no longer in US Border Patrol custody.

[REDACTED]
Supervisory Border Patrol Agent
Tucson Coordination Center (TCA-HQ)
Office: [REDACTED]
[REDACTED] [@cbp.dhs.gov](#)

From: Nicholas Stefaniak <nstefaniak@supportkind.org>
Sent: Thursday, July 23, 2020 3:21 PM
To: [REDACTED] <[REDACTED]@cbp.dhs.gov>
Cc: [REDACTED] <[REDACTED]@CBP.DHS.gov>; [REDACTED] <[REDACTED]@cbp.dhs.gov>; Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: Imminent removal of an unaccompanied child

CAUTION: This email originated from outside of DHS. DO NOT click links or open attachments unless you recognize and/or trust the sender. Contact the [CBP Security Operations Center](#) with questions or concerns.

Hello,

Attached is a G-28 for W [REDACTED] M [REDACTED] A [REDACTED], DOB [REDACTED]/2002, from Guatemala. We believe he crossed on 7/21/2020 through Tucson and was apprehended by CBP. I am authorized by his brother to speak on his behalf.

We are concerned about the imminent removal of this unaccompanied child, and as the attorney of record, would like to find out how we can talk to the child in custody as soon as possible. We believe that the child may have a fear of return to Guatemala, and he should be provided with a screening of his claim under the Convention Against Torture. Please let us know if you need any more information.

Thank you for your attention to this matter,
Nick Stefaniak

Nick Stefaniak, Esq.

Senior Attorney – Special Programs – Tijuana, Mexico *
Kids in Need of Defense (KIND)
1201 L Street NW, Floor 2
Washington, DC 20005
Phone: (202) 459-6142, ext. 1057

Please note that I am working remotely.

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www.supportkind.org

**Admitted to practice in Maryland only*



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From: [REDACTED]
To: [Nicholas Stefaniak](#); [REDACTED]
Cc: [Florence Chamberlin](#); [Lisa Frydman](#)
Subject: RE: Imminent removal of an unaccompanied child
Date: Thursday, July 23, 2020 4:32:47 PM
Attachments: [image003.png](#)
[image004.png](#)

[External Email]

Good Afternoon, your client will be placed in title 8 proceedings and placed in ORR care as soon as his case is reprocessed.

Thank you,

[REDACTED]
Deportation Officer
Phoenix FOJC Unit
Phoenix Field Office
Cell: [REDACTED]
Office: [REDACTED]

From: Nicholas Stefaniak <nstefaniak@supportkind.org>
Sent: Thursday, July 23, 2020 4:30 PM
To: [REDACTED] <[REDACTED]@ice.dhs.gov>
Cc: Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: RE: Imminent removal of an unaccompanied child

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Hello,
Regarding W [REDACTED] M [REDACTED] A [REDACTED], DOB [REDACTED]/2002, Guatemala, I would also appreciate it if your office could confirm that he is being processed under Title 8, and that he will be sent to ORR custody.
Any information on this case would be appreciated.
Thank you for your attention to this matter,

Nick Stefaniak, Esq.
Senior Attorney – Special Programs – Tijuana, Mexico *
Kids in Need of Defense (KIND)
1201 L Street NW, Floor 2
Washington, DC 20005
Phone: (202) 459-6142, ext. 1057
Please note that I am working remotely.
Skype: Nicholas Stefaniak

Email: nstefaniak@supportkind.org
www.supportkind.org

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From: Nicholas Stefaniak
Sent: Thursday, July 23, 2020 3:54 PM
To: [REDACTED]@ice.dhs.gov
Cc: Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: Imminent removal of an unaccompanied child

Hello,

Attached is a G-28 for W [REDACTED] M [REDACTED] A [REDACTED], DOB [REDACTED]/2002, from Guatemala. We believe he crossed on 7/21/2020 through Tucson and was apprehended by CBP. I am authorized by his brother to speak on his behalf.

I just spoke with a Deportation Officer who confirmed that W [REDACTED] was initially placed in Title 42 proceedings, but that he has requested W [REDACTED] be sent back to CBP to be reprocessed under Title 8 and sent to ORR.

We are concerned about this child and would like to find out how we can talk to the child in custody as soon as possible.

Please let us know if you need any more information.

Thank you for your attention to this matter,
Nick Stefaniak

Nick Stefaniak, Esq.

Senior Attorney – Special Programs – Tijuana, Mexico *
Kids in Need of Defense (KIND)
1201 L Street NW, Floor 2
Washington, DC 20005
Phone: (202) 459-6142, ext. 1057

Please note that I am working remotely.

Skype: Nicholas Stefaniak
Email: nstefaniak@supportkind.org
www.supportkind.org

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From: [REDACTED]
To: [Nicholas Stefaniak](#)
Cc: [REDACTED]; [REDACTED] ([OCC](#)); [REDACTED]
Subject: RE: Imminent removal of an unaccompanied child
Date: Friday, July 24, 2020 10:18:18 AM
Attachments: [image003.png](#)
[image005.png](#)

[External Email]

We can confirm that M [REDACTED]-A [REDACTED] is being processed under Title 8 and will be referred to ORR.

No A# or shelter information is available at this time, however your client is available by telephone.

[REDACTED]
Special Operations Supervisor
Tucson Sector Headquarters
Tucson Coordination Center

[REDACTED] **Desk**
[REDACTED] **Cell**

From: Nicholas Stefaniak <nstefaniak@supportkind.org>
Sent: Friday, July 24, 2020 9:49 AM
To: [REDACTED] <[REDACTED]@CBP.DHS.GOV>; [REDACTED] <[REDACTED]@cbp.dhs.gov>
Cc: [REDACTED] <[REDACTED]@CBP.DHS.gov>; [REDACTED] <[REDACTED]@cbp.dhs.gov>; Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: RE: Imminent removal of an unaccompanied child

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Hello,

I very much appreciate your prompt response and attention to this matter. I spoke with a Deportation Officer at ICE, Phoenix who informed me that my client - **W [REDACTED] M [REDACTED]-A [REDACTED], DOB [REDACTED]/2002 Guatemala** - will be returned to CBP for Title 8 processing.

If your office could confirm that my client will be referred to ORR and processed through Title 8, I would be much appreciative. If he receives an A# and shelter destination, I would appreciate receiving that information in order to track processing more efficiently.

Please let me know if there is any additional information you need regarding this request.

Regards,

Nick Stefaniak, Esq.

Senior Attorney – Special Programs – Tijuana, Mexico *
Kids in Need of Defense (KIND)
1201 L Street NW, Floor 2
Washington, DC 20005
Phone: (202) 459-6142, ext. 1057

Please note that I am working remotely.

Skype: Nicholas Stefaniak
Email: nstefaniak@supportkind.org
www.supportkind.org

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From: [REDACTED] <[REDACTED]@CBP.DHS.GOV>
Sent: Thursday, July 23, 2020 3:29 PM
To: Nicholas Stefaniak <nstefaniak@supportkind.org>; [REDACTED] <[REDACTED]@cbp.dhs.gov>
Cc: [REDACTED] <[REDACTED]@CBP.DHS.gov>; [REDACTED] <[REDACTED]@cbp.dhs.gov>; Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: Re: Imminent removal of an unaccompanied child

[External Email]

This individual is no longer in US Border Patrol custody.

