No. 25-6308

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

On appeal from the
United States District Court for the Central District of California
Case No. 2:85-cv-04544-DMG-AGR

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INTRODUCTION

In 1997, the Government entered into the *Flores* settlement agreement ("FSA" or "Settlement"), which outlines basic protections for children in immigration custody. Among other things, the Settlement requires that detained children be held in safe and sanitary facilities, be afforded individualized consideration for release, and generally be placed in a licensed, nonsecure facility if not released to a relative or other suitable caregiver. The Settlement has served as a critical safeguard for this vulnerable population.

The Department of Homeland Security ("DHS") and the Department of Health and Human Services ("HHS") share responsibility for children in immigration custody: HHS for unaccompanied children, and DHS for those who arrive with a parent.

In 2024, HHS partially implemented the FSA through a regulation known as the Foundational Rule. *Unaccompanied Children Program Foundational Rule*, 89 Fed. Reg. 34384 (Apr. 30, 2024) (codified at 45 C.F.R. pt. 410) ("Foundational Rule"). In response, the district court terminated most provisions of the Settlement as to HHS. 4-ER-0715-735. The Settlement remains in full force and effect as to DHS. *Id.*

The FSA notwithstanding, DHS has regularly failed to comply with the Settlement and constitutional standards for the humane treatment of children. The

district court has repeatedly found that children at Customs and Border Protection ("CBP") facilities are held in "egregious conditions," with inadequate food or clean drinking water, unsanitary environments, frigid temperatures, and deficient sleeping conditions. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1052-1061 (C.D. Cal. 2017), *reprinted at* 2-SER-458-491; *Flores v. McHenry*, No. 85-cv-4544, 2025 WL 2373258 (C.D. Cal. Jan. 30, 2025), *reprinted at* 1-SER-279-290; *Flores v. Johnson*, 212 F. Supp. 3d 864, 905-908 (C.D. Cal. 2015), *reprinted at* 2-SER-529-553. In conjunction with the order at issue in this appeal, the district court issued a separate order finding continued violations of children's basic rights in CBP custody. 1-ER-0016 n.6; *Flores v. Bondi*, No. 85-cv-4544, 2025 WL 2995478, at *3-6 (C.D. Cal. Aug. 15, 2025), *reprinted at* 1-SER-20-16.

Children have been held for *weeks* in CBP holding cells, without windows, access to the outdoors, or even toilets they can flush. *Id.* at *3-4, 6-7. In one conscience-shocking instance, in 2025 CBP detained a two-year-old child for 42 days in a windowless holding cell with no access to the outdoors, no recreation, no soap, no private toilet, and no on-site showers. *Id.* at *3-4 & n.4; Decl. of A.K. ¶¶ 1, 6, 11-12, 20, 25, 1-SER-93-95. The Government did not contest these conditions. Decl. of Luis Mejia ¶¶ 21, 24, 26-27, 29, 32, 1-SER-18.

The Government now seeks to terminate the Settlement in its entirety. Most of its reasons for doing so were rejected by this Court in *Flores v. Rosen*, 984 F.3d

720 (9th Cir. 2020) ("*Flores IV*"). Others are waived. Yet even on the merits, none hold water. The district court did not abuse its discretion in denying Rule 60(b) relief where (1) the Government failed to carry its burden to establish a significant change in factual circumstances or law and that a durable remedy would protect children's basic rights were the FSA terminated; (2) the district court properly exercises jurisdiction to oversee the Settlement; and (3) the Government did not and cannot show it has substantially complied with the Settlement.

This Court should affirm. But should it nonetheless determine that further fact-finding is necessary to dispose of the Government's motion, the Court should remand for further proceedings.

STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1651. Plaintiffs-Appellees disagree with Defendants-Appellants' assertion that 8 U.S.C. § 1252(f)(1) deprives the district court of jurisdiction over this case or to enforce the Settlement. Plaintiffs-Appellees otherwise concur in Defendants-Appellants' statement of jurisdiction.

QUESTION PRESENTED FOR REVIEW

Did the district court abuse its discretion in denying the Government's renewed motion to terminate the FSA pursuant to Federal Rule of Civil Procedure 60(b)?

STATEMENT OF THE CASE

In this appeal, the Government—for the second time in recent years—challenges the district court's declining to terminate the FSA.

Plaintiffs filed this case in the United States District Court for the Central District of California in 1985. *See Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988). Following decisions by this Court and the Supreme Court,[1] the parties reached a settlement, which the district court approved under Rule 23(e). Defendants-Appellants' Excerpts of Record ("ER") 680-714.

The Settlement protects all children in civil immigration detention, whether they are taken into custody alone or with parents or other relatives. *Flores I*, 828 F.3d at 905-07.[2] It requires the Government to treat children "with dignity, respect

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[1] Opinions in this case preceding the FSA include *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991) (en banc); and *Reno v. Flores*, 507 U.S. 292 (1993).

This Court's opinions addressing the FSA include *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) ("*Flores I*"); *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) ("*Flores II*"); and *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019) ("*Flores III*"); *Flores IV*; and *Flores v. Garland*, 3 F.4th 1145 (9th Cir. 2021) ("*Flores V*").

[2] In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) ("HSA"), Congress dissolved the Immigration and Naturalization Service ("INS") and transferred most of its functions to DHS. Congress directed, however, that the Office of Refugee Resettlement of HHS ("ORR") should care for unaccompanied minors detained pursuant to the INA. 6 U.S.C § 279.

and special concern for their particular vulnerability as minors" and to house children in facilities licensed to care for dependent—as opposed to delinquent—minors. FSA ¶¶ 6, 11, 12.A., 19, 21, 4-ER-682-88.

The Settlement also requires the Government to maintain a "general policy favoring release" of children unless continued detention is "required either to secure [their] timely appearance … or to ensure the minor's safety or that of others." FSA ¶ 14, 4-ER-686.

The FSA also contains rulemaking and sunset provisions. The rulemaking clause stipulates that the Government will promulgate regulations that "implement" the agreement and provides that such regulations "shall not be inconsistent with the terms of this Agreement." FSA ¶ 9, 4-ER-683. The Settlement's sunset provision, as the Parties modified it during the George W. Bush administration, stipulates that the FSA shall end "45 days following the Government's publication of final regulations implementing this Agreement." 4-ER-710-12.

Congress included a savings clause in the HSA that transferred all of INS's legal obligations—including those of the FSA—to the Government as well. 6 U.S.C. § 552(a)(1) (incorporated by reference into 6 U.S.C. § 279(f)(2)).

In both the HSA and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) ("TVPRA"), Congress preserved the FSA as a binding consent decree. *Flores II*, 862 F.3d at 870-71, 871 n.7.

A. The Government's record of noncompliance.

The Government has nevertheless repeatedly violated the Settlement, leading to multiple enforcement actions and appeals before this Court.

In 2014, DHS began detaining accompanied children "in secure, unlicensed facilities for the duration of the proceedings that determine whether they are entitled to remain in the United States" in violation of the Settlement. *Flores v. Johnson*, 212 F. Supp. 3d 864, 869 (C.D. Cal. 2015).

DHS further denied children "safe and sanitary" conditions of detention by permitting "widespread and deplorable conditions in the holding cells of the Border Patrol stations," including "overcrowded and unhygienic conditions," extreme cold, and constant illumination. *Id.* at 881. The district court ordered the Government to improve its treatment of accompanied children, and this Court affirmed in relevant part, holding that the FSA's protections extended to accompanied children. *Flores I*, 828 F.3d at 905-908.

The Government's violations nonetheless continued. DHS "continue[d] to detain [Plaintiff] class members in deplorable and unsanitary conditions." *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1048 (C.D. Cal. 2017). In 2017, the district court found the Government failed to provide humane conditions in five different respects: "(1) inadequate food; (2) inadequate access to clean drinking water; (3) inadequate hygiene (bathrooms, soap, towels, toothbrushes); (4) cold temperatures;

and (5) inadequate sleeping conditions." *Id.* at 1052, 1072.

This Court dismissed the Government's appeal, finding these conditions violated the Settlement's safe and sanitary requirement. *Flores III*, 934 F.3d at 912, 915-16.

Conditions in DHS custody remain persistently unsafe and unsanitary. *See Flores v. Bondi*, 2025 WL 2995478, at *3-5; *Flores v. McHenry,* 2025 WL 2373258, at *2; and *Flores v. Barr*, No. 85-cv-4544, 2019 WL 2723798 (C.D. Cal. June 28, 2019), *reprinted at* 2-SER-384-386.

B. The Government's prior motions to modify or terminate the FSA.

The district court has declined to grant the Government Rule 60(b) relief several times; when appealed, this Court has just as often affirmed.

In 2015, the Government moved to modify the FSA on the grounds (1) that the HSA and TVPRA supersede the Settlement; and (2) that "the number of unaccompanied and accompanied children ha[d] increased." *Flores v. Johnson*, 212 F. Supp. 3d at 883-886 (quotation marks and citation omitted). The district court denied the Government's motion. *Id.* at 886.

The Government soon filed yet another Rule 60(b) motion, which the district court construed as a motion for reconsideration of *Johnson*. *Flores v. Lynch*, 212 F. Supp. 3d at 909. The Government argued that DHS policy directives, which predated *Johnson*, and INA provisions, which predated the FSA itself, constituted

material changes in law warranting reconsideration. *Id.* at 910-911. The Government also argued that "improvements to detention facilities in Texas" were "new material facts" warranting consideration. *Id.* at 911.

The district court again held that the Settlement protects all children, whether accompanied or not, and that no change in law or fact warranted modifying the agreement to exclude accompanied children. *Id.* at 886-87.

