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The "*Flores* Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions

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SUMMARY

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Ben Harrington
Legislative Attorney

The "*Flores* Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions

Reports of alien minors being separated from their parents at the U.S. border have raised questions about the Department of Homeland Security's (DHS's) authority to detain alien families together pending the aliens' removal proceedings, which may include consideration of claims for asylum and other forms of relief from removal.

The Immigration and Nationality Act (INA) authorizes—and in some case requires—DHS to detain aliens pending removal proceedings. However, neither the INA nor other federal laws specifically address when or whether alien family members must be detained together. DHS's options regarding the detention or release of alien families are significantly restricted by a binding settlement agreement from a case in the U.S. District Court for the Central District of California now called *Flores v. Sessions*. The "*Flores* Settlement" establishes a policy favoring the release of alien minors, including accompanied alien minors, and requires that those alien minors who are not released from government custody be transferred within a brief period to non-secure, state-licensed facilities. DHS indicates that few such facilities exist that can house adults and children together. Accordingly, under the *Flores* Settlement and current circumstances, DHS asserts that it generally cannot detain alien children and their parents together for more than brief periods.

Following an executive order President Trump issued that addressed alien family separation, the Department of Justice filed a motion to modify the *Flores* Settlement to allow for the detention of alien families in unlicensed facilities for longer periods. The district court overseeing the settlement rejected that motion, much as it has rejected similar motions to modify the settlement filed by the government in recent years. (The U.S. Court of Appeals for the Ninth Circuit has affirmed the earlier rulings but has not yet reviewed the most recent ruling.) In its most recent motion, the government has argued, among other things, that a preliminary injunction entered in a separate litigation, *Ms. L v. ICE*, which generally requires the government to reunite separated alien families and refrain from separating families going forward, supports a modification of the *Flores* Settlement to allow indefinite detention of alien minors alongside their parents.

On a separate track, DHS and the Department of Health and Human Services (HHS) have announced that they intend to seek termination of the *Flores* Settlement through the promulgation of new regulations that, according to the agencies, would adopt the substantive terms of the agreement with certain modifications. Significantly, the proposed regulations would allow DHS to detain families together until immigration proceedings were completed by creating an alternative federal licensing scheme for family residential centers. That federal scheme would impose facility standards that purport to mimic the standards set forth in the *Flores* Settlement, which calls for the exclusive use of state-licensed facilities for the detention of minors. A legal dispute seems likely to arise over whether the proposed regulations adequately implement the *Flores* Settlement, including whether the regulations are consistent with the agreement's general policy favoring the release of minors from immigration custody.

Congress, for its part, could largely override the *Flores* Settlement legislatively, although constitutional considerations relating to the rights of aliens in immigration custody may inform the permissible scope and effect of such legislation.

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Reports of alien minors being separated from their parents at the U.S. border—either when they have presented themselves at a port of entry to claim asylum or when they have been apprehended by authorities after unlawfully entering between ports of entry[1]—have raised questions about the authority of the Department of Homeland Security (DHS) to detain families together pending removal proceedings. The Immigration and Nationality Act (INA) does not provide a specific framework for the detention of alien families during the removal process. Much of the governing law stems from a binding, 20-year-old settlement agreement (*Flores* Settlement) between the federal government and parties challenging the detention of alien minors, which the U.S. District Court for the Central District of California entered in a case now called *Flores v. Sessions*.[2] The *Flores* Settlement establishes a policy favoring the release of alien minors, including alien minors accompanied by an alien parent, from immigration detention and requires that those alien minors who are not released from government custody be transferred within a brief period to non-secure, state-licensed facilities.[3] According to DHS, few if any such state-licensed facilities capable of holding minors and adults together exist.[4] For that reason, it is DHS's position that, to comply with the *Flores* Settlement, it must choose between (1) releasing the family together and (2) releasing the alien child while the adult family members remain in detention until removal proceedings have concluded.[5] Recent federal court decisions cast doubt on the legality of the second option,[6] however, leaving the general release of family units together as the only clearly viable option under current law.

In an executive order issued on June 20, 2018, President Trump directed DHS "to the extent permitted by law and subject to the availability of appropriations, [to] maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members."[7] The executive order also directed Attorney General Sessions to ask the district court overseeing the *Flores* Settlement to modify the agreement to allow the government to detain alien families together throughout the duration of the family's immigration proceedings as well as the pendency of any criminal proceedings for unlawful entry into the

[1] *See* Memorandum in Support of Classwide Preliminary Injunction, Ms. L. v. ICE, No. 18-cv-00428-DMS-MDD (S.D. Cal. Mar. 19, 2018), https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-classwide-preliminary-injunction; Michelle Brané & Margo Schlanger, *This is What's Really Happening to Kids at the Border,* WASH. POST, May 30, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/30/this-is-whats-really-happening-to-kids-at-the-border/?utm_term=.86df956a45f8; Letter from Kate Shepherd, Am. Immigration Council & Katharina Obser, Women's Refugee Comm'n, et al., to Cameron Quinn, DHS Officer for Civil Rights and Liberties, and John V. Kelly, DHS Acting Inspector Gen. (Dec. 11, 2017), https://www.womensrefugeecommission.org/rights/resources/document/download/1540.

[2] Flores v. Sessions, 862 F.3d 863, 869, 874 (9th Cir. 2017).

[3] Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).

[4] Flores v. Sessions, No. CV 2:85-4544-DMG-AGR, 2017 WL 6060252, at *18 (C.D. Cal. June 27, 2017). The executive branch has indicated that the lack of such facilities is due in part to "ongoing and unresolved disputes over the ability of States to license these types of facilities that house both adults and children." Defendant's Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the Flores Settlement Agreement, Flores v. Sessions, No. CV 2:85-4544 DMG, at 17-18 (June 21, 2018) [hereinafter, "Government Motion to Modify"]. For instance, Pennsylvania revoked the Berks County family detention center's license in 2016, but the center continues to operate while the merits of the license revocation are litigated. *See* Jacob Parmuk, *A Controversial Detention Center in Pennsylvania Could be a Model as Trump Looks to Detain Migrant Families Together,* CNBC (July 17, 2018, 3:19 PM), https://www.cnbc.com/2018/07/17/berks-county-pennsylvania-detention-center-could-be-model-for-trump.html.

[5] Defendant's Mem. of Points & Authorities in Supp. of *Ex Parte* Appl. for Relief from the Flores Settlement Agreement at 1, Flores v. Sessions, No. 2:85-CV-85-4544 (C.D. Cal. June 21, 2018).

[6] *See* Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1142-49 (S.D. Cal. 2018); *see infra* "What are the executive branch's options concerning family detention while Flores remains in effect?"

[7] Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435, 29435 (June 25, 2018).

