

No. 25-6308

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

v.

PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES,  
*et al.*,  
Defendants-Appellants

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On Appeal from an Order of the United States District Court  
for the Central District of California

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**BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH IN SUPPORT  
OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *amicus curiae* Human Rights Watch makes the following disclosures: Human Rights Watch is a donor-funded, nonprofit nongovernmental organization that has no parent corporation and issues no stock.

Dated: January 28, 2026

/s/ Michael Garcia Bochenek  
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## STATEMENT OF INTEREST OF AMICUS CURIAE

Human Rights Watch is a non-profit, independent organization that investigates allegations of human rights violations in more than 90 countries around the world, including in the United States, by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates with governments and international organizations to remedy the violations and mobilizes public pressure for change. Human Rights Watch has monitored rights conditions for migrant youth in United States custody for over three decades, including in the lead up to the finalization of the *Flores* Settlement Agreement in 1997.

Human Rights Watch has filed amicus briefs before the U.S. Supreme Court, this Court and other U.S. courts of appeal, and other courts.

Human Rights Watch submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).<sup>1</sup> All parties have consented to the filing of this brief.

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<sup>1</sup> No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. FED. R. APP. P. 29(a)(4)(E).

## INTRODUCTION

Jenny Lissette Flores was 15 when the U.S. Immigration and Naturalization Service (INS) detained her for weeks in 1985 in a decommissioned motel where children shared common areas with unrelated adult women and men.<sup>2</sup> There were no services for children: “The kids would essentially just hang around by the drained pool or on the balconies for days—or weeks or months—until it was determined what to do with them.”<sup>3</sup>

Her experience was not unusual: at the time, the INS was detaining children for up to two years, during which they were “deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause.” *Flores v. Galvez-Maldonado v. Meese*, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting).

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<sup>2</sup> Jenny Rodriguez, *Where We Stand: A 20-Year Retrospective of the Unaccompanied Children’s Program in the United States, Chapter Two: The Flores Saga*, U.S. COMM. FOR REFUGEES & IMMIGRANTS, at 1 (2022), [https://refugees.org/wp-content/uploads/2022/07/Chapter-Two\\_The\\_Flores\\_Saga.pdf](https://refugees.org/wp-content/uploads/2022/07/Chapter-Two_The_Flores_Saga.pdf). See also Complaint ¶¶ 42–45, *Flores v. Meese*, No. 85-4544 (C.D. Cal. filed July 11, 1985), 5-ER-950.

<sup>3</sup> *The History of the Flores Settlement and Its Effects on Immigration*, ALL THINGS CONSIDERED (NPR), June 22, 2018, <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration>.

Little had changed by 1996, the year before the government entered into the Stipulated Settlement Agreement (“the Agreement”), 4-ER-681–714, it now seeks to terminate: children were held in overcrowded conditions with no access to education, very limited recreation and contact with family members, and inadequate access to legal information and counsel, *amicus* found.<sup>4</sup>

To remedy these and other violations of federal law, the Agreement sets forth fundamental protections for children, including by setting limits on children’s time in immigration detention, requiring their expeditious transfer to appropriate caregivers, and providing that when the government does detain children, it does so in conditions that are “safe and sanitary,” 4-ER-684 (¶ 12A), and treats them “with dignity, respect and special concern for their particular vulnerability as minors,” 4-ER-684 (¶ 11). These protections are consistent with U.S. international human rights law obligations to provide special measures of protection to children.<sup>5</sup>

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<sup>4</sup> HUMAN RIGHTS WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 3-5 (1997), <https://www.hrw.org/reports/us974.pdf>.

<sup>5</sup> See section I.B., *infra*.

But in the years since the government entered into the Agreement, it has regularly failed to afford children these fundamental protections, as *amicus* and the district court have found.<sup>6</sup>

The monitoring provisions of the Agreement, 4-ER-692 (¶ 33), have been a crucial means of identifying and remedying violations of detained children’s fundamental rights. The same is true of the efforts of the Independent Monitor (2018 to 2022) and the Juvenile Care Monitor (2022 to 2024), experts appointed by the district court in response to specific egregious breaches.

The Agreement unequivocally sets forth the terms for its termination: “45 days following defendants’ publication of final regulations implementing this Agreement,” 4-ER-711, subject to the express proviso that “the final regulations shall not be inconsistent with the terms of this Agreement,” 4-ER-684 (¶ 9).

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<sup>6</sup> See, e.g., *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015), 2-SER-529, *aff’d in part, rev’d in part & remanded sub nom. Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (abuses in family detention centers); *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1061 (C.D. Cal. 2017), 2-SER-472 (lengthy detention in unsanitary conditions in Rio Grande Valley Customs and Border Protection (CBP) holding cells); 5-ER-903 (Order of July 30, 2018) (regular administration of psychotropic medication without parental consent or judicial authorization); 4-ER-746 (Order of Apr. 3, 2024) (detention of children in “open-air” sites between primary and secondary border fences, areas to which CBP agents transported or otherwise directed children and their parents); see also HUMAN RIGHTS WATCH, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN U.S. IMMIGRATION HOLDING CELLS (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/uscrd0218\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/uscrd0218_web.pdf).

