No. 15-56434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

LORETTA E. LYNCH, Attorney General of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04544-DMG-AGR

RESPONSE TO MOTION PURSUANT TO CIRCUIT RULES 27-12 AND 34-3 TO EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL

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PLAINTIFFS-APPELLEES' RESPONSE TO MOTION PURSUANT TO CIRCUIT RULES 27-12 AND 34-3 TO EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL

Pursuant to Ninth Circuit Rules 27-12 and 34-3, Defendants-Appellants ("Defendants") have moved to expedite the briefing and hearing of this appeal. Dkt Entry: 6-1 ("Motion").

Plaintiffs-Appellees ("Plaintiffs") take no position on whether the Court should expedite this appeal, leaving the matter to the discretion of the Court. However, as explained below, Plaintiffs disagree with Defendants' factual assertions set forth in the Motion.

FLORES SETTLEMENT

The original complaint in this action was filed on July 11, 1985. Doc. # 1.[1] On January 28, 1997, the Court approved a class-wide settlement of this action pursuant to Fed. R. Civ. P. 23. Doc. #101, Plaintiffs' First Set of Exhibits in Support of Motion to Enforce Settlement, Exh. 1 ("Settlement").

The Settlement prescribes national standards for the housing, detention and release of children detained by agents of the U.S. Customs and Border Protection

[1] References to "Doc." are to the District Court docket.
[2] On December 7, 2001, the parties stipulated that the Settlement remain binding until "45 days following defendants' publication of final regulations implementing this Agreement." Doc. #101, Exhibit 3. Defendants have never published such regulations.
[3] The *Flores* Settlement requires ICE (1) to "release a minor from its custody without unnecessary delay" to a parent, a legal guardian, or other qualified adult custodian, except where the detention of the minor is required "either to secure his

("CBP") or U.S. Immigration and Customs Enforcement ("ICE"). For nearly 18 years[2] the Settlement has guaranteed class member children apprehended alone or with a parent (1) safe and appropriate placement during federal custody in non-secure licensed facilities; and (2) a fair opportunity for prompt release on bond or recognizance pending proceedings to determine whether they are lawfully entitled to remain in the United States.[3] These provisions give effect to Defendants' professed resolve to treat "all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors." Settlement ¶ 11.

For some 17 years Defendants largely complied with the Settlement, promptly releasing class members with their accompanying parent (and unaccompanied minors).[4] Defendants scheduled released class members for

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[3] The *Flores* Settlement requires ICE (1) to "release a minor from its custody without unnecessary delay" to a parent, a legal guardian, or other qualified adult custodian, except where the detention of the minor is 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"; and (2) "[u]pon taking a minor into custody, . . . [to] make and record prompt and continuous efforts on its part toward … release of the minor . . . ." Settlement ¶¶ 14, 18.

[4] Prior to June 2014, mothers who arrived in the United States with their minor children were generally promptly released on parole (under 8 U.S.C. § 1182(d)(5)) or on their own recognizance. Pursuant to 8 U.S.C. § 1226(a) and its implementing regulations, DHS made custody determinations considering release on bond, recognizance, or other conditions. ICE officers "may … release an alien . . . under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must

ordinary removal proceedings before an Immigration Judge pursuant to 8 U.S.C. § 1229a to determine whether they may legally remain in the country under federal law.

DEFENDANTS RESPONSE TO A TEMPORARY SURGE IN "FAMILY" APPREHENSIONS

Beginning in the summer of 2014, in response to a temporary 3-month increase in the number of Central Americans arriving at the U.S.-Mexico border, and in disregard of the Settlement, ICE adopted a new policy to detain "all female-headed families," including accompanied class member children, in secure, unlicensed lock-down facilities for the duration of the proceedings that determine whether they are entitled to remain in the United States. Order Re Plaintiffs' Motion to Enforce Settlement of Class Action, Doc. #177, filed 7-24-15 ("7-24-15 Order") at 2.