United States.[8] While that motion was pending, in a different lawsuit, *Ms. L. v. ICE*, challenging the government's policy of separating alien children from their parents when family units entered the United States at or in between ports of entry, a district judge issued a preliminary injunction mandating alien family reunification.[9] In response, the government notified the *Flores* court that it would begin detaining alien family units together in DHS facilities until a family's immigration proceedings had been completed.[10] The *Flores* court rejected the government's motion and argument that the preliminary injunction in the *Ms. L.* lawsuit allowed the government to detain family units together in DHS facilities.[11] In the aftermath of this ruling, DHS appears to have returned to its prior practice of generally releasing family units apprehended at the border that demonstrate a credible fear of persecution pending removal proceedings.[12] However, on September 7, 2018, DHS and the Department of Health and Human Services (HHS), the primary agency responsible for the care and custody of unaccompanied alien minors,[13] published a notice of proposed rulemaking, which, once finalized, would allow DHS to detain families together until immigration proceedings were completed.[14] The proposed regulations would create an alternative federal licensing scheme for family residential centers that purports to mimic the standards for the detention of minors set forth in the *Flores* Settlement, which mandates the use of state-licensed facilities only.[15]

This report answers frequently asked legal questions pertaining to the *Flores* Settlement and the settlement's impact on the detention of alien families apprehended at or near the U.S. border. In particular, the report addresses (1) the background of the *Flores* litigation, (2) how the *Flores* Settlement restricts DHS's power to keep families in civil immigration detention, (3) the relationship between the *Ms. L.* litigation and the *Flores* Settlement, (4) the executive branch's policy options for detaining or releasing family units apprehended at or near the U.S. border under the *Flores* Settlement, (5) the September 7, 2018, notice of proposed rulemaking purporting to implement the terms of the *Flores* Settlement, and (6) the extent to which either the executive branch or Congress can override or modify the terms of the *Flores* Settlement.

Statutory Background

Before considering the legal impact of the *Flores* Settlement on DHS's authority to detain family units arriving at the border without valid entry documents, it is useful to review the relevant

[8] *Id*. at 29436.

[9] *Ms. L*., 310 F. Supp. 3d at 1149-50.

[10] Defendants' Notice of Compliance at 4, Flores v. Sessions, No. 2:85-CV-85-4544 (C.D. Cal. June 29, 2018).

[11] *See* Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 5 (C.D. Cal. July 9, 2018).

[12] *See* Nick Miroff et al., *'Deleted families: What went wrong with Trump's family-separation effort*, Wash Post (July 28, 2018) ("Trump's decision to stop separating families . . . has largely brought a return to the status quo at the border, with hundreds of adult migrants released from custody to await immigration hearings while living with their children in the United States."); *Oversight of Immigration Enforcement and Family Reunification Efforts: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (July 31, 2018) (statement of Matthew Albence, Immigration and Customs Enforcement) ("It is important to note that the current laws and court rulings effectively mandate the release of family units . . . into communities across the United States."); *see also infra* "General Statutory Framework for Detention of Aliens at the Border Without Valid Entry Documents."

[13] *See* 6 U.S.C. § 279.

[14] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410).

[15] *Id.*

statutory framework. The INA contains provisions that govern the detention of aliens in general pending the outcome of removal proceedings. Federal statutes also contain specific provisions concerning the detention of unaccompanied alien children (UACs) who are in removal proceedings. However, neither federal law generally, nor the INA, contains provisions that specifically address the detention of family units or accompanied alien minors for immigration enforcement purposes.

General Statutory Framework for Detention of Aliens at the Border Without Valid Entry Documents

Whether they attempt to enter the United States surreptitiously or present themselves at a port of entry, aliens encountered near the border without valid entry documents are generally subject to expedited removal under the INA.[16] Expedited removal is a streamlined process that contemplates removal without a hearing before an immigration judge.[17] Family units, including children arriving with their families, encountered near the border without valid entry documents are subject to expedited removal,[18] but UACs are not subject to this streamlined removal process.[19]

If an alien subject to expedited removal "indicates either an intention to apply for asylum . . . or a fear of persecution," then the immigration officer must refer the alien to an asylum officer for a determination of whether the alien has a credible fear of persecution.[20] Aliens who demonstrate such a fear are referred to standard removal proceedings in immigration court for further consideration of their claims for asylum or other relief.[21]

The statutory framework that governs the detention of aliens in this situation—that is, where an alien has been referred from expedited to standard removal proceedings after showing a credible fear of persecution—is not straightforward, but its general effect is to permit (without requiring) DHS to detain such aliens pending the outcome of the standard proceedings.[22]

- *First*, for aliens referred from expedited to standard removal proceedings following surreptitious entry (i.e., entry or attempted entry into the United States at a place other than a port of entry), the applicable statute is 8 U.S.C. § 1226(a).[23] That statute authorizes DHS to continue detaining the alien, or to release the alien on bond or parole.[24] If DHS decides to keep the alien in detention, the alien is entitled to challenge that decision in a custody

[16] 8 U.S.C. § 1225(b); see generally CRS Legal Sidebar LSB10150, *An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*, by Hillel R. Smith.

[17] *See* 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(B)(iii)(iv).

[18] *See* Flores v. Lynch, 212 F. Supp. 3d 907, 913 (C.D. Cal. 2015) (discussing applicability of expedited removal procedures to family units), *rev'd on other grounds and remanded*, 828 F.3d 898 (9th Cir. 2016); Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 811 (2018).

[19] 8 U.S.C. § 1232(a)(5)(D); see generally CRS Legal Sidebar LSB10150, *An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*, by Hillel R. Smith.

[20] 8 U.S.C. § 1225(b)(1)(A)(ii).

[21] *Id*. § 1225(b)(1)(B)(ii).

[22] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 838 (2018) ("U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) . . . .").

[23] Matter of X-K-, 23 I. & N. Dec. 731, 735-36 (BIA 2005); R.I.L.-R. v. Johnson, 80 F. Supp. 3d 164, 171-72 (D.D.C. 2015).

[24] 8 U.S.C. § 1226(a).

redetermination hearing before an immigration judge.[25] Under the standard that governs both the DHS and immigration judge custody determinations, the alien must demonstrate that release on bond or parole "would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."[26]

- *Second*, for aliens referred from expedited to standard removal proceedings after presenting themselves at a port of entry without valid entry documents, the applicable statute is 8 U.S.C. § 1225(b). That statute provides that such aliens "shall be detained" pending the outcome of the standard removal proceedings in immigration court.[27] But the INA grants DHS authority to release even these aliens on parole.[28] DHS regulations and internal guidance, in turn, instruct DHS officials to make individualized determinations about whether to release such aliens on parole, taking into account factors such as flight risk, danger to the public, and whether the alien has established his identity sufficiently.[29] Recently, in light of evidence that DHS has deviated from this policy in order to detain more aliens for deterrence purposes, two different federal judges in the District of Columbia issued preliminary injunctions ordering DHS to comply with the policy by making individualized parole determinations for aliens detained under § 1225(b).[30]

Some federal case law suggests that constitutional principles may limit DHS's ability to detain aliens pending removal proceedings for general deterrence purposes (that is, for the purpose of deterring other aliens from committing civil immigration violations), notwithstanding the

[25] *Matter of X-K-*, 23 I. & N. Dec. at 735-36; *R.I.L.-R.*, 80 F. Supp. 3d at 171-72.

