No. 19-56326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WILLIAM BARR, ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Defendants-Appellants.

DEFENDANTS-APPELLANTS' OPENING BRIEF

JOSEPH HUNT
Assistant Attorney General
Civil Division

AUGUST E. FLENTJE
Special Counsel to the
Assistant Attorney General
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 514-3309
Fax: (202) 305-7000

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

JEFFREY ROBINS
Deputy Director

WILLIAM C. SILVIS
Assistant Director
Office of Immigration Litigation
District Court Section

SARAH B. FABIAN
Senior Litigation Counsel
Office of Immigration Litigation
District Court Section
Attorneys for Defendants

TABLE OF CONTENTS

STATEMENT OF JURISDICTION....................1
ISSUES PRESENTED....................1
STATEMENT OF FACTS....................1
A. Early Litigation....................1
B. The 1997 Settlement Agreement....................2
C. Early Regulatory Efforts....................5
D. Legislative Action....................6
E. Migration Patterns....................6
F. Enforcement Litigation....................8
G. The 2019 Final Rule....................9
H. Termination Proceedings....................11
SUMMARY OF THE ARGUMENT....................13
STANDARD OF REVIEW....................15
ARGUMENT....................16

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DECLINING TO TERMINATE THE AGREEMENT UNDER RULE 60(B)....................16

A. Courts Must Be Flexible In Releasing Governmental Operations from Long-Term Institutional Consent Decrees....................16

B. Significant Changes in the Regulatory and Operational Environment Necessitate Termination....................21

C. The District Court Disregarded *Horne* and *Rufo* and Abused its Discretion in Declining to Terminate the Agreement....................27

D. The District Court Failed to Follow *Rufo* and Exaggerated Differences Between the Final Rule and the Agreement in Justifying its Decision Not to Terminate 35

1. HHS Custody of Unaccompanied Minors 36

2. Initial DHS Custody of Accompanied and Unaccompanied Minors 40

3. Provisions Relating to Accompanied Minors 41

E. The District Court Should Have At Least Terminated the Agreement in Part...52

II. THE AGREEMENT TERMINATES BY ITS OWN TERMS.....................52

CONCLUSION 55

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 17

Alliance To End Repression v. City of Chicago,
742 F.2d 1007 (7th Cir. 1984) 20

Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 20

Berger v. Heckler,
771 F.2d 1556 (2d Cir. 1985) 56

Bunikyte, ex rel. Bunikiene v. Chertoff, No. A-07-CA-164-SS,
2007 WL 1074070 (W.D. Tex. Apr. 9, 2007) 44

City and County of San Francisco v. U.S.C,
.I.S., 2019 WL 6726131 (9th Cir. Dec. 5, 2019) 31

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019)...54

Flores v. Barr,
934 F.3d 910 (9th Cir. 2019) 9

Flores v. Johnson,
212 F. Supp. 3d 864 (C.D. Cal. 2015)..8

Flores v. Lynch,
212 F. Supp. 3d 907 (C.D. Cal. 2015)..9

Flores v. Lynch,
828 F.3d 898 (9th Cir. 2016) .... *passim*

Flores v. Sessions,
862 F.3d 863 (9th Cir. 2017) .... *passim*

Frew ex rel. Frew v. Hawkins,
540 U.S. 431 (2004) 15, 17, 19

Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 21

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 20

Heath v. De Courcy,
888 F.2d 1105 (6th Cir. 1989) 19

Horne v. Flores,
557 U.S. 433 (2009) .... *passim*

In re Pearson,
990 F.2d 653 (1st Cir. 1993) 19

Jeff D. v. Otter,
643 F.3d 278 (9th Cir. 2011) 28, 30, 33

Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016)..40

Leslie Miller, Inc. v. Arkansas,
352 U.S. 187 (1956) 49, 50

Mathews v. Diaz,
426 U.S. 67 (1976) 21

McGrath v. Potash,
199 F.2d 166 (D.C. Cir. 1952)..19

Money Store, *Inc v. Harriscorp Finance Inc.*,
885 F.2d 369 (7th Cir. 1989) 20

Ms. L. v. U.S Immigration & Customs, Enf't,
310 F. Supp. 3d 1133 (S.D. Cal. 2018) 44, 51

