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15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA  
17 WESTERN DIVISION

18 JENNY LISETTE FLORES, *et al.*,

19 Plaintiffs,

20 v.

21 WILLIAM BARR, Attorney General of  
22 the United States, *et al.*,

23 Defendants.  
24

No. CV 85-4544-DMG-AGR<sub>x</sub>

REPLY TO OPPOSITION TO MOTION TO  
ENFORCE SETTLEMENT RE “TITLE 42”  
CLASS MEMBERS

Hearing: Sept. 4, 2020  
Time: 11:00 a.m.  
Hon. Dolly M. Gee

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1 I. INTRODUCTION

2 Opposing the instant motion, Defendants wholly fail to counter Plaintiffs’  
3 showing that —

- 4 • Defendants regularly detain children in hotels and hold rooms for  
5 weeks despite having thousands of vacant beds in licensed facilities;
- 6 • Hotels and hold rooms in which the Department of Homeland Security  
7 (“DHS”) places children during Title 42 detention are not licensed, not  
8 inspected by independent child welfare agencies, not open to  
9 children’s individual legal counsel, not open to class counsel, and  
10 apparently closed even to the Independent Monitor;
- 11 • DHS exercises unbridled discretion to classify children for Title 42  
12 detention, and to re-classify them for Title 8 detention, without regard  
13 to any discernable public health purpose; and
- 14 • DHS—and not the Department of Health and Human Services  
15 (“HHS”) or the Centers for Disease Control and Prevention  
16 (“CDC”)—also exercises plenary decision-making authority over the  
17 placement of children designated for Title 42 detention.

18 Further, Defendants’ opposition is entirely unpersuasive because, as used in the  
19 settlement approved by this Court on January 28, 1997 (“Settlement”), the federal  
20 agency with “legal custody” of a child is the agency that has decision-making  
21 authority over their placement regardless of the statute alleged to authorize their  
22 detention. Here, that agency is DHS.

23 In candor, the Order Suspending Introduction of Certain Persons from  
24 Countries where a Communicable Disease Exists (“Closure Order”) itself appears  
25 to be more of an end-run around protections Congress has conferred on  
26 immigrants and asylum-seekers in general, and non-citizen children in particular,  
27 than a rational measure to protect public health. 85 Fed. Reg. 17,060 (March 20,  
28

1 2020). Yet however inhumane, unnecessary and unlawful it may be, the instant  
2 motion does not call upon the Court to decide whether the Closure Order violates  
3 Title 8.

4 Rather, it here suffices that the Court should respect Congress's  
5 unmistakable solicitude for the safety and well-being of immigrant and asylum-  
6 seeking children for howsoever long they are in federal custody. There simply is  
7 no conflict, much less an irreconcilable one, between Title 42 and the Closure  
8 Order, on the one hand, and Defendants' affording vulnerable children prompt  
9 licensed placement, on the other.

10 The Court should respect Congress's wishes. It should grant the instant  
11 motion and require Defendants to transfer children they designate for Title 42  
12 detention to licensed placements without unnecessary delay.

13 II. CHILDREN DESIGNATED FOR TITLE 42 DETENTION ARE ENTITLED TO THE  
14 SETTLEMENT'S PROTECTIONS.

15 A. **DHS has plenary decision-making authority over children**  
16 **ostensibly detained under Title 42 and, therefore, they are in**  
17 **DHS's "legal custody."**

18 The Settlement protects "all minors who are detained in the legal custody of  
19 the INS." Settlement ¶ 10. It is undisputed that this includes children in the legal  
20 custody of DHS and its component entities Customs and Border Protection  
21 ("CBP") and Immigration and Customs Enforcement ("ICE"). *See* Defs'  
22 Response in Opposition to Pls' Motion to Enforce [Doc. # 925] ("Defs' Opp.") at  
23 11. The uncontroverted facts establish that children designated for Title 42  
24 detention remain in DHS's legal custody regardless of the nominal statutory  
25 authority for their detention.

26 The Settlement uses the term "legal custody" to refer to the entity with  
27 decision-making power over a child's placement and transfer: the INS. Settlement  
28 ¶ 19 ("All minors placed in such a licensed program remain in the legal custody of

1 the INS and may only be transferred or released under the authority of the INS.”).  
2 According to Defendants, “Paragraph 19 makes clear the parties’ agreement that  
3 the ‘legal custody of the INS’ means custody at the direction of the INS, where the  
4 INS retains the authority to authorize continued detention or release of the minor.”  
5 Defs’ Response to Pls’ Report on Parties’ Conference re “Title 42” Class  
6 Members [Doc. # 900] at 5. Defendants also acknowledge that when the parties  
7 entered into the Settlement the “distinction between legal custody and physical  
8 custody was clearly understood in California,” with “legal custody” referring to  
9 “the power to make major decisions affecting the life of the child.” *Id.* at 5-6 n.2  
10 (citing *In re Jennifer R.*, 17 Cal. Rptr. 2d 759, 763 (Ct. App. 1993)).<sup>1</sup>

11 There is no question that DHS exercises authority over all major decisions  
12 affecting children detained pursuant to Title 42, including initial designation,  
13 transfer, placement, and care. DHS exercises unfettered authority to reclassify  
14 children under Title 8 at any point during their detention. *See* Pls’ Motion to  
15 Enforce Settlement Re “Title 42” Class Members [Doc. # 920-1] (“Mot. to  
16 Enforce”) at 8-13; Declaration of Maria Odom (“Odom Decl.”) [Doc. # 920-3] ¶¶  
17 19-20; Ex. A, Declaration of Melissa Adamson, Ex. 1, Title 42 Data Summary  
18 (“Data Summary”) at 12-13, 17-18 (DHS July ¶ 29 report lists 37 accompanied  
19 and nine unaccompanied children “reprocessed” from Title 42 to Title 8 and  
20 thereafter released or transferred to licensed placement or family detention