This Court affirmed in all relevant respects, holding that the FSA "unambiguously applies to accompanied minors." *Flores I*, 828 F.3d at 908. The Court further held that the Parties had anticipated and accommodated an "influx," such that an increase in the number of children coming into DHS's custody did not warrant modification of their agreement. *Id.* at 908-10.

In September 2018, the Government proposed rules aimed at sunsetting the FSA. *Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45,486. In August 2019, it finalized those regulations. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 ("2019 Regulations"). The final regulations did not materially differ from the proposed version and were palpably inconsistent with the FSA, especially as regards DHS's rules. *Flores IV*, 984 F.3d at 727.

On August 30, 2019, the Government nonetheless filed a notice declaring

the Settlement terminated, but moved in the alternative to terminate the agreement pursuant to Rule 60(b) should the 2019 Regulations be insufficient to end the FSA under the stipulated sunset clause. *Flores IV*, 984 F.3d at 730.

The district court voided the Government's notice of termination and denied its motion to terminate. *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019), *reprinted at* 2-SER-360-383. The district court identified "myriad relevant and substantive differences" between the 2019 Regulations and the FSA. *Id*. at 927. The court held the 2019 Regulations insufficient to terminate the agreement under the sunset clause.

Regarding the Government's Rule 60(b) motion, the district court held, *inter alia*, that it "constitute[d] yet another in a long line of not so thinly-veiled motions for reconsideration of prior Orders rejecting similar arguments," *id*., and that "Defendants continue[d] to rely on 'dubious' and 'unconvincing' logic and statistics" to support termination. *Id*. at 928. The court enjoined the Government from implementing the 2019 Regulations.

This Court affirmed in part and reversed in part. It found HHS's part of the 2019 Regulations consistent with the FSA except (1) to the extent they allow placement of children in secure facilities, such as juvenile halls, in circumstances the Settlement did not, *Flores IV*, 984 F.3d at 732-33; and (2) "to the extent that they require unaccompanied minors held in secure or staff-secure placements to

request a hearing, rather than providing a hearing to those minors automatically unless they refuse one." *Id*. at 736.

The Court nonetheless upheld the district court's having declined to terminate the FSA in whole because "[t]he government moved the district court to terminate the Agreement in full, not to modify it or terminate it in part. The Agreement therefore remains in effect, notwithstanding the overlapping HHS regulations." *Id*. 737.

As to DHS, however, the Court held that its part of the 2019 Regulations "differ substantially from the Agreement . . . [and] undermine [1] the Agreement's core 'presumption in favor of releasing minors,' and [2] its requirement that those not released be placed in 'licensed, non-secure facilities that meet certain standards.'" 984 F.3d at 737 (quoting *Flores I*, 828 F.3d at 901).

The Court rejected the Government's argument that the FSA's release standard conflicts with 8 U.S.C. § 1225(b)(1)(A)(i), which generally prescribes mandatory detention of noncitizens subject to "expedited" removal. *Id*. at 738 (quoting *Flores III*, 934 F.3d at 917) ("'expedited removal [process] does *not* require mandatory detention for minors'") (alteration in original). It further held that DHS's regulations on the release of minors in standard removal proceedings impermissibly "shrink the pool of potential custodians to whom DHS is required to release a minor who does not present a safety or flight risk." 984 F.3d at 739.

The Court held that DHS's regulations allowing secure confinement of children are also inconsistent with the FSA: "[T]he regulations expressly define a licensed facility as a "detention facility," as opposed to the group homes contemplated by the Agreement." *Id*. at 739 (quoting 8 C.F.R. § 236.3(b)(9)). "The government's intent," the Court held, "is not to place families together in 'an open setting,'. . . but to 'detain' them together for 'enforcement' purposes . . . ." 984 F.3d at 740 (quoting 45 C.F.R. § 410.801(b)(2)).

DHS's regulations, the Court concluded, "dramatically increase the likelihood that accompanied minors will remain in government detention indefinitely, instead of being released while their immigration proceedings are pending or housed in nonsecure, licensed facilities." 984 F.3d at 740.

Turning to the Government's Rule 60(b) motion, the Court held that neither the TVPRA nor the 2019 Regulations warranted termination of the FSA. *Id*. at 741. Finally, the Court again rejected the Government's argument that an "unprecedented increase in the number of minors arriving annually at U.S. borders warrants termination of the Agreement." *Id*. at 741-43.

C. The Foundational Rule and partial termination of the FSA.

Following *Flores IV*, HHS initiated new rulemaking aimed at bringing its regulations into harmony with the FSA. *See Unaccompanied Children Program Foundational Rule*, 89 Fed. Reg. 34384 (Apr. 30, 2024) (codified at 45 C.F.R. pt.

410) ("Foundational Rule"). The Government then moved to terminate the FSA with respect to HHS.

On June 28, 2024, the district court granted partial termination of HHS's Settlement obligations but declined to terminate in full because the Foundational Rule fails to protect children ORR places in out-of-network facilities and permits it to place children in "heightened supervision" facilities for reasons the Settlement disallows. 4-ER-725-735.

The Government did not appeal, nor has HHS ever amended the Foundational Rule to resolve its remaining inconsistencies with the FSA.

D. Appellants' renewed motion to terminate.

For its part, DHS has declined to initiate any new rulemaking to correct the inconsistencies in its 2019 Regulations this Court identified in *Flores IV*. Instead, in May 2025 the Government filed yet another Rule 60(b) motion to terminate the FSA in whole and as to both DHS and HHS.

The Government argued that 8 U.S.C. § 1252(f)(1), as construed in *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), rendered the FSA void *ab initio*. Order re Defendants' Motion to Terminate, 1-ER-0007-8. The district court disagreed, noting that "Defendants have argued on several occasions throughout this litigation that section 1252(f)(1) deprives the Court of jurisdiction to oversee the FSA. To that extent, Defendants' motion is an undisguised motion for reconsideration." *Id.*,

1-ER-009. The court nonetheless again considered and rejected the Government's argument on its merits: "[I]f the FSA could not co-exist with section 1252(f)(1), the FSA would not have been approved in the first place." *Id.*, 1-ER-008. The court held that *Aleman Gonzalez* required no different result. *Id*., 1-ER-0010-11.

The Government next argued that the FSA should end because the 2019 Regulations "'resolv[e] the concerns that instigated this lawsuit' and 'generally incorporate' the FSA." *Id*, 1-ER-0013. Again the district court disagreed, holding that both it and this Court had previously "deemed DHS's 2019 Regulations to be inconsistent with the FSA." *Id*.

Next, the Government "incredulously" argued that (1) the FSA does not apply to accompanied minors and (2) does not apply to family detention facilities in any event. *Id*., 1-ER-0014. The Government's arguments, the court held, were "plainly incorrect and ignore[] the rulings of at least three separate courts," including this Court. *Id*. (citing *Flores I*, 828 F.3d at 907; *Flores IV*, 984 F.3d at 727).

The court also rejected the Government's argument that the FSA's sunset clause renders the Administrative Procedure Act's ("APA") rulemaking procedures a "charade": "The Court only addresses a promulgated regulation when one of the Parties invites it to do so . . . and it does so only because consistency with the FSA is a termination requirement agreed to by the Parties." *Id*., 1-ER-0019.

The district court found the Government's complaint that the FSA indefinitely regulates immigration policy unpersuasive. Congress itself, the court noted, passed two bills "that preserved the FSA, and the TVPRA [which] partially codified the Agreement." *Id*., 1-ER-0020 (citing *Flores I*, 828 F.3d at 904). "Thus, it is the Government that continues to bind itself to the FSA by failing to fulfill its side of the Parties' bargain." *Id*., 1-ER-0021.

The district court lastly considered "[t]he one genuine change in law cited by Defendants[:] the enactment of the Laken Riley Act in January 2025." *Id.*, 1-ER-0017. The Government "provide[d] no explanation, however, as to how this Act makes 'compliance with the [FSA] substantially more onerous,' and the Court [saw] no apparent conflict between the Act and the FSA at all." *Id*. (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

In sum, the Government "point[ed] to no meaningful change 'either in factual conditions or in law' since their last motion to terminate." *Id*., 1-ER-0016-17 (quoting *Horne v. Flores,* 557 U.S. 433, 447 (2009) ("The party seeking relief bears the burden of establishing that changed circumstances warrant relief.")).

SUMMARY OF THE ARGUMENT

For many years, the FSA has protected children against unnecessary detention and obliged the Government to observe minimum standards of humane treatment for children in civil immigration custody. The Parties agreed that the

Settlement would remain in effect until the Government publishes regulations that are consistent with the Settlement's substantive protections for detained children.

The district court did not abuse its discretion in denying the Government's repetitive motion to terminate. In *Flores IV*, this Court held that DHS's 2019 Regulations are inconsistent with the FSA and therefore do not warrant its termination. DHS has not amended its disapproved regulations and offers no significant change in law or fact to support its demand that this Court reconsider *Flores IV*.

The only new circumstance the Government offered to justify renewing its past motions was passage of the Laken Riley Act, Pub. L. 119-1, 139 Stat. 3 (2025) and the One Big Beautiful Bill Act, Pub. L. 119-21, 139 Stat 72 (2025) ("OBBB Act"). Yet the Government failed to identify any actual conflict between the Settlement and the Laken Riley Act or the OBBB Act, for there is none.

All other changed circumstances that the Government argued—an increase in the number of families arriving at the southern border and resumed family detention—were recycled contentions that this Court previously rejected. *Flores I*, 828 F.3d at 909-10; *Flores II*, 862 F.3d at 874-78; *Flores IV*, 984 F.3d at 742-43.