Defendants' position was that failing to detain class members would "encourage[ ] additional adults to take themselves and their children on the … journey to our Southwest border." Defendants' Response in Opposition to Plaintiffs' Motion to Enforce, Doc. #121 at 4. Defendants' argued that "the use of

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demonstrate … that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). *See Matter of Patel*, 15 I. & N. Dec. 666, 666 (BIA 1976) ("An alien generally … should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or … a poor bail risk." (internal citation omitted) (construing former INA § 242(a)); *see also Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112-13 (BIA 1999) (construing current INA § 236(a)).

detention" was "effective at deterring [future] aliens … from entering the United States through the South Texas region." Doc. #177, 7-24-15 Order at 10 (quoting Declaration of Border Patrol agent Kevin W. Oaks ¶¶ 25-29.)[5]

MOTION TO ENFORCE THE FLORES SETTLEMENT

On February 2, 2015, Plaintiffs filed a motion to enforce the Flores Settlement. Doc. # 120. Plaintiffs challenged: (1) ICE's new detention policy, which Plaintiffs argued breached the Settlement's requirements that Defendants minimize the detention of children and consider promptly releasing class members to available custodians in the order of preference specified in the Settlement; (2) ICE's practice of confining children in secure, unlicensed facilities with unrelated adults; and (3) ICE's practice of exposing children in Border Patrol custody to "harsh, substandard" conditions and treatment. *Id*. at 5-21.[6]

DISTRICT COURT ORDER SUBJECT OF THE APPEAL

Following briefing and oral argument, on July 24, 2015, the District Court issued an Order finding that Defendants were in material breach of the *Flores*

[5] In a separate case, *R.I.L.R., et al. v. Johnson, et al.*, Case No. 15-0011, Opinion, ECF No. 33 (D.D.C. Feb. 20, 2015), the Court found that the Government's new family detention policy to "deter" future families from entering the U.S. was illegal. *Id*. at 8-9.

[6] Defendants opposed the motion and on February 27, 2015, filed a "protective" motion to amend the Agreement pursuant to Fed. R. Civ. P. 60(b)(5) and (6). Doc. # 120. Defendants argued, *inter alia*, that the class definition does not include minors who arrive in the United States accompanied by a parent, and that the Settlement's state licensing requirement for housing minors does not apply to class members locked up in Defendants' "family residential facilities." *Id*.

Settlement. Doc. #177. The District Court found, *inter alia,* that contrary to Defendants' interpretation, "the [*Flores*] Agreement encompasses both accompanied and unaccompanied minors." *Id*. at 4-7. The District Court ordered Defendants within 90 days to show cause why the Court should not issue an Order requiring Defendants to comply with paragraphs 6, 9, 12, 14, 21, 22 and 23 of the Settlement (dealing with the detention and release of class members). *Id*. at 24-25.

Following briefing in response to the Court's OSC, the Court issued its August 21, 2015 Order. Doc. #187. The Court provided Defendants with an additional 90 days to comply with the Settlement, ordering that defendants (1) comply with Paragraph 18 (make and record prompt efforts toward family reunification and the release of detained class members); (2) comply with Paragraph 14A (release class members without unnecessary delay in first order of preference to a parent); (3) comply with Paragraph 12A (not detain minors in secure facilities that do not meet the requirements of Paragraph 6); (4) comply with Paragraphs 14A and 15 (a class member's accompanying parent shall be released with the class member "in accordance with applicable laws and regulations … unless the parent is subject to mandatory detention under applicable law"); (5) comply with Paragraph 28A (Defendants shall monitor compliance with standards and procedures for detaining class members in facilities that are safe and sanitary); and (6) comply with Paragraph 28A (Defendants shall provide Class Counsel on a

monthly basis statistical information collected pursuant to the Agreement).

Only two portions of the Order vary slightly from the Settlement language. First, to give effect to Paragraph 14's preference for release to a "parent," the Court ordered defendants to release an accompanying parent (unless the parent is subject to mandatory detention), "in accordance with applicable laws and regulations." This directive does *not* change Defendants' obligations under "applicable laws and regulations." Second, because of their non-compliance, the Court ordered Defendants to provide class counsel with statistical reports required by Paragraph 24 every month instead of every six months. *In all other respects the Court simply ordered Defendants to comply with the terms of the Settlement*. With regards the treatment of class members, the Court ordered *no* new procedures or steps Defendants were required to take beyond the plain terms of the Settlement.