Instead of issuing such regulations, the government now seeks to avoid its responsibility to protect the children it detains.

For the reasons set forth in Plaintiffs' brief and in the district court order, the government's approach is plainly insufficient as a matter of law; continued enforcement of the agreement is in the public interest.

The government can—and should—achieve what it says it intends by promptly promulgating regulations consistent with the Agreement's terms and international human rights law, fulfilling the undertaking it made in 1997.

## ARGUMENT

The government seeks, for at least the third time in six years, to avoid compliance with an agreement it made voluntarily to protect the rights of children, the terms of which are consistent with and reinforced by statute and international law obligations of the United States.

But the government has not and cannot “establish[] that changed circumstances warrant relief,” *Horne v. Flores*, 557 U.S. 433, 447 (2009), or that it is complying with its obligations “by other means,” *id.* at 439. To the contrary, the serious violations revealed by monitoring under the Agreement show that the government persists in flagrant disregard of the Agreement's terms and of the due process rights of the children it detains. The public interest is best served by

the Agreement's continued enforcement until such time as the government promulgates regulations consistent with the undertakings it has made through the Agreement.

**I. The Agreement is a crucial means of ensuring the special measures of protection children are entitled to by law**

**A. Monitoring under the Agreement has consistently revealed serious violations of children's rights**

In June 2018, as documented by *amicus*, a group of lawyers and health experts visited the Central Processing Center, the CBP detention center on Ursula Avenue in McAllen, Texas. Much of what they saw and heard from the children and parents they interviewed was disturbingly familiar. Most children were held apart from their parents, though they could occasionally glimpse each other as they sat in the caged pens that then filled a large, very cold space that resembled a warehouse. As in all CBP detention areas, the lights in the Ursula facility were on 24 hours a day and never dimmed, disorienting children. Everybody, including infants and toddlers, received the same food as adults, at times only partially thawed. CBP agents imposed rules that children struggled to understand, telling them, for instance, that they would be "punished" or "deported right now" if they looked at their parents in nearby cages. In one case, CBP agents refused to let an 8-year-old girl shower or rinse out her underwear after she soiled herself, forcing

her to remain in that state for several days. HUMAN RIGHTS WATCH, “WE NEED TO TAKE AWAY CHILDREN”: ZERO ACCOUNTABILITY SIX YEARS AFTER ZERO TOLERANCE 23–24 (2024), <https://www.hrw.org/report/2024/12/16/we-need-take-away-children/zero-accountability-six-years-after-zero-tolerance>.

This facility visit by Plaintiffs’ counsel and associated experts under the Agreement, 4-ER-692 (¶ 33), one of several in which *amicus* participated between 2017 and 2019, took place at what we now know to be the height of the government’s forcible family separation policy. Interviews by the expert group helped document the nature and extent of the government’s deliberate and extraordinarily harmful targeting of children and their parents. Among many such accounts the group heard, a 16-year-old boy from Nicaragua said he had not seen his mother in the six weeks since CBP separated them in early June 2018. “I feel terrorized, nervous, anxious and worried,” he said. HUMAN RIGHTS WATCH, “WE NEED TO TAKE AWAY CHILDREN,” at 29. The group also learned that a group of teenage girls had been taking turns caring for a young girl in diapers for three days. The teens reported that guards had done nothing more than check off the little girl’s name at roll call. *Id.* at 25.

In another example of the importance of the Agreement’s monitoring framework, a June 2019 facility visit in which *amicus* participated found that senior CBP officials had instructed Border Patrol agents to hold children of all

ages, some still in diapers, for weeks in increasingly overcrowded cells, a windowless warehouse, and on a loading dock at a little-used border station in Clint, Texas, near El Paso.<sup>7</sup>

Among other abusive practices, the 2019 visit helped confirm that the government was continuing its practice of forcibly separating children, including infants and toddlers, from their parents. Among many other instances of forcible family separation documented by the expert group in Clint, a 15-year-old girl told the group, “A Border Patrol agent came in our room with a 2-year-old boy and asked us, ‘Who wants to take care of this little boy?’” *Id.* at 49.

The Clint visit was the same week that the government asserted to this Court that the *Flores* requirement to hold children in “safe and sanitary” facilities did not require the provision of soap, toothbrushes, or the opportunity to sleep,<sup>8</sup> a

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<sup>7</sup> Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids*, AP, June 21, 2019, <https://apnews.com/article/46da2dbe04f54adbb875cfbc06bbc615>; Simon Romero, Zolan Kanno-Youngs, Manny Fernandez et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES, July 9, 2019, <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html>.