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21  
22 <sup>1</sup> Defendants offer no support for their assertion that the term “legal custody” refers  
23 “to the source of legal authority to hold the child.” Defs’ Opp. [Doc. # 925] at 14.  
24 The Settlement nowhere limits its coverage to children taken into custody under  
25 any particular statute, and, as Defendants concede, the *only* children DHS detains  
26 under the Closure Order are those whom it would otherwise take into custody in  
27 enforcing Title 8. *See* Amendment and Extension of Order Suspending  
28 Introduction of Certain Persons from Countries where a Communicable Disease  
Exists, 85 Fed. Reg. 31,503, 31,507 (May 26, 2020) (defining “covered alien” and  
exempting, among others, U.S. citizens, green card holders, and individuals with  
valid travel documents).

1 center).<sup>2</sup> Defendants’ July report also indicates that DHS freely transferred  
2 children between hotels, other unlicensed placements, licensed ORR placements,  
3 and ICE Family Residential Centers before expelling them pursuant to Title 42.  
4 Data Summary at 12-19.<sup>3</sup>

5 DHS likewise retains plenary decision-making authority over children they  
6 place in MVM Transport’s physical custody. Mellissa Harper, Chief of the  
7 Juvenile and Family Residential Management Unit (JFRMU) within ICE  
8 Enforcement and Removal Operations (ERO), declares that “JFRMU addresses  
9 issues confronting unaccompanied alien children (UAC) and alien family groups  
10 *who come into ERO custody*” “includ[ing] oversight of the housing of minors and  
11 family groups/units in hotels” through a contract with MVM. Harper Decl. [Doc.  
12 # 925-1] ¶¶ 1-2 (emphasis added); *see also id.* at ¶ 11 (ICE “oversees all aspects  
13 of the operations” of hotel placements).

14 By contrast, there is no indication that the CDC plays any role in decisions  
15  
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17

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18 <sup>2</sup> DHS detained at least 23 of the 37 accompanied children it “reprocessed” from  
19 Title 42 to Title 8 for more than six days in hotels or other unlicensed facilities  
20 before releasing or transferring them to family detention centers. Data Summary at  
21 17-18. DHS detained at least three unaccompanied children for six days in a hotel  
22 or other unlicensed placement before reprocessing and transferring them to licensed  
23 ORR placement. *Id.* at 12-13.

23 <sup>3</sup> For example, ICE detained some accompanied children at hotels or other  
24 unlicensed placements, before sending them to Karnes Family Residential Center  
25 (“Karnes”), whereas others have been transferred directly to Karnes and then  
26 expelled under Title 42. Data Summary at 15-16.

26 DHS appears to have placed at least one child in ORR custody, only to then transfer  
27 him to a hotel prior to Title 42 expulsion. *Id.* at 13. DHS initially detained two  
28 others in hotels and then transferred them to ORR custody. Both were still reported  
as “T42 awaiting expulsion” in the July report. *Id.*



1 regarding the classification, placement, or care of children.<sup>4</sup> *See* Mot. to Enforce  
2 at 8-13. The Closure Order covers *only* persons whom DHS would otherwise  
3 detain under Title 8 and nowhere hints that CDC will assume legal custody of any  
4 individual. *See* Amendment and Extension of Order Suspending Introduction of  
5 Certain Persons from Countries where a Communicable Disease Exists, 85 Fed.  
6 Reg. 31,503, 31,507 (May 26, 2020) (order applies to “persons traveling from  
7 Canada or Mexico (regardless of their country of origin) who would otherwise be  
8 introduced into a congregate setting in a land or coastal Port of Entry (POE) or  
9 Border Patrol station”). To the contrary, the Closure Order expressly  
10 contemplates that critical decision-making authority in individual cases will  
11 remain with DHS. *See id.* (customs officers can except individuals from the order  
12 “based on the totality of the circumstances”).

13  
14 **B. All unaccompanied children in HHS custody are members of the class.**

15 As Plaintiffs established in their opening brief, it is also clear that even  
16 were unaccompanied children designated under Title 42 in HHS’s, rather than  
17 DHS’s, “legal custody,” they would nonetheless remain class members. The  
18 Trafficking Victims Protection Reauthorization Act (TVPRA) assigns “the care  
19 and custody of all unaccompanied alien children, including the responsibility for  
20 their detention,” to the Secretary of Health and Human Services (“HHS”). 8  
21 U.S.C. § 1232(b)(1). Congress has therefore made HHS the INS’s successor for  
22 purposes of the detention and placement of unaccompanied class members. *See*  
23 *Flores v. Barr*, 934 F.3d 910, 912 n.2 (9th Cir. 2019); *Flores v. Johnson*, 212 F.

24 \_\_\_\_\_  
25 <sup>4</sup> Even assuming, arguendo, the CDC were to have some role with regard to the  
26 treatment of children subject to the Closure Order, DHS’s decision-making  
27 authority means it would retain legal custody nonetheless. *See Flores v. Sessions*,  
28 862 F.3d 863, 877 (9th Cir. 2017) (noting that “both the HSA and TVPRA provide  
[] for a degree of cooperation between ORR and outside agencies” with regard to  
the treatment of unaccompanied minors).