The district court also correctly held that 8 U.S.C. § 1252(f)(1) does not require it to terminate the FSA. Section 1252(f)(1) does not implicate subject matter jurisdiction and is therefore waivable. The Government waived this

argument multiple times, both when it agreed to the Settlement and then failed to raise it in earlier appeals. *Aleman Gonzalez*, 596 U.S. 543 (2022), does not excuse that waiver. The Government's § 1252(f)(1) argument is also both untimely and barred by the law of the case. On the merits, § 1252(f)(1) is inapplicable and could at most require modification, not wholesale termination of the Settlement.

Finally, the district court did not abuse its discretion in holding the Government is not in substantial compliance with the Settlement. DHS's record of Settlement violations and its inconsistent regulations foreclose a finding that it is substantially complying with the FSA. Nor can HHS establish substantial compliance warranting termination via mutable internal policies that conflict with inconsistent, yet binding, regulations.

This Court should affirm.

STANDARD OF REVIEW

"Decisions on '[m]otions for relief from judgment under Rule 60(b) are reviewed for abuse of discretion.'" *Flores IV*, 984 F.3d at 731 (quoting *United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005)). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011) (quoting *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)).

"A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1087 (9th Cir. 2011) (quoting *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010)). "Deference to the district court's … discretion is heightened where," as here, it "has been overseeing complex institutional reform litigation for a long period of time." *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE GOVERNMENT'S RULE 60(b) MOTION.

As the district court correctly held, the Government failed to carry its burden to warrant termination of the Settlement under Rule 60(b)(5).

Rule 60(b)(5) permits relief when a "judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The rule requires "[t]he party seeking relief" to establish "a significant change either in factual conditions or in law" that warrants revisiting a judgment. *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 384). The Government "bears the burden of

establishing that changed circumstances warrant relief." *Id.*[3]

The district court did not abuse its discretion in denying the Government's motion to terminate. This Court previously rejected the majority of its arguments for termination, and the Government failed to show that circumstances, including the existence of a durable remedy that would protect children were the Settlement terminated, are changed since its last moved for Rule 60(b) relief. This Court should affirm.[4]

A. The Government's motion is an improper collateral attack on prior orders of the district court and opinions of this Court.

"Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Horne*, 557 U.S. at 447. Rather, it "takes the original judgment as a given." *Id.* at 453. The bulk of the Government's arguments

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[3] The Government makes passing references (at 27, 33, 64) that termination is alternatively warranted under Rule 60(b)(6), which permits relief from judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

But "relief under Rule 60(b)(6) is available only when Rules 60(b)(1) through (b)(5) are inapplicable," and "[e]ven then, extraordinary circumstances must justify" relief. *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 211 (2025) (quotation marks and citation omitted). Because the Government nowhere argues that Rule 60(b)(5) is inapplicable, it has waived this undeveloped argument.

In any event, termination of the FSA is unwarranted under Rule 60(b)(6) because, as explained herein, no "extraordinary circumstances" justify termination. *Id.*

[4] To the extent that this Court finds that further analysis of whether the Government has implemented a durable remedy is required, it should remand to the district court for any required fact-finding.

nevertheless transparently "challenge[s] the legal conclusions" of this Court. *Horne,* 557 U.S. at 447. However much the Government may disagree with *Flores IV*, "Rule 60(b) simply may not be used as an end run to effect an appeal outside the specified time limits, . . ." *Anderson v. City of New Orleans*, 38 F.4th 472, 478 (5th. Cir. 2022); *see also Coney Island Auto Parts Unlimited v. Burton*, 2026 WL 135998 at *3-4, 607 U.S. ___ (Jan. 20, 2026) ("[T]he argument that a party may allege voidness at any time, if taken to its logical conclusion, would have extreme implications" such as permitting "the adversely affected party [to] wait as long as it wanted before filing a notice of appeal" or "petition for a writ of certiorari"). This principle is especially salient "where a Rule 60(b) motion is itself an attack on the denial of a prior post-judgment motion that asserted virtually identical grounds for relief, and . . . is filed *after* the time for giving notice of appeal from the order denying the earlier motion." *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993); *see also Bowles v. Russell*, 551 U.S. 205, 211-212 (2007) (statutory deadlines to appeal and petition for writ of certiorari are jurisdictional).

The Government's bid to overturn prior orders that were intensely litigated over multiple presidential administrations is improper. Rule 60(b)(5) cannot be used to seek reconsideration of prior holdings or to obtain a second (or third or fourth) chance to litigate issues that were or could have been raised in prior appeals. *Latham*, 987 F.2d at 1204 ("[A]t least absent truly extraordinary

circumstances, not present here, the basis for the second [Rule 60(b)] motion must be something other than that offered in the first."); *Flores III*, 934 F.3d at 917-918 ("[A] party cannot offer up successively different legal or factual theories that could have been presented in a prior request for review."(citation omitted)).

Flores IV is the law of this case, and the district court was bound by it. *Mont. v. Talen Mont., LLC*, 130 F.4th 675, 691 (9th Cir. 2025) ("The mandate rule states that when a higher court decides an issue and remands the case, that issue is 'finally settled.'") (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)); *Sw. Marine Inc. v. Danzig*, 217 F.3d 1128, 1135 n.8 (9th Cir. 2000) ("Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal."); *cf. Duarte v. City of Stockton*, 60 F.4th 566, 574 (9th Cir. 2023) ("[A]s a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.").

The Government has shown no significant change in fact or law since *Flores IV*.

B. The Government failed to establish a significant change in factual circumstances.

The Government raises no significant factual changes since *Flores IV*. It instead recycles (at 57-64) three purported changes this Court previously rejected: (1) an increase in migration; (2) the detention of families; and (3) allegedly improved detention conditions. None of these facts—even assuming, arguendo,

they are accurate—are actually new. And even were they in fact new, the Government fails to establish a durable remedy for its ongoing violations of federal law.

1. Changes in migration numbers are not new nor do they warrant termination.

The Government's argument (at 57-58) that the Parties never anticipated an influx of children crossing the southwest border at the time they settled has long been foreclosed: "The Settlement expressly anticipated an influx" and provided contingencies if such an increase in migration were to occur. *Flores I*, 828 F.3d at 910. And "even if the parties did not anticipate an influx of this size," the Court further held, it would make no sense to "exempt an entire category of migrants from the Settlement." *Id.* The Government repeated this argument in *Flores IV*, and the Court rejected it again. *Flores IV*, 984 F.3d at 743. It gains nothing by repetition here.

The Government's characterization of child migration numbers is also misleading. It cites data from 2023 and 2024, while omitting that such apprehensions are now at multi-year lows. *See* Appellants' Br. at 57; Ord. re Motion to Terminate at 16 n.7, 1-ER-17; Decl. of Tom K. Wong ¶¶ 26-33 1-SER-41-42; Decl. of Diane de Gramont ¶ 30, 1-SER-60. The Government thus has not offered—and cannot offer—evidence that current migration patterns are "unprecedented" or "catastrophic." Appellants' Br. at 57.

Nor is there any substantial evidence "that the FSA *itself* contributed to the increase in minors at the border" and has "hamstrung the government in addressing" unlawful migration. Appellants' Br. 4, 57. The Government's only evidence for this assertion: an ICE official's statement drawn from a declaration filed some two decades ago in a different case, which merely recounts the Government's having then discontinued a purported "catch-and-release" policy. Appellants' Br. at 14 (citing 2-ER-161-162, declaration signed March 15, 2007).

The district court found long ago the Government's paltry evidence "of the deterrent effect of the detention policy" "distinctly lacking in scientific rigor." *Flores v. Johnson*, 212 F. Supp. 3d at 886; *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 189-90 (D.D.C. 2015) (no credible evidence that detaining families significantly deters others from unauthorized entry). Substantial evidence instead shows that the FSA does "not cause an increase in the migration of families to the United States." Wong Decl. ¶¶ 25-26, 1-SER-40-41 ("[T]here is no evidence of correlation—much less causation—between recent family migration numbers and the *Flores* settlement."); *accord* Rep. of the DHS Advisory Comm. on Family Residential Centers, Sept. 30, 2016, *available at* https://perma.cc/NN4F-S9BY ("DHS should not use detention for the purpose of deterring future family migration or punishing families seeking asylum in the U.S. Any contrary policy is unlawful, and ineffective.").

2. Defendants' detaining accompanied children is not new.

The Government next asserts that ICE's having re-opened family detention centers in March 2025 is a changed circumstance warranting termination of the Settlement. The notion borders on the frivolous. Family detention centers existed and figured prominently in both *Flores I* and *Flores IV*, both of which rejected the argument the Government repeats here.

Flores I held that the Settlement covers accompanied children. 828 F.3d at 905, 908. In *Flores IV*, the Court again rejected the Government's argument that the FSA affords accompanied children no protection: "Even if the government has legitimate justifications for detaining adults, it has not shown why it must also detain accompanying minors." 984 F.3d at 729, 741-43.

3. The Government failed to establish a durable remedy to ongoing unconstitutional detention conditions.

The Government next argues that the district court "should have considered whether there was an underlying violation of the law that the Decree was still needed to remedy." Appellants' Br. at 60 (citing *Horne*, 557 U.S. at 454). The Government's argument is meritless; its inviting this Court to make factual findings properly remanded to the district court would be premature in any event.

First, filing a Rule 60(b) motion—especially one that repeats failed arguments—cannot, without more, require an opposing party to re-litigate settled claims. The Supreme Court emphasized in *Horne* that the "*party seeking relief*

bears the burden of establishing that changed circumstances warrant relief," including current compliance with federal law. 557 U.S. at 447 (emphasis added); *id.* at 451. It is axiomatic that a Rule 60(b) motion cannot "automatically open[] the door for relitigation of the merits of every affected consent decree," because this "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo*, 502 U.S. at 389.