<sup>8</sup> Helen Christophi, *Feds Tell 9th Circuit: Detained Kids ‘Safe and Sanitary’ Without Soap*, COURTHOUSE NEWS SERVICE, June 18, 2019, <https://www.courthousenews.com/feds-tell-9th-circuit-detained-kids-safe-and-sanitary-without-soap/>.

position with which this Court “emphatically disagree[d].” *Flores v. Barr*, 934 F.3d 910, 915 (9th Cir. 2019).

The regular facility visits by Plaintiffs’ counsel and associated experts also helped document conditions for thousands of children held in “large congregate care facilities” between 2017 and 2019, including a tent city in the desert,<sup>9</sup> a repurposed Walmart,<sup>10</sup> and an unused military base.<sup>11</sup>

Relatedly, an Independent Monitor appointed by the district court in October 2018 found serious ongoing concerns with the case management and care of unaccompanied children through 2022. *See, e.g.*, Dkt. 1147; Dkt. 1219 at 2.<sup>12</sup> And between July 2022 and December 2024, under the terms of a supplemental settlement agreement, Dkt. 1254-1 (“2022 CBP Settlement”), a Juvenile Care

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<sup>9</sup> *See* Tanvi Misra, *A Tent City in Tornillo, Texas, Housed Thousands of Migrant Children. Now It’s Almost Gone*, PACIFIC STANDARD, (Jan. 23, 2019), <https://psmag.com/social-justice/a-tent-city-in-texas-is-seeing-its-final-days>.

<sup>10</sup> *See* Michael E. Miller, Emma Brown & Aaron C. Davis, *Inside Casa Padre, the Converted Walmart Where the U.S. Is Holding Nearly 1,500 Immigrant Children*, WASH. POST, June 14, 2018, [https://www.washingtonpost.com/local/inside-casa-padre-the-converted-walmart-where-the-us-is-holding-nearly-1500-immigrant-children/2018/06/14/0cd65ce4-6eba-11e8-bd50-b80389a4e569\\_story.html](https://www.washingtonpost.com/local/inside-casa-padre-the-converted-walmart-where-the-us-is-holding-nearly-1500-immigrant-children/2018/06/14/0cd65ce4-6eba-11e8-bd50-b80389a4e569_story.html).

<sup>11</sup> *See* John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.*, NPR NEWS, Feb. 13, 2019, <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->.

<sup>12</sup> “Dkt. \_\_\_” refers to the district court docket number of documents that are not reprinted in the Excerpts of Record or the Supplemental Excerpts of Record.

Monitor assessed CBP’s compliance with the 2022 CBP Settlement as well as with the Agreement itself, frequently finding serious deficiencies that required urgent correction. For instance:

- Substantial overcrowding in areas holding families, Dkt. 1372 at 5, 19.
- Children as young as 8 held separately from parents of same gender with minimal or no opportunities for contact, Dkt. 1360 at 6, 23–29, with the “substantial” potential for “serious, deleterious effects” for all children, *id.* at 28–29.
- Young children (2 to 5 years of age) given adult meals instead of age-appropriate food until the second half of 2024. Dkt. 1360 at 8, 33; Dkt. 1372 at 7; Dkt. 1522 at 9.
- Ongoing concerns with medical care, Dkt. 1360 at 10, 51–53, including instances in which CBP personnel resisted medical decisions to transfer children to local health facilities, Dkt. 1522 at 17.

The Agreement has long been one of the few sources of external monitoring and oversight of conditions in which immigrant children are held.<sup>13</sup> But for the

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<sup>13</sup> See, e.g., Michael Garcia Bochenek & Warren Binford, *Children Arriving in the United States Need Strong Safeguards*, HEALTH & HUM. RTS., Apr. 19, 2022, <https://www.hhrjournal.org/2022/04/19/children-arriving-in-the-united-states-need-strong-safeguards/>.

Agreement, in fact, many of these and other serious violations would likely never have come to light.

**B. The Agreement requires the government to promote the best interests of the child and is otherwise consistent with binding U.S. international law obligations**

The Agreement is grounded in the understanding that the government must act in the best interests of the child. The Agreement requires, for instance, that the government treat “all minors in its custody with dignity, respect, and *special concern for their particular vulnerability as minors.*” 4-ER-684 (¶ 11) (emphasis added). Children must be held “in the least restrictive setting appropriate to the minor’s age and special needs.” *Id.* Elsewhere, the Agreement requires that “safe and sanitary” conditions of detention be provided because of the government’s “concern for the particular vulnerability of minors.” *Id.* (¶ 12A). Taken together, these provisions mean that “[the] best interests [of the child] should be paramount.” Dkt. 455 (July 9, 2018 Order) at 7.

This understanding also implements international law obligations binding on the United States. The International Covenant on Civil and Political Rights (“ICCPR”), ratified in 1992, guarantees the right of the child to “such measures of protection as are required by [their] status as a minor.” ICCPR art. 24, Mar.