1 Supp. 3d 864, 885 (C.D. Cal. 2015).

2 Defendants’ answer—that holding HHS as the INS’s successor would lead  
3 to “absurd results,” including the quarantine of U.S. citizens, Defs’ Opp. at 13-14,  
4 is meritless. First, the TVPRA charges HHS with the former INS’s responsibilities  
5 *only* with respect to the placement and release of “unaccompanied alien children.”  
6 § 1232(b)(1). The TVPRA was “intended to address the unique vulnerability of  
7 minors who enter this country unaccompanied, and to improve the treatment of  
8 such children while in government custody.” *Flores v. Sessions*, 862 F.3d at 881.  
9 These children are indisputably among the Settlement’s intended class members.  
10 *See id.* at 866; *Flores v. Lynch*, 828 F.3d 898, 907 (9th Cir. 2016).

11 Second, as has been seen, the Closure Order applies only to non-citizens  
12 whom DHS would otherwise detain pursuant to Title 8. 85 Fed. Reg. at 31,507.  
13 Holding HHS to its obligations under the Settlement does not broaden the class  
14 definition and is consistent with the parties’ intent to provide “minimum standards  
15 for the detention, housing, and release of non-citizen juveniles who are detained  
16 by the government.” *Flores v. Sessions*, 862 F.3d at 866.

17  
18 **III. CONGRESS HAS PRESERVED THE SETTLEMENT INVIOLETE, AND NOTHING**  
19 **PREVENTS DEFENDANTS FROM COMPLYING WITH THEIR AGREEMENT WHILE**  
20 **CARRYING OUT THE CLOSURE ORDER.**

21 **A. Nothing in Title 42 or the Closure Order requires the Court to**  
22 **ignore Congress’s solicitude for Plaintiff children.**

23 Underlying the whole of Defendants’ opposition is a flawed assumption  
24 that providing children appropriate placement and carrying out the Closure Order  
25 are zero-sum propositions: that is, there is some irreconcilable conflict that  
26 prevents doing both. Defendants never identify any such conflict, because there is  
27 none.

28 The TVPRA both (1) preserves the Settlement; and (2) directs *all* federal  
agencies to transfer the custody of unaccompanied minors to “the Secretary of

1 Health and Human Services not later than 72 hours. . . ,” who must then  
2 “promptly” place them “in the least restrictive setting that is in the best interest of  
3 the child.” 8 U.S.C. §§ 1232(b)(3), (c)(2)(A). Congress’s objective in enacting  
4 the TVPRA is unmistakable: the federal government must treat immigrant and  
5 asylum-seeking children with compassion and care, just as the Settlement  
6 requires. *See Flores v. Sessions*, 862 F.3d at 881.

7 In contrast, 42 U.S.C. § 265 does not mention detention at all. The CDC’s  
8 statutory authority to detain is found at 42 U.S.C. § 264(b), a statute that pre-dates  
9 the TVPRA by some six decades. It provides in pertinent part:

10  
11 Regulations prescribed under this section shall not provide for the  
12 apprehension, detention, or conditional release of individuals except for  
13 the purpose of preventing the introduction, transmission, or spread of  
14 such communicable diseases as may be specified from time to time in  
Executive orders of the President upon the recommendation of the  
Secretary, in consultation with the Surgeon General.

15 *Id.*

16 The “regulation[] prescribed under this section,” 42 C.F.R. § 71.37, posits  
17 detailed procedures the CDC must follow when quarantining, isolating, or  
18 releasing individuals conditionally:

19  
20 A Federal order authorizing quarantine, isolation, or conditional release  
21 shall be in writing, signed by the Director, and contain the following  
22 information: . . . (4) An explanation that the Federal order will be  
23 reassessed no later than 72 hours after it has been served and an  
24 explanation of the medical review of the Federal order pursuant to this  
25 part, including the right to request a medical review, present witnesses  
26 and testimony at the medical review, and to be represented at the  
medical review by either an advocate (e.g., an attorney, family member,  
or physician) at the individual’s own expense, or, if indigent, to have  
representatives appointed at the government’s expense . . .

27 The procedures Defendants follow in detaining children pursuant to the Closure  
28

1 Order do not appear at all related to § 264 or its implementing regulations. The  
2 sole regulation the CDC appears to have promulgated specifically to implement  
3 the Closure Order, 42 C.F.R. § 71.40, never mentions “apprehension,” “detention”  
4 or “custody” at all.

5 Defendants’ expansive reading of their detention powers under 42 U.S.C.  
6 § 265 offers no reason to ignore Congress’s having preserved the Settlement many  
7 decades after it last addressed this provision in 1944. *FDA v. Brown &*  
8 *Williamson Tobacco Corp*, 529 U.S. 120, 143 (2000), *superseded on other*  
9 *grounds by statute*, 21 U.S.C. § 387a (“[A] specific policy embodied in a later  
10 federal statute should control our construction of the earlier statute, even though it  
11 has not been expressly amended.”) (internal quotation marks and alterations  
12 omitted)).

13 In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court held, “The  
14 courts are not at liberty to pick and choose among congressional enactments, and  
15 when two statutes are capable of co-existence, it is the duty of the courts, absent a  
16 clearly expressed congressional intention to the contrary, to *regard each as*  
17 *effective.*” *Id.* at 551 (emphasis added); *see also Connecticut Nat’l*  
18 *Bank v. Germain*, 503 U.S. 249, 253 (1992) (“Redundancies across statutes are  
19 not unusual events in drafting, and so long as there is no ‘positive repugnancy’  
20 between two laws, . . . a court must give effect to both.”).

21 In *J.B.B.C. v. Wolf*, the court applied this principle to preliminarily enjoin  
22 Defendants against summarily expelling a child pursuant to Title 42, a practice  
23 that unavoidably conflicts with the TVPRA.<sup>5</sup> *See* Transcript of Telephonic  
24

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25 <sup>5</sup> 8 U.S.C. § 1232(a)(5)(D) provides, “Any unaccompanied alien child sought to be  
26 removed by the Department of Homeland Security, except for an unaccompanied  
27 alien child from a contiguous country . . . shall be— (i) placed in removal  
28 proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C.  
1229a); . . .”