Rule 60(b) accordingly requires the Government, as the party seeking relief, to establish the existence of a "durable remedy" ensuring that the injuries giving rise to the litigation and settlement will not reemerge once the decree is lifted. *Horne*, 557 U.S. at 450.[5]

The Government argues (at 59-60) that DHS's 2019 Regulations[6] supply a

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[5] The district court held that the FSA itself equates a "compliant federal regulation. . ." with a durable remedy. 1-ER-0018. The district court did not, however, indicate that it was unwilling to consider alternative durable remedies. The Government simply failed to present one.

Notably, the district court released HHS from the FSA's state licensing requirement for facilities located in Texas and Florida following those States' decision against licensing ORR facilities. The court found that HHS's Foundational Rule contains protections equivalent to state licensing, thus affording children a durable remedy. 4-ER-720-25, 728-29.

[6] The Government also asserts (at 59-60) that HHS's Foundational Rule mandates improved conditions for detained unaccompanied children and, therefore, justifies termination on account of changed circumstances. The district court had already terminated the Settlement to the extent the Foundational Rule is consistent with the

durable remedy. But in *Flores IV,* this Court (and the district court) held these very regulations as insufficient to sunset the FSA. 984 F.3d at 737-740. DHS's current regulations are unchanged from those rejected in *Flores IV*. These regulations are still not a durable remedy.

Nor did the Government present any other evidence that a durable remedy would protect children were the FSA terminated. The district court found that any improvement in conditions children experience in DHS custody is *because* of its remedial orders. The FSA, the court concluded, is "serving its intended purpose," but that hardly means "that the agreement should be abandoned," lest any improvements be undone. 1-ER-18. The district court faithfully applied the standard articulated in *Horne*. *See Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) (A "'durable' remedy means a remedy that gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends."). That Plaintiffs have had to bring repeated motions to remedy the same violations of children's basic rights to safe and sanitary conditions demonstrates that a durable remedy is decidedly lacking.

The Government next argues (at 59-60) that DHS's informal internal

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FSA. 4-ER-715-735. The changed circumstances the Government offers can require no more.

policies supply a durable remedy that would protect children even were the FSA terminated. But the factual record before the district court demonstrates otherwise: DHS's internal policies have not remedied ongoing violations of federal law.

Even after CBP issued its Transport, Escort, Detention, and Search ("TEDS") standards in 2015, the district court repeatedly found that children regularly experience dangerous conditions in CBP custody. *E.g., Flores III*, 934 F.3d at 916 ("[T]he district court referred to TEDS . . . to confirm that the government's inattention to ensuring that children were being adequately fed was egregious, as the government was not even complying with its own standards."); *id.* at 915-16 (summarizing district court findings of unsafe and unsanitary conditions in CBP holding cells).

Notwithstanding the TEDS requirement that children "generally should not be held for more than 72 hours in a CBP facility" (Appellants' Br. 18), the district court recently found the agency regularly detains children for *weeks* in CBP cells. *See Flores v. Bondi*, 2025 WL 2995478, at *3, 6-7 (finding that "the physical limitations of certain CBP facilities (e.g., lack of windows, inability to go outdoors, toilet-flushing mechanisms" "underscores precisely why the prolonged times in CBP custody remain a significant problem"); Decl. of Diane de Gramont ¶¶ 20-27 & Ex. A, 1-SER-59-60, 62 (summarizing length-of-stay data, including that in January 2025, 494 children were held in CBP custody for over 7 days and 54

children for over 20 days).

Prolonged detentions are only the tip of the iceberg. CBP recently confined a 2-year-old for *42 days* under conditions that shock the conscience: During some six weeks, the child had no access to recreation or the outdoors, saw virtually no daylight, and had no access to soap, a private toilet, or on-site showers. *Flores v. Bondi*, 2025 WL 2995478, at *3-4 & n.4; Decl. of A.K. ¶¶ 1, 6, 11-12, 20, 25, 1-SER-93-95. The Government never denied that the child suffered such mistreatment. Decl. of Luis Mejia ¶¶ 21, 24, 26-27. 29, 32, 1-SER-24-27 (noting that toilet had to be flushed by CBP officer, the facility was taking steps to provide soap, the facility lacked "an outdoor or recreation space," "CBP hold rooms generally do not have windows," and CBP records indicate the child was provided with a toothbrush 10 times in 42 days). Multiple other children reported experiencing prolonged detention under similarly inappropriate conditions. *Flores v. Bondi*, 2025 WL 2995478, at *3-4, 6.

Nor are these isolated incidents. *Id.* at *4-6 (describing lack of access to soap and children kept in "extremely cold temperatures" with "inadequate sleeping conditions" and detained in facilities that "by design, are not suitable for minors for long periods of time."); *Flores v. McHenry,* 2025 WL 2373258, at *2 ("Children housed in CBP facilities regularly complained of being refused clean clothing or extra layers, unreasonably cold temperatures in their rooms," and other

violations); *Flores v. Sessions*, 394 F. Supp. 3d at 1059-1060 (evidence of "extreme discomfort with cold temperatures" and "constant lighting" preventing sleep); *Flores v. Johnson*, 212 F. Supp. 3d at 880-881 ("extreme cold" conditions violate the Settlement).[7]

In yet another instance, the district court found that CBP detained children at make-shift, open-air detention sites, forcing them to spend days exposed to an unforgiving desert climate amid unsafe and unsanitary conditions. *See* 4-ER-743-746 (noting "significant evidence in the record that CBP has physical control over minors at the" sites and that the site had a "foul smell" because of "overflowing and unusable" porta-potties, which forced detained children to "relieve themselves outdoors").

Families detained after the court's August 2025 order continue to report egregious conditions in CBP facilities. *E.g.,* Decl. of M.R.P. ¶¶ 7, 13-15, 19-24, 1-SER-216-218 (8-year-old held for five days in cold windowless cell with

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[7] Although the district court found evidence "that the lack of soap issue is actively being resolved," *Flores v. Bondi*, 2025 WL 2995478, at *4 n.5, CBP's failure to provide children with soap and other basic needs persisted long after repeated court orders faulting it for precisely the same violations. *E.g., Flores v. Sessions*, 394 F. Supp. 3d at 1056-58 ("There is an apparent disconnect between the CBP's standards and class members' experiences, all of whom describe unsanitary conditions with respect to the holding cells and bathroom facilities, and lack of privacy while using the restroom, access to clean bedding, and access to hygiene products (i.e., toothbrushes, soap, towels)."). Such improvements would never have happened absent the FSA.

insufficient clothes, constant illumination, no private toilet, and no showers or toothbrushes for first four days).

Conditions at ICE family detention centers also fail to square with the Government's portrayal. The Governments points (at 59-62) to ICE's 2020 Family Residential Standards ("FRS"), but those, too, are informal guidelines; they are neither new nor effective. ICE's standards are subject to modification without public disclosure or participation, are at least partially secret,[8] and are neither enforceable nor consistently observed in practice.

The Government itself admits that the FRS are suitable for "abbreviated" stays only, yet ICE has detained hundreds of children in family detention centers for over 20 days, and many have been detained in such facilities for months. ICE Juvenile Coordinator Suppl. Report at 2, 1-SER-232; Decl. of Leecia Welch ¶¶ 24-25, 1-SER-213 (as of November 2025, ten children had been in family detention for 55 days or longer) ("Welch Decl.").

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[8] In moving to terminate, the Government represented that ICE had modified these standards. They refused to disclose those modifications, however. *Flores v. Bondi*, 2025 WL 2995478, at *4.

The district court repeatedly asked Defendants to explain how the standards had been modified. 1-SER-272, 1-SER-275. Defendants eventually offered only generalities: *i.e.*, that the modifications accommodated "operational realities" and "resource constraints," and that "some standards were modified to reflect the abbreviated length of stay." ICE Juvenile Coordinator Suppl. Report at 14, 1-SER-244.

Children and their parents, meanwhile, report enduring decidedly unsafe and unsanitary conditions: lack of critical medical care, inadequate access to basic hygiene products, poor food, and conditions that obstruct adequate sleep. *E.g.* Decl. of Javier Hidalgo ¶¶ 23, 28-30, 1-SER-136, 138-139; Welch Decl. ¶ 2-5, 11-13, 16-22 1-SER-205-206, 208, 210-212. ICE's Juvenile Coordinator admitted that prolonged confinement of children is a "widespread operational challenge," that a "comprehensive education program [is] not in place" at ICE facilities, and that lights are kept on all night in children's sleeping areas. 1-SER-232, 243, 245-246, 260, 262.

Such conditions would fail to meet constitutional standards even for adults convicted of crimes. *Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996) ("[T]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional"; "[t]he Eighth Amendment guarantees adequate heating" and "personal hygiene supplies such as toothbrushes and soap"); *Jones v. Neven*, 399 F. App'x 203, 205 (9th Cir. 2010) ("24-hour illumination" violates clearly established law); *Holloway v. Cohen*, 61 F. App'x 435, 437 (9th Cir. 2003) ("[A] low cell temperature at night combined with a failure to issue blankets may establish an Eighth Amendment violation"); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (recognizing prison officials' "duty to ensure that prisoners are provided

adequate shelter, food, clothing, sanitation, medical care, and personal safety").