23, 1976, 999 U.N.T.S. 171.<sup>14</sup> Drawing on U.S. jurisprudence, the U.N.

Convention on the Rights of the Child (“CRC”) explicitly states that “[i]n *all actions* concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” CRC art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).<sup>15</sup>

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<sup>14</sup> Congress has not passed legislation explicitly implementing the ICCPR’s terms, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992), but when it submitted the ICCPR to the Senate for its advice and consent to ratification, the Executive Branch assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 5, 19, 26-27 (1992) (noting that existing laws obviated the need for further implementing legislation). As noted in Section I.C, *infra*, regardless of whether a ratified treaty provides a rule of decision for federal courts, the judiciary should interpret [laws and orders] in a way that avoids conflict with the United States’ international law obligations.

<sup>15</sup> The United States signed the CRC in 1995 after playing a leading role in its drafting, *see* Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9 (1998), but it is the only U.N. member state that has not yet ratified it. Nonetheless, as a signatory the United States is obligated under customary international law to refrain from acts that would defeat the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. (The United States has not ratified the Vienna Convention on the Law of Treaties but regards this convention as “the authoritative guide to current treaty law and practice.” S. EXEC. DOC. L., 92-1 (1971), at 1.) Consonant with this customary international law obligation, the U.S. Supreme Court and other courts have looked to the CRC’s standards as instructive. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing CRC’s prohibition on juvenile capital punishment as persuasive authority).

The ICCPR also requires that all persons in detention “shall be treated with humanity and with respect for the inherent dignity of the human person,” ICCPR art. 10, and in the case of children, in a manner that takes their status into account.<sup>16</sup> This principle is reinforced by the CRC, which provides that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age,” CRC art. 37(c), and other international standards.<sup>17</sup>

Moreover, the right to liberty is a fundamental norm of international human rights law. The right to liberty includes a strict prohibition on arbitrary detention. *See* ICCPR art. 9; Universal Declaration of Human Rights art. 9(1), G.A. Res. 217A(III) (Dec. 10, 1948); U.N. Working Group on Arbitrary Detention (“WGAD”), Rev. Delib. No. 5 on Deprivation of Liberty of

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<sup>16</sup> U.N. Hum. Rts. Comm., General Comment No. 17 (Article 24), ¶ 2, in Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, U.N. Doc. A/44/40, at 173 (Sept. 29, 1989) (“The Committee points out that . . . as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protections than adults . . .”).

<sup>17</sup> *See, e.g.*, U.N. Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), Rule 1, G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Jan. 8, 2016); U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113 (Dec. 14, 1990).

Migrants, ¶ 8, U.N. Doc. A/HRC/39/45 (July 2, 2018) (“The prohibition of arbitrary detention is absolute, meaning that it is a *non-derogable* norm of customary international law, or *jus cogens*.”); *see also* CRC art. 37(b) (“No child shall be deprived of his or her liberty unlawfully or arbitrarily.”).

Detention is justified and not arbitrary only if it is lawful (that is, prescribed in law and based on allowed grounds); reasonable, necessary, and proportionate in light of the circumstances; and respectful of procedural safeguards, including, for example, the requirement that it be reassessed periodically. *See* U.N. Human Rights Comm., General Comment No. 35: Art. 9, Liberty and Security of Person, ¶ 12, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2004); WGAD, Rev. Delib. No. 5, ¶ 20.

For adults, detention should only be used as an “exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose.” WGAD, Rev. Delib. No. 5, ¶ 12. Mandatory detention of a class of persons exceeds the requirements of necessity and proportionality and constitutes arbitrary detention, as does excessive or indefinite detention. Human Rights Comm., General Comment No. 35, ¶ 18; WGAD, Rev. Delib. No. 5, ¶¶ 25–26. The detention of adults who are asylum seekers is subject to stricter standards. *See* U.N. High Commissioner for Refugees (UNHCR), Guidelines on the

Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012).

Stronger protections yet apply when the liberty of children is at issue. International and regional standards recognize that children should not be detained solely because of their or their parents' immigration status and that such detention is never in children's best interests.<sup>18</sup> The U.N. Secretary-General has accordingly observed: "Detention of migrant children constitutes a violation of children's rights." U.N. General Assembly, International Migration and Development: Report of the Secretary-General ¶ 75, U.N. Doc. A/68/190 (July 25, 2013). In addition, the U.N. special rapporteur on torture has

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<sup>18</sup> See, e.g., WGAD, Rev. Delib. No. 5, ¶ 11; U.N. Comm. on Migrant Workers & U.N. Comm. on the Rights of the Child, Joint General Comment No. 4 (Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child) on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination, and Return ¶¶ 5–13, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017); U.N. General Assembly, Manfred Nowak (Independent Expert), Global Study on Children Deprived of Liberty ¶ 56, U.N. Doc. A/74/136 (July 11, 2019); U.N. Human Rights Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) ("Méndez Report"); UNHCR, UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context (Jan. 2017); Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking, Inter-Am. Comm'n H.R., Res. No. 04/19, ¶ 71 (Dec. 7, 2019).

concluded that immigration detention of children puts them at risk of cruel, inhuman, or degrading treatment or punishment.<sup>19</sup>

These international law and standards are mirrored in and therefore guaranteed by application of the Agreement’s protections for children.