[REDACTED]
Supervisory Border Patrol Agent
Tucson Coordination Center (TCA-HQ)
Office: [REDACTED]
[REDACTED]@cbp.dhs.gov

From: Nicholas Stefaniak <nstefaniak@supportkind.org>
Sent: Thursday, July 23, 2020 3:21 PM
To: [REDACTED] <[REDACTED]@cbp.dhs.gov>
Cc: [REDACTED] <[REDACTED]@CBP.DHS.gov>; [REDACTED] <[REDACTED]@cbp.dhs.gov>; Florence Chamberlin <fchamberlin@supportkind.org>; Lisa Frydman <lfrydman@supportkind.org>
Subject: Imminent removal of an unaccompanied child

CAUTION: This email originated from outside of DHS. DO NOT click links or open attachments unless you recognize and/or trust the sender. Contact the [CBP Security Operations Center](#) with questions or concerns.

Hello,

Attached is a G-28 for W [REDACTED] M [REDACTED] A [REDACTED], DOB [REDACTED]/2002, from Guatemala. We believe he crossed on 7/21/2020 through Tucson and was apprehended by CBP. I am authorized by his brother to speak on his behalf.

We are concerned about the imminent removal of this unaccompanied child, and as the attorney of record, would like to find out how we can talk to the child in custody as soon as possible. We believe that the child may have a fear of return to Guatemala, and he should be provided with a screening of his claim under the Convention Against Torture. Please let us know if you need any more information.

Thank you for your attention to this matter,
Nick Stefaniak

Nick Stefaniak, Esq.

Senior Attorney – Special Programs – Tijuana, Mexico *
Kids in Need of Defense (KIND)
1201 L Street NW, Floor 2
Washington, DC 20005
Phone: (202) 459-6142, ext. 1057

Please note that I am working remotely.

Skype: Nicholas Stefaniak
Email: nstefaniak@supportkind.org
www.supportkind.org

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EXHIBIT C

1 I, Jennifer Nagda, declare as follows:

2
3 1. This declaration is based on my personal knowledge, except as to those
4 matters based on information and belief, which I believe to be true. If called to testify
5 in this case, I would testify competently about these facts.
6

7 **Experience/Qualifications**

8 2. I am the Policy Director for the Young Center for Immigrant Children’s
9 Rights (hereinafter “Young Center.”) I have worked for the Young Center in various
10 roles for nearly 12 years.

11 3. The Young Center is a registered 501(c)(3) organization based in Chicago
12 with programs in seven additional locations including: Harlingen, Texas; Houston,
13 Texas; San Antonio, Texas; Phoenix, Arizona; Los Angeles, California; Washington,
14 D.C.; and New York, New York.

15 4. The Young Center was created in 2004 as a pilot project of the federal
16 Office of Refugee Resettlement, Department of Health and Human Services
17 (hereinafter “ORR”) to create a program to provide best interests guardians *ad litem*—
18 Child Advocates—for trafficking victims and other vulnerable unaccompanied
19 children. Young Center attorneys and social workers are appointed as Child
20 Advocates alongside trained, bilingual volunteers.

21 5. The role of the Child Advocate is to advocate for the best interests of the
22 child. Child Advocates identify a child’s best interests by considering the child’s
23 expressed wishes, safety, right to family integrity, liberty, developmental needs and
24 identity. These “best interests factors” are well-established in the child welfare laws of
25 all 50 states and in international law including the Convention on the Rights of the
26 Child.

27 6. As the Child Advocate, we submit best interests recommendations on behalf
28 of unaccompanied children in government custody to federal agencies including the

1 Executive Office for Immigration Review within the Department of Justice,
2 Immigration and Customs Enforcement within the Department of Homeland Security,
3 and ORR. Child Advocates’ recommendations are grounded in federal and domestic
4 best interests law.

5 7. As specified in the Trafficking Victims Protection Reauthorization Act
6 (TVPRA), child trafficking victims and other vulnerable unaccompanied children may
7 be appointed an independent Child Advocate. The most vulnerable children in ORR
8 custody include but are not limited to young children (infants, toddlers, pre-verbal and
9 elementary school-aged children), children facing protracted stays in ORR custody,
10 children with disabilities, mental health concerns, or other illnesses, children who
11 have been separated from their parents, children at risk of turning 18 in government
12 custody, and children who fear returning to their countries of origin.

13 8. Since its founding, the Young Center has served as independent Child
14 Advocate for thousands of children in government custody. We are the only
15 organization authorized by ORR to serve in that capacity.

16
17 **Protections to Ensure the Safety of Immigrant Children While in HHS/ORR**
18 **Custody and in the Community**

19 9. When a child under the age of 18 arrives at the border without a parent or
20 legal guardian and without evidence of legal status in the United States, that child is
21 designated an unaccompanied child pursuant to 6 U.S.C. § 279(g) and transferred to
22 the Office of Refugee Resettlement.

23 10. The Young Center has been appointed to thousands of children designated as
24 unaccompanied children by DHS officials and transferred to the Office of Refugee
25 Resettlement.

26 11. All children in ORR custody, with the exception of children temporarily
27 placed in so-called “influx” facilities, are held in state-licensed facilities contracted by
28 ORR to care for children (ORR-contracted, state-licensed facilities). States not only

1 approve the opening of these facilities in a manner consistent with state child welfare
2 laws but have the ability to enter and inspect the facilities to ensure compliance with
3 child protection laws.

4 12. These ORR-contracted, state-licensed facilities are also subject to the Prison
5 Rape Elimination Act (PREA), which is intended to prevent, detect and respond to
6 sexual abuse and sexual harassment. Among other measures, ORR-contracted
7 facilities must provide children with access to phones and other mechanisms to report
8 instances of abuse and harm.

9 13. Staff who work in ORR-contracted, state-licensed facilities are bound by
10 “mandatory reporter” laws, which—very generally summarized—impose sanctions
11 for failing to report reasonable concerns that a child has been abused or neglected or
12 whose safety or well-being is in danger. Moreover, many staff in these facilities are
13 professionals bound by independent ethical obligations to report concerns of abuse,
14 neglect or danger to the child’s safety and well-being.

15 14. While in ORR custody, children are screened to evaluate their physical and
16 mental health; this is to ensure that the facility is able to provide appropriate care for
17 the child. The children are also screened to assess their linguistic and educational
18 background, and to identify needed services.

19 15. While in ORR custody, children must be provided with medical care,
20 nutritious meals, education, access to religious services, access to lawyers, time for
21 outdoor recreation and activities, and all other services identified in the Flores
22 Settlement Agreement, the TVPRA, and as required by the state child welfare
23 agencies that license the facilities.

24 16. ORR also develops safety plans for each child in its custody, including but
25 not limited to emergency situations such as evacuations, medical emergencies, and
26 disease outbreaks. (ORR Policy 3.3.3.)

27 17. While in ORR custody, children are screened to determine whether they are
28 victims of human trafficking, exploitation, abuse and persecution. (*See, e.g.*, ORR

1 Policy 3.3.3.) That information is critical in evaluating how or whether the child can
2 be safely repatriated if they ask to return or are ordered removed.

3 18. Once in ORR custody, unaccompanied children are able to seek
4 reunification with parents, family members or other adults with whom they have an
5 established relationship. Those individuals are known as sponsors.

6 19. In order for children to be released to those individuals, the sponsor must
7 provide proof of their identity, their address, and their relationship to the child they
8 wish to sponsor. They must also submit proof of the identity of other adults in the
9 home. (ORR Policy 2.2.4.)