National Audubon Society v. Watt,
678 F.2d 299 (D.C. Cir. 1982)....................20

Nat'l Labor Relations Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433,
891 F.3d 1182 (9th Cir. 2018)....................35

NLRB v. Wyman-Gordon Co.,
394 U.S. 759 (1969)....................24

Nolasco v. ICE,
319 F. Supp. 3d 491, 498 (D.D.C. 2018)....................46

Norton v. S. Utah Wilderness All.,
542 U.S. 55 (2004)....................40

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015)....................54

Reno v. Flores,
507 U.S. 292 (1993).................... *passim*

Rouser v. White,
825 F.3d 1076 (9th Cir. 2016)....................34

Rufo v. Inmates of the Suffolk County Jail,
502 U.S. 367 (1992).................... *passim*

Sameena Inc. v. U.S. Air Force,
147 F.3d 1148 (9th Cir. 1998)....................40

Small v. Hunt,
98 F.3d 789 (4th Cir. 1996).................... 30, 31

Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright,
364 U.S. 642 (1961)....................18

Tin Cup, LLC v. United States Army Corps of Engineers,
904 F.3d 1068 (9th Cir. 2018)....................40

United States v. Asarco Inc.,
430 F.3d 972, 978 (9th Cir. 2005) 15

United States v. California,
921 F.3d 865 (9th Cir. 2019) 49

United States v. Swift & Co.,
286 U.S. 106 (1932) 18

STATUTES

6 U.S.C. § 279 39

6 U.S.C. § 279(a) 6, 23, 27

6 U.S.C. § 279(b) 6, 23

6 U.S.C. § 279(b)(1)(A) 6

8 U.S.C. § 1225(b) 23

8 U.S.C. § 1225(b)(1)(B)(ii) 50

8 U.S.C. § 1225(b)(1)(B)(iii)(IV) 50

8 U.S.C. § 1232 23

8 U.S.C. § 1232(a) 41

8 U.S.C. § 1232(b) 41, 46

8 U.S.C. § 1232(b)(1) 6, 39, 46

8 U.S.C. § 1232(c)(2)(A) 38, 39

28 U.S.C. § 1291 1

28 U.S.C. § 1292(a)(1) 1

RULES

Fed. R. Civ. P. 60(b) 15, 23, 35, 36, 53

Fed. R. Civ. P. 60(b)(5).......... 1, 17, 29, 35

Fed. R. Civ. P. 60(b)(6)..........17

REGULATIONS

8 C.F.R. § 212.5(b)(3)(i) 46, 51

8 C.F.R. § 236.3(a)(1) 10, 55

8 C.F.R. § 236.3(b)(9).......... 11, 44

8 C.F.R. § 236.3(b)(11)..........48

8 C.F.R. § 236.3(f)(3) 41

8 C.F.R. § 236.3(f)(4)(i)..........42

8 C.F.R. § 236.3(g) 10

8 C.F.R. § 236.3(g)(2)..........42

8 C.F.R. § 236.3(g)(2)(i) 42

8 C.F.R. § 236.3(i)(4)..........44

8 C.F.R. § 236.3(i)(4)(i-xv) 11

8 C.F.R. § 236.3(j) 10

8 C.F.R. § 236.3(j)(4).......... 11, 45

8 C.F.R. § 236.3(j)(5)(i).......... 11, 46, 51

8 C.F.R. § 236.3(n)(2) 11

45 C.F.R. § 410.101 37

45 C.F.R. § 410.102 .... 10, 55

45 C.F.R. § 410.102(d) 11, 12

45 C.F.R. § 410.201(a)..40

45 C.F.R. § 410.202 37

45 C.F.R. § 410.203 37

45 C.F.R. § 410.301 .... 10, 37

45 C.F.R. § 410.302 10

45 C.F.R. § 410.810 .... 10, 39

45 C.F.R. § 410.810(a)(2)...39

OTHER AUTHORITIES

Homeland Secuirty Act of 2002
Pub. L. No. 107-296 1165 Stat. 2135 6

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
Pub. L. No. 110-457, 122 Stat. 5044 ....*passim*