[26] 8 C.F.R. § 236.1(c)(8); Matter of Fatahi, 26 I. & N. Dec. 791, 793–94 (BIA 2016) ("After the general bond authority provisions were recodified at section 236(a) of the Act, we applied those provisions and the regulation at 8 C.F.R. § 236.1(c)(8) (1999), to hold that an alien who seeks a change in custody status must establish that he does not pose a danger to persons or property and that he is not a flight risk.").

[27] 8 U.S.C. § 1225(b)(1)(B)(ii).

[28] *See id*. § 1182(d)(5)(A).

[29] 8 C.F.R. § 212.5(b); Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* 6-8 (Dec. 8, 2009).

[30] Aracely R. v. Nielsen, -- F. Supp. 3d --, 2018 WL 3243977, at *18, *31 (D.D.C. July 3, 2018) ("Plaintiffs have shown that it is likely that they will succeed on the merits of their claims because they have supplied evidence tending to show that Defendants have considered immigration deterrence when making parole determinations, in contravention of binding agency policy."); Damus v. Nielsen, -- F. Supp. 3d --, 2018 WL 3232515, at *17 (D.D.C. July 2, 2018) ("[T]his Court finds that the asylum-seekers are able to demonstrate that individualized parole determinations are likely no longer par for the course. The Court therefore finds that Plaintiffs have demonstrated a likelihood of success on the merits of their . . . claim that [the DHS] Defendants are not abiding by their own policies and procedures.").

statutory authorization in the INA for detention during the removal process.[31] The Supreme Court has yet to resolve this question, however.[32]

Statutory Framework Governing the Treatment of Unaccompanied Alien Children

Federal statutes set forth a separate framework for the treatment of UACs. The Homeland Security Act of 2002 tasks the Office of Refugee Resettlement (ORR), within the Department of Health and Human Services, with "coordinating and implementing the case and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status."[33] Minors remain subject to DHS custody unless and until they are deemed "unaccompanied."[34] Under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), if DHS learns that a person in its custody is an "unaccompanied alien child" (UAC), it must transfer the UAC to ORR custody within 72 hours (unless the child is from a contiguous country, in which case the UAC generally may be given the option to voluntarily return to that country in lieu of being held by ORR and DHS authorities).[35] An alien minor is considered a UAC if (1) the minor has no parent or legal guardian in the United States, or (2) no parent or legal guardian "is available to provide care and physical custody" in the United States.[36] Once a UAC

[31] *See* R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 187-90 (D. D.C. 2015) (opining that detention of alien families seeking asylum pending the outcome of their standard removal proceedings, for the purpose of deterring other foreign nationals from coming to the United States in pursuit of the same relief, would raise serious due process concerns); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *but cf.* Demore v. Kim, 538 U.S. 510, 531 (2003) ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings."). For a discussion of the interplay between *Zadvydas* and *Demore*, see CRS Legal Sidebar LSB10112, *Can Aliens in Immigration Proceedings Be Detained Indefinitely? High Court Rules on Statutory, but not Constitutional Authority*, by Hillel R. Smith ("The relationship between the *Zadvydas* and *Demore* rulings has been open to debate. Some have construed the rulings to mean that the standards for mandatory, indefinite detention *prior to* a final order of removal differ from those governing detention *after* a final order is issued. However, several lower courts have suggested that mandatory detention pending a final order of removal may, if 'prolonged,' raise similar constitutional issues as those raised after a final order.").

[32] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (not reaching question whether prolonged detention of aliens pending removal proceedings without stringent procedural protections, such as a requirement that the government justify continued detention by clear and convincing evidence in recurring bond hearings, would violate due process).

[33] 6 U.S.C. § 279(a), (b).

[34] *See id*.; 8 U.S.C. § 1232(b)(1).

[35] 8 U.S.C. § 1232(a)(2), (b).

[36] 6 U.S.C. § 279(g)(2)(C). Until recently, the Trump Administration's practice apparently had been that, if an alien minor was separated from the parent who brought the minor to the border (because of a decision to prosecute the parent for illegal entry or for other reasons), the minor was treated as a UAC and transferred to the custody of ORR, which then began seeking a suitable placement for the child. *See* Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1139-40 (S.D. Cal. 2018); CRS Legal Sidebar LSB10150, *An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*, by Hillel R. Smith ("The UAC typically must be transferred to ORR within 72 hours after DHS determines that the child is a UAC. Following transfer to ORR, the agency generally must place the UAC 'in the least restrictive setting that is in the best interest of the child."). This practice, at least in some cases, appears to have caused prolonged periods of separation and child placements that were hundreds of miles away from the detained parent. *Ms. L*, 310 F. Supp. 3d at 1137. Moreover, "[s]ome parents were deported at separate times and from different locations than their children." *Id*. On June 26, 2018, however, a federal district court issued a preliminary injunction ordering the federal government to "promptly reunify these family members," in most circumstances, following separations caused by illegal entry prosecution or other executive branch decisions. *Id*. at 1145.

is in ORR custody, ORR must "promptly place[] [the child] in the least restrictive setting that is in the best interest of the child."[37] As noted above, UACs are not subject to expedited removal.[38]

What was the underlying *Flores* lawsuit about?

The *Flores* lawsuit began in 1985, reached a settlement in 1997, and remains under the supervision of a U.S. district judge in the Central District of California until the federal government promulgates final regulations implementing the 1997 agreement.[39] Initially, the lawsuit involved a class of unaccompanied alien minors who were apprehended at or near the U.S. border and then detained pending removal proceedings.[40] At that time, before the enactment of the Homeland Security Act or the TVPRA, there was no national policy addressing the care for unaccompanied alien minors.[41] One former Immigration and Naturalization Service (INS) facility in California had adopted a policy of releasing apprehended alien minors only to "a parent or lawful guardian" except in "unusual and extraordinary cases."[42] Several detainees filed a lawsuit on behalf of a class of all aliens under the age of 18 who were detained at that facility because a parent or legal guardian did not personally appear to take custody of the child.[43] The lawsuit challenged the conditions of confinement at the INS facility and also contended that the release policy violated the Due Process Clause of the Fifth Amendment.[44] By 1987, the parties had settled the claims related to the conditions of confinement, but the constitutional challenge to the release policy continued to be litigated.[45]

Meanwhile, the INS promulgated a rule governing the detention and release of alien minors (accompanied and unaccompanied) at *all* INS facilities.[46] That rule authorized additional adult relatives (other than a parent or lawful guardian) to whom alien minors could be released from custody.[47] The *Flores* plaintiffs maintained the lawsuit by challenging the new INS policy under the Due Process Clause, arguing that the government had violated their fundamental right to be released to unrelated adults.[48] The litigation ultimately made its way to the Supreme Court. In a 1993 ruling—nearly a decade after the litigation's start—the Supreme Court upheld the constitutional validity of the INS policy on its face.[49] In doing so, the Court concluded that the detained alien minors had no constitutional right to be released from government custody into the custody of a "willing-and-able private custodian" when a parent, legal guardian, or close relative

[37] 8 U.S.C. § 1232(c)(2)(A); *see generally*, Flores v. Sessions, 862 F.3d 863, 870-71 (9th Cir. 2017).