### **C. Treaties and customary international law are federal law**

Under the U.S. Constitution’s Supremacy Clause, treaties “shall be the supreme Law of the Land . . . .” U.S. CONST. art. VI, cl. 2. Regardless of their implementation through legislation, treaties “bind the United States as a matter of international law,” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004), and courts appropriately take treaty obligations into account in construing federal law, *see Chew Heong v. United States*, 112 U.S. 536, 548–50 (1884); *Ma v. Ashcroft*, 257 F.3d 1095, 1114-15 (9th Cir. 2001) (construing 8 U.S.C. § 1231(a)(6) as requiring a reasonable time limitation on immigration detention to avoid conflict with ICCPR).

Similarly, under longstanding Supreme Court precedent, customary international law obligations defined with appropriate specificity can give rise to a cause of action in—and rule of decision for—U.S. courts, even where the obligation is not reflected in an independent legislative enactment. *See Alvarez-*

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<sup>19</sup> Méndez Rept. ¶ 80. *Cf.* ICCPR art. 7; CRC art. 37(a).

*Machain*, 542 U.S. at 737–38; *The Paquete Habana*, 175 U.S. 677, 700 (1900); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (Am. Law Inst. 1987).

Courts can and do endeavor to construe U.S. law in a manner consistent with treaty and customary international law obligations, rather than in ways that would put the United States in breach of its international law obligations.

RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 301(3), 310 n.12 (Am. Law Inst. 2018) (“A treaty’s lack of judicial enforceability is not inconsistent with a status of ‘Law of the Land’ under the Supremacy Clause.”).

The Supreme Court has admonished that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). This doctrine has been consistently reaffirmed by the Supreme Court, including in the context of immigration. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 561–63 (2006); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432–41 (1987). This Court should accordingly construe the Agreement and resolve this litigation in a manner consistent with U.S. treaty and customary international law obligations.

## **II. Ongoing violations are abundant evidence of the continuing need for the protections delineated in the Agreement**

The government claims that termination of the Agreement is justified because it is fulfilling its obligations toward detained children by “other means,” *Horne*, 557 U.S. at 439; *see* Def-App’s Opening Br. at 34, 47, including through the publication of DHS regulations in 2019, *see id.* at 52, 59–60.

Not so. The ongoing violations found by the district court are serious and systematic. These ongoing violations are consistent with violations that have been documented at least since 2016.

This Court enjoined most of the 2019 DHS regulations, 84. FED. REG. 44,392 (Aug. 23, 2019), to which the government points, *see Flores v. Rosen*, 984 F.3d 720, 744 (9th Cir. 2020), and for good reason. The enjoined 2019 DHS regulations would not have addressed these violations; to the contrary, the enjoined regulations would have opened the door to additional violations of federal law and would have breached international law.

### **A. Ongoing violations are consistent with the pattern and practice of violations documented since at least 2016**

Violations of the Agreement identified by the Juvenile Care Monitor through the end of 2024, *see* section I.A., *supra*, as well as those alleged by Plaintiffs in

the course of 2025, *see* Dkt. 1575 (Mot. to Enforce), are strikingly consistent with violations documented over the last decade, including by *amicus*. These are “ongoing violation[s] of federal law,” *Horne*, 557 U.S. at 454, because they violate children’s fundamental liberty interests, protected by the Fifth Amendment’s Due Process Clause<sup>20</sup> as well as by treaties to which the United States is a party and customary international law by which the United States is bound, *see* section I.C., *supra*.

### ***The Government’s Failure to Provide Safe and Sanitary Conditions of Immigration Detention***

The sworn declarations and other evidence of CBP holding cell conditions the district court cites in its August 2025 enforcement order, 1-SER-2, tell an

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<sup>20</sup> “[W]hen the State . . . so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it [violates] . . . the Due Process Clause.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). These due process requirements apply in immigration detention. *Unknown Parties v. Johnson*, No. CV-15-00250-TUCDCB, 2016 WL 8188563, at \*1 (D. Ariz. Nov. 18, 2016) (finding that unsafe and unsanitary conditions for adults in CBP detention, including “deprivation of sleep, of hygienic and sanitary conditions, of adequate medical screening and care, of adequate food and water, and of warmth,” likely violated due process requirements), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017). Children as well as adults have fundamental liberty interests. *See, e.g., In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (segregation of children of children in Washington, D.C., schools was deprivation of a Fifth Amendment liberty interest).