Detention and Release of Juveniles
53 Fed. Reg. 17449 (May 17, 1988) 2

Processing, Detention, and Release of Juveniles
63 Fed. Reg. 39759 (July 24, 1998) codfied at 8 C.F.R. § 236.......................5, 26

Processing, Detention, and Release of Juveniles
67 Fed. Reg. 1670 (January 14, 2002) 5, 55

Apprehension, Processing, Care, and Custody of Alien Minors and

Unaccompanied Alien Children
83 Fed. Reg. 45486 (Sept 7, 2018) 9

Executive Order No. 13841, § 1
83 Fed. Reg. 29435 ....44, 52

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children
84 Fed. Reg. 44392....................3, 45

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children
84 Fed. Reg. 44403....................29, 31, 32, 47

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children
84 Fed. Reg. 44455....................38

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children
84 Fed. Reg. 44476-84 39

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the district court's final permanent injunction order. 28 U.S.C. §§ 1291, 1292(a)(1). Defendants-Appellants timely filed their Notice of Appeal on November 14, 2019. Excerpts of Record (ER) 1.

ISSUES PRESENTED

I. Whether the district court abused its discretion under Rule 60(b)(5) in declining to wholly or partially terminate the 1997 Flores Agreement given dramatic changes in the operational and regulatory environment over the past two decades, including the promulgation of comprehensive rules governing the treatment, custody, and release of minors.

II. Whether the Agreement terminated by its own terms upon the promulgation of implementing rules pursuant to the Administrative Procedure Act ("APA").

STATEMENT OF FACTS

A. Early Litigation. This case began in 1985. Plaintiffs brought their action on behalf of a class of minors detained by the INS Western Region because "a parent or legal guardian fails to personally appear to take custody of them." *Reno v. Flores*, 507 U.S. 292, 296 (1993); ER 271. In May 1988, during the pendency of the litigation, the INS published rules governing the detention and release of juveniles, 53 Fed. Reg. 17449, which the Supreme Court upheld. *Flores*, 507 U.S. at 315.

The Supreme Court stated that where a child has come within the Federal

Government's custody, "[m]inimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements . . . is a policy judgment rather than a constitutional imperative." *Id.* at 304-05. Consequently, the Supreme Court determined the new rules were a "reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles" and "accords with both the Constitution and the relevant statute." *Id.* at 315.

B. The 1997 Settlement Agreement. After remand, the parties entered into the Flores Agreement to resolve the case. ER 233. The Agreement was subjected to a highly streamlined approval process, which did not include a fairness hearing. It defined the class as "all minors who are detained in the legal custody of the INS." ER 239 (¶) 10; ER 231 (Notice). The parents or legal guardians of minors – whether accompanied or unaccompanied – were not involved in the settlement or certification process.

The stated purpose of the Agreement was to establish a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS." ER 238 (¶ 9). The Agreement addresses the custody of minors at all stages. Upon initial apprehension, the Agreement provides that INS must hold minors in facilities that are "safe and sanitary" and "consistent with the INS's concern for the particular vulnerability of minors." ER 239 (¶ 12). INS will then place a minor to a "licensed

program" within certain timelines. ER 240 (¶ 12.A). In the case of an "influx" – when over 130 minors are awaiting placement – minors must be placed "as expeditiously as possible." *Id.*

A licensed program is defined as "any program . . . that is licensed by an appropriate State agency to provide . . . services for dependent children." ER 236 (¶ 6). Such a program "must also meet those standards . . . set forth in Exhibit 1" of the Agreement. *Id.* Exhibit 1 includes a set of detailed standards for licensed programs that include, among other things, suitable living accommodations; medical and dental care; educational services; recreation activities; visitation with family members; family reunification services; access to religious services; privacy rights; and counseling. ER 255-58. Licensed programs "shall be non-secure as required under state law" with certain exceptions for special needs minors or secure custody. ER 236, 244-46 (¶¶ 6, 21-23).