10 20. Sponsors are also subjected to background checks, including a public
11 records background check of criminal history and sex offender registry databases.
12 With the exception of most parents and most immediate relatives, sponsors must
13 submit to fingerprint background checks processed by federal agencies. Sponsors may
14 also be required to submit to background checks through state child abuse and neglect
15 registries. (ORR Policy 2.2.5)

16 21. Before a child is released to a sponsor, ORR evaluates whether the sponsor
17 is able to care for the child, considering the child's individual needs, strengths, risk
18 factors and relationship to the sponsor. (ORR Policy 2.4.)

19 22. The standards described in paragraphs 11-22 apply even if the child will
20 spend just one day with the sponsor before turning 18. In other words, sponsors who
21 wish to take custody of a young person who will be a child for just one day, including
22 providing food and shelter for the young person in a private space, must meet all of
23 these standards.

24
25 **Standards for Federally Appointed Child Advocates**

26 23. Young Center Child Advocates are appointed to child trafficking victims
27 and other vulnerable, unaccompanied children pursuant to 8 U.S.C. § 1232(c).
28

1 24. To be appointed to individual children, Child Advocates must undergo a
2 rigorous series of checks. These include: an application, individual screening, and
3 personal observation; state and FBI criminal background checks; a child abuse and
4 neglect (CAN) registry check for every state where the Child Advocate has resided in
5 the last five years; a two-day, intensive training focused on unaccompanied children;
6 and positive personal and professional references.

7 25. Even after a Child Advocate passes these checks and is appointed to an
8 individual child, their visits with children take place in spaces where the child and the
9 Child Advocate can be observed by others.

10 26. Child Advocates never meet with children in bedrooms or other spaces
11 hidden from public view or observation. In many ORR facilities, the rooms where
12 Child Advocates and children meet are monitored by video cameras. Child Advocates
13 meet with children in rooms where there are windows, doors with glass, or in rooms
14 where the door is left open. This is done to protect the child's safety and to protect the
15 Child Advocate from unfounded accusations of improper conduct.

16
17 **Children Held in DHS Custody In Border Region Hotels are Unable to Access**
18 **Independent Child Advocates**

19 27. On multiple occasions in July and August 2020, Young Center Child
20 Advocates have been contacted by family members of children detained in hotels after
21 reaching the U.S. border.

22 28. These children were not designated as "unaccompanied" despite meeting the
23 definition set forth in 6 U.S.C. § 279(g). They were not assigned A#s, which means
24 that there was no way to track them through the immigration court system, or to
25 identify them if there was any confusion regarding their name or date of birth. DHS
26 did not alert the Young Center to their presence or recommend the appointment of a
27 Child Advocate for any of these children.

1 29. We only learned that these children were being held by ICE in hotels
2 because of family members who reached out to organizations, including the Young
3 Center, for help. The family members who reached out to us were extremely and
4 concerned for the safety of these children.

5 30. In the absence of any system to track these children, Young Center Child
6 Advocates must contact as many DHS officials as possible to try to determine the
7 whereabouts of the children using only their names, and when known, ages. DHS has
8 no designated point of contact, and we frequently reach out to multiple CBP and ICE
9 officials when trying to locate each child.

10 31. In these cases, DHS officials have advised us that the children were not in
11 the custody of ORR or a state child welfare agency but were instead in the custody of
12 DHS officials or private entities working at the direction of DHS: specifically, the
13 private security contractor known as “MVM.”

14 32. In certain cases, we were able to confirm a child’s presence in DHS custody
15 in a hotel, after which the children were re-designated as “unaccompanied,” assigned
16 an A#, and transferred out of DHS custody to ORR custody. We are not aware of any
17 reason for the children’s “re-designation” other than our efforts to notify DHS that we
18 were aware of the child’s presence in DHS custody. We are not aware of any effort by
19 DHS or the Centers for Disease Control and Prevention (CDC) to test these children
20 for COVID-19 prior to their transfer to ORR custody.

21 33. To the best of our knowledge and belief, the CDC has not been involved in
22 any decision to designate children under Title 42 or to re-designate children as
23 unaccompanied under Title 8 after they were originally designated as Title 42. It is our
24 understanding that these designation and re-designation decisions are made by DHS
25 officials. Throughout the multiple cases referenced in this declaration, we have never
26 interacted with a CDC representative in any capacity, including when attempting to
27 locate a child or advocating to re-designate children from Title 42 to Title 8.
28

1 34. In other cases, DHS advised us that the children we inquired about had
2 already been “expelled” from the United States. In those cases, it has been nearly
3 impossible to locate the children. Without an A#, and without a repatriation plan put
4 in place by an immigration judge’s grant of voluntary departure or order of removal,
5 we have no way of knowing where a child was sent upon “expulsion”—whether they
6 were walked to the middle of a bridge at the U.S.-Mexico border, whether they were
7 placed on a plane, and whether an official in the receiving country took custody of,
8 processed, or detained or jailed the child.

9 35. At this time, the Young Center is still unable to confirm the whereabouts of
10 two sisters, ages 15 and 12, who came to a port of entry seeking protection on August
11 8, 2020, and who were expelled to Mexico despite being El Salvadoran. Officials from
12 both the United States and Mexican governments have been unable to tell us where
13 the girls are, whether they are safe, or provide us with an identification number or
14 repatriation itinerary that would allow us to find the children. Instead, we are
15 contacting non-governmental organizations throughout Mexico and Central America
16 who might have encountered the girls.

17 36. In our 16 years of work as Child Advocate, we have observed that children
18 arriving at the border are held in DHS (CBP) custody before their release to the
19 community, their transfer to ORR custody if unaccompanied, or their transfer to ICE
20 facilities if accompanied or if determined to be 18 or older. We are not aware of
21 situations in which children have been transferred to or held in other private spaces
22 such as hotels.

23
24 **Unaccompanied Children Awaiting Repatriation under the TVPRA Discovered in**
25 **DHS Custody in Hotels**

26 37. Young Center Child Advocates also learned of a different group of children
27 held in hotels while in ICE custody—not children arriving at the border, but children
28 taken from ORR custody to be repatriated to their countries of origin. These

1 unaccompanied children were returning to home country pursuant to grants of
2 voluntary departure or orders of removal issued by immigration judges, unlike the
3 children held in hotels immediately after arriving at the U.S. border.

4 38. In the case of unaccompanied children, Young Center Child Advocates were
5 only able to confirm the children's location in hotels by speaking directly with ICE
6 officials who were coordinating the children's return to home country. We do not
7 know if the children were able to speak with their attorneys during this time.

8 39. In our communication with ICE, ICE officials insisted the unaccompanied
9 children returning to home country were fine because the agency provided food and
10 made it as comfortable as possible for the children. However, the agency could not or
11 would not disclose how many children were held in each room; how many adults were
12 in the same room; whether those adults stayed in the room over night; whether those
13 adults permitted the children to use the bathroom privately; or the ages and genders of
14 both the children and adults in hotel rooms.

15 40. In one case, a girl younger than nine years old who was awaiting repatriation
16 spent seven nights in a hotel room with adults who were strangers to her. For more
17 than six days, her precise location was unknown to her appointed Child Advocate, her
18 attorney, or the ORR-contracted facility staff who had cared for the child for months.
19 We still do not know which adults from ICE or its contractor (MVM) were in the
20 hotel room with the child, whether they were in the room with the child as she slept,
21 and whether she was ever left in the custody of a single adult in a hotel room. This
22 situation was harmful to the child, who could have remained in a licensed ORR
23 placement where she had developed trusting relationships with trained, child welfare
24 staff over many months.

25 41. In another case, a Child Advocate was alarmed to learn that an
26 unaccompanied child returning to home country pursuant to a removal order did not
27 know where he was other than in a room, did not know the adults who took him to the
28 hotel room, or what their role was.