[38] *See supra* note 18.

[39] Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017).

[40] Reno v. Flores, 507 U.S. 292, 294 (1993).

[41] *Id*. at 295 (describing the care of unaccompanied alien juveniles as having been "apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations").

[42] *Id*. at 296.

[43] *Id*.

[44] *Id*. The district court also ruled in favor of the class's claim that the policy, which treated alien minors in deportation proceedings differently from those in exclusion proceedings, violated the class members' rights to equal protection. *Id*.

[45] *Id*.; Stipulated Settlement Agreement at 3, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

[46] Detention and Release of Juveniles, 53 Fed. Reg. 17449, 17449 to 17450 (May 17, 1988).

[47] *Id*.

[48] *Reno*, 507 U.S. at 298, 302; Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1006 (9th Cir. 1990).

[49] *Reno*, 507 U.S. at 315.

is unavailable.[50] After the case was remanded to the district court for further proceedings, the parties continued to litigate whether the INS was complying with the earlier settlement agreement, in which the government had agreed to house alien minors in facilities meeting certain minimum standards.[51] The parties in the *Flores* litigation eventually reached a settlement agreement in 1997, a modified version of which remains in force today.[52]

What does the *Flores* Settlement provide?

The *Flores* Settlement establishes a "nationwide policy for the detention, release, and treatment of minors" in immigration custody.[53] The settlement agreement announces a "general policy favoring release" and requires the government to place apprehended alien minors in "the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and immigration courts and to protect the minor's well-being and that of others."[54] The settlement agreement further elaborates that when alien minors are first arrested by immigration authorities, those minors may be detained only in "safe and sanitary" facilities.[55] Within a few days, subject to exception, federal authorities must transfer the detained alien minor to the custody of a qualifying adult or a non-secure facility that is licensed by the state to provide residential, group, or foster care services for dependent children.[56]

The *Flores* Settlement binds the parties until the federal government promulgates final regulations implementing the agreement.[57] However, to date, no implementing regulations have been promulgated.[58] Additionally, although the litigation initially stemmed from the detention of unaccompanied alien minors, the *Flores* Settlement defines a "minor," subject to certain exceptions, as *any* person under age 18 who is detained by immigration authorities.[59] Accordingly, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) later held that the *Flores* Settlement applies to both accompanied *and* unaccompanied minors in immigration custody.[60]

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[50] *Id*. At 302-03. Whether the alien minors had a fundamental right to be released to a parent, legal guardian, or close relative was not before the Court. *Id*. at 302.

[51] Stipulated Settlement Agreement, *supra* note 44, at 3.

[52] *Id.* at 1; Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017). In a 2001 modification to the settlement agreement, the parties stipulated that the agreement would terminate 45 days after the government publishes final regulations implementing the terms of the agreement. Stipulation Extending Settlement Agreement at 1, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Dec. 7, 2001).

[53] Stipulated Settlement Agreement, *supra* note 44, at ¶ 9.

[54] *Id.* at ¶ 11.

[55] *Id*. at ¶ 12.

[56] *Id.* at 4-5, ¶¶ 12.A, 19.

[57] *See* Stipulation Extending the Settlement Agreement and for Other Purposes, and Order Thereon, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. December 7, 2001); Flores v. Sessions, 862 F.3d 863, 869 (9th Cir. 2017) ("The *Flores* Settlement was intended as a temporary measure, but in 2001 the parties stipulated that it would remain in effect until days following defendants' publication of final regulations" governing the treatment of detained, minors. It has now been twenty years since the Settlement first went into effect, and the government has not published any such rules or regulations. Thus, pursuant to the 2001 agreement, the Settlement continues to govern those agencies that now carry out the functions of the former INS.").

[58] *Flores*, 862 F.3d at 869.

[59] Stipulated Settlement Agreement, *supra* note 44, at ¶ 4.

[60] Flores v. Lynch, 828 F.3d 898, 905-08 (9th Cir. 2016).

How does the *Flores* Settlement restrict DHS's power to keep families in civil immigration detention?

The *Flores* Settlement qualifies the authority that DHS possesses under the INA and other statutes to detain alien minors—whether accompanied or unaccompanied—pending the outcome of removal proceedings. With regard to minors meeting the statutory definition for UACs, Congress has enacted statutes regulating their care and custody and providing protections that to some extent displace the *Flores* Settlement as the operative body of law.[61] But Congress has enacted no such laws with regard to *accompanied* alien minors or alien family units. Accordingly, much of the current impact of the *Flores* Settlement comes in the manner that it restricts DHS's authority to detain accompanied alien minors.

As mentioned earlier, the *Flores* Settlement establishes a "nationwide policy for the detention, release, and treatment of minors" in the custody of the former INS.[62] The core of the *Flores* Settlement favors the release of alien minors and requires that those alien minors who are not released from government custody be housed in non-secure, state-licensed facilities.[63] Subject to exceptions described below, the government must do so within three days if the minor is apprehended in a district where space is available at a licensed facility or, otherwise, within five days. However, as of the date of this report, there presently do not appear to be any qualifying facilities that can house alien minors *and* their parents.[64]

Under the *Flores* Settlement's terms, alien minors' placement in a non-secure, licensed facility may be delayed when there is an "influx of minors into the United States."[65] An influx of minors exists when more than 130 minors are eligible for placement at a licensed facility.[66] When there is an influx, placements must be made "as expeditiously as possible."[67] The effect of these provisions, as interpreted by the district court overseeing the *Flores* Settlement, has allowed DHS to detain some family units for longer than five days during "influxes."[68]

There is no fixed amount of time for what amounts to "expeditious" placement during an influx, but the district court that has continued to oversee the settlement has provided some guidance. For

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[61] *See Flores*, 862 F.3d at 870 (explaining that the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008 are laws "directly addressing the care and custody of unaccompanied minors.").

[62] Stipulated Settlement Agreement, *supra* note 44, at ¶ 9.