1 Motion Hearing, No. 1:20-cv-01509-CJN, ECF No. 39 (D.D.C. June 24, 2020)  
2 [previously filed as Doc. # 897-2]. The court held, “Even if the power to remove  
3 were read by [42 U.S.C.] section 265, the plaintiff has likelihood of success  
4 because the provision, in the Court’s view, *should be harmonized, to the maximum*  
5 *extent possible, with immigration statutes . . . that grant special protections to*  
6 *minors . . .” Id. at 50 (emphasis added).*

7 The Settlement clearly regulates how Defendants must treat children while  
8 these children are in their custody. If the court in *J.B.B.C.* enjoined Defendants to  
9 observe the special protections Congress has conferred on Plaintiff children, this  
10 Court should do no less: it should order Defendants to observe the protections the  
11 Settlement confers and Congress preserved in the Homeland Security Act and the  
12 TVPRA.

13 **B. Defendants fail to show how the Closure Order prevents them**  
14 **from affording children prompt, licensed placement.**

15 Defendants’ affording children licensed placement would not impede their  
16 carrying out the Closure Order. First, Defendants detain a relatively small  
17 percentage of children pursuant to Title 42 for longer than 72 hours. Defendants’  
18 data show that between March and July, CBP “encountered” over 8,600 UACs  
19 and some 8,700 family units at the Southwest border. *See* U.S. Customs & Border  
20 Protection, *Southwest Border Migration FY 2020, U.S. Border Patrol Southwest*  
21 *Border Encounters FY 2020*, [www.cbp.gov/newsroom/stats/sw-border-migration](http://www.cbp.gov/newsroom/stats/sw-border-migration)  
22 (last modified August 6, 2020); *see also id.* (“Beginning in March FY20, USBP  
23 Encounters statistics include both Title 8 Apprehensions and Title 42  
24 Expulsions.”).

25 Over approximately the same period, Defendants report detaining 510  
26 children pursuant to Title 42 for 72 hours or more. Data Summary at 6-7; *see*  
27  
28

1 Attachment A.<sup>6</sup> Of the 577 unaccompanied children Defendants held in hotels,  
2 436 were detained for three or more days. *Id.* These children total 5 percent of all  
3 unaccompanied children Defendants “encountered” at the Southwest border.<sup>7</sup>  
4 Clearly, there is nothing limiting Defendants from providing children detained  
5 over 72 hours a licensed placement.<sup>8</sup>

6 Second, Defendants’ argument that providing children a licensed placement  
7 would “introduce” them into the United States, *see, e.g.*, Defs’ Opp. at 12, is  
8 devoid of merit. Defendants cannot seriously deny that children detained in hotels

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9 <sup>6</sup> This number derives from Attachment A [Doc. # 927] to Exhibit 1 (Declaration of  
10 Mellissa Harper) [Doc. # 925-1]. As the Data Summary explains, it is an open  
11 question whether the data included in Defendants’ Attachment A or ¶ 29 are fully  
12 accurate. Data Summary at 1-5. The Independent Monitor’s report expressed  
13 similar concerns regarding inconsistencies in the data provided in Defendants’  
14 Attachment A and the monthly *Flores* reports. *See* Interim Report on the Use of  
15 Temporary Housing for Minors and Families under Title 42 by Independent  
16 Monitor and Dr. Paul Wise, August 26, 2020 [Doc # 938] (“Aug. Interim Report”)  
17 at 11 n.9.

16 <sup>7</sup> It is not possible to calculate this percentage for accompanied children, as the CBP  
17 data does not distinguish between children and adults when reporting Family Unit  
18 numbers. *See* CBP, *Southwest Border Migration FY 2020*,  
19 <https://www.cbp.gov/newsroom/stats/sw-border-migration> (“Family Unit represents  
20 the number of individuals (either a child under 18 years old, parent, or legal  
21 guardian) apprehended with a family member by the U.S. Border Patrol.”).

21 <sup>8</sup> Defendants complain that Plaintiffs fail to state whether unaccompanied children  
22 only, or both accompanied and unaccompanied children, are entitled to licensed  
23 placement as Settlement ¶ 12 directs. Defs’ Opp. at n.3.

23 The short answer is that the TVPRA preserves the Settlement in whole, and the  
24 agreement protects *both* accompanied and unaccompanied children. *Flores v.*  
25 *Lynch*, 828 F.3d at 901.

26 As this Court has remarked, however, Defendants have elected to force families to  
27 separate if they wish to avail themselves of their Settlement rights. As a practical  
28 matter, the primary beneficiaries of requiring Defendants to afford class members  
prompt licensed placement will be unaccompanied class members.

1 in McAllen, El Paso, San Antonio, or Phoenix are *already* in the United States.  
2 Nor do Defendants deny that they have hundreds of empty licensed beds at their  
3 disposal in or near these very same cities.

4 Defendants never explain how placing a child in a licensed facility would  
5 introduce a child into the United States any more than does their detaining them  
6 for weeks in unlicensed and unmonitored hotels or MVM transport facilities,  
7 where they have daily contact with multiple MVM, medical, and ICE personnel.<sup>9</sup>  
8 *See Harper Decl.* ¶¶ 6-9, 19-20; *J.B.B.C. Hearing Tr.* at 49-50 (“In my view, the  
9 plaintiff is likely to succeed on the question of whether 42 U.S.C. 265 grants the  
10 director of the CDC the power the government articulates here” because “the  
11 statute authorizes the director of the CDC to prohibit the introduction of persons . .  
12 .. There’s a serious question about whether that power includes the power also to  
13 remove or exclude *persons who are already present in the United States.*”  
14 (emphasis added)).<sup>10</sup>

15 Insofar as placement is concerned, Defendants fail to demonstrate how their  
16 complying with the Settlement impedes their ability to execute the Closure Order.  
17 Resolving the question sub judice is accordingly straightforward: because there is  
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19 <sup>9</sup> Defendants also admit that they introduce hotelled children into urgent care  
20 centers and local emergency rooms if emergency or behavioral health services are  
21 needed. *See Harper Decl.* ¶ 20.