1 **Dangers of Holding Children in Private Locations with Unknown Adults**

2 42. It is in children’s best interests to be in the custody of family; when that is
3 not possible, to be in the custody of authorities licensed to provide child welfare
4 services.

5 43. If children must be in government custody, it is in their best interests to be in
6 the custody of ORR, whose contracted facilities are subject to state child welfare laws
7 and policies.

8 44. It is not in children’s best interests to be held by DHS in hotel rooms—
9 generally understood to be a room with one or two beds and an adjacent bathroom—
10 with adults who are law enforcement officials, or who are contracted by law
11 enforcement officials.

12 45. When children are secreted in private rooms, with only a single adult or a
13 small group of adults who are not experts in child welfare or child development
14 watching over them, they are at heightened risk of improper treatment, including
15 physical or sexual abuse. As far as we know, there are no cameras in these rooms, no
16 publicly-available guidelines for adults’ presence in these rooms, no access to phones
17 to register PREA complaints, no spot inspections from state child welfare officials,
18 and no access by Child Advocates or attorneys—in essence none of the mandated
19 protections in place in ORR-contracted, state-licensed facilities.

20 46. The children we have come into contact with who were held in hotels,
21 whether after arriving at the border or after receiving an order to repatriate from an
22 immigration judge, were held in parts of the country where ORR operates state-
23 licensed facilities and which at this time we believe to be well under capacity and able
24 to house children with appropriate protections in place.

1 47. I declare under penalty of perjury that the foregoing is true and correct.
2 Executed on August 14, 2020 in Bala Cynwyd, Pennsylvania.

3
4
5
6


7 Jennifer Nagda

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EXHIBIT D

1 I, Andrew Seaton, declare as follows:
2

3 1. This declaration is based on my personal knowledge, except as to those
4 matters based on information and belief, which I believe to be true. If called to testify
5 in this case, I would testify competently about these facts.

6 2. My name is Andrew Seaton, and I am a Staff Attorney with the Florence
7 Immigrant and Refugee Rights Project (“Florence Project”), specifically with the
8 Children’s Program in the organization’s Tucson office. The Florence Project is a
9 non-profit legal service provider for detained men, women, and children facing
10 removal processing in Arizona. I am licensed to practice in the state of Arizona and
11 have been an attorney with the Florence Project for one year.

12
13 Locating and Representing E.Z.

14 3. On July 22, 2020, at approximately 11:24am PST, I received a call from
15 K.Z., a woman living in Ohio. K.Z. stated that she had received a call from the
16 Guatemalan Consulate regarding her minor child, a 13-year old male, E.Z. She
17 explained that the Consulate told her that E.Z. had been apprehended by U.S. Customs
18 and Border Protection (“CBP”) and that he was being detained in Arizona while
19 waiting for transportation to become available to remove him back to Guatemala. K.Z.
20 informed me that she did not want E.Z. returned to Guatemala, as it was dangerous
21 there, and instead, she wanted him to be released to her in the U.S.

22 4. I was aware that children were being apprehended by CBP and quickly
23 repatriated under the recent order pursuant to Title 42. I knew that it was important to
24 move quickly before the child was removed.

25 5. I quickly emailed and then called a contact at the American Civil Liberties
26 Union (“ACLU”). I then spoke with an attorney at the ACLU on the phone and they
27 stated they would provide information to the Department of Justice (“DOJ”) and
28

1 request that E.Z. be removed from Title 42 expulsion proceedings and placed into
2 Title 8 removal proceedings.

3 6. At the same time, I made contact with our local CBP and ICE with an
4 executed G-28 on behalf of E.Z. to request that he be removed from Title 42 expulsion
5 proceedings and placed into Title 8 removal proceedings.

6 7. Because I was unsure who had custody of this child, I reached out to
7 multiple contacts in two agencies within the Department of Homeland Security
8 (“DHS”). I left a voicemail with a CBP officer, who returned my call and explained
9 that he did not have any information regarding E.Z.’s location, but recommended that
10 I should contact the Tucson and Yuma CBP Stations at their posted telephone
11 numbers. This CBP contact also gave me the email address of the Tucson
12 Coordination Center – Supervisory Border Patrol Agent (“TCC-SBPA”).

13 8. I contacted several other contacts at CBP, forwarding email correspondence
14 regarding E.Z. and attaching the executed G-28. While some of those contacts did not
15 respond in any way, one CBP contact did respond, and indicated that they had
16 forwarded the G-28 to CBP.

17 9. I forwarded email correspondence to TCC-SBPA, attaching a copy of the
18 executed G-28 and requesting information as to the location of E.Z. I later received an
19 email from a contact at TCC-SBPA stating that E.Z. was no longer in CBP custody,
20 but was instead in the custody of ICE Enforcement and Removal Operations (“ICE-
21 ERO”). The contact did not provide any “Subject ID” for E.Z., nor any other means to
22 identify him or track his whereabouts.

23 10. At approximately 4:37pm PST, I contacted the office of Tucson ICE, but at
24 that time, the office was closed, and I was not able to speak with anyone at that office,
25 nor was I able to leave a voicemail.

26 11. At approximately 4:45pm PST, I telephoned the Phoenix ICE Juvenile
27 Coordinator and left a voicemail. Additionally, I forwarded email correspondence to
28

1 the Phoenix ICE Juvenile Coordinator and attached the executed G-28. At
2 approximately 4:52pm PST, I called and left a voicemail with another ICE officer.

3 12. At approximately 7:53pm PST that same evening, I received a call from the
4 Tucson CBP Coordination Center, specifically, from a CBP officer, who indicated
5 that E.Z. had been taken to the CBP Coordination Center for processing, and that the
6 minor was being removed from Title 42 custody and being placed in Title 8 removal
7 proceedings. This CBP Officer explained that the minor would be transferred by ICE-
8 ERO to a facility operated by the Office of Refugee Resettlement (“ORR”), likely the
9 following day. During this telephone call, the CBP officer let me speak with E.Z., who
10 informed me that he was taken from a hotel back to the Tucson CBP Coordination
11 Center.

12 13. The next day, July 23, 2020, at approximately 9:54am PST, I placed a call
13 again to the ICE Tucson office, but was unable to speak with anyone and was not able
14 to leave a voicemail.

15 14. At approximately 9:59am PST, I called and left a voicemail with the
16 Phoenix ICE Juvenile Coordinator.

17 15. At approximately 10:00am PST, I called the ICE Officer that I had initially
18 attempted to contact the previous day at 4:52PM PST. I wanted to confirm that E.Z.
19 had been moved out of the hotel and was in ORR custody. This ICE Officer was able
20 to provide E.Z.’s Alien Registration Number and the name of the ORR facility that
21 was scheduled to receive him. This ICE officer confirmed that E.Z. would be
22 transported to the ORR facility that afternoon.

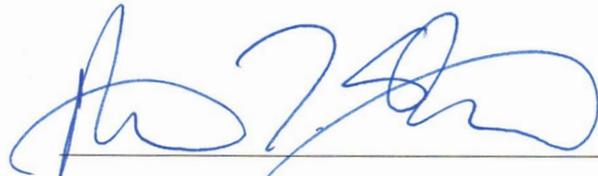
23 16. That afternoon, our office received a call from the ORR facility that ICE had
24 transported E.Z. to the ORR facility and that the ORR facility received E.Z. To the best
25 of my knowledge and belief, the Centers for Disease Control and Prevention (“CDC”)
26 was not involved in the decision to transfer E.Z. from Title 42 expulsion proceedings
27 to Title 8 removal proceedings. I did not interact or communicate with any
28 representatives from the CDC during my representation of E.Z.