Constant lighting, poor temperature control, and lack of access to soap, basic hygiene items, and clean clothing, fall below constitutional minimums for immigration detainees as well. *E.g., Clarke v. U.S. Dep't of Homeland Sec.*, No. 25-CV-6773 (GRB), 2025 WL 3674471, at *6 (E.D.N.Y. Dec. 18, 2025) ("Depriving detainees of sleep, toiletries and hygiene materials, and medical care can amount to constitutional violations."); *Pablo Sequen v. Albarran*, No. 25-CV-06487-PCP, 2025 WL 3283283, at *25 (N.D. Cal. Nov. 25, 2025) (conditions for adult immigration detainees, "including the cold temperatures, continuous lighting, and lack of beds, mattresses, and blankets" and a lack of "clean cells, hygiene supplies like toothbrushes, opportunities [for detainees] to wash their bodies, and clean clothing," likely unconstitutional); *Gonzalez v. Noem*, No. 25-cv-13323, 2025 WL 3170784 (N.D. Ill. Nov. 5, 2025) (issuing temporary restraining order against "serious conditions" in ICE detention facility, including substandard hygiene, food, and medical care); *Mercado v. Noem*, 800 F. Supp. 3d 526, 571-73 (S.D.N.Y. Sept. 17, 2025) (describing inhumane and unconstitutional detention conditions, including "unsanitary environment and the denial of basic personal hygiene items"); *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) ("[A] civil detainee … is entitled to conditions of confinement that are not punitive.").

Detaining children in windowless holding cells for days or weeks without

access to the outdoors or exercise is plainly unconstitutional. *Shorter v. Baca*, 895 F.3d 1178, 1185 (9th Cir. 2018) ("[W]e have confirmed, time and time again, that the Constitution requires jail officials to provide outdoor recreation opportunities, or otherwise meaningful recreation, to prison inmates."). That constitutional principle attains even for "violent inmates in administrative segregation"—let alone children in civil detention—and "[l]ogistical problems" are no excuse for "deprivation of a basic human need.'" *Id.* at 1185-86; *see also Pierce v. Cnty. of Orange*, 526 F.3d 1190 (9th Cir. 2008) ("[P]roviding the equivalent of slightly less than thirteen minutes of exercise a day does not give meaningful protection to this basic human necessity.").[9]

Finally, the Government makes clear (at 60-62) its preference for the blanket confinement of children in secure family detention centers. Were it free to pursue such a policy, even more constitutional issues would ensue. A blanket detention policy for children is not justified by concerns about "preventing flight" or "protecting the community," *Zadvydas v. Davis*, 533 U.S. 679, 690 (2001); the Settlement already accounts for those interests. And to the extent a child is

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[9] Such constitutional violations are a matter of record herein. CBP official Luis Mejia testified that in the facility where a 2-year-old was held for 42 days, the Government failed to "provide children with an outdoor or recreation space," forcing them to "mov[e] around or play[] in their holding cell" as their only physical activity. Mejia Decl. ¶ 24, 1-SER-25. Sadly, such conditions are stubbornly commonplace. 2025 MTE Order at 6-7, 13, 1-SER-7-8, 14.

demonstrably dangerous or a flight-risk, the Settlement nowhere requires the Government to release. FSA ¶ 14, 4-ER-686.

The Government's primary reason for wanting blanket detention authority appears to be deterring future family migration, Appellants' Br. at 4, 14, 57, but that is not a constitutional use of civil detention either. *R.I.L-R*, 80 F. Supp. 3d at 188-90.[10]

In sum, the Government failed to carry its burden of establishing a durable remedy that would protect children in the absence of the FSA. The evidence shows that DHS's treatment of children continues to fall short of constitutional requirements, even with the legal remedies the Settlement supplies; such treatment would be markedly worse were the FSA terminated.[11]

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[10] The sole legal authority the Government invokes (at 62) for detaining children indefinitely, *Flores v. Reno*, 507 U.S. 292 (1993), is inapposite. Appellants' Br. at 62.

Reno was decided with the proviso that the former INS would house children in "facilities that meet 'state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children' and are operated 'in an open type of setting without a need for extraordinary security measures." *Id.* at 298; *id.* at 302 (noting that "'freedom from physical restraint' . . …. is not at issue in this case . . . given the Juvenile Care Agreement"). ICE's family detention centers, by contrast, are both secure and unlicensed. "The government's intent is not to place families together in 'an open setting,' but to 'detain' them together for 'enforcement' purposes." *Flores IV*, 984 F.3d at 740; *see also* Welch Decl. ¶¶ 7-9, 1-SER-207.

[11] Subsequent to the district court's denying the Government's instant motion to terminate, Plaintiffs presented voluminous evidence of substandard conditions

C. No change in law supports Defendants' repeating their motion to terminate.

"A change in law may justify modifying or terminating a consent decree if the new law makes complying with the consent decree 'impermissible,' or, on the other hand, if it 'make[s] legal what the decree was designed to prevent.'" *Flores IV*, 984 F.3d at 741 (quoting *Rufo*, 502 U.S. at 388). However, even if a change in law justifies modifying a consent decree, a "suitably tailored" remedy must seek to "return both parties as nearly as possible to where they would have been absent the changed circumstances." *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016).

Neither the Laken Riley Act, the OBBB Act, nor the APA effect a change in law warranting modification of the FSA, much less its termination.

1. Neither the Laken Riley Act nor the OBBB Act are material changes of law.

Defendants argue that the Laken Riley Act, Pub. L. 119-1, 139 Stat. 3 (2025), requires the Settlement's termination. As the district court held, however, Defendants fail to identify any actual conflict between the Settlement and the Laken Riley Act. The enactment nowhere mentions children in DHS or HHS

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prevalent in ICE facilities. Pls.' Resp. to ICE JC Report, 1-SER-100 (Doc. 1706); *see also Creech v. Tewalt*, 84 F.4th 777, 794 n.7 (9th Cir. 2023) (recognizing Court's "discretion to remand in light of factual changes").

Even were the Government correct that the district court's analysis of durable remedies fell short, Appellants' Br. at 47, remand for additional factfinding, not wholesale termination of the FSA, would be the appropriate disposition.

custody, nor are children even among its actual targets. *Cf. Matter of Devison*, 22 I. & N. Dec. 1362, 1365 (BIA 2000) (juvenile delinquency adjudications are not criminal convictions).[12]

Although it never says as much, the Government's apparent concern is that the Settlement may oblige DHS to release a child who then harms residents of a State, which then sues DHS. That concern is speculative at best. The Government points to no such lawsuit having been filed, and even were one initiated, the Laken Riley Act authorizes "appropriate injunctive relief," and not money damages. Pub. L. No. 119-1, § 3. It is even unclear what form such equitable relief would take.

In any event, the FSA nowhere requires Defendants to release children who are dangerous. 4-ER-686. Nor does the Laken Riley Act address the conditions children experience in DHS detention. The Act cannot possibly justify termination of the entire Settlement.

Defendants next suggest that § 90003 of the OBBB Act, requires termination of the Settlement. It does not.

First, § 90003(a) is an *appropriation*: it funds ICE to operate detention

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[12] The Immigration and Nationality Act's requirement for mandatory detention of noncitizens who commit certain criminal offenses predates the FSA and has never been considered to conflict with the Settlement. *Zadvydas*, 533 U.S. at 698 (Congress expanded mandatory detention on criminal grounds in 1996). The Laken Riley Act's adding to older grounds for mandatory detention could not create a conflict where none existed before.

facilities for single adults and families. This bill resulted from budget reconciliation, from which significant policy changes are generally disallowed. 2 U.S.C. § 644. The OBBB Act could not and does not prescribe substantively new policy: for years ICE has used public monies to operate facilities where it detains families. *See generally, Flores v. Johnson*, 212 F. Supp. 3d at 877.

Finally, the OBBB Act neither prohibits ICE from making individualized release determinations nor authorizes it to hold children in conditions that violate the Settlement. Although the Act provides that detention standards for single adults "shall be set in the discretion of the Secretary of Homeland Security, consistent with applicable law," it recognizes no similar discretion regarding detention standards for accompanied minors. OBBB Act § 90003(b).

The OBBB Act posits no change material to the FSA and falls palpably short of justifying the wholesale termination of the Settlement.

2. The Administrative Procedure Act is not contrary to the FSA's sunset provision and does not require termination.

The APA has existed for decades. It supplies no change in law supporting the Government's latest Rule 60(b) motion. The Government nevertheless insists once again that the Settlement must be terminated because its sunset clause is inconsistent with the APA.

As has been seen, Rule 60(b)(5) permits modification or termination of a settlement on account of a *change* in fact or law. "Rule 60(b)(5) may *not* be used to

challenge the legal conclusions on which a prior judgment or order rests." *Horne*, 557 U.S. at 447 (emphasis added). The almost century-old APA cannot be a change in law warranting Rule 60(b)(5) relief.

Even were the APA a change in law, the Government's argument would be untimely, waived and barred by the law of the case.

First, the Government has waived its APA argument multiple times: first, when it agreed to the Settlement, stipulating that it "knew of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law.'" 4-ER-694 ¶ 41. Second, in 2001, when it agreed to amend the FSA to provide for termination following the publication of regulations consistent with the agreement. Stipulation Extending Settlement Agreement, December 7, 2001, 4-ER-711; *cf. Flores I*, 828 F.3d at 908 ("[T]he government waived its ability to challenge the class certification when it settled the case and did not timely appeal the final judgment."). Its argument is also barred by the law-of-the-case doctrine.

In a 2019 Rule 60(b) motion the Government argued that "a settlement that provide[s] for the issuance of rules without regard to considerations required under the APA would violate the APA and impermissibly bind federal action in perpetuity." 4-ER-842.