The Agreement further addresses release. *See* ER 241-44 (¶¶ 14-18). Release occurs when "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." ER 241-42 (¶ 14). The first preference is release to a "parent" or a "legal guardian." *Id.* Following that the order of preference is: other close family members; individuals designated by a parent; a licensed program; or other adults in the discretion of INS. *Id.* These paragraphs of

the Agreement do not contain any provisions specifically governing release when the minor is in custody with a parent or legal guardian.

The Agreement also specifies that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates . . . that he or she refuses such a hearing." ER 246 (¶ 24.A).

The Agreement includes implementation and termination provisions. Paragraph 9 is the implementation provision discussing what must happen immediately after the Agreement is approved including when various provisions become effective. ER 238 (¶ 9). It specifies that "[w]ithin 120 days of the final district court approval of this Agreement, the INS shall initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation" and that "[t]he final regulations shall not be inconsistent with the terms of this Agreement." *Id*.

Paragraph 35 addresses dismissal of the litigation. It specifies that dismissal will occur "[a]fter the court has determined that the INS is in substantial compliance with this Agreement." ER 252 (¶ 35).

Paragraph 40 addresses termination of the Agreement. As originally agreed to in 1997, it specified that "[a]ll terms of this Agreement shall terminate the earlier of five years after the date of final court approval of this Agreement or three years

after the court determines that the INS is in substantial compliance with this Agreement." ER 254. When the original termination date was nearing, the parties amended paragraph 40 to provide that the agreement "shall terminate 45 days following defendants' publication of final regulations implementing this Agreement." ER 223. It specifies that notwithstanding termination, "INS shall continue to house the general population of minors in INS custody in facilities that are licensed for the care of dependent minors." *Id.*

C. Early Regulatory Efforts. The INS published a proposed rule in 1998, explaining that the "substantive terms of the settlement form the basis for the proposed rule." 63 Fed. Reg. 39,759 (1998). The 1998 proposed rule included several of the substantive provisions of the Agreement, but excluded others – like the provisions of Exhibit 1. *Id.* Unlike the Agreement, the proposed rule addressed release when a child and parent were both in custody, explaining INS would consider "simultaneous release . . . on a discretionary case-by-case basis." *Id.* at 39763.

In January 2002, shortly after the Agreement was extended, the INS "reopen[ed] the comment period" and "particularly invite[d] comments that relate[d] to issues that ha[d] come to the public's attention since the close of the original comment period in 1998." 67 Fed. Reg. 1670 (2002). Plaintiffs submitted comments in response to this request. Plaintiffs also submitted a public policy paper "to provide a framework for discussing policy options" and requested that any final

rules should "incorporate[e] . . . prior comments" submitted and reflect "learning from the first five years under the Settlement Agreement." Flores Working Paper (Jan. 14, 2003). This rulemaking was not finalized.

D. Legislative Action. In 2002, Congress enacted the Homeland Security Act ("HSA"). Pub. L. No. 107-296, 116 Stat. 2135. This law created DHS, transferring most immigration functions to it. It also transferred to HHS the responsibility for the care of "unaccompanied alien children" (UACs) "who are in Federal custody by reason of their immigration status." 6 U.S.C. § 279(a), (b)(1)(A). HHS was given responsibility for making all placement decisions for UACs and prohibited from releasing UACs on their own recognizance. *See id*. § 279(b).

The 2008 Trafficking Victims Protection Reauthorization Act ("TVPRA"), Pub. L. No. 110-457, 122 Stat. 5044, provided further protections to unaccompanied alien children in government custody. As this Court has explained, the TVPRA "partially codified the Settlement by creating statutory standards for the treatment of unaccompanied minors." *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016). The TVPRA affirms that "the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of" HHS. 8 U.S.C. § 1232(b)(1).

E. Migration Patterns. Since the Agreement was signed, the number of alien minors arriving in the United States, both accompanied and unaccompanied,

has skyrocketed and created an ongoing border crisis. In 1993, the Supreme Court recognized that a one-year surge of "more than 8,500 . . . [minors] – as many as 70% of them unaccompanied" – represented a "problem" that is "serious." *Reno*, 507 U.S. at 295. That judicially acknowledged "problem" number became the normal number through the 1990s.[1] In 2003, Plaintiffs described an unprecedented increase in the number of minors in immigration custody—from "130 in custody in 1996, to an average of nearly 500 juveniles in custody in 2000." Flores Working Paper at 3.