1 17. To the best of my knowledge and belief, without the actions taken by the
2 Florence Project and the ACLU, E.Z. would have been quickly expelled to Guatemala
3 without having the opportunity to reunify with his mother or present his case in
4 immigration court.

5 18. In locating and representing E.Z., I only received information regarding his
6 location and Title 42 or Title 8 proceedings status from representatives of CBP, ICE,
7 and ORR.

8
9 I declare under penalty of perjury that the foregoing is true and correct. Executed on
10 August 13, 2020 in Tucson, Arizona.

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Andrew Seaton

EXHIBIT E

DECLARATION OF LINDA CORCHADO

I, Linda Corchado, hereby declare under penalty of perjury, that the following is true and correct to the best of my knowledge.

1. I am an attorney licensed to practice law in New York. Since May 2019, I have been the Legal Director at Las Americas Immigrant Advocacy Center (“Las Americas”). I engage in direct representation of noncitizen clients and also supervise attorneys and other staff at Las Americas who represent individuals detained during immigration proceedings.
2. I have been practicing law since 2014. Prior to joining Las Americas, I worked as a private immigration attorney for four years.
3. I make this declaration based on my personal experience working with noncitizen unaccompanied children subject to the Title 42 process since the process came into effect in March 2020.
4. Our office regularly provides legal services and other assistance to low-income refugees and asylum seekers in CBP and ICE custody. In the past, before the government began expelling people by using its Title 42 process, our office was often able to find our clients relatively quickly once we received a referral. For example, with a name and A-number, or name and country of origin, we could typically confirm the person’s location within approximately five minutes using a ICE locator website. Even when we had less information or the client had not yet shown up in the locator website, delays in finding a client were much smaller than they are under Title 42.
5. Since the CDC order went into effect in March 2020, it has been extremely difficult to find unaccompanied children before they are deported under Title 42. These children are only in the United States for a few days, and sometimes just a few hours, before being summarily deported. Without a quick and effective way to find such children, they will be removed without an attorney having been able to find and talk to them.
6. I have recently represented four children who were subject to the Title 42 Process who were still in the United States at the time my office heard of them. All of them were facing imminent deportation, and it required significant resources to intervene in their cases.
7. For example, in June 2020, I represented an unaccompanied minor who fled to the United States to seek safety and to reunite with this father, who lives here. He was a 16-year-old boy from Honduras fleeing persecution. I was made aware of this minor only because our office happened to receive a phone call from his father seeking assistance in stopping his son’s deportation. By the point that we heard about this case, the child was in an unknown hotel in Phoenix awaiting deportation. The minor could not tell me exactly where he was detained because he had no way to know.

8. DHS was not forthcoming with information about the child. To locate the child, I could only provide DHS officials with my client's date of birth since DHS does not assign A numbers to people subjected to the Title 42 Process. I have also found that immigration officials sometimes have conflicting information among agencies about who has custody of a child — for example, a child could be under the custody of the CBP port director at a U.S.-Mexico port of entry, a child could be under CBP custody at a CBP station or can be under ICE custody while the child is in a hotel. Throughout the process of locating a child, I have to go through these three different entities in order to pinpoint to whom I should direct my questions and requests to about my client's case. I have had to make multiple inquiries to DHS agencies, and have had multiple conversations with a child's family members to get more details, in order to get DHS to confirm they have the child and to sort out which agency has custody. This is a much slower and more labor-intensive effort to find a child than was the case before the government began expelling people under Title 42.
9. The 16-year-old boy referenced above was scheduled to be taken from the hotel and removed on a flight within hours. Had I not been able to locate my client in the brief window when he was in the country, I would have been unable to help him. I referred his case to the ACLU, which brought a federal lawsuit on his behalf. After a federal judge issued a preliminary injunction against his deportation, the government voluntarily transferred him out of the Title 42 process and into regular immigration proceedings.
10. In late June and through July, I heard of three other cases of children subject to the Title 42 Process. One was a 16-year-old Honduran boy, another was a 17-year-old Nicaraguan girl, and the third was a 13-year-old Guatemalan boy. All three had various claims for humanitarian relief, and followed the same general pattern as above—they were all set for imminent deportation at the time their cases found their way to my office. Fortunately, through a combination of my intervention and the ACLU's work, I successfully advocated for their referral to ORR custody and averted their deportation.
11. However, each case required substantial time and effort on an emergency basis, as I had to move very quickly to gather information about the child's case from the child and family members, advocate with DHS to allow me phone contact with the child, and work with other lawyers to stop the child's deportation. In the cases I found, there were delays of several days before children were able to speak to a lawyer, because DHS limited the phone calls that a child could make to family, which necessarily delays either the child or family being able to learn about legal assistance and reach out to any lawyer. I estimate that for each child, I spent approximately six to twelve hours over the course of two or three days before getting confirmation the child would not be deported.
12. We also insist to the government that clients be given a type of screening for Convention Against Torture ("CAT") claims that the government is sometimes providing under its Title 42 process. It's important that we help the client prepare for that screening and go over their rights. When I was able to get the government to do a CAT screening for one client, I was only able to conduct a very brief and basic preparation while my client was

in CBP custody. Given his vulnerabilities as a minor, and given the fact that his parents knew more about the facts surrounding his persecution and fear of torture than he did, my effort was largely fruitless. To make matters worse, my client had never gone to school, could not read or write and had a very basic understanding of the Spanish language, even though it was the only language he understood. I requested to be present at his interview, and flagged these vulnerabilities to USCIS, my requests to be present were ignored and my client was forced to proceed without an attorney.

13. For another client, I was never notified by DHS that he would undergo a CAT screening. My first conversation with him was in a van where the call was not confidential, so I had to quickly end the call until he reached a hotel in El Paso where he could speak with me. However, upon arriving at the hotel, he was told that he must undergo an interview with an officer, he was not told by any immigration official or ICE contractor that he could access an attorney during the interview or that he could postpone the interview. He didn't even understand what the interview was for.
14. Preparing for a client's fear screening interview can be an extensive process, because asylum seekers have no knowledge of the U.S. immigration system and do not know how to respond to questions. Thus, access to potential clients is vital. Asylum seekers are particularly vulnerable: they have fled dangers in their home country and made a harrowing journey all the way to the United States border by themselves, often being exploited and harmed along the way. My staff and I work to establish the trusting relationship necessary to solicit all of the necessary information for them to be able to present their fear claims.
15. Such preparation is especially critical for minors, for several reasons. Minors are frequently less likely to understand their rights and often have greater difficulty conveying a coherent factual narrative. Minors will also not know the full story behind their persecution because adults will often shield them from the worst aspects of their situation. Speaking at length with the minor's family members and investigating the facts is therefore critical, because I often cannot rely on the minor's testimony alone to support his claims of fear.

I declare under penalty of perjury, under the laws of the United States of America and Texas, that the foregoing is true and correct to the best of my knowledge.

Executed and dated: July 24, 2020, in El Paso, Texas, United States.