The district court disagreed: "Defendants argue that applying a non-APA standard to review the New Regulations would 'create additional procedures for

rulemaking … .'" "But the Court has not created 'additional procedures' by enforcing an agreement into which Defendants willingly entered and agreed to be bound." *Flores v. Barr*, *supra*, 407 F. Supp. 3d at 924-25; *see also Berger v. Heckler*, 771 F.2d 1556, 1579 (2d Cir. 1985) (no error where "Secretary [of HHS] has merely been required to redraft her regulations to bring them into conformity with a court order to which she has consented").

On appeal, the Government argued that following APA rulemaking protocols was enough to terminate the Settlement despite any conflicts, but not that the Settlement's sunset provision was itself impermissible. *See* Defendants-Appellants' Opening Brief, No. 19-56326, 2-SER-292. This Court affirmed in all pertinent respects. *Flores IV*. Defendants did not seek further review, and the law-of-the-case doctrine accordingly precludes their re-arguing the APA now. *Flores III*, 934 F.3d at 917-918; *Sw. Marine Inc*, 217 F.3d at 1135 n.8.

Even were Defendants entitled to repeat their APA argument here, it would remain meritless. The Settlement nowhere prevents Defendants from following APA rulemaking procedures.

In 2024, HHS promulgated regulations implementing most of its Settlement obligations. HHS considered thousands of comments in the course of promulgating those rules. *See* Preamble, ORR Foundational Rule, 89 Fed. Reg. 34384 (April 30, 2024); Comments, Unaccompanied Children Program Foundational Rule,

available at https://perma.cc/DL56-J2TT. The resulting final rule included many modifications responding to public comment. *E.g.*, Preamble, 89 Fed. Reg. at 34,434-35 (noting changes to runaway risk considerations in response to comments and departure from specific wording of 4-ER-689 ¶ 22).

The district court thereafter partially terminated the Settlement as to HHS. 4-ER-715-735.[13] Defendants explain neither why DHS refuses to similarly amend its 2019 Regulations, nor why HHS refuses to cure the inconsistencies in the Foundational Rule that *Flores IV* held preclude complete termination.

The Government's argument that the FSA's sunset clause requires it to ignore public comments is, as the district court concluded, "mere speculation." 1-ER-20 n.9. The vast majority of public comments submitted in connection with the 2019 Regulations urged Defendants to more closely track the Settlement. 1-ER-0020 n.9 (citing 84 Fed. Reg. at 44433); *see also* Preamble to Foundational Rule,

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[13] The Government complains that the district court's retaining jurisdiction to modify its termination order suggests the FSA will continue to bind HHS forever. That is plainly not the case.

Not surprisingly, the district court retained jurisdiction over the FSA as a whole. HHS Termination Order, 4-ER-734-35. The Government, having largely won its motion to terminate, declined to appeal from the district court's order. Had it done so, Plaintiffs would have had the right to cross-appeal. Fed. R. App. P. 4(a)(4).

And whether Plaintiffs will ever seek reinstatement of the FSA's now-terminated provisions and whether the district court would grant such a motion are wholly speculative. It is premature to consider the merits of such a motion now.

89 Fed. Reg. at 34409-10 (rejecting public recommendation that children in out-of-network placements "receive all the minimum services for standard programs. . .").[14]

Nor is the Government's professed concern for the role of the public in its rulemaking at all credible. In lieu of promulgating FSA-consistent rules, the Government would prescribe the treatment and conditions detained children experience by way of informal internal policies that the public has *no* opportunity to participate in at all. Appellants' Br. at 58-60. Given the APA's strong preference for public participation in rulemaking, *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94-

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[14] *Conservation Northwest v. Sherman,* 715 F.3d 1181 (9th Cir. 2013), is not to the contrary. In that case, a consent decree amended a land management standard in derogation of rulemaking procedures that applicable environmental laws declared mandatory. *Id*. at 1187-88.

First, the FSA's modified sunset clause *permits* Defendants to exit the Settlement by promulgating implementing regulations, but it does not require them to modify any existing agency rule.

Second, unlike the controlling law in *Conservation Northwest,* the relevant substantive statutes nowhere force Defendants to enshrine policies toward children in formal regulations. Indeed, for decades, the bulk of such policies has been found not in the Code of Federal Regulations, but in informal manuals and policy guides, a practice that continues to this day.

Third, *Conservation Northwest* was decided on direct appeal of the approval of the settlement and the appellant was an intervenor who had opposed the settlement, not a settling party.

Finally, a case decided in 2013 posits no change in law since 2019, when Defendants last raised their instant APA argument.

95 (D.C. Cir. 2012), Defendants' arguing that the APA frees them to operate via secretive internal policies entirely *without* public participation makes no sense.[15]

Finally, the Government failed to establish that termination—rather than modification—of the FSA is a suitable remedy even were the sunset clause to run afoul of the APA. Even assuming, arguendo, that changed circumstances were to warrant modification of the FSA, permitting the Government to end the Parties' agreement entirely based on a provision they agreed to and warranted was lawful would be inimical to the equitable purposes underlying Rule 60(b).[16]

In sum, the Parties agreed that the FSA would sunset upon Defendants' adopting regulations consistent with the agreement. The sunset clause balances the Parties' interests by providing the Government a path to termination while

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[15] Notably, *Flores v. Reno* was decided on the basis of an agreement setting minimum standards for detention conditions. The Court never suggested that agreement was improper. *Reno*, 507 U.S. at 301.

[16] Standard contract law is in accord. California law applies to the interpretation of the FSA. *Flores V*, 3 F.4th at 1155 n.7. In California, "courts will generally sever illegal provisions and enforce a contract when nonenforcement will lead to an undeserved benefit or detriment to one of the parties . . . ." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 127 (Cal. 2000).

Termination is appropriate only where "'the central purpose of the contract' is so tainted with illegality that there is no lawful object of the contract to enforce." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1273 (9th Cir. 2017) (quoting *Marathon Entm't v. Blasi*, 42 Cal.4th 974, 996 (Cal. 2008)).

The object of the FSA—protecting detained children—is unquestionably lawful. *Flores IV*, 984 F.3d at 743; *Flores II*, 862 F.3d at 880.

affording Plaintiffs modest assurance that children will continue to enjoy humane treatment. Plaintiff children are entitled to the full benefit of that bargain. *Kelly*, 822 F.3d at 1098 (modification should "return both parties as nearly as possible to where they would have been absent the changed circumstances").

D. There is nothing inequitable in maintaining the Settlement's protections for children.

The Government next seeks to paint the district court as bent on dictating immigration policy in perpetuity. But the Government's characterization simply does not square with the district court's history of cautious and flexible enforcement of the FSA in response to the Government's persistent failure to fulfill its bargain, even on such anodyne matters as providing children soap and clean clothing.

This Court, in turn, has repeatedly affirmed the gravamen of the district court's orders. *Flores V*, 3 F.4th 1145 (affirming district court's holding FSA applicable to children "hotelled" under Title 42, United States Code); *Flores IV*, 984 F.3d 720 (affirming district court's holding that 2019 regulations insufficient to terminate Settlement as to DHS); *Flores III*, 934 F.3d 910 (affirming district court order requiring safe and sanitary conditions in CBP facilities); *Flores II*, 862 F.3d 863 (affirming district court's order requiring Defendants to afford children bond hearings); *Flores I*, 828 F.3d 898 (affirming district court's holding that FSA covers accompanied children). In other rulings it now characterizes as overreach,

the Government accepted the district court's rulings without appeal. *E.g.,* 5-ER-00921-934.

The district court has also proved willing to approve modification of the FSA when changed circumstances actually warrant. In 2024, the district court waived the FSA's state licensing requirement with respect to HHS facilities in Texas and Florida after those states began refusing to license them. 4-ER-722-727. The court held that substitute safeguards "provide an equivalent, even if not identical, method of oversight" to state licensing. 4-ER-0722.[17]

The Government's imagined litany of judicial overreach, therefore, is more accurately described as repetitive disregard for its fundamental obligation under the FSA: that is, "to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors." FSA ¶ 11, 4-ER-684.

Permitting the Government to shirk its legal obligations would itself raise

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[17] Nor has the district court consistently ruled for Plaintiffs. For example, in an order issued on July 30, 2018, the district court held that the FSA bars the Government from consigning children to secure juvenile detention facilities based on unsupported allegations of gang affiliation. 5-ER-00921. It declined, however, to order procedural remedies Plaintiffs had requested, concluding that such procedures exceeded the Settlement's requirements. 5-ER-00904-908.

The district court's orders regarding post-release services and fingerprinting requirements during the Covid-19 pandemic addressed blanket policies that created unnecessary delays in release, but allowed the Government to detain children based on individualized safety assessments. The court also denied Plaintiffs relief against time-consuming home studies. 5-ER-00931-932, 4-ER-802-803, 809-10.

troubling concerns over the separation of powers. *Nehmer v. U.S. Dep't of Veterans Aff.*, 494 F.3d 846, 860-61 (9th Cir. 2007); *cf. Flores IV*, 984 F.3d at 741 ("We reject the notion that the executive branch of the government can unilaterally create the change in law that it then offers as the reason it should be excused from compliance with a consent decree.").

II. 8 U.S.C. § 1252(f)(1) DOES NOT JUSTIFY TERMINATING THE SETTLEMENT.

Defendants' argument that 8 U.S.C. § 1252(f)(1) applies to the FSA and warrants relief under Rule 60(b) fails for multiple reasons: (1) the argument does not satisfy Rule 60(b) standards; (2) Defendants have waived the argument; and (3) the FSA does not conflict with part IV of the INA.

Section 1252(f)(1) is a "narrow[]" and "carefully worded provision depriving the lower courts of power to 'enjoin or restrain the operation of' certain sections of the *statute*." *Biden v. Texas*, 597 U.S. 785, 800 (2022) (emphasis added). This provision "does *not* deprive the lower courts of all subject-matter jurisdiction over claims brought under sections 1221 through 1232 of the INA." *Id.* at 798 (emphasis added).