22 <sup>10</sup> The CDC has interpreted “introduction into the United States of persons from a  
23 foreign country” to mean “movement of a person from a foreign country . . . into  
24 the United States so as to bring the person into contact with persons in the United  
25 States, or so as to cause the contamination of property in the United States, in a  
26 manner that the Director determines to present a risk of transmission of a  
27 communicable disease to persons or property, even if the communicable disease has  
28 already been introduced, transmitted, or is spreading within the United States.” 42  
C.F.R. § 71.40(b)(1). Assuming, arguendo, the CDC has correctly construed what  
it means to introduce them into the United States, Defendants have the Plaintiff  
children in their custody, and whether they are detained in a licensed facility or a  
hotel, they are in “contact with persons in the United States.”

1 no conflict between Defendants’ executing the Closure Order and their providing  
2 children a licensed placement, the Court should give effect to Congress’s having  
3 protected and preserved class members’ Settlement rights, including their right to  
4 licensed placement.

5 IV. ANY AMBIGUITY IN THE SETTLEMENT CAN AND SHOULD BE RESOLVED IN  
6 FAVOR OF REQUIRING DEFENDANTS TO PLACE CHILDREN EXPEDITIOUSLY IN  
7 LICENSED FACILITIES.

8 **A. The Settlement nowhere suggests Defendants should have free**  
9 **rein to deny children licensed placement by facile designation.**

10 Defendants next argue that despite the Settlement’s expressly binding the  
11 INS’s successors and Congress’s having expressly named HHS as that successor  
12 with respect to custody and placement of unaccompanied class members, they are  
13 free to treat children howsoever they wish because the parties never intended the  
14 Settlement to apply to children DHS purports to detain pursuant to Title 42. *E.g.*,  
15 Defs’ Opp. at 12-13. Defendants’ argument is meritless. The parties *intended* to  
16 protect immigrant and asylum-seeking children from inappropriate, unmonitored,  
17 and unlicensed placement; they did *not* intend that Defendants have license to  
18 evade that obligation by arbitrarily branding or un-branding children as threats to  
19 public health.

20 In their opening brief, Plaintiffs explained that CBP and ICE *choose* to  
21 designate children under Title 8 or Title 42 detainees without much, if any,  
22 apparent regard for public health. Mot. to Enforce at 10-12. The Independent  
23 Monitor observed that “there appears to be no formal policy regarding the  
24 procedures” for unaccompanied children who test positive for Covid-19 and two  
25 of three unaccompanied children who “tested positive for Covid-19 while in the  
26 custody of ICE at a hotel” were transferred to ORR custody. Interim Report on the  
27 Use of Temporary Housing for Minors and Families under Title 42 by  
28 Independent Monitor and Dr. Paul Wise, August 26, 2020 [Doc # 938] (“Aug.



1 Interim Report”) at 16-17.<sup>11</sup>

2 The Settlement, however, squarely places Defendants under a *mandatory*  
3 duty to afford the general population of detained children prompt placement in  
4 licensed, non-secure facilities. Settlement ¶ 12.A (“[T]he INS *shall* place all  
5 minors pursuant to Paragraph 19 as expeditiously as possible. . .” (emphasis  
6 added)); *see also* Settlement ¶ 41 (“The undersigned . . . warrant that upon

7  
8 <sup>11</sup> Defendants admit that CBP exempts children from the Closure Order based on  
9 ill-defined “humanitarian concerns,” including when an officer “sees signs of  
10 illness.” *See* Defs’ Opp. at 5-6, 20 n.9. It appears that the majority, if not the only,  
11 children Defendants actually expel under the Closure Order are those who do not  
12 have COVID, while those who test positive are sometimes “introduced” into  
13 facilities holding Title 8 detainees. *See* Interim Report on the Use of Temporary  
14 Housing for Minors and Families Under Title 42 by Independent Monitor, July 22,  
15 2020 [Doc # 873] (“July Interim Report”) at 17 (“[A]t least one family was  
16 transferred to the Karnes FRC after 2 symptomatic members tested positive for  
17 COVID-19.”). Expelling the healthy while admitting the infected is certainly a  
18 curious approach to protecting public health.

19 But to speak straight from the shoulder, it is increasingly evident that the Closure  
20 Order is a legal and factual subterfuge for the unlawful expulsion of immigrant and  
21 asylum-seeking children. *See, e.g.,* Letter to HHS Secretary Azar and CDC  
22 Director Redfield Signed by Leaders of Public Health Schools, Medical Schools,  
23 Hospitals, and Other U.S. Institutions, May 18, 2020,  
24 [www.publichealth.columbia.edu/public-health-now/news/public-health-experts-  
25 urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers](http://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers) (“The  
26 nation’s public health laws should not be used as a pretext for overriding  
27 humanitarian laws and treaties that provide life-saving protections to refugees  
28 seeking asylum and unaccompanied children. . . . *Despite its public health pretext, the CDC order fails to further public health and disregards alternative measures that can protect public health while preserving access to asylum and other protection.*” (emphasis added)).