all-too-familiar story of the government’s failure to comply with the Agreement: “water but no soap”; cells described as “freezing cold,” “very cold,” “freezing all the time,” “always cold,” and “extremely cold”; bright lights on throughout the day and night, making it difficult for children to sleep; and other unsafe, unsanitary conditions. 1-SER-10–14. *Amicus* has documented many similar accounts, often in identical terms, between 2017 and 2025.<sup>21</sup> For instance, a 33-year-old woman from Russia told *amicus* she and her 9-year-old daughter spent more than a month in a CBP holding cell near San Diego in early 2025. She said:

The conditions were beyond awful. There wasn’t enough food, we weren’t allowed outside at all, even the kids. When my daughter and I were brought there, they [the guards] put us into a “family room”—which held 23 to 25 women and approximately 14 children. . . . All the kids had diarrhea or were puking or both. Their stomachs were constantly upset because of the unhealthy food. . . . The toilet bowl was right in the room, and it was busy, to say the least, but the flush button was actually outside the cell. So, every time we needed to flush, we had to call the guards—and sometimes they’d accommodate us and sometimes they just would not come and then finally

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<sup>21</sup> See *cf.*, *e.g.*, HUMAN RIGHTS WATCH, IN THE FREEZER, at 7-21 (near-identical accounts documented in 2017); HUMAN RIGHTS WATCH, “WE NEED TO TAKE AWAY CHILDREN,” at 23–26, 56–61 (similar accounts documented in 2018 and 2019); HUMAN RIGHTS WATCH, “NOBODY CARED, NOBODY LISTENED”: THE U.S. EXPULSION OF THIRD-COUNTRY NATIONALS TO PANAMA 22 (2025) (similar accounts in 2025); HUMAN RIGHTS WATCH, “THE STRATEGY IS TO BREAK US”: THE U.S. EXPULSION OF THIRD-COUNTRY NATIONALS TO COSTA RICA 17–26 (2025) (overcrowded, uncomfortably cold cells; limited access to showers; inappropriate food; inadequate medical care; protracted time in detention), [https://www.hrw.org/sites/default/files/media\\_2025/05/costarica0525%20web.pdf](https://www.hrw.org/sites/default/files/media_2025/05/costarica0525%20web.pdf).

flush in the middle of the night, waking the kids. That flushing “woosh” was really loud—my daughter is still afraid of loud sounds and back at that place, she would always wake up screaming.

HUMAN RIGHTS WATCH, “THE STRATEGY IS TO BREAK US,” at 17–18.

Similarly, accounts of conditions in the Dilley family detention center describe overcrowding, *e.g.*, Dkt. 1706-7 (¶ 22), 1706-8 (¶ 10), 1706-10 (¶ 22); inadequate sleeping conditions, *e.g.*, Dkt. 1706-4 (¶ 15), 1656-12 (¶ 13); and serious concerns with medical care, 1-SER-208 (¶ 13), 1-SER-139 (¶ 30), 1706-21 (¶ 5).

As this Court has observed, “[a]ssuring that children eat enough edible food, drink clean water, are housed in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and are not sleep-deprived are without doubt essential to the children’s safety.” *Flores v. Barr*, 934 F.3d at 916. And as the court-appointed Juvenile Care Monitor repeatedly emphasized:

Experience has shown no custodial condition is of greater consequence to the care for children than overcrowding. This is because overcrowding not only results in inappropriately confined living spaces but also the overburdening of virtually all custodial capabilities, including nutrition, hygiene, and medical care.

Dkt. 1522 (Juvenile Care Monitor Rept.) at 20.

At the extreme, the government’s failure to ensure “safe and sanitary” conditions for children in immigration detention is life-threatening. Between

September 2018 and May 2019, five children died from infectious diseases while in CBP detention. Another child died of complications from infection shortly after release.<sup>22</sup>

One of these children, an 8-year-old Guatemalan boy named Felipe, contracted influenza while in CBP detention. We know this because he spent at least six days in detention, well in excess of the incubation period for influenza.<sup>23</sup> We also know from Felipe’s autopsy report that the government did not provide him with the care he needed and that his death was the result of that failure:

On his first visit to the hospital, roughly 12 hours before his death, Felipe in fact had received a test for influenza, which was positive. Despite this, medical staff did not prescribe the indicated antiviral medication for influenza. He was instead discharged to the care of CBP with an antibiotic prescription. That Felipe did not receive the standard-of-care treatment for influenza raises serious concerns about the capacity of the treating medical facility to care for children, and CBP’s ability to ensure the proper treatment of those for whom it has assumed responsibility.

Over the course of 30 pages, the autopsy report describes the damage inflicted by influenza on Felipe and the accompanying effects of sepsis—essentially, an overwhelming bacterial infection . . . Bloody fluid filled his chest cavity, and there was extensive damage from inflammation throughout

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<sup>22</sup> Fiona Danaher et al., *Collateral Damage: Increasing Risks to Children in a Hostile Immigration Policy Environment*, 10 CURR. PEDIATR. REP. 260 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9676715/>.