A. The Government's § 1252(f)(1) argument does not satisfy Rule 60 standards.

The Government argues that 1252(f)(1) requires it receive relief under Rule 60(b)(4) and (b)(5).

Rule 60(b)(4) permits relief from a void judgment, which requires an

infirmity so "fundamental" that there is not "even an 'arguable basis" for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010).

No jurisdictional infirmity, much less a fundamental one, supports reversing the district court here. The Government points to no case that applies § 1252(f)(1) to settlements, and Plaintiffs know of no precedent that forecloses all arguable bases for the district court's jurisdiction to enforce the Parties' agreement.

As for Rule 60(b)(5), as has been seen, the Government must demonstrate changed circumstances warranting relief. Section 1252(f)(1) is not new, and the Supreme Court's decision in *Aleman Gonzalez* is not the fundamental change in law the Government imagines.[18] Not every new court decision justifies Rule 60(b)(5) relief, and even if the Government were able to show a meaningful change in law, any modification would need be suitably tailored. *Rufo*, 502 U.S. at 388. The Government did not move for partial relief, and wholesale termination of the FSA would far exceed suitably tailored relief.

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[18] *Agostini v. Felton,* 521 U.S. 203 (1997), is not to the contrary. In *Agostini*, the Supreme Court held that Establishment Clause jurisprudence had changed such that the defendant's conduct no longer "run[s] afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion." *Id.* at 234. The Court held that Rule 60(b)(5) relief was appropriate to vacate a permanent injunction overtaken by new substantive law. The Court cautioned, however, against courts concluding that decisional law has been overruled "by implication." *Id.* at 237.

Further, the Government delayed three *years* before again moving to terminate in the wake of *Aleman*. Rule 60(c) requires a party seeking relief following a change in law to do so within a reasonable time, even in motions alleging that the underlying judgment is void for lack of jurisdiction. *See Coney Island Auto Parts Unlimited ,* 2026 WL 135998 at *3 ("[S]tatutes and rules routinely limit the time during which a party can seek relief from a judgment infected by error" and "we cannot divine any principle requiring courts to keep their doors perpetually open to allegations of voidness."). The Government "bears[] the burden of showing timeliness." *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016); *Cotterill v. City & Cnty. of San Francisco*, No. 23-15162, 2025 WL 484697, at *1 (9th Cir. Feb. 13, 2025).

The Government nowhere explains its delay. This Court should decline to entertain its argument now. *Moses*, 815 F.3d at 166 (court "acted well within its discretion" in holding 15-month delay after change in decisional law unreasonable under Rule 60(c)); *In re Hammer,* 940 F.2d 524, 526 (9th Cir. 1991) (affirming denial of Rule 60(b) relief based on movant's "unexcused two-year delay in [seeking relief from] default judgment").

B. The Government's § 1252(f)(1) argument is waived, forfeited, and barred by the law of the case.

Because § 1252(f)(1) does not limit subject matter jurisdiction, *Biden*, 597 U.S. at 798, it can be waived.

Section 1252(f)(1) has been law since 1996. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat 1214 (1996). The Government agreed to the FSA—and the district court's jurisdiction to oversee it—in 1997. The Government then expressly stated that it knew "of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law." 4-ER-694 ¶ 41. *See Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) ("[I]f a party fails to raise an objection to an issue before judgment, he or she waives the right to challenge the issue on appeal." (quotation marks and citations omitted)).

The Government's arguing that "§1252(f)(1) is not waivable since it is jurisdictional" is meritless. Appellants' Br. at 67. The only authority it cites for this proposition, *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), is no longer good law. *Miranda* held that § 1252(f)(1) limits subject-matter jurisdiction. *Id.* at 356. The Supreme Court held in *Biden* to the contrary. *See also Biden*, 597 U.S. at 836 (Barrett, J., dissenting) ("The only court of appeals to have addressed [the majority's] theory rejected it.") (citing *Miranda*, 34 F.4th at 354-56).

Clearly, limitations on a court's *remedial* authority may be waived. *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 n.1 (1939) ("Unlike the objection that the court is without jurisdiction as a federal court, the parties may waive their objections to the equity jurisdiction by consent, or by failure to take it

seasonably.") (internal citations omitted); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (challenge to court's equitable authority waived); *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1160 (D.C. Cir. 2007) ("objection to any asserted misuse of the court's equitable powers" waived); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (objections to remedial orders forfeitable). Following *Biden*, courts have held § 1252(f)(1) waivable. *E.g., Castañon-Nava v. DHS*, 161 F.4th 1048, 1056 (7th Cir. 2025) ("[T]here is ample reason to believe" § 1252(f)(1) is waivable).

Nor does *Aleman* excuse the Government's delay. Though intervening law may excuse waiver, "[f]or this exception to apply … the defendant must show that the defense, if timely asserted, *would have been futile under binding precedent*" and "only protect[s] those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1119 (9th Cir. 2022) (emphasis added) (internal quotation marks and citation omitted).

Here, long before *Aleman* the Government objected repeatedly to enforcement of the FSA as violative of § 1252(f)(1). *E.g.*, *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1063 (C.D. Cal. 2017); Def. Supp. Resp., *Flores v. Sessions*, No. 85-4544 (C.D. Cal.) (Sept. 26, 2016), 2-SER-502-503. Although its argument failed, the Government hardly thought it "futile under binding precedent."

The Government's argument is further barred by forfeiture and law-of-the-

case doctrines. Some nine years ago, the district court expressly rejected the Government's present § 1252(f)(1) argument:

> Defendants argue that 'under 8 U.S.C. § 1252(f)(1), the Court cannot simply order that [class members'] detention be prohibited on a class-wide basis.' The Court will issue no such order . . . instead, the court will order Defendants to comply with the unambiguous charge of the *Flores* Agreement to make *individualized* determinations regarding a minor's flight risk rather than blanket determinations.

Flores v. Sessions, 394 F. Supp. 3d at 1066-1067. The court ordered CBP to, inter alia, "make and record continuous efforts" aimed at releasing accompanied minors. *Id.* at 1062, 1072-1073.

The Government declined to argue before this Court that § 1252(f)(1) bars the district court's ordering DHS to follow the FSA's presumption of release to accompanied children. *See* Brief for Appellants, *Flores v. Sessions*, No. 17-56297, ECF No. 6 (9th Cir. Jan. 5, 2018), 2-SER-387. Although this Court dismissed the Government's appeal for lack of jurisdiction, it observed that the FSA's "'presumption in favor of releasing minors' . . . is fully consistent with the [INA's] expedited removal provisions." *Flores III,* 934 F.3d at 916 (quoting *Flores I*, 828 F.3d at 901). The Government did not seek further review.

The Government thereafter spurned multiple opportunities to argue for terminating the FSA on account of § 1252(f)(1). *E.g., Flores IV*, 984 F.3d 720; *Flores I*, 828 F.3d 898.

In addition to being untimely under Rule 60(c), the Government's

§ 1252(f)(1) argument is accordingly waived, forfeited, and barred by the law-of-the-case. *Flores III*, 934 F.3d at 917-918; *see also Sw. Marine Inc*, 217 F.3d at 1135 n.8; *Hammond v. Berryhill*, 688 F. App'x 486, 488 (9th Cir. 2017) ("Hammond did not appeal the district court's 2009 decision. As a result, that court's previous rejection of his arguments have preclusive effect under law of the case.); *Jordan v. U.S. Dep't of Labor*, 2020 WL 283003, at *1 (D.C. Cir. Jan. 16, 2020) ("If a party fails to raise a point he could have raised in the first appeal, the 'waiver variant' of the law-of-the-case doctrine generally precludes the court from considering the point in the next appeal of the same case." (citation omitted)).

C. The Settlement does not restrain or enjoin the operation of anything in Part IV of the INA.

The Government's argument fails as well on its merits.

First, the Government cites no authority for its claim that § 1252(f)(1) bars the Government from settling a class action because the agreement touches upon DHS's authority to detain accompanied children it places in expedited removal.[19]

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[19] Post-*Aleman*, Defendants have regularly settled class actions touching upon detention and removal. *E.g., Hernandez Roman v. Mayorkas*, Case No. 5:20-cv-00768-TJH-PVC, ECF No. 2636-2 (C.D. Cal. 2024), https://perma.cc/NKX6-RG52 (requiring COVID-19 protocols in ICE detention center and protecting released class members from re-detention); *Cancino v. Mayorkas*, Case No. 3:17-cv-00491-JO-AHG, ECF Nos. 242-2 (C.D. Cal. 2024), https://perma.cc/7QUD-JPAB (class action settlement for immigration detainees requiring, *inter alia*, DHS to promptly present class members for immigration court hearings and bond hearings); *Padilla v. ICE*, 2:18-cv-00928-MJP, ECF No. 215-2 (W.D. Wash.

Aleman itself makes clear that "a court may enjoin the unlawful operation of a provision that is not specified in § 1252(f)(1), even if that injunction has some collateral effect on the operation of a covered provision." 596 U.S. at 553 n.4 (emphasis omitted).