Nor is there any doubt the stratagem is succeeding in abrogating asylum protections by other means. *See* C-SPAN, *Senate Hearing on Customs and Border Protection Oversight*, June 25, 2020, [www.c-span.org/video/?473378-1/senate-hearing-customs-border-protection-oversight](http://www.c-span.org/video/?473378-1/senate-hearing-customs-border-protection-oversight) (00:54:25) (CBP Acting Commissioner Morgan testifies that his agency has summarily expelled 2,000 unaccompanied children while processing only some 300 as Title 8 directs).

1 execution of this Agreement in their representative capacities, their principals,  
2 agents, and successors of such principals and agents shall be fully and  
3 unequivocally bound hereunder to the full extent authorized by law.”).

4 Nothing in the Settlement hints that DHS should be at liberty to evade that  
5 obligation by mere incantation: that is, by arbitrarily designating one or another  
6 child for Title 42 detention. Ceding Defendants such a prerogative would, of  
7 course, render the Settlement illusory, a result settled canons of contract  
8 interpretation categorically condemn. 2 CORBIN ON CONTRACTS 142 (rev. ed.  
9 1995) (“An illusory promise is one containing words ‘in promissory form that  
10 promise nothing’”); RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981)  
11 (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to  
12 all the terms is preferred to an interpretation which leaves a part . . . of no effect”);  
13 *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989)  
14 (“Preference must be given to reasonable interpretations as opposed to those that  
15 are unreasonable, or that would make the contract illusory.”) (quotation marks  
16 omitted).<sup>12</sup>

17  
18 <sup>12</sup> Defendants dramatically oversimplify the law in arguing that what the parties  
19 anticipated when they entered into the Settlement—and only what they then  
20 anticipated—strictly cabins the Settlement. *E.g.*, Defs’ Opp. at 13.

21 For example, in 1997 the parties had no inkling Congress would dissolve the INS in  
22 2002 or enact the TVPRA in 2008, yet the Settlement remains binding on HHS and  
23 DHS. *Flores v. Sessions*, 862 F.3d at 870-71. That the parties did not anticipate  
24 the current pandemic or, to speak plainly, Defendants’ seizing upon a public health  
25 emergency to adopt a novel interpretation of 42 U.S.C. § 265 and deny non-citizen  
26 children the Settlement’s protections, is of no moment. *See Flores v. Lynch*, 828  
27 F.3d at 906 (“[T]hat the parties gave inadequate attention to some potential  
28 problems of accompanied minors does not mean that the Settlement does not apply  
to them.”). Children whom Defendants select for Title 42 expulsion are just as  
needful of proper placement as those they openly detain under Title 8. *Id.* at 907  
 (“The government has not explained why the detention claims class would exclude  
accompanied minors; minors who arrive with their parents are as desirous of

1                   **B. The Settlement should not be construed to deny identically**  
2                   **situated children proper placement.**

3                   Nor is Defendants’ picking and choosing children for licensed or unlicensed  
4 placement minimally rational. In the opening brief, Plaintiffs argued that, should  
5 the Court detect any ambiguity in the Settlement, it should construe the Settlement  
6 as protecting children irrespective of whether Defendants choose to designate  
7 them for Title 42 or Title 8 detention. Mot. to Enforce at 13. The Court would  
8 thereby avoid serious constitutional questions regarding equal protection that  
9 would arise from Defendants’ treating *identically* situated children differently. *Id.*

10                   In opposing the instant motion, Defendants fail to explain how a child  
11 whom they elect to brand “Title 42” is any less deserving of prompt licensed  
12 placement, or any more likely to threaten public health, than one they decide to  
13 detain pursuant to Title 8. Indeed, Defendants nowhere deny that they regularly  
14 shift the nominal basis for detaining a child from Title 42 to Title 8 for little or no  
15 reason.

16                   Instead, Defendants argue that the “Court is not being asked to interpret  
17 Title 42, but rather it is being asked to interpret a settlement agreement. The  
18 doctrine of constitutional avoidance has no application here.” Defs’ Opp. at 16.  
19 Whether Title 42 necessarily conflicts with the TVPRA’s savings clause and, a  
20 fortiori, the Settlement, is among the questions sub judice. Assuming, arguendo,  
21 Defendants were to succeed in conjuring up some irreconcilable conflict between  
22 Title 42 and the Settlement, the doctrine of constitutional avoidance would  
23 mitigate in favor of harmonizing Title 42 with Congress’s subsequent directives  
24 (1) that the Settlement should endure, and (2) that all federal agencies must

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27 \_\_\_\_\_  
28 education and recreation, and as averse to strip searches, as those who come  
alone.”).

1 transfer unaccompanied children to HHS within 72 hours.<sup>13</sup> See 8 U.S.C.  
2 1232(b)(3), (c)(2)(A).

3 In sum, whether viewed as a question of statutory construction, contractual  
4 interpretation, or both, the result is the same: Defendants have no rational basis for  
5 denying children proper placement by dint of the label they choose to fasten upon  
6 them. Both Title 42 and the Settlement should therefore be construed such that  
7 Defendants are required to afford identically situated children prompt, licensed  
8 placement.

9  
10 V. PLAINTIFFS HAVE MORE THAN CARRIED THEIR BURDEN OF PROVING THAT  
11 DEFENDANTS ARE DETAINING CHILDREN IN UNLICENSED PLACEMENTS IN  
12 VIOLATION OF THE SETTLEMENT.

13 Defendants do not deny they are detaining children in unlicensed facilities,  
14 in some cases for weeks at a time. Nor do Defendants counter Plaintiffs' evidence  
15 that they deny children detained in unlicensed facilities access to counsel,  
16 education, and recreation.<sup>14</sup> Finally, Defendants nowhere deny (i) that no state

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17 <sup>13</sup> In any event, the doctrine of constitutional avoidance is applicable to interpreting  
18 contracts. *E.g.*, *City of San Diego v. Rider*, 47 Cal. App. 4th 1473, 1490 (1996)  
19 (“As a contract, the lease must receive such an interpretation as will make it lawful .  
20 . . if it can be done without violating the intention of the parties. Here the facility  
21 lease itself provides the city and agency intended the lease be carried out in a lawful  
22 *and constitutional* fashion.” (emphasis added) (internal quotation marks and  
23 citations omitted)).