<sup>23</sup> Mark A. Travassos, *A “Natural Death”: The Political Battlefield of Infections and Migrant Children’s Bodies*, 70 CLINICAL INFECTIOUS DISEASES 2721, 2721 (2020), <https://doi.org/10.1093/cid/ciz1026>.

his respiratory tract, with massive hemorrhage within the lower lung lobes. . . .<sup>24</sup>

### ***Lengthy Periods of Detention***

Strict time limits on the immigration detention of children are imperative. In a retrospective analysis, detained children were reported to have a tenfold increase in developing psychiatric disorders.<sup>25</sup> Numerous clinical studies have demonstrated that parental presence does not preclude the damaging impact of detention on the physical and mental health of children.<sup>26</sup>

The evidence before the district court shows that the government continues to detain children in CBP holding cells for longer than the 72-hour limit set by CBP standards. “CBP facilities, by design, are not suitable for minors for long periods of time.” *Flores v. Bondi*, No. 85-cv-4544, 2025 WL 2995478 (C.D.

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<sup>24</sup> *Id.*

<sup>25</sup> Zachary Steel et al., *Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia*, 28 AUSTL. & N. Z. J. PUB. HEALTH 527 (2004).

<sup>26</sup> See, e.g., Michael Dudley et al., *Children and Young People in Immigration Detention*, 25 CURRENT OP. PSYCHOL. 285 (2012); Kim Ehntholt et al., *Mental Health of Unaccompanied Asylum-Seeking Adolescents Previously Held in British Detention Centres*, 23 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 238 (2018); Rachel Kronick et al., *Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85 AM. J. ORTHOPSYCHIATRY 287 (2015).

Cal. Aug. 15, 2025), 1-SER-14. And regardless of whether children are in CBP or ICE detention facilities, even short periods of detention can cause psychological trauma and long-term mental health issues.<sup>27</sup>

Children held in family detention centers run by U.S. Immigration and Customs Enforcement (ICE) also frequently remain in those centers for protracted periods. The ICE Juvenile Coordinator informed the district court that “extended custody” of children in the South Texas Family Residential Center in Dilley, Texas, is “a widespread operational challenge.” Dkt. 1692-4 at 2 (ICE Juvenile Coordinator supplemental annual report). Hundreds of children were detained for a month or more in August and September 2025, ICE data show. Dkt. 1692-4, 1692-6 (August data), 1692-9 (September data).

The government has, in fact, attempted to avoid disclosure of relevant information about its protracted detention of children. When the government’s own data showed that 60 percent of children in CBP detention were held for more than 7 days and 23 percent held for more than 14 days, the government

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<sup>27</sup> See Julie M. Linton et al., *Policy Statement: Detention of Immigrant Children*, AM. ACAD. PEDIATRICS (Apr. 2017), <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>; see also CHILD MIGRANTS IN FAMILY IMMIGRATION DETENTION IN THE U.S.: AN EXAMINATION OF CURRENT PEDIATRIC CARE STANDARDS AND PRACTICES (2024), <https://fxb.harvard.edu/wp-content/uploads/2024/01/Child-Migrants-in-Family-Immigration-Detention-in-the-US-2.pdf>.

objected to the district court’s request for additional information to assess whether these lengthy periods of detention were reasonable. *Flores v. Bondi*, 2025 WL 2995478, 1-SER-8–9.

## **B. The 2019 DHS regulations were inconsistent with the Agreement**

The enjoined regulations would have authorized the government to detain children indefinitely, *Flores v. Barr*, 407 F. Supp. 3d 909, 917 (C.D. Cal. 2017), 2-SER-365, in secure or more secure facilities, 2-SER-369, 372–374, and to strip children of the ability to challenge certain detention decisions before an independent decisionmaker, 2-SER-372 (shifting such determinations “away from independent immigration judges . . . strips class members of a ‘fundamental protection’”). The enjoined regulations would have enabled the government to detain arbitrarily, without an individualized analysis of the best interests of the child, and in disregard of children’s need for special measures of protection by the government. *See* 4-ER-689 (¶ 24A); *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016) (“The Settlement creates a presumption in favor of release and favors family reunification.”); *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017) (the right of independent review of government’s custody determinations is “a fundamental protection” under the Agreement); *Flores v.*

*Rosen*, 984 F.3d at 738–39 (the district court properly enjoined these regulations as inconsistent with the Agreement).

The enjoined regulations lacked other basic protections for detained children. For example, the enjoined regulations would have eliminated the requirement that facilities detaining children with their parents be properly licensed. *Compare* 4-ER-682, 695–697 (¶ 6 & Ex. 1) *with* enjoined section 236.3(b)(9) (audit process in lieu of licensing), 84. FED. REG. at 44,526.