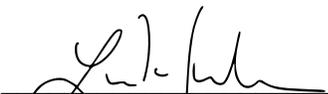
Signature: 
Linda Corchado

EXHIBIT F

DECLARATION OF DANIEL A. GALINDO

I, Daniel A. Galindo, hereby declare:

1. I am an attorney licensed to practice law in New York. I am a staff attorney at the ACLU's Immigrants' Rights Project, where I litigate cases in state and federal trial and appellate courts.
2. I am one of the attorneys working on legal challenges the ACLU has filed to the U.S. government's practice, since March 2020, of invoking Title 42 to summarily expel people at the southern border. I make this declaration based on my personal experience working with noncitizens subjected to the government's Title 42 process.
3. As of August 13, 2020, the U.S. government has transferred at least 44 unaccompanied children out of the Title 42 process and into ORR care as a result of our efforts.
4. Additionally, we have identified to the U.S. government at least 17 families (adults with children) who we understood were in the Title 42 process. The government subsequently informed us that those families would be processed under Title 8.

I declare under penalty of perjury, under the laws of the United States of America and New York, that the foregoing is true and correct to the best of my knowledge.

Executed and dated: August 14, 2020, in Brooklyn, New York, United States.

Signature:



Daniel A. Galindo

EXHIBIT G

1 I, Melissa Adamson, declare as follows:

2
3 1. I am an attorney at the National Center for Youth Law, which serves as class
4 counsel for Plaintiffs in *Flores v. Sessions*. I execute this declaration in support of
5 Plaintiffs' Motion to Enforce Settlement re "Title 42" Class Members.

6 2. This declaration is based on my personal knowledge, except as to those
7 matters based on information and belief, which I believe to be true. If called to testify
8 in this case, I would testify competently about these facts.

9 3. Pursuant to ¶¶ 28 and 29 of the *Flores* Settlement Agreement, the
10 Department of Homeland Security ("DHS") and the Department of Health and Human
11 Services ("HHS") provide class counsel with monthly statistical reports on class
12 members in its custody.

13 4. The monthly HHS reports include a "Referrals Tab," "Discharges Tab,"
14 "Census Tab," "Transfers Tab," and "Out of Network Placements Tab." The
15 "Referrals Tab" lists all unaccompanied children referred to ORR custody in that
16 month.

17 5. The March HHS report indicates that 1,852 unaccompanied children were
18 referred to ORR custody in March 2020.

19 6. The April HHS report indicates that 62 unaccompanied children were
20 referred to ORR custody in April 2020.

21 7. The May HHS report indicates that 39 unaccompanied children were
22 referred to ORR custody in May 2020.

23 8. The June HHS report indicates that 61 unaccompanied children were
24 referred to ORR custody in June 2020.

25 9. The DHS reports provide each class member's "Alien File Number,"
26 "Subject ID," "Given Name," "Family Name," "Country of Citizenship," "Birth
27 Date," and "Initial ICE Book-In Date." The DHS reports also provide the "Book-in
28 Date" and "Book-out Date" for each placement in which the child has been detained,

1 as well as each placement’s “Facility Name” and “Facility Type.” The DHS reports
2 also include information regarding “Release Reason” and “Detention Criteria.”

3 10. The June DHS report states the following under “Detention Criteria” for 16-
4 year-old B.B.C.: “On 06/29/20 case was reprocessed [sic] from a T42 to T8, UAC was
5 placed in ORR Custody pending Immigration Hearing.” The June ICE report indicates
6 that B.B.C was first detained at a hotel for four days, sent to a different hotel for one
7 day, returned back to the original hotel for 19 days, and transferred to a licensed ORR
8 placement on the day DHS “reprocessed” him from Title 42 to Title 8.

9 11. In the month of June, 20 unaccompanied children were detained in hotels
10 and awaiting expulsion under Title 42 at the end of the month. These children were
11 listed as “T42 Awaiting Expulsion” in the “Detention Criteria” column and were still
12 in custody as of June 30, 2020.

13 12. Among the children listed as “T42 Awaiting Expulsion” at the end of June
14 were 2-month-old B.E.F., 1-year-old M.E., 5-year-old H.E., and 8-year-old H.E.,
15 likely siblings, who had already been held at a hotel for three days, and 13-year-old
16 J.M.A., who had already been held at a hotel for six days.

17
18 I declare under penalty of perjury that the foregoing is true and correct. Executed this
19 14th day of August, 2020 at San Mateo, California.

20
21 

22 Melissa Adamson

EXHIBIT H

From: Fabian, Sarah B (CIV) Sarah.B.Fabian@usdoj.gov
Subject: RE: Letter requesting conference re detention facility COVID disclosures, etc.
Date: August 12, 2020 at 1:11 PM
To: Carlos Holguín crholguin@centerforhumanrights.email
Cc: Silvis, William (CIV) William.Silvis@usdoj.gov, Andrea Sheridan Ordin aordin@strumwooch.com, Leecia Welch lwelch@youthlaw.org, Neha Desai ndesai@youthlaw.org, Melissa Adamson madamson@youthlaw.org, Peter Schey pschey@centerforhumanrights.org, Murley, Nicole (CIV) Nicole.Murley@usdoj.gov

Carlos – see attached copies of the March and May ICE “Redo” spreadsheets that we previously sent you, each of which add a column containing apprehension dates from CBP, which is the data usually provided in the CBP reporting. This should resolve the issues you identified below for those two months. If I recall correctly ICE is still preparing an updated April spreadsheet and when that is complete CBP can provide any updated CBP data. If this does not resolve your concerns please let me know.

The data teams are working on getting the monthly reporting as quickly as possible and I will send as soon as I have them but I do not think they can expedite the production at this stage.

Best,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Carlos Holguín <crholguin@centerforhumanrights.email>
Sent: Monday, August 10, 2020 7:46 PM
To: Fabian, Sarah B (CIV) <sfabian@CIV.USDOJ.GOV>
Cc: Silvis, William (CIV) <WSilvis@civ.usdoj.gov>; Andrea Sheridan Ordin <aordin@strumwooch.com>; Leecia Welch <lwelch@youthlaw.org>; Neha Desai <ndesai@youthlaw.org>; Melissa Adamson <madamson@youthlaw.org>; Peter Schey <pschey@centerforhumanrights.org>; Murley, Nicole (CIV) <NMurley@civ.usdoj.gov>
Subject: Re: Letter requesting conference re detention facility COVID disclosures, etc.

Sarah,

Thank you for checking in with CBP. We are happy to clarify our request.

In the May CBP report supplementing ICE reporting (“May CBP Subjects by Requested Alien Number_Corresponds to ICE Data,” attached), the report includes three columns: “Alien Number,” “APP/Inadmissible DT,” and “Component.” This report does not include “Subject ID” as a column and therefore does not include children who were only assigned a Subject ID and not an Alien Number.

The other two CBP files provided for May (“CBP_MAY2020” and “CBP_May 2020_by Requested Alien Number_Corresponds to HHS Data”) do not include children who were only assigned a Subject ID and therefore do not provide the CBP entry date for such children.

In the June CBP report supplementing ICE reporting (“June 2020_CBP Subjects by Requested Subject Ids_Corresponds to ICE Data,” attached), the report includes four columns: “Alien Number,” “APP/Inadmissible DT,” “Component,” and “Subject ID.” This report therefore does include children who were assigned a Subject ID and not an Alien Number. This is the data that we are requesting for March, April, and May.

On a related matter, as you know, Plaintiffs are required to file papers respecting Title 42 children by Friday, August 14. The Court ordered that “[b]riefing on a motion to enforce regarding the Title 42 hotelling issue shall be accompanied by data regarding, inter alia, how many minors are affected, whether they are accompanied or unaccompanied, the minors’ ages, and where they were hotelled.” Order, Aug. 7, 2020 [Doc. # 914], at 4.