24 <sup>14</sup> Defendants do not deny barring individual legal counsel's or class counsel's  
25 access to “hotelled” children while guilefully impugning the evidence children's  
26 legal services providers are able to supply. The Court has rebuffed similarly sharp  
27 practices in the past, and it should do so here again. See *e.g.*, Transcript of Video  
28 Proceedings at 16, *Lucas R. v. Azar et al.*, No CV18-05741-DMG (Mar. 27, 2020)  
[previously filed as Doc. # 774-71] (“I cannot tell the plaintiffs to come up with  
data that they don't have because you won't give it to them.”). In any event, the  
declarations supporting the instant motion are clearly admissible: the declarants  
provide direct legal services to the children at issue and have experienced first-hand  
Defendants' concerted efforts to hold “hotelled” children all but incommunicado.

1 child welfare licensing official monitors the conditions and treatment children  
2 experience during unlicensed placement,<sup>15</sup> (ii) that they are blocking Plaintiffs’  
3 counsel’s access to children detained in unlicensed facilities notwithstanding  
4 Settlement ¶¶ 32 and 33, or (iii) that not even the Independent Monitor has been  
5 provided access to class members or the ability to independently assess detainee  
6 experiences. *See* Aug. Interim Report at 15.

7  
8 **A. The uncontroverted evidence establishes that Defendants are**  
9 **failing to transfer children to licensed placements as**  
10 **expeditiously as possible.**

11 In their opening brief, Plaintiffs explained that absent an “influx,”  
12 Settlement ¶ 12 generally requires Defendants to transfer a minor to a non-secure  
13 licensed placement within three days, but that even during an influx, the  
14 agreement requires licensed placement “as expeditiously as possible.” Settlement  
15 ¶ 12A3.

16 Defendants do not deny that their licensed shelters are now nearly empty.  
17 Under prevailing circumstances, Defendants’ transferring children to licensed

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18 <sup>15</sup> Defendants expect Plaintiffs and the Court to ignore the independent state  
19 monitoring protections of the Settlement and instead to rely on ICE’s  
20 “[u]nannounced virtual inspections” to verify the conditions these children are  
21 kept in. Harper Decl. ¶ 12. This type of self-monitoring has already been rejected  
22 by this Court once before and should not now be deemed sufficient independent  
23 monitoring to ensure compliance with the Settlement. *See* Order re Pls’ Mot to  
24 Enforce Settlement [516] and Defs’ Notice of Termination and Mot in the  
25 Alternative to Terminate the Flores Settlement Agreement [639] at 9, [Doc. # 688]  
26 (“Therefore, this new regulatory definition of ‘licensed facility’ would effectively  
27 authorize DHS to place class members in ICE detention facilities that are not  
28 monitored by state authorities, but are instead audited by entities handpicked by  
DHS... . This is more than a minor or formalistic deviation from the provisions of  
the Flores Agreement, as ‘[t]he purpose of the licensing provision is to provide  
class members the essential protection of regular and comprehensive oversight by  
an *independent* child welfare agency.’”).

1 placement after three days is entirely “possible,” and Defendants offer no  
2 evidence to the contrary.<sup>16</sup> Defendants’ latest ¶ 29 report and Attachment A to  
3 their Opposition also confirm that DHS is *not* transferring class members to  
4 licensed placements as expeditiously as possible.<sup>17</sup>

5 The most Defendants muster in opposition is that children’s “average  
6 lengths of stay” in irregular facilities are short. *See* Harper Decl. ¶ 23. This says  
7 nothing about the many children whom DHS has detained for 10, 15, 20, or 25  
8 days or more in unlicensed placements. Data Summary at 6-7, 9-19. In July,  
9 DHS detained at least 13 accompanied and eight unaccompanied children in  
10 hotels for two weeks or more, including two unaccompanied children whom it  
11 detained in hotels for 28 days. *Id.* at 6-7, 10-12, 14-18. Once again, Defendants’  
12 own data confirm they are violating the Settlement’s command that they provide  
13 children safe and proper placement as expeditiously as possible.

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14 <sup>16</sup> Similarly, the TVPRA requires all federal agencies to transfer the custody of  
15 unaccompanied minors to “the Secretary of Health and Human Services not later  
16 than 72 hours. . . ,” who must then “promptly” place them “in the least restrictive  
17 setting that is in the best interest of the child.” 8 U.S.C. §§ 1232(b)(3). Defendants  
18 use the term “single minor.” To the extent this term is used to imply that these  
19 children fall outside the protections granted by Congress to unaccompanied  
20 children, this usage is inconsistent with statute. *See* 6 U.S.C. § 279(g)(2).

20 <sup>17</sup> Defendants argue they may delay 20 days before transferring children to a  
21 licensed placement without violating the Settlement’s requirement that transfer  
22 occur “as expeditiously as possible.” Defs’ Opp. at 20.

23 Defendants’ attempt to analogize delay in licensed placement while ORR facilities  
24 are nearly vacant to delays in releasing accompanied children during the 2015  
25 “surge” in family detention is deeply and obviously flawed. *See* Order re Response  
26 to Order to Show Cause [Doc # 189] at 10 n.7 (“Paragraph 12A requires that  
27 Defendants ‘place all minors pursuant to Paragraph 19 as expeditiously as possible’  
28 in ‘the event of an emergency or influx of minors into the United States.’ This  
language, on its face, gives Defendants some latitude, *provided it is exercised  
reasonably and in good faith, to deal with emergency situations.*”) (emphasis  
added).