[63] *Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

[64] "ICE currently operates three family residential centers: the Karnes County Residential Center ('Karnes'); the South Texas Family Residential Center ('Dilley'); and the Berks Family Residential Center ('Berks'). Plaintiffs continue to present evidence that these family residential centers are unlicensed. Defendants do not dispute that the family residential centers continue to be unlicensed." Order Re Plaintiffs' Motion to Enforce and Appoint a Special Monitor at 28, Flores v. Sessions, No. 2:85-CV-04544 (C.D. Cal. June 27, 2017) (internal citations, quotation marks, and parentheticals omitted); *see also* Parmuk, *supra* note 4 ("The Pennsylvania family detention center is the only one of the three in the U.S. that ever had a state license. The state revoked its license in 2016, but the detention center continues to operate amid a court fight over the license.").

[65] Stipulated Settlement Agreement, *supra* note 44, at ¶ 12.

[66] *Id*. at ¶ 12.

[67] *Id*.

[68] *See* Order Re Response to Order to Show Cause at 10, Flores v. Lynch, No. 2:85-CV-04544 (C. D. Cal. Aug. 21, 2015).

instance, time extensions must be "de minimis" (i.e., minimal) and made based on individualized circumstances.[69] In other words, during an influx the government likely cannot announce a blanket extension of time for placements of particular groups. In 2015, for example, the government advised the *Flores* court that, for alien families subject to expedited removal but seeking asylum, the government would need to detain those families for an average of 20 days to complete the credible fear interview and processing.[70] The court opined that "if 20 days is as fast as [the government], in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear," then a 20-day extension "may" be expeditious under the terms of the settlement, "especially if the brief extension of time will permit the DHS to keep the family unit together."[71] But the court did not place its imprimatur on 20 days for all families seeking asylum. Further, when class members attested to being detained for periods ranging from 5 weeks to 13 months, the court concluded that the government was in substantial noncompliance with the *Flores* Settlement.[72] The requirement for expeditious release remains the law of the land because the district court rejected the government's motion to amend the *Flores* Settlement.[73]

In sum, the reason alien minors and their parents generally cannot remain together for more than brief periods *while in* immigration detention is because the *Flores* Settlement requires minors to be placed in non-secure, state-licensed facilities within days or (in individualized circumstances during an influx) weeks of their apprehension, yet there do not appear to be any facilities that both comply with the *Flores*-required conditions *and* authorize adults to be housed in the facility.[74] Exactly how long DHS may detain alien minors in a temporary, nonqualifying facility during an influx remains unclear. But the overseeing district court has opined that 20 days may be reasonable under certain individualized circumstances. Having said that, an exception exists if an alien parent affirmatively waives a child's right under the *Flores* Settlement to be detained in a non-secure, state-licensed facility.[75]

How does *Ms. L. v. ICE* relate to the *Flores* Settlement?

The government has unsuccessfully argued in the *Flores* litigation that it has been absolved of its obligation to house alien minors in non-secure, state-licensed facilities as a consequence of the preliminary injunction entered in the *Ms. L.* litigation.[76] In *Ms. L.*, two asylum seekers brought a class action lawsuit claiming that their substantive due process rights had been violated by the government's practice of separating families entering the United States at the border—both when lawfully seeking admission at a port of entry and when illegally crossing into the United States

[69] *Id*. at 10-11.

[70] *Id*. at 9.

[71] *Id*. at 10.

[72] Flores v. Sessions, No. 2:85-CV-04544, 2017 WL 6060252, at *20-21 (C. D. Cal. June 27, 2017).

[73] Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544 (C.D. Cal. July 9, 2018).

[74] *See supra* note 63.

[75] *See* Order Denying Defendants' *Ex Parte* Application, *supra* note 72, at 6.

[76] *See id*. at 5-7. For more information on the Ms. L. litigation, see CRS Legal Sidebar LSB10180, *Family Separation at the Border and the Ms. L. Litigation*, by Sarah Herman Peck.

between ports of entry.[77] The district court certified a class generally composed of all alien adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody.[78] Then the court imposed a preliminary injunction against the government, which, as relevant here, orders it to refrain from detaining in DHS custody class members without their minor children and to reunite all class members with their minor children.[79] The injunction required reunification within 14 days for children under age five, and within 30 days for older children.[80]

In *Flores*, the government alerted the district court to the *Ms. L.* preliminary injunction and explained that, to comply with the injunction, it intended to detain families together during the entirety of immigration proceedings.[81] The government asserted that the *Flores* Settlement permits alien children to remain in DHS detention alongside their parents because the agreement requires the release of minors "without *unnecessary* delay," and the *Ms. L.* injunction, the government said, makes delay *necessary*.[82]

The *Flores* court rejected the government's contention that it could indefinitely detain alien minors in secure, unlicensed facilities and still comply with the terms of the *Flores* Settlement.[83] The court characterized the government's submission as a "strained construction" of the *Flores* Settlement—one that renders many of its protective requirements meaningless.[84] Nor, the court added, does the injunction make it impossible to comply with both court orders—the *Ms. L.* injunction and the *Flores* Settlement—because, the court explained, "[a]bsolutely nothing prevents [the government] from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion."[85]

Consequently, as children of class members were reunited with their detained parents in unlicensed facilities, the *Flores* clock, so to speak, began running. Once the clock started, the government faced the requirement to "expeditiously"—generally viewed as a 20-day window—place each family in a *Flores*-qualifying detention facility or release the family.[86] In practice, because of a lack of qualifying bed space, the government has been releasing families.[87]

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[77] *See* Amended Complaint for Declaratory & Injunctive Relief with Class Action Allegations, Ms. L. v. ICE, No. 18-cv-00428 (S.D. Cal. Mar. 9, 2018).

[78] Order Granting in Part Plaintiffs' Motion for Class Certification at 17, Ms. L. v. ICE, No. 18-cv-00428 (S.D. Cal. June 26, 2018). That class does not include, however, an alien parent who has been determined to be unfit or present a danger to the child, who has criminal history or a contagious disease, who is within the interior of the United States, or is detained with the parent's minor child as a result of the executive order. *Id.* at 17 & n.10.

[79] Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

[80] *Id*.

[81] Defendants' Notice of Compliance, *supra* note 10, at 1. This policy would apply to aliens apprehended at *and* in between ports of entry. *Id*.

[82] *Id*. at 5 (quoting *Flores* Settlement) (emphasis in original).

[83] Order Denying Defendant's' *Ex Parte* Application, *supra* note 72, at 5.

[84] *Id*.

[85] *Id*.

[86] *See supra* notes 64-72 and accompanying text.

[87] *See* Ron Nixon, Erica L. Green, and Michael D. Shear, *Border Officials Suspend Handing over Migrant Families to Prosecutors*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html.

What are the executive branch's options concerning family detention while *Flores* remains in effect?