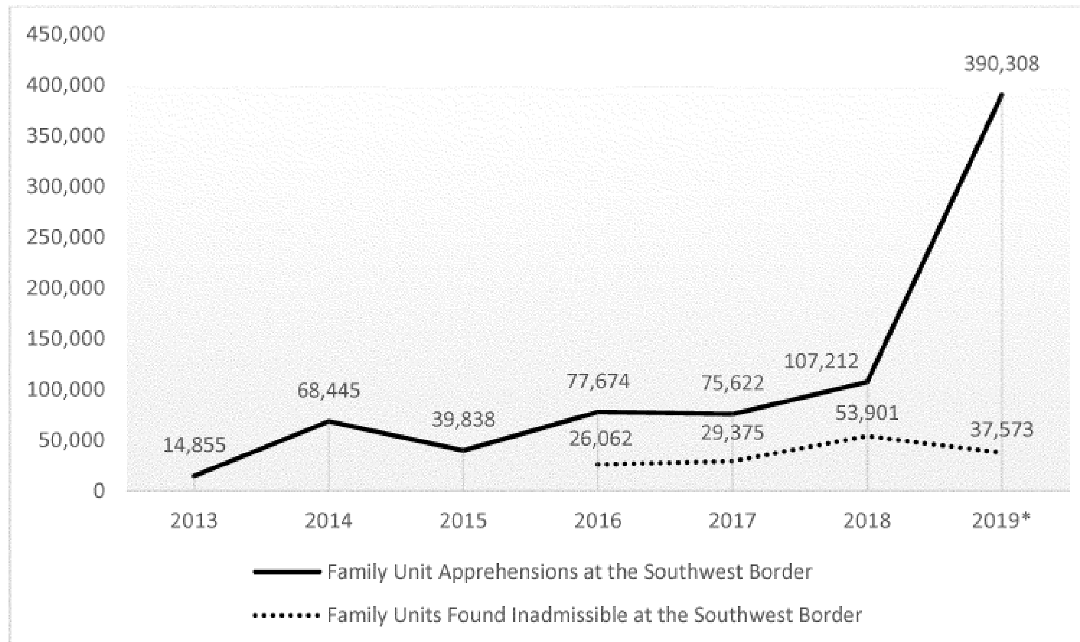
These numbers have increased exponentially. In contrast to the 130 minors in custody and defined as an "influx" in 1997, in 2019 there were periods with over 10,000 unaccompanied minors in HHS custody. In fiscal year 2019, over 80,000 unaccompanied alien children were encountered at the southwest border, *ten times* the annual number up until 2012. *See* https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019; *supra* n. 1.

The changes in family migration are even more dramatic. In FY 2019, over 500,000 members of family units were encountered at the southwest border – either apprehended after crossing illegally (473,682) or found inadmissible at a port of entry (53,430). https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

[1] *See* HHS Fact Sheet (September 2019) (prior to 2012, fewer than 8,000 children were referred for ORR care each year), https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf.

Indeed, irregular family migration has increased by *more than 33 times* what it was as recently as 2013—from 14,855 in FY 2013, to over 500,000 in FY 2019. *See id.*; 84 Fed. Reg. at 44,404:

Figure 1: Family Unit Apprehensions and Inadmissibles at the Southwest Border by Fiscal Year



* Partial year data for FY 2019; through June.

F. Enforcement Litigation. Since 2014, this burgeoning border crisis has sparked enforcement litigation and disputes over whether and how the Agreement applies to minors who are apprehended with parents.

In 2015, the district court held that the Agreement applies to minors accompanied by their parents or legal guardians and requires release of the family units. *See Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015). The court also held that family residential centers were not "licensed programs," but nonetheless made clear that Defendants were permitted "some flexibility" to use them to hold

accompanied minors with their parents during credible fear processing under Section 1225(b). *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015).