In approving and enforcing the Settlement, the district court neither enjoined nor restrained the operation of any statute. Rather, it is "the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 521-22 (1986)). Section 1252(f)(1) simply does not limit a court's authority to enforce a settlement. *Castañon-Nava*, 161 F.4th at 1058 (citing cases); *Escobar Molina v. D.H.S.*, No. CV 25-3417 (BAH), 2025 WL 3465518 *31 (D.D.C. Dec. 2, 2025) ("Such a reading would give § 1252(f)(1) a meaning without any limiting principle, expanding the provision far beyond its terms to strip district courts of jurisdiction over all kinds of matters not expressly covered.").[20] Second, the INA

2023), https://perma.cc/Q7Z5-D3DA (class action settlement requiring DHS to conduct credible fear interviews under 8 U.S.C. § 1225(b)(1) within 60 days); *Jimenez v. Mayorkas*, Case No. 1:18-cv-10225-MLW, ECF No. 654-1 (D. Mass. Jan. 16, 2025), https://perma.cc/V7BX-V9EB (protecting class members from ICE enforcement and providing a process to reopen and dismiss their removal cases).

[20] The same is true of relief based on non-INA statutes, including the APA. *E.g., Immigrant Defs. L. Ctr. v. Noem,* 145 F.4th 972, 990 (9th Cir. 2025).

nowhere addresses the treatment or conditions children experience in Defendants' custody.[21] Nor does it even speak to the detention or release of all children in immigration-related custody.

The TVPRA, and not subchapter IV of the INA, governs custody and release of unaccompanied children. Section 1252(f)(1) is thus irrelevant to the Settlement's protecting such children. *See Flores I*, 828 F.3d at 904 (explaining that the "TVPRA partially codified the Settlement."); *Galvez v. Jaddou*, 52 F.4th 821, 830-31 (9th Cir. 2022) (the TVPRA is not covered by §1252(f) because, *inter alia*, "[t[he TVPRA was enacted in 2008" and therefore "is certainly not a provision of the INA '*as amended by* the [IIRIRA] of 1996'"); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 n.19 (N.D. Cal. 2017) ("Because this preliminary injunction neither enjoins nor restrains the proper operation of any part of Part IV of the immigration statutes, 8 U.S.C. § 1252(f)(1) does not bar the relief ordered."); *Garcia Ramirez v. ICE*, No. 18-cv-508, 2025 WL 3563183, at *18 (D.D.C. Dec. 12, 2025) (Section 1252(f)(1) "does not preclude class-wide injunctive relief affecting Section 1232" for unaccompanied children transferred to ICE custody upon turning 18) (citing *L.G.M.L. v. Noem*, 800 F. Supp. 3d 100, 123 n.6 (D.D.C. 2025)).

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[21] The closest §§ 1221-31 come to regulating detention conditions is granting authority for land acquisition and building construction in 8 U.S.C. § 1231(g).

As for accompanied children, the Settlement's presumption in favor of release neither enjoins nor restrains the Government's authority under the covered provisions on a class-wide basis: it requires only that DHS make individualized determinations as to whether an accompanied child should be released, which may be accomplished through 8 U.S.C. § 1182(d)(5), not a provision covered by § 1252(f)(1).[22]

Even were § 1252(f)(1) to preclude enforcement of the FSA's presumption in favor of release as to accompanied children in expedited removal, it would not warrant terminating the *entire* Settlement.[23] *Flores IV*, 984 F.3d at 737 ("the district court did not abuse its discretion in declining to terminate those portions of the Agreement covered by the HHS regulations. The government moved the

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[22] The Government contends that requiring individual release assessments for accompanied children DHS places in expedited removal proceedings is an injunction § 1252(f)(1) forbids, but many children are placed in non-expedited removal proceedings.

During recent visits to ICE family detention sites, Plaintiffs' counsel encountered children in a wide variety of procedural postures, including those who appeared to be outside of the expedited removal process. *See, e.g.,* Declaration of E.D.C. ¶¶ 2, 4, 25-29, 1-SER-44, 49-50 (high school freshman has lived in the United States since he was five); Decl. of N.T.G. ¶ 2 (lived in U.S. for ten years) 1-SER-226.

[23] The Government's motion was clearly to terminate the entire Settlement, and the district court rightfully ruled on it as such. The Government's passing reference to partial termination in its brief before the district court was insufficient to convert its motion into one for partial termination. *Greisen v. Hanken*, 925 F.3d 1097, 1115 n.6 (9th Cir. 2019).

district court to terminate the Agreement in full, not to modify it or terminate it in part. . . ."); *Rufo,* 502 U.S. at 388 (Rule 60(b) relief must be suitably tailored).

Section 1252(f)(1), in sum, does not warrant wholesale termination of the Settlement. The statute limits a court's remedial authority, not its jurisdiction. The Government waived § 1252(f)(1) when it failed to argue it before this Court in *Flores III* and delayed three years after *Aleman* before resurrecting the argument in the district court. Nor does *Aleman* prescribe a change in law that renders the whole of the Settlement inequitable. This Court should affirm.

III. HHS IS NOT IN SUBSTANTIAL COMPLIANCE WITH THE SETTLEMENT.

The Government lastly argues (at 70-73) that the FSA must be terminated as to HHS because it "has substantially complied with its terms."[24]

Rule 60(b)(5) permits termination of a consent decree where "the judgment has been satisfied, released, or discharged." Although "substantial compliance does imply something less than a strict and literal compliance … fundamentally it means that the deviation is unintentional and so minor or trivial as not substantially to defeat the object which the parties intend to accomplish." *Jeff D. v. Otter*, 643 F.3d at 284. "[L]ike terms in a contract, distinct provisions of consent decrees are

[24] The Government offers no argument that DHS has substantially complied with the Settlement. As this Court held in 2020, "The significant inconsistencies between the DHS regulations and the Agreement detailed in this opinion preclude a finding of substantial compliance." *Flores IV*, 984 F.3d at 744 n.11.

independent obligations, each of which must be satisfied before there can be a finding of substantial compliance." *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016). HHS cannot establish substantial compliance because it has not resolved inconsistencies between the Foundational Rule and the FSA.

As noted *supra*, in 2024 the district court terminated most of the Settlement as to HHS based on the Foundational Rule. 4-ER-0734. The court declined to terminate the Settlement in full (4-ER-0726-27), however, because HHS's regulations (1) explicitly permit it to consign children to medium-secure, "heightened supervision" facilities on account of "isolated or petty offenses" or "solely because a child is ready to 'step-down' from a secure facility" (4-ER-0726; 4-ER-688 ¶ 21.A); and (2) exempt out-of-network facilities from the Settlement's minimum detention standards and monitoring provisions. 4-ER-0727. "[T]he Rule fails to provide *substantive* protections for the children placed at these facilities." *Id.* The Government declined to appeal from this order, and its merits are not at issue here.

HHS has not amended its regulations. Instead, on May 19, 2025—nearly a year after the district court's order and a mere three days before filing the motion to terminate—ORR updated its internal "Policy Guide" to remove references to petty offenses and add general language regarding services for children placed out-of-network. 2-ER-0069 ¶ 7. As the district court found, "ORR can modify its

Policy Guide easily and unilaterally, and there is no public enforcement mechanism if the agency violates its own policies." 1-ER-0016.

Mutable internal policies that conflict with the Foundational Rule cannot bring HHS into substantial compliance with the Settlement. The termination clause provides that the FSA shall terminate "following defendants' publication of final *regulations* implementing this Agreement." *Flores IV*, 984 F.3d at 727. As this Court has held, for regulations to "implement[]" the FSA, they cannot be inconsistent with the Settlement. *Id.* at 727, 732, 736, 741. The Government cannot satisfy the termination clause through internal policy guidance at odds with federal regulations.

Nor does the Government's characterizing (at 70) the Policy Guide as an "interpretative rule" have any merit. The Policy Guide nowhere mentions the provisions the Foundational Rule that conflict with the Settlement, leaving HHS free to implement policy based on the offending regulations. 2-ER-0084-87, 100-102.[25]

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[25] Despite the Government's asserting that "ORR has now clarified that isolated and petty offenses are not a basis for [heightened-supervision] placement," Appellants' Br. at 70, the agency's most recent proposed Restrictive Placement Checklist again states that petty theft, truancy, and curfew violations are grounds for secure placement. *See* Intakes Restrictive Placement Checklist (Form P-7), Correction to Published Federal Register Notice; Office of Management and Budget Review Placement and Transfer of Unaccompanied [Alien] Children Into Office of Refugee Resettlement Care Provider Facilities, 90 Fed. Reg. 59126

Even assuming, arguendo that the Policy Guide were an "interpretative rule," the Government agreed that the FSA would sunset only with "publication of final regulations." The Policy Guide is not a regulation. *See Regulation*, Black's Law Dictionary (12th ed. 2024) (a regulation is "[a]n official rule" with "legal force"); *see also Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("Any rule that effectively amends" a "prior legislative rule … must be promulgated under notice and comment rulemaking."); *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (an agency may not "under the guise of interpreting a regulation, [] create *de facto* a new regulation").

The Government's complaining (at 53-54, 72-73) that the district court erred in requiring it to amend the Foundational Rule to remove inconsistencies with the FSA thus gets the APA's requirements backwards. The Policy Guide cannot override the Foundational Rule's inconsistent provisions.[26]

CONCLUSION

For the foregoing reasons, this Court should affirm.

(proposed Dec. 18, 2025), https://perma.cc/784J-VPPL. The Settlement, of course, provides otherwise.

[26] In all events, Plaintiffs presented evidence that ORR is failing still to comply with the Settlement with respect to children it consigns to secure facilities. Because the district court concluded that the Policy Guide was insufficient for termination, it did not evaluate ORR's compliance. 1-ER-0015-16. Should this Court determine actual compliance material, remand for additional findings of fact, not termination of the FSA, would be the appropriate disposition.

Dated: January 21, 2026

s/ Carlos Holguín

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Cir. R. 32-1 because: this brief contains 13,687 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface and Times New Roman size 14 font.

Dated: January 21, 2026

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