We appreciate that Defendants have been producing ¶ 29 reports on the 15th of each month, but given the Court’s order, Plaintiffs request that Defendants produce ¶ 29 reports for July at their earliest convenience such that we may supply the Court the information it requests in Friday’s filing.

Thank you.

—

Carlos Holguín
General Counsel
Center for Human Rights & Constitutional Law
256 S. Occidental Blvd.
Los Angeles, California 90057
(213) 388-8693 x.309 (v)
(213) 290-1642 (direct)
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On Aug 10, 2020, at 12:46 PM, Fabian, Sarah B (CIV)
<Sarah.B.Fabian@usdoj.gov> wrote:

I am following up on this portion of your request below:

Second, the March, April, and May CBP data reports appear to omit children for whom no A-number was assigned, which we understand to be the practice when designating children for “Title 42” removal. The June CBP data included both children with an A-number and children

June CBP data included both children with an A-number and children with only a "Subject ID." We will accordingly request that you provide updated March, April, and May CBP data reports that include children to assigned only a "Subject ID."

CBP has reviewed your question but does not understand your request. Both the May and June CBP reports listed minors who do not have A#s. May was the first month that Defendants provided a CBP-only report from CBP following the meet and confer between the parties and Defendants' changes to their reporting in response to those discussions. Prior to that, the CBP report being provided supplemented the HHS reporting only. Since May, there are three reports from CBP, two of which supplement the ICE and HHS reporting, and the third of which provides CBP-only data.

Best,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Fabian, Sarah B (CIV)
Sent: Thursday, August 06, 2020 2:31 PM
To: Carlos Holguín <crholguin@centerforhumanrights.email>
Cc: Silvis, William (CIV) <WSilvis@civ.usdoj.gov>; Andrea Sheridan Ordin <aordin@strumwooch.com>; Leecia Welch <lwelch@youthlaw.org>; Neha Desai <ndesai@youthlaw.org>; Melissa Adamson <madamson@youthlaw.org>; Peter Schey <pschey@centerforhumanrights.org>; Murley, Nicole (CIV) <NMurley@civ.usdoj.gov>
Subject: RE: Letter requesting conference re detention facility COVID disclosures, etc.

Please see the attached in response to your correspondence below.

Best,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Carlos Holguín <crholguin@centerforhumanrights.email>
Sent: Sunday, July 26, 2020 8:46 PM
To: Fabian, Sarah B (CIV) <sfabian@CIV.USDOJ.GOV>
Cc: Silvis, William (CIV) <WSilvis@civ.usdoj.gov>; Andrea Sheridan Ordin <aordin@strumwooch.com>; Leecia Welch <lwelch@youthlaw.org>; Neha

Desai <ndesai@youthlaw.org>; Melissa Adamson
<madamson@youthlaw.org>; Peter Schey
<pschey@centerforhumanrights.org>; Murley, Nicole (CIV)
<NMurley@civ.usdoj.gov>

Subject: Re: Letter requesting conference re detention facility COVID disclosures, etc.

Sarah,

Defendants' refusing to discuss the treatment and conditions children experience in hotels and other irregular facilities will only increase the likelihood they will face even more litigation.

Plaintiffs are advised that some or all class members have been removed from the Hampton Inn hotel in McAllen, Texas, and we can think of no reason Defendants should refuse to disclose where those still in Defendants' custody are now placed. Plaintiffs expect the Parties to discuss why licensed placements are not being used, who is caring for these children, where they are being flown, why only 61 children were transferred to ORR in June when 120 were relegated to Title 42 expulsion. Plaintiffs also propose to discuss arranging video interviews with class members detained in unlicensed facilities.

With respect to ¶ 29 reports, Plaintiffs are advised that Defendants began designating class members for "Title 42" detention and removal beginning in March, yet as best I can determine, the reports for that period fail to include data on such class members detained longer than 72 during the reporting period. We will accordingly request a supplemental report for March.

Second, the March, April, and May CBP data reports appear to omit children for whom no A-number was assigned, which we understand to be the practice when designating children for "Title 42" removal. The June CBP data included both children with an A-number and children with only a "Subject ID." We will accordingly request that you provide updated March, April, and May CBP data reports that include children to assigned only a "Subject ID."

With respect to the HHS Juvenile Coordinator's July 24 report, Plaintiffs propose to confer regarding the following deficiencies:

1. Failure to identify infected minors.
2. Failure to state what ORR considers "medical vulnerabilities" and define "children with complex medical needs."
3. Failure to state specific reasons minors in COVID-infested facilities have not been released.
4. Failure to describe each facility's "unique" policies and/or practices aimed at identifying and protecting minors who are at heightened risk of serious illness or death should they contract COVID-19.
5. Complete failure to "[e]xplain whether the medical professionals at ORR are making expeditious individual assessments about a Class Member's eligibility for release when a Class Member has been exposed to COVID-

eligibility for release when a Class Member has been exposed to COVID-19 or has a sponsor whose household has a confirmed case of COVID-19, and provide the average time in which such individual assessments take place during the reporting period.”

6. Complete failure to explain the reasons each of the 30 MPP detainees have not been released.
7. ORR’s revised fingerprinting waiver policy does not appear to comply with the Court’s order requiring ORR to "provide for a less onerous chain of approvals or show cause to the Court why the policy, as written, is imperative." Doc. 833 at 5. The revised policy included as Attachment B to the Report now requires approval by both the Director for Unaccompanied Children's Operations and the ORR Director (pp. 18-19), and accordingly appears even more onerous than its prior policy.

Please advise at your earliest convenience regarding tomorrow’s 9:00 am call.

Thank you.

—

Carlos Holguín
General Counsel
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256 S. Occidental Blvd.
Los Angeles, California 90057
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(213) 290-1642 (direct)
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<http://www.centerforhumanrights.org>

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On Jul 26, 2020, at 6:54 AM, Fabian, Sarah B (CIV)
<Sarah.B.Fabian@usdoj.gov> wrote:

Carlos - I’m still waiting on confirmation from my client regarding our tentative plan to talk Monday at 9am PT. I am unlikely to have confirmation before tomorrow morning and will let you know as soon as I hear. Defendants are prepared to discuss our positions on Issues 2 and 4 from your letter. Defendants are not planning to discuss media reports or unverified claims from other sources, particularly where those claims are the subject of other litigation. With regard to the Monitor’s report, Defendants will review the Judge’s latest order

the monitor's report, Defendants will review the judge's latest order which I have not yet had the chance to discuss with my team and will determine how to proceed after that. I do not expect we will meet and confer on those issues on Monday morning.

Having heard nothing more from you on issue 3 we are assuming the updated spreadsheet that we sent has resolved that issue.

On Issue 1, I am waiting to hear from you regarding when you intend to send us a list of Issues-if any-from the HHS juvenile coordinator report for discussion. once we receive that list from you I can confirm a time to discuss those issues along with Issue 1.

Best

Sarah

Sarah B. Fabian
Tel. 202.532.4824

On Jul 25, 2020, at 2:34 PM, Carlos Holguín
<crholguin@centerforhumanrights.org> wrote:

Sarah,

Plaintiffs request to go forward on Monday to discuss Defendants' position regarding the points set out in Plaintiffs' correspondence of July 14, 2020, as well as Title 42 detentions and media reports on how children and their legal service providers are being treated.

We can use the following conference line: (205) 825-9165; no access code required.

Please confirm Defendants' availability for that call as soon as possible.

Thank you.