With the *Flores* Settlement in place, the executive branch maintains that it has two options regarding the detention of arriving family units that demonstrate a credible fear of persecution pending the outcome of their removal proceedings in immigration court: (1) generally release family units; or (2) generally separate family units by keeping the parents in detention and releasing the children only.[88] The executive branch appears to have resumed implementing the first option after the district court in *Flores* rejected the argument that it could detain family units together in DHS facilities under *Ms. L*.[89] As for the second option—to separate families by detaining parents only—doubts exist as to whether it is legally viable. The "zero-tolerance policy" for prosecuting illegal entry offenses, announced by Attorney General Sessions in April 2018,[90] was one manner of implementing this option, at least for family units that entered the country surreptitiously: when parents were referred for criminal prosecution for illegal entry or other criminal violations, the children were deemed UACs and transferred to ORR custody.[91] The June 20, 2018, executive order ended this practice,[92] and the district court in *Ms. L*. concluded that the practice likely violated due process by separating families without a plan for their reunification following the conclusion of criminal proceedings.[93] Thus, to effect the release of

[88] Government Motion to Modify, *supra* note 4, at 1-2; Defendant's Notice of Compliance, *supra* note 10, at 1 ("[T]he Flores Agreement—as interpreted by this Court and the Ninth Circuit—put the government in the difficult position of having to separate families if it decides it should detain parents for immigration purposes.").

[89] *See* Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 5 (C.D. Cal. July 9, 2018) ("Defendants . . . have not shown that *Ms. L* required [them] to violate the *Flores* Agreement or that compliance with the *Ms. L* Order would 'directly conflict' with the *Flores* Agreement's release and state licensure provisions. Absolutely nothing prevents Defendants from reconsidering their current blanket policy of family detention . . . ."); Nick Miroff et al., *'Deleted families: What went wrong with Trump's family-separation effort*, Wash Post (July 28, 2018) ("Trump's decision to stop separating families . . . has largely brought a return to the status quo at the border, with hundreds of adult migrants released from custody to await immigration hearings while living with their children in the United States. . . .With families once more largely exempted from detention, agents have grudgingly reverted to the 'catch and release' system that Trump promised to end."). Before the "zero tolerance" policy began in May 2018, the executive branch also generally released family units, although for a period in 2014 and 2015 the Obama Administration pursued a policy of detaining most arriving family units in DHS facilities under the unsuccessful argument that the *Flores* Settlement should be interpreted to permit such detention. Flores v. Lynch, 828 F.3d 898, 904 (9th Cir. 2016); *see also* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 174–75 (D.D.C. 2015).

[90] Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download.

[91] Dep't of Homeland Security, Press Release, *Myth vs. Fact: DHS Zero-Tolerance Policy*, at 3 (June 18, 2018) ("If an adult is referred for criminal prosecution, the adult will be transferred to U.S. Marshals Service custody and any children will be classified as an unaccompanied alien child and transferred to the Department of Health and Human Services custody."), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy) [hereinafter, "DHS *Myth v. Fact* Press Release"].

[92] Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435, 29435 (June 25, 2018) ("The Secretary of Homeland Security (Secretary), shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members.").

[93] Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) ("[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. . . . The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.") (emphasis in

children without their parents through a general policy of criminally prosecuting the parents does not appear to be a legally viable policy for the executive branch because due process may require that the families be reunited following the criminal proceedings.[94] The Department of Justice may decide to prosecute parents who enter the country illegally, but the executive branch as a whole likely cannot use prosecution to separate families for prolonged periods.[95]

Aside from criminal prosecution, another way for the executive branch to pursue the second option would be to keep parents in DHS civil immigration detention while releasing children to other relatives or guardians. The Ninth Circuit has held that the *Flores* Settlement does not require DHS to release parents along with their children.[96] The executive branch has argued that this holding "specifically envisioned separating parents from their children under the terms of the [*Flores*] Agreement."[97] Nonetheless, it does not appear that DHS has ever pursued a general policy of releasing children without their parents from civil immigration detention.[98] Such a policy, in any event, would likely face practical and legal barriers. On the practical front, DHS would need to locate other relatives or licensed programs to accept the children while the parents remained in detention.[99] On the legal front, the *Ms. L.* court has held that a "government practice of family separation without a determination that the parent was unfit or presented a danger to the child" likely violates due process, except to the extent that the family separation occurs during pending criminal proceedings.[100] Under this standard, it is not clear that DHS could constitutionally create family separation by continuing to detain, in civil immigration detention, alien parents whose children were released under the *Flores* Settlement.[101]

A conceivable third option would be for the executive branch to create licensed family detention centers that comply with the *Flores* Settlement and detain families together in those centers. The executive branch apparently does not count this as a feasible option, however, and has said that "ongoing and unresolved disputes" exist "over the ability of States to license these types of facilities that house both adults and children."[102] Even if such licensed facilities existed, a blanket policy of detaining families together in them arguably might still violate the *Flores* Settlement,

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original).

[94] *See id*.

[95] *See id*. at 1145 ("Th[e] practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim.").

[96] Flores v. Lynch, 828 F.3d 898, 908–09 (9th Cir. 2016) ("[P]arents were not plaintiffs in the *Flores* action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights for parents.").

[97] Government Motion to Modify, *supra* note 4, at 1-2.

[98] *See, e.g.*, DHS *Myth v. Fact* Press Release, *supra* note 91 ("DHS generally releases families within 20 days. This creates a 'get out of jail free' card for illegal alien families and encourages groups of illegal aliens to pose as families hoping to take advantage of that loophole.").

[99] *See Flores v. Lynch*, 828 F.3d at 903 (listing the categories of individuals and programs to which minors may be released under the *Flores* Settlement).

[100] Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018).

[101] *See id*.

[102] Government Motion to Modify, *supra* note 4 at 17-18; *see also* Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 6 (C.D. Cal. July 9, 2018) ("Defendants have known for *years* that there is 'no state licensing readily available for facilities that house both adults and children.'") (emphasis in original) (quoting DOJ brief dated Feb. 27, 2015); *but see* Bunikyte, ex rel. Bunikiene v. Chertoff, No. A-07-CA-164-SS, 2007 WL 1074070, at *8 (W.D. Tex. Apr. 9, 2007) ("Plaintiffs point out that Texas does in fact provide licensing for residential child care to emergency shelters and other organizations offering residential care to both adults and children. *See* Tex. Admin. Code § 748.1901 *et seq.* ('The rules in this subchapter apply to operations that provide care for both children and adults.')").

which favors release over detention in qualifying facilities.[103] Also, apart from the *Flores* Settlement, at least one federal district court has concluded that the detention of arriving family units pending the outcome of their removal proceedings in immigration court would likely violate due process, if undertaken for the purpose of deterring future arrivals.[104]

In summary, the only clearly viable option under current law for the treatment of family units that demonstrate a credible fear of persecution is for the executive branch generally to release the families pending their removal proceedings in immigration court.

Does the executive branch have the authority to alter the *Flores* Settlement?