1                   **B. Defendants have concealed the conditions and treatment class**  
2                   **members experience during unlicensed placement from class**  
3                   **counsel, children’s individual counsel, and the Independent**  
4                   **Monitor.**

5                   The Settlement’s requirement that children be placed in licensed facilities  
6 ensures that children in immigration custody are in placements that “comply with  
7 all applicable state child welfare laws and regulations” and are “licensed by an  
8 appropriate State agency to provide residential, group, or foster care services for  
9 dependent children . . . .” Settlement Ex. 1, ¶ 6. As this Court has observed, the  
10 agreement’s licensing requirement ensures that Defendants’ facilities are regularly  
11 inspected by independent state child welfare authorities. *Flores v. Johnson*, 212  
12 F. Supp. 3d 864, 879 (C.D. Cal. 2015), (independent oversight “the animating  
13 concern of the Agreement’s licensing requirement”).

14                   Defendants do not deny that hotels and MVM hold rooms are unlicensed,  
15 and their failure to transfer children to licensed placement as expeditiously as  
16 possible is a per se breach of the Settlement.

17                   Instead, Defendants argue that the Court should trust that they are supplying  
18 “hotelled” children the basics: clothing, food, a bed and a shower.<sup>18</sup> Yet even  
19 taking Defendants’ rosy portrayal at face value, the Settlement requires them to  
20 provide children far more than just food and basic sanitation. The uncontroverted  
21 evidence shows that children in unlicensed placements lack adequate access to  
22 legal counsel, to a needs assessment, including identification of special needs, to  
23 recreation, to an educational assessment and educational services, to leisure time  
24 activities apart from television, to mental health and family reunification services,

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25  
26 <sup>18</sup> There is no mention of what steps Defendants take to ensure safe and sanitary  
27 conditions when children are detained in other unlicensed placements listed in the  
28 monthly *Flores* data reports that are not hotels, such as hold rooms, “MVM  
Transport,” or “MVN Transportation.” See Data Summary at 11-19 (listing  
examples of children held by “MVM Transport” and “MVN Transportation”).

1 all of which licensed placements must supply. Settlement Ex. 1.<sup>19</sup> *See e.g.* Aug.  
2 Interim Report at 15 (The current “hotelling” of unaccompanied minors “is not  
3 fully responsive to the safe and sanitary requirements of young children.”).

4 Defendants fail as well to offer any evidence casting doubt on the  
5 Independent Monitor’s finding that “hotelled” children are rarely permitted  
6 outdoor recreation, education, or counseling. July Interim Report at 9. The  
7 August Report of the Independent Monitor similarly did not find evidence of the  
8 provision of recreation, education, or counseling. *See* Aug. Interim Report. The  
9 Independent Monitor has made clear the current system of detaining  
10 unaccompanied minors in unlicensed facilities “is not a system of care for children  
11 of different ages and developmental stages.” *Id.* at 17. Adequate custodial care  
12 requires “specialized custodial elements, continuous oversight, and specialized  
13 training of relevant personnel.” *Id.* Moreover, Defendants have no formal age  
14 limit policy regarding which unaccompanied children are “too young” to be held  
15 in unlicensed facilities and there is no apparent limit to the length of stay for  
16 unaccompanied children in unlicensed placements. *Id.* at 16. Instead of meeting  
17 their clear legal obligation, Defendants are improperly detaining unaccompanied  
18 children for long periods of time in unlicensed facilities.

19 Defendants claim that children detained in hotels and other unlicensed  
20 placements have “telephonic access . . . to counsel while housed in the hotels”  
21 because each minor “is given a minimum of one phone call a day.” Defs’ Opp. at  
22 25. Defendants fail to explain how a child is supposed to locate a lawyer when  
23 pro bono legal services providers have been ejected from hotels, when they insist  
24 a lawyer must have entered an appearance for a child before he or she will be  
25 allowed to call her lawyer, and when few lawyers will appear for a client whose  
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27 <sup>19</sup> According to Defendants, the only “behavioral health” services “hotelled”  
28 children receive is a trip to the emergency room when necessary. Harper Decl. ¶  
20.



1 location they do not know and whom they have never previously been permitted  
2 to interview. *See* Mot. to Enforce at 17-18 (families often do not know where  
3 Defendants are detaining their children and cannot reasonably be expected to  
4 retain counsel, let alone obtain a signed Form G-28; legal service providers report  
5 extreme difficulty locating “hotelled” children because Defendants obstruct  
6 access).<sup>20</sup>

7 As of August 14, 2020, Defendants had access to over 12,000 vacant beds  
8 in licensed facilities. ORR Juvenile Coordinator Interim Report, Aug. 24, 2020  
9 [Doc. # 932-2] at 2. There is no excuse for leaving vulnerable children in  
10 unlicensed and unmonitored facilities while licensed beds sit vacant —at taxpayer  
11 expense.

12 VI. CONCLUSION.

13 For the foregoing reasons, the Court should grant this motion and order  
14 Defendants to comply with the Settlement with respect to placement and  
15 monitoring of class members designated for Title 42 expulsion.

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25 <sup>20</sup> The importance of children’s having meaningful access to counsel is hard to  
26 overstate. Without a lawyer, children’s ability to oppose summary Title 42  
27 expulsion is nil, whereas DHS nearly always transforms Title 42 children into Title  
28 8 children once counsel enters an appearance. *See* Odom Decl. at ¶ 19; Ex. F to  
Mot. to Enforce, Declaration of Daniel Galindo ¶¶ 3-4 (“Galindo Decl.”).

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Dated: August 28, 2020

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\_\_\_\_\_  
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