DEFENDANTS' MOTION TO EXPEDITE THE APPEAL

Defendants argue that "the number of family units apprehended while illegally crossing the Southwest Border has increased [over the past few months] to a level that makes expedited resolution of this appeal imperative." Motion at 3. Defendants compare family unit apprehensions for August through November comparing each month's 2014 with 2015 numbers. *Id*. at 4-5 (August increase 57%, September 129%, October 200%, November 165%).

Month to month apprehension statistics fluctuate widely for all types of

migrant populations including total apprehensions of single adults, unaccompanied minors, and family units. Fluctuations are caused by any number of factors *which defendants do not address*, including DHS's geographical allocation of enforcement resources, the number of agents assigned to border enforcement, conditions in sending countries, fluctuations in Mexico's interdiction efforts at its southern border, etc.

Comparing recent months to the same months in 2014 may also be misleading if the 2014 months selected were "low" months. The CBP Annual Report for 2014 states in part:

> In FY 2013, the Border Patrol apprehended a total of 38,833 unaccompanied children and 15,056 family units nationwide. In FY 2014, those numbers were 68,631 and 68,684, respectively—a 76 percent increase in unaccompanied children and *a 356 percent increase* in family units over FY 2013. *DHS responded aggressively to this spike, and by September the number of unaccompanied children and family units crossing into South Texas were at their lowest levels in almost two years*.

https://www.cbp.gov/sites/default/files/documents/FINAL%20Draft%20CBP%20FY14%20Report_20141218.pdf (emphasis supplied) (last checked December 11, 2015).

Individuals apprehended in family units also make up only a small proportion of total apprehensions along the US-Mexico border. For example, in Fiscal Year 2014 (the last year for which data on total apprehensions is publicly

available), total apprehensions along the US-Mexico border were 479,371,[7] while apprehended individuals in family units were only 68,445, or about 14% of total CBP US-Mexico border apprehensions.[8] DHS also apprehends and deports immigrants from the interior of the country. In FY 2014 it removed 315,943 immigrants apprehended in the interior.[9] If these numbers are considered, the number of individuals in family units apprehended at the US-Mexico border drops to about 8.5% of total apprehensions, and this number still does not include overall apprehensions by CBP nationwide.

CBP records also show that for a wider view of apprehension data, Fiscal Year 2015 (October 2014 to September 2015), the number of individuals apprehended in family units has actually *decreased* by about 42% from Fiscal Year 2014.[10]

It is unclear that a limited snapshot showing an increase in apprehensions of family units over the past few months provides any empirical basis upon which to

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[7] https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2014_0.pdf (last checked 12/11/15)

[8] https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf (last checked 12/11/15)

[9] https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf (last checked 12/11/15)

[10] https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY14-FY15.pdf (last checked 12/11/15)

predict "a potential surge of migrants traveling as family units" at an uncertain date in the future. Motion at 1.[11]

Second, Defendants contend that whatever steps they have taken with regards to the *Flores* Settlement has required the allocation of "significant" additional resources to complete interviews and assessments for credible and reasonable fear. Motion at 3. Defendants offer no admissible evidence, or any evidence for that matter, about how "substantial" its allocation of resources has been to end their material breach of the Settlement. Has the agency assigned two, five, ten, twenty or more additional ICE and USCIS agents (to end their breach of the Settlement) out of their combined 32,458 employees?[12]

Nor have Defendants advised the Court about the cost-savings experienced by moving toward compliance with the Settlement given that it costs the DHS over $300 per day per individual detained in the "family detention" facilities, money paid to for-profit private corporations.[13] For example, Defendants most recently

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[11] In general, CBP data shows major fluctuations in annual apprehensions in increments of hundreds of thousands with totals often increasing or decreasing by hundreds of percent. CBP Annual Report 2014, Immigration Enforcement Actions, Figure 1. http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf (last checked 12/11/15).

[12] As of June 2015, the total number of USCIS employees was 13,943 and total number of ICE employees was 18,515. http://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll (last checked Dec. 11, 2015).