The executive branch may modify or terminate its obligations under the *Flores* Settlement through three primary avenues: (1) by reaching an agreement with the plaintiffs;[105] (2) by prevailing on a motion to modify the settlement;[106] or (3) by terminating the agreement through promulgation of "final regulations implementing th[e] Agreement," pursuant to the terms of the settlement agreement (as interpreted by the district court).[107]

Government Motion to Modify

On June 21, 2018, the executive branch began pursuing the second option by asking the *Flores* district court to approve changes to the settlement agreement that would exempt accompanied minors from the general release policy and make the state-licensure requirement inapplicable to ICE family residential facilities.[108] These modifications would allow DHS to detain accompanied alien minors with their families in ICE family detention centers for more than brief periods without violating the *Flores* Settlement. However, the district court rejected the government's motion on July 9, 2018.[109] The government has filed an appeal to the Ninth Circuit.[110]

On appeal, the government would appear to have limited prospects for success under current circuit case law. A party seeking judicial modification of a settlement agreement must establish that "'a significant change in circumstances warrants revision of the decree.'"[111] The Ninth Circuit has applied this standard to the *Flores* Settlement on two occasions in recent years. In 2016, the Ninth Circuit held that the "surge in family units crossing the Southwest border" during

[103] *See Flores v. Lynch*, 828 F.3d at 901 ("The Settlement creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.").

[104] *See* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 187-90 (D.D.C. 2015).

[105] *See, e.g.*, Flores v. Lynch, 828 F.3d 898, 903 (9th Cir. 2016) (noting that the parties stipulated an amendment to the consent decree's termination provisions in 2001).

[106] *See* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 379 (1992) (holding that consent decrees are subject to modification under Federal Rule of Civil Procedure 60(b)).

[107] Flores v. Lynch, 828 F.3d 898, 903 (9th Cir. 2016).

[108] Government Motion to Modify, *supra* note 4, at 4.

[109] Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 6 (C.D. Cal. July 9, 2018).

[110] Notice of Appeal, Flores v. Sessions, No. 2:85-CV-04544 (C.D. Cal. Sept. 6, 2018).

[111] *Flores v. Lynch*, 828 F.3d at 909 (quoting Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992)). If the party seeking modification meets this standard, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id*.

the migrant crisis that began in 2014 did not constitute a significant change in circumstances and thus did not justify modifying the settlement agreement so that it no longer applied to accompanied alien minors.[112] The Ninth Circuit reasoned that the *Flores* Settlement anticipated that such an influx could occur and provided the government added flexibility in responding under the "as expeditiously as possible" standard.[113] In 2017, the Ninth Circuit held that developments in the law after the *Flores* Settlement went into effect in 1997—in particular, the enactment of provisions governing the care and custody of UACs in the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008—did not release the government from its obligations under the decree to provide UACs in removal proceedings with bond hearings.[114] The two statutes, the Ninth Circuit held, did not constitute a "significant change in circumstances" for modification purposes because they did not render compliance with the terms of the consent decree "impermissible."[115]

The thrust of the government's argument in its most recent motion is that a "worsening influx of families unlawfully entering the United States at the southwest border" constitutes a significant change in circumstances that justifies modifying the *Flores* Settlement to allow accompanied minors to remain detained with their families in unlicensed ICE facilities.[116] This is similar to the argument that the Ninth Circuit rejected in the 2016 ruling—that a "surge in family units crossing the Southwest border" justified modification of the consent decree.[117] Indeed, the district court concluded that the most recent government motion is but "a thinly veiled motion for reconsideration" of the argument that the Ninth Circuit rejected in 2016.[118] In the most recent motion, the government argued that "the number of family units crossing the border illegally has increased . . . by 30% since the 2014 influx" and that, notwithstanding the 2016 decision, "nothing suggests that the parties anticipated that this increase would consist largely of children who were accompanied by their parents."[119] Nonetheless, in light of the Ninth Circuit's holding that influxes *do not* justify modification because they were anticipated by, and addressed in, provisions of the *Flores* Settlement, the government's best prospects of success on the motion might be on eventual review at the Supreme Court, which would not be bound by the Ninth Circuit's 2016 opinion.[120]

DHS/HHS Proposed Regulations

On September 7, 2018, the DHS and HHS published a notice of proposed rulemaking for the "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" to replace the *Flores* Settlement.[121] According to the parties' 2001 stipulation, the

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[112] *Id*. at 910.

[113] *Flores v. Lynch*, 828 F.3d at 910.

[114] Flores v. Sessions, 862 F.3d 863, 881 (9th Cir. 2017) ("We hold that the statutes have not terminated the *Flores* Settlement's bond-hearing requirement for unaccompanied minors.").

[115] *Id*.

[116] Government Motion to Modify, *supra* note 4, at 11.

[117] *Flores v. Lynch*, 828 F.3d at 910.

[118] Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, Flores v. Sessions, No. 2:85-CV-04544, at 1 (C.D. Cal. July 9, 2018).

[119] Government Motion to Modify, *supra* note 4, at 13-14.

[120] *See* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 384 (1992) ("Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous.").

[121] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410). It is the government's position that the rules, once

Flores Settlement will terminate 45 days after the government publishes final regulations implementing the agreement.[122] Likely, one or both parties to the agreement will seek a court determination as to whether the final rules implement the settlement agreement. It is unclear whether the district court overseeing the settlement would conclude that the rules, at least as proposed, constitute "final regulations implementing th[e] Agreement" within the meaning of the settlement's termination provision.[123]

Principally, the proposed regulations provide standards for DHS care and custody of alien minors who were *accompanied* upon entry and for HHS care and custody of *unaccompanied* children.[124] In doing so, the regulations would separately define "minor" and "unaccompanied alien child." "Minor" will be defined as any alien who is under 18 years old and has not been emancipated or incarcerated for a criminal offense for which the alien had been tried as an adult.[125] "Unaccompanied Alien Child," like the statutory definition, will be defined as an alien without lawful immigration status, who is under the age of 18 years old and who has no parent or legal guardian in the United States or has no parent or legal guardian in the United States that is available to provide care and physical custody.[126]

The proposed regulations diverge from the original agreement in two notable ways. First, the rules are written to conform to two intervening statutes—(1) The Homeland Security Act of 2002, which transferred from the former INS to ORR the function of caring for UACs, and (2) the TVPRA, which provides placement and custody standards for UACs in ORR's custody.[127] Second, and perhaps more likely to generate legal dispute, the proposed rules seek to create a federal alternative to the *Flores* Settlement's requirement that facilities be state-licensed, which the government views as an impediment to detaining families together.[128] The proposed rules specify that any unreleased alien minor who is not a UAC will remain in DHS custody in a non-secure, licensed facility.[129] If an ICE family detention center is situated in a locality that does not have a licensing scheme that would allow for family detention, a family detention center would still be considered "licensed" under the proposed regulations if DHS hires a third party with "relevant audit experience" to ensure compliance with ICE-established standards for family residential centers.[130] The proposed regulations outline certain minimal provisions that ICE must include when establishing its standards, including arrangements for living accommodations, food, clothing, medical care, counseling, individualized needs assessments, education, recreation,

finalized, would terminate the *Flores* Settlement. *Id*.