Carlos Holguín
General Counsel
Center for Human Rights & Constitutional Law
256 S. Occidental Blvd.
Los Angeles, California 90057
213.388-8693 x.309 (v)
(213) 290-1642 (direct)
213.386.9484 (fax)
<http://www.centerforhumanrights.org>

On Jul 23, 2020, at 5:39 PM, Fabian, Sarah

B (CIV) <Sarah.B.Fabian@usdoj.gov>
wrote:

Carlos – if you send a letter demanding information regarding four separate issues then I need time to gather the information before I can discuss the issues, and as the information comes from many different sources that can take some time. Moreover, as you may be aware there are several other pressing Flores issues going on at this time and I have been focused primarily on working with your co-counsel on the most immediate deadlines. While it may feel leisurely to you, I assure you that I and my team have been working quite a bit on several *Flores*-related issues at one time.

I can talk at 9am PT on Monday about Issues 2 and 4. I cannot confirm that time until Monday morning though because as I mentioned, my client who I need to participate in the call is having surgery and is out the rest of this week. I will try to touch base with her and will confirm a time as soon as I can.

If you would like to meet and confer regarding the HHS juvenile coordinator report first thing on Monday as well then I will check with HHS regarding their availability. Please confirm that you will send us notification of what issues you would like to discuss related to the report –which is being filed tomorrow–no later than 9am ET Monday morning, so that we can be prepared to discuss any issues you may have.

Best,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District
Court Section
(202) 532-4824

From: Carlos Holguín
<crholguin@centerforhumanrights.email>
>
Sent: Thursday, July 23, 2020 8:21 PM
To: Fabian, Sarah B (CIV)
<sfabian@CIV.USDOJ.GOV>
Cc: Silvis, William (CIV)
<WSilvis@civ.usdoj.gov>; Andrea Sheridan Ordin
<aordin@strumwooch.com>; Leecia Welch <lwelch@youthlaw.org>; Neha Desai <ndesai@youthlaw.org>; Melissa Adamson <madamson@youthlaw.org>; Peter Schey <pschey@centerforhumanrights.org>; Murley, Nicole (CIV) <NMurley@civ.usdoj.gov>
Subject: Re: Letter requesting conference re detention facility COVID disclosures, etc.

Sarah,

Plaintiffs continue to believe your proposed schedule unacceptably leisurely, especially in light of the Independent Monitor's findings regarding Defendants' routine use of unlicensed hotels to detain very young children during the COVID-19 pandemic. I urge Defendants to meet and confer tomorrow, especially with respect to Issues 2 and 4.

If Monday of next week is the soonest Defendants are willing to meet, Plaintiffs will meet then. I suggest 9:00 am pacific, or as soon thereafter as Defendants are willing. I suggest we convene a second call with the "separate group" to discuss Issue 1 and the HHS Juvenile Coordinator's report immediately following the 9:00 am call.

Thank you,

Carlos Holguín
General Counsel
Center for Human Rights & Constitutional Law

256 S. Occidental Blvd.
Los Angeles, California 90057
213.388-8693 x.309 (v)
(213) 290-1642 (direct)
213.386.9484 (fax)
<http://www.centerforhumanrights.org>

On Jul 23, 2020, at 8:08 AM,
Fabian, Sarah B (CIV)
<Sarah.B.Fabian@usdoj.gov>
> wrote:

Please see the attached updated May ICE report. This responds to, and hopefully resolves, the concerns raised in Issue Number 3 of your letter.

I expect to have more information regarding issues 2 and 4 tomorrow. However, the individual I need to participate on a call regarding issue 4 is out of the office having surgery this week. Therefore I propose that we set a call on that issue for Monday or Tuesday of next week. Please let me know your availability on those days. If I get the information I need from my clients, we can hopefully talk about issue 2 at that time as well.

With regard to Issue 1, as noted, I propose we set a time next week to discuss at the same time that we talk about any issues related to the HHS Juvenile Coordinator report that will be filed tomorrow. Since that will be a separate group that call should be separate from the one above. Please let

me know your availability for that call as well and I will figure out a time with my clients.

Best,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration
Litigation – District Court
Section
(202) 532-4824

From: Carlos Holguín
<crholguin@centerforhumanrights.email>
Sent: Friday, July 17, 2020
5:04 PM
To: Fabian, Sarah B (CIV)
<sfabian@CIV.USDOJ.GOV>
>
Cc: Silvis, William (CIV)
<WSilvis@civ.usdoj.gov>;
Andrea Sheridan Ordin
<aordin@strumwooch.com>;
Deane.Dougherty@ice.dhs.gov; Miranda-Maese, Aurora
(ACF) (CTR)
<Aurora.Miranda-maese@acf.hhs.gov>;
Leecia Welch
<lwelch@youthlaw.org>;
Neha Desai
<ndesai@youthlaw.org>;
Melissa Adamson
<madamson@youthlaw.org>
; Holly S Cooper
<hscooper@ucdavis.edu>;
Peter Schey
<pschey@centerforhumanrights.org>; Murley, Nicole
(CIV)
<NMurley@civ.usdoj.gov>
Subject: Re: Letter
requesting conference re
detention facility COVID
disclosures, etc.

In Plaintiffs' view, your proposal would needlessly delay any potential resolution of growing concerns over both ORR's and DHS's treatment of class members during an expanding pandemic. We urge Defendants to reconsider and agree to meet at their earliest convenience the first part of next week.

Thank you,

Carlos Holguín
General Counsel
Center for Human Rights
& Constitutional Law
256 S. Occidental Blvd.
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<http://www.centerforhumanrights.org>

On Jul 17, 2020,
at 12:58 PM,
Fabian, Sarah B
(CIV)
<Sarah.B.Fabian@usdoj.gov>
wrote:

Carlos – with regard to the issues concerning ORR, Defendants propose that we combine this meet and confer with the required meet and confer to take place

to take place following the submission of the Juvenile Coordinator's report on July 24 in advance of filing a joint response to that report on July 31. Therefore, please let me know your availability to talk that week regarding these issues.

With regard to the issues concerning DHS I am talking to my clients on Tuesday 7/21 and will suggest a time to discuss those issues after that.

Best,
Sarah

Sarah B. Fabian
Senior Litigation
Counsel
Office of
Immigration
Litigation –
District Court
Section
(202) 532-4824

From: Carlos Holguín
<crholguin@centerforhumanrights.org>

Sent: Friday,
July 17, 2020
1:24 PM

To: Silvia

William (CIV)
<WSilvis@civ.usdoj.gov>;

Fabian, Sarah B (CIV)
<sfabian@CIV.USDOJ.GOV>

Cc: Andrea Sheridan Ordin
<aordin@strumwooch.com>; Deane.Dougherty@ice.dhs.gov;

Miranda-Maese, Aurora (ACF) (CTR)
<[-
<\[maese@acf.hhs.gov\]\(mailto:maese@acf.hhs.gov\)>; Leecia](mailto:Aurora.Miranda</p></div><div data-bbox=)

Welch
<lwelch@youthlaw.org>; Neha

Desai
<ndesai@youthlaw.org>; Melissa

Adamson
<madamson@youthlaw.org>;

Holly S Cooper
<hscooper@ucdavis.edu>; Peter

Schey
<pschey@centerforhumanrights.org>

Subject: Letter requesting conference re detention facility COVID disclosures, etc.

Plaintiffs request the courtesy of a response indicating whether Defendants intend to meet

intend to meet
and confer
Monday, July 20,
at 11:00 am, as
proposed in the
annexed
correspondence.

Thank you,

Carlos Holguín
General Counsel
Center for Human
Rights
& Constitutional
Law
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Report
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2020 F...n.xlsx