Eliminating the state licensing requirement would have removed a critical backstop that helps ensure that children are housed in facilities that are capable of providing for their health, safety, and welfare. *See Flores v. Rosen*, 984 F.3d at 740.

The enjoined regulations would also have allowed the government to ignore the basic needs of children, including snacks and meals, under an overbroad definition of “emergency” conditions that would open the door to a permanent state of exception to safeguards that should be the norm. *See* enjoined section 236.3(b)(5), 84 FED. REG. at 44,526.

### **C. The Agreement’s continued enforcement is in the public interest**

The government has repeatedly failed to show that it has made “genuine changes,” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that might warrant modification<sup>28</sup> of the Agreement. No “durable remedy has been implemented.” *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). It has not instituted important factual or legal changes of the kinds identified in *Horne v. Flores*, 557 U.S. 433, 472 (2009), as “appropriate action”—for instance, “significant structural and programmatic changes,” *id.* at 463—that would call into question the Agreement’s continued enforcement.

To the contrary, the factual circumstances discussed above establish that the government has continued what has become a pattern and practice of serious violations of the rights of the children it detains. Its violations of children’s rights are at times so serious that children’s health and even their lives are threatened. Indeed, the government’s abysmal track record suggests deeply entrenched practices that have been “substantially impervious to change.” *United States v. Swift & Co.*, 286 U.S. 106, 114–115 (1932).

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<sup>28</sup> As in its prior unsuccessful Rule 60(b)(5) motions, the government does not seek modification “suitably tailored to the changed circumstance” it alleges, *Rufo*, 502 U.S. at 393; instead, it seeks termination.

Nor can the government show that “a significant change . . . in law,” *Rufo*, 502 U.S. at 384, warrants termination of the Agreement. Echoing arguments the government has made before and this Court has rejected, the government erroneously asserts that laws enacted decades before the Agreement are a “change in decisional law,” Dkt. 1567 (Def’s Mot. to Terminate) at 32, that should be a basis for the Agreement’s termination. *Compare* Def-App’s Opening Br. at 2 (relying for this purpose on the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559) *with, e.g., Flores v. Barr*, 934 F.3d at 916 (finding that Agreement’s “presumption in favor of releasing minors” is consistent with expedited removal provisions); Order re Defendants’ Mot. to Terminate at 7-9, *Flores v. Bondi*, No. 85-cv-4544 (C.D. Cal. Aug. 15, 2025), 1-ER-8–10 (finding that the Agreement is also consistent with other provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, enacted or amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996)).<sup>29</sup>

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<sup>29</sup> The broad requirement that regulations “implement” the Agreement, FSA ¶ 9, does not “preordain any specific outcome,” as the government claims, Def-App’s Opening Br. at 51. *See Flores v. Rosen*, 984 F.3d at 744 (finding that 2019 HHS regulations, as well as certain of the 2019 DHS regulations, were consistent with the Agreement); *Flores v. Sessions*, 394 F. Supp. 3d at 1066 (multiple provisions of the Agreement recognize and defer to the government’s discretion over how to implement the Agreement).

This Court also appropriately considers the public interest in assessing requests to terminate or modify consent decrees. *See Rufo*, 502 U.S. at 381–82 (citing *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). Here, the public interest weighs heavily in favor of continued enforcement of the Agreement. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)) (“Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution”)

The flexibility a district court exercises in considering requests for modification of an institutional reform consent decree does not mean that modification will always be warranted. As the Supreme Court cautioned in *Rufo*: “Rule 60(b)(5) provides that a party may obtain relief from a court order when ‘it is no longer equitable that the judgment should have prospective application,’ not when it is no longer convenient to live with the terms of a consent decree.” 502 U.S. at 383.

The ongoing serious violations of the human rights of detained children and the inadequacy of the enjoined regulations to remedy those violations demonstrate a continuing need for the Agreement’s enforcement.

## CONCLUSION

The district court observed in 2019 that “the evidentiary record before this Court overwhelmingly shows that throughout several presidential administrations, the Agreement has been necessary, relevant, and critical to the public interest in maintaining standards for the detention and release of minors arriving at the United States’ borders.” *Flores v. Barr*, 407 F. Supp. 3d at 928–29, 2-SER-380. This observation continues to be true today.

The government does not and cannot meet its burden “of establishing that a significant change in circumstances warrants revision” of the Agreement, *see Flores v. Lynch*, 828 F.3d at 909 (quoting *Rufo*, 502 U.S. at 383). Nor can it credibly claim that it is fulfilling its obligations toward detained children by means other than the Agreement, *see Horne*, 557 U.S. at 439.

For the reasons stated above, *amicus* respectfully support the request of Plaintiffs-Appellees that this Court affirm the district court's order.

Dated: January 28, 2026

Respectfully submitted:

/s/ Michael Garcia Bochenek

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