This Court partially affirmed, holding that the Agreement applies to accompanied minors in government custody, but does not require the release of parents. *Flores v. Lynch*, 828 F.3d 898, 907-09 (9th Cir. 2016). In doing so, this Court recognized that the Agreement "does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children." *Id*. at 906. This Court has separately held that the Agreement's bond hearing requirement applies to unaccompanied children in HHS care. *Flores v. Sessions,* 862 F.3d 863 (9th Cir. 2017).

There has also been enforcement litigation focused on conditions at border, and a few discrete issues regarding application of the Agreement to HHS funded facilities. *See*, *e.g.*, *Flores v. Barr*, 934 F.3d 910, 913 (9th Cir. 2019).

G. The 2019 Final Rule. In September 2018, DHS and HHS issued proposed rules to implement the Agreement and on August 23, 2019, finalized those rules, including DHS provisions (8 C.F.R.) and HHS provisions (45 C.F.R.). 84 Fed. Reg. 44,392 (2019) (ER 34). The rules address the comprehensive and multi-faceted responsibilities that arise with respect to immigration custody and release of minors at multiple federal components and in a range of circumstances. They adopt the Agreement's commitment to treat all minors in government custody with "dignity,

respect and special concern for their particular vulnerability as minors" and requires they be placed in the least restrictive setting appropriate for their age and special needs. *Compare* ¶ 11 *with* 45 C.F.R. § 410.102 *and* 8 C.F.R. § 236.3(a)(1).

The rules address the custody of minors immediately following apprehension by mandating, parallel to the Agreement, that minors receive notice of rights and be placed in facilities that are safe and sanitary, including the specific requirements derived from the Agreement. *Compare* 8 C.F.R.§ 236.3(g) *with* ¶ 12.A.

The rule addresses the custody, care, and release of unaccompanied alien children in a manner substantively identical to the Agreement. It incorporates the Agreement's procedures governing release and sponsorship. *Compare* ¶¶ 14-18 with 45 C.F.R. §§ 410.301-302. It codifies a custody hearing procedure under the auspices of an independent HHS hearing officer. *Compare* ¶ 24.A. *with* 45 C.F.R. § 410.810.

For minors who are apprehended with a parent or legal guardian, the rule adopts the general release provision in paragraph 14, subject to federal statutes mandating detention during expedited removal. *Compare* 8 C.F.R. § 236.3(j) *with* ¶ 14. In that regard, the rule updates the applicable parole regulation, specifying that for minors in expedited removal who establish credible fear, parole is generally appropriate so long as the minor does not present a safety risk or risk of absconding – the custody standard in Paragraph 14. *See* 8 C.F.R. § 236.3(j)(4). Where continued

detention of the parent or legal guardian is required by law or otherwise appropriate, the rule permits release of the accompanied minor, in DHS discretion, to a broad range of relatives, including siblings, aunts, uncles, or grandparents. *See* 8 C.F.R. § 236.3(j)(5)(i) & (n)(2).

The rule incorporates all of the detailed standards for family residential centers from Exhibit 1, including suitable living accommodations, education services, medical care, and counseling. 8 C.F.R. § 236.3(i)(4)(i-xv). It requires state licensing of family residential centers unless there is no state licensing scheme, in which case independent third party review is required. 8 C.F.R. § 236.3(b)(9).

H. Termination Proceedings. On August 30, 2019, the moved to terminate the Agreement. Following a hearing, on September 27, 2019, the district court enjoined the new rule in its entirety and did not terminate the agreement, in whole or in part. ER 4 (Opinion); ER 28 (Injunction).

The District Court identified four aspects of the rule that it believed conflicted with the Agreement. ER 8-18. First, the district court held that certain DHS provisions governing the release of accompanied minors were inconsistent with the release obligations in the Agreement. ER 8-10. Second, it held that the DHS regulatory regime for family residential centers was inconsistent with the Agreement because it did not always require a state license. ER 11-14. Third, with respect to unaccompanied minors, the court reasoned that the HHS regulations improperly

allowed a minor to be placed in a secure facility if "a danger to self or others" – a standard in the TVPRA but not included in the Agreement – and improperly provided for the "bond hearings" envisioned in the Agreement to be conducted by HHS independent hearing officers rather than immigration judges. ER 14-17. Fourth, the district court viewed some of the regulatory protections as being aspirational rather than mandatory. ER 17-18.