[122] Stipulation Extending Settlement Agreement, *supra* note 51, at 1.

[123] Flores v. Lynch, 828 F.3d 898, 903, 905 (9th Cir. 2016) ("The [Flores] Settlement is a consent decree, which, 'like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.'") (quoting United States v. Asarco Inc., 430 F.3d 972, 980 (9th Cir.2005)).

[124] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,495.

[125] *Id*. at 45,525.

[126] *Compare Id*. at 45,525, 45,530, *with* 6 U.S.C. § 279(g)(2).

[127] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,487; *see also* 8 U.S.C. § 1232 (TVPRA); P.L. 107-296, 116 Stat. 2135 (HSA).

[128] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,493 ("[T]he practical implications of the [*Flores* Settlement], and in particular the lack of state licensing for [family residential centers] and the release requirements for minors, have effectively prevented the Government from using family detention for more than a limited period of time, and in turn often led to the release of families.").

[129] *Id*. at 45,526.

[130] *Id*. at 45,497, 45,525.

religious services, and information about legal services, among others.[131] These minimal standards are not identical to the minimal standards for licensed programs outlined in the *Flores* Settlement, and thus an argument could be made that the proposed regulations do not "implement" the settlement.[132] For instance, according to the *Flores* Settlement—but not the proposed regulations—a licensing program must maintain discipline standards and client records.[133]

More generally, it might be argued that the proposed regulations replace *Flores*'s general policy favoring release of minors with a policy that favors maintaining family unity, even if that requires detaining minors for longer periods in a family residential center.[134] The proposed regulations do afford DHS officials some discretion to parole alien children in custody, and further indicate that a "[m]inor may be released with an accompanying parent or legal guardian who is in detention."[135] But the *Federal Register* notice for the proposed regulations indicates that "[t]o the extent that [the *Flores* Settlement] has been interpreted to require . . . [the parole of juveniles] during expedited removal proceedings, this regulation is intended to permit detention . . . in order to avoid the need to separate or release families in these circumstances."[136] If a court accepts the argument that the proposed regulations, once finalized, do not implement the terms of the *Flores* Settlement, the court would probably hold that the regulations do not satisfy the settlement agreement's termination provision, leaving the agreement in effect.[137]

Does Congress have the authority to override or alter the *Flores* Settlement?

If Congress enacts new statutes that directly conflict with provisions of the *Flores* Settlement—such that the provisions of the settlement become "impermissible" under the law—then the executive branch could move the district court to modify the decree in conformity with the new statutes.[138] For example, the *Flores* Settlement establishes a general policy that minors in removal

[131] *Id*. at 45,527.

[132] *Compare id*., *with* Stipulated Settlement Agreement, *supra* note 45, at Exhibit 1; *see also* Flores v. Lynch, 828 F.3d 898, 905 (9th Cir. 2016) (explaining that principles of contract interpretation govern the interpretation of the *Flores* Settlement).

[133] *Compare* Stipulated Settlement Agreement, *supra* note 45, at Exhibit 1 (establishing that "[p]rogram rules and discipline standards shall be formulated" and that "[p]rograms shall develop, maintain and safeguard individual client case records"), *with* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,527, 45,533 (imposing minimum discipline standard and client record requirements on UAC facilities but not family facilities).

[134] *Compare* Stipulated Settlement Agreement, *supra* note 45, at ¶ 14 ("Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay, to [a parent, legal guardian, adult relative, or other appropriate placement] . . . ."), *with* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,526 (providing that "DHS will transfer a minor who is not a UAC . . . to a licensed facility as defined in paragraph (b)(9) of this section" but not creating presumption of release).

[135] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83. Fed. Reg. at 45,525 (proposed 8 C.F.R. § 212.5(b)(3)).

[136] *Id.* at 45,494 n.8 (also observing that parole of such aliens may nonetheless be permitted if certain other factors are met) (citation omitted).

[137] *See Flores*, 828 F.3d at 903, 905.

[138] Flores v. Sessions, 862 F.3d 863, 874 (9th Cir. 2017).

proceedings should be released from custody.[139] In contrast, the Protect Kids and Parents Act (S. 3091), as introduced in the Senate on June 19, 2018, would provide that "[a] child shall remain in the custody of and be detained in the same facility as the Asylum Applicant who is the child's parent or legal guardian during the pendency of the Asylum Applicant's asylum or withholding of removal proceedings."[140] If the bill becomes law, it likely would enable the executive branch to obtain modification of the settlement's general release policy on the ground that the policy is "impermissible" under the new law.[141] Other bills introduced in the 115th Congress may have similar consequences.[142] Constitutional restrictions would remain a potential obstacle to such a government motion, however. For example, if the district court determines that new statutory provisions are unconstitutional as applied to alien minors accompanied by their parents in immigration detention pending formal removal proceedings, the court likely would not grant a motion to conform the *Flores* Settlement to the new statute.[143] Any district court holding to this effect—which would implicate unsettled issues noted above about the constitutionality of prolonged immigration detention[144]—would be subject to de novo review on appeal.[145]

Author Information

Ben Harrington
Legislative Attorney

[139] Stipulated Settlement Agreement, *supra* note 44, at 10.

[140] Protect Kids and Parents Act, S. 3091, 115th Cong. § 2 (as introduced in the Senate, June 19, 2018) (providing that "[a] child shall remain in the custody of and be detained in the same facility as the Asylum Applicant who is the child's parent or legal guardian during the pendency of the Asylum Applicant's asylum or withholding of removal proceedings"); *see also* Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. tit. III, § 3102(a) (as introduced in the House, June 19, 2018) ("There exists no presumption that an alien child who is not an unaccompanied alien child should not be detained, and all such determinations shall be in the discretion of the Secretary of Homeland Security.").

[141] *See Flores v. Sessions*, 862 F.3d at 874.

[142] *E.g.*, H.R. 6173, 115th Cong. § 1 (as introduced in the House, June 21, 2018) ("There exists no presumption that an alien child who is not an unaccompanied alien child should not be detained, and all such determinations shall be in the discretion of the Secretary of Homeland Security."); Keep Families Together and Enforce the Law Act, H.R. 6181, 115th Cong. § 2 (as introduced in the House on June 21, 2018) (rendering the *Flores* Settlement inapplicable to accompanied minors arriving at or apprehended near the border).

[143] *See* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 391 (1992) ("[A] modification must not create or perpetuate a constitutional violation."); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 187-90 (D.D.C. 2015) (opining that indefinite detention of alien families seeking asylum, for the purpose of deterring other foreign nationals from coming to the United States in pursuit of the same relief, would raise serious due process concerns).

[144] *See supra* notes 30 & 31.

[145] *See* Flores v. Lynch, 828 F.3d 905, 910 (9th Cir. 2016).

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