[13] The FY 2016 Budget Request to Congress (page 54), DHS cites the average rate of individuals housed in family units at $342.73.

reported to the District Court that the average length of detention of individuals apprehended in family units is 20 days. Defendants' Response to OSC, Doc. #184 at 2. Defendants report they apprehended about 6,000 individuals in family units in November 2015. Thus, the cost of Defendants' family detention policy each 20-day cycle is about $36,000,000 (or approximately $54,000,000 per month).

In short, coming into compliance with the Settlement would actually save the Defendants (and the tax-payers) millions of dollars every month rather than requiring Defendants to allocate "substantial" additional resources and revenues to processing detained class members and their mothers over several weeks.

Finally, it appears that Defendants' real reason for wanting to expedite this appeal is so that it may detain families as a deterrent to others coming in the future. As they did in response to the motion to compel compliance with the Settlement, defendants again argue that having to comply with the Settlement would "constrain[ ] DHS's flexibility to respond to an increasing flow of illegal migration into the United States [of children and their mothers] through the appropriate use of immigration detention …" Motion at 5. Defendants cite a newspaper article that hypothesizes that migrant mothers are "influenced" by "reports about the release of immigrant families" to come to the United States. Motion at 6 n. 4.

Yet in the District Court Defendants furnished no competent evidence that

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http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf

their complying with the Settlement misled or would motivate any substantial number of persons to migrate to the U.S. To the contrary, both reason and the evidence suggested that Defendants' detaining children in secure, unlicensed facilities has had no appreciable impact on unauthorized migration at all. The Settlement has been in effect since 1997 and was largely adhered to by Defendants until July 2014, yet Defendants offer no explanation as to why the agreement should only now encourage others to enter the United States without authorization.[14]

The great weight of scholarly authority holds that the principal causes of Central American migration have nothing to do with the Settlement. Rather —

> the root causes pushing unaccompanied children to leave El Salvador, Guatemala, and Honduras [are] poor security and socioeconomic conditions, with high violent crime rates, significant transnational gang activity, low economic growth rates, and high levels of poverty and inequality.

Congressional Research Service, Unaccompanied Children from Central America: Foreign Policy Considerations, February 10, 2015, at 16.

As a scholar whose work Defendants frequently rely upon declares, "[T]here

[14] The 2014 "surge" turned out to be temporary: by October 2014, fewer than 100 families were apprehended in the Border Patrol Rio Grande Sector per day, far and away the sector most impacted by the surge. http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy- (last checked Dec. 11, 2015). Barring calamities, migration flows of refugees from Central America may actually be fairly constant with "surges" (or decreases) in apprehensions, such as took place in May-July 2014, caused by drop offs or increases in Mexico's interdiction practices at its southern border.

is absolutely no evidence in the Report that U.S. policy with respect to detention has any influence at all on the decisions of women and their children are making with respect to migration." Declaration of Jonathan Hiskey, Sept. 22, 2014, Ex. 8, Doc. #101-7, ¶ 17;[15] *see also* Declaration of Nestor Rodriguez, Dec. 12, 2014, Ex. 54, Doc #122, ¶ 14 ("[R]umors regarding lenient immigration detention policies in the United States are not a significant factor motivating current Central American immigration.")[16]

For the reasons explained above, Defendants abandoned their "deterrence" argument before the District Court and it provides no basis for this Court to now expedite this appeal.

CONCLUSION

While Plaintiffs disagree with the underlying assumptions upon which Defendants build their motion to expedite this appeal, as stated above they neither support nor oppose the motion leaving it entirely to the Court to determine whether

[15] Professor Hiskey's work features prominently in Defendants' stock opposition to Central American families' requests that immigration judges order them released over ICE objection. E.g., Plaintiffs' Exhibit 8, Doc. #101-3.

[16] Interestingly, Defendants seek no modification of the Settlement insofar as "unaccompanied" class members are concerned. A fortiori, the Office of Refugee Resettlement (ORR) continues releasing and housing the great bulk of class members just as the Settlement prescribes. Haphazardly detaining a minority of children in secure, unlicensed facilities for several weeks could hardly send an intelligible message to would-be entrants that they had best seek refuge from widespread violence and crushing poverty elsewhere.

sufficient good cause exists under Ninth Circuit Rules 27-12 and 34-3 to expedite this appeal.

Dated: December 11, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2015, I electronically filed the foregoing response to motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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