The district court rejected the argument that the termination provision, by invoking an APA process, necessarily anticipated that the final rule would reflect the agency's reasoned decision-making at the time of promulgation and public comment. ER 18-19.

The court also declined to terminate the Agreement under Rule 60(b). The court reasoned that the moving party must show the provision it seeks to modify "has become 'impermissible,'" which the government could not do. ER 21. The court also reasoned that the government did not show that the "objective of the Agreement has been achieved" or that the new rules served to "fulfill[] [the government's] obligations . . . by other means." Id. The court stated that it had already rejected the relevance of dramatic changes in migration patterns, and that ongoing enforcement litigation "showed Defendants' lack of substantial compliance." ER 22. And the court refused to consider flaws in the certified class, stating that those arguments were waived. ER 23.

In spite of finding a limited number of conflicts between the new rules and the Agreement, the district court concluded that appropriate relief was to invalidate the new rules in their entirety. ER 24-25. The court reasoned that the "Agreement, by its own terms . . . enjoins implementation" and it could enjoin the rules under the All Writs Act to "effectuate its orders enforcing the . . . Agreement." *Id*. The court refused to allow the vast majority of provisions in the regulations—which were *consistent* with the Agreement—to go into effect. ER 25-26.

SUMMARY OF THE ARGUMENT

The Court should reverse the district court's order. The district court's order is based on a cramped view of the equitable propriety of maintaining a 23-year-old settlement agreement in the face of dramatically changed circumstances. Indeed, the district court made every error the Supreme Court has identified as problematic in its precedent governing termination of long-term consent decrees:

The district court declined to consider a profound transformation in the legal and regulatory environment, including the promulgation of comprehensive new rules that the parties themselves envisioned as terminating the Agreement, statutes implementing much of the Agreement over a decade ago, and a crisis of irregular migration by families and children.

The court focused on narrow conflicts between the outdated decree and the agencies' new method of addressing the regulatory problems rather than evaluating

the agencies chosen solutions.

The district court purported to scrutinize the agencies' history of compliance, rather than considering the equities going forward. In doing so, it overlooked a long record of compliance while zeroing in on a few narrow disputes over contested legal issues.

The court locked the government into addressing a new and vexing problem – irregular family migration – using a decree that all parties and this Court agree did not carefully address that issue.

And it declined to consider critical flaws in the class as certified, which is grossly unmanageable and fails to account for parental interests. Compounding those errors, the court refused to lift the decree even though the decree itself stated that it would terminate upon the publication of implementing regulations. In sum, the court plainly flouted the Supreme Court's repeated admonition that courts must embrace a "flexible approach" to modifying or terminating consent decrees in institutional reform litigation. *Horne v. Flores*, 557 U.S. 433, 450 (2009); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 392 (1992); *accord Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004). That abuse of discretion must be reversed.

Furthermore, even assuming the government did not establish equitable termination under Rule 60(b), the district court erred in concluding that the

Agreement does not terminate according to its own terms given the "publication of final regulations implementing the Agreement." Agreement ¶ 40. The rules implement the Agreement through the APA process to which the parties agreed. Moreover, the DHS rules governing initial processing and the HHS rules governing unaccompanied minors are virtually identical to the Agreement. With respect to accompanied minors, the rules address issues that the parties did not consider in 1997. Plaintiffs do not claim that the agencies failed to comply with the requirements of the APA in formulating the rules and the District Court erred in second-guessing the product of that legitimate process.

STANDARD OF REVIEW

The Court reviews the District Court's rulings on motions for relief from judgment under Rule 60(b) for abuse of discretion. *United States v. Asarco Inc*., 430 F.3d 972, 978 (9th Cir. 2005). In this context, "[a] district court abuses its discretion if it does not apply the correct law." *Id*. at 978. The district court's interpretation of the Agreement is reviewed de novo. *Flores*, 828 F.3d at 805.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DECLINING TO TERMINATE THE AGREEMENT UNDER RULE 60(B)

The district court abused its discretion in declining to terminate the Agreement because it is no longer equitable or in the public interest to have a substantial portion of the immigration system administered under a 23-year-old agreement in the face of dramatically changed circumstances, including comprehensive new regulations addressing the custody and care of minors in immigration custody. First, the standards for institutional reform litigation require flexibility in terminating long-term agreements that govern governmental operations. Freezing in place an outdated, judicially administered regime of immigration enforcement undermines the democratic process, interferes with core executive branch functions, and impinges upon the separation of powers. The district court cited, but did not fairly apply, those requirements. Second, it is in the public interest to terminate the Agreement based on changes in the legal and factual landscape, including the massive increase in family migration, intervening legislation, and the publication of final rules governing this significant aspect of the immigration system.

A. Courts Must Be Flexible In Releasing Governmental Operations from Long-Term Institutional Consent Decrees.

Federal Rules of Civil Procedure 60(b)(5) and (6) provide that a court may relieve a party from "a final judgment, order, or proceeding [if] applying [the prior

action] prospectively is no longer equitable," or for "any other reason that justifies relief." Institutional reform litigation will normally eventually implicate the last clause, where applying the decree is no longer equitable due to "the passage of time [and] . . . changed circumstances." *Horne*, 557 U.S. at 448. The party seeking relief "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. That burden may be met by showing "a significant change either in factual conditions or in law." *Id.* at 384. And once such changes have been demonstrated, a court "abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.'" *Horne*, 557 U.S. at 447 (quoting *Agostini v. Felton*, 521 U.S. 203 (1997)).

As the Supreme Court has explained, "the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id*. at 448 (2009). Permitting the change or termination of a consent decree in light of a change in law makes sense because consent "is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932)).

Institutional reform decrees involving government operations require an even more flexible approach to termination. In *Horne*, 557 U.S. at 439, in the context of institutional litigation that involved enforcement of a nine-year-old order, the Supreme Court criticized the lower courts for focusing too narrowly on the terms of the decree, and giving short shrift to the broader question, namely, "whether, as a result of the important changes during the intervening years, the State was fulfilling its obligations under the [law] by other means." *Id*. The Court went on to observe that a "flexible approach" to modifying consent decrees allows courts to "ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant." *Id*. at 448 (internal quotations and citations omitted). Indeed, "[i]f a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper," *id*. at 450, and the "longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic process," *id*. at 453.

In *Rufo*, when a defendant moved to modify a consent decree ten years after its entry, the Supreme Court noted that "the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees reach beyond the parties involved directly in the suit and impact the public's right to the sound and efficient operation of its institutions." 502 U.S. at 376, 381; *see also In re Pearson,* 990 F.2d 653, 658 (1st

Cir. 1993) (court "not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest."); *Heath v. De Courcy*, 888 F.2d 1105, 1110 (6th Cir. 1989).

As the Supreme Court has stated, when a consent decree binds elected officials, it may "improperly deprive future officials of their designated legislative and executive powers." *Horne*, 557 U.S. at 449 (2009) (quoting *Frew*, 540 U.S. at 441 (2004)). And these concerns are heightened when a decree binds *federal* operations, as in those circumstances a long-term decree threatens the constitutional separation of powers. As the D.C. Circuit has explained, there are "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party." *National Audubon Society v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1982); *see Alliance To End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (interpreting consent decree to ensure that "coequal branch of government" did not "improvidently surrender[] its obligations," thus "maintain[ing] a proper separation of powers"); *The Money Store, Inc v. Harriscorp Finance Inc.*, 885 F.2d 369, 375–376 (7th Cir. 1989) (Posner, J., concurring).

In particular, the *Rufo* Court stressed that "the public interest and

considerations based on the allocation of powers within our federal system require that the district court defer to [government officials] who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification." 502 U.S. at 392. These concerns are paramount in cases involving immigration, where judicial management represents "a substantial intrusion" into the workings of the political branches entrusted to manage policies towards aliens. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, n.18 (1977); *see Harisiades v. Shaughnessy,* 342 U.S. 580, 588–589 (1952).

One of the underpinnings for this long-recognized proposition is that immigration policy involves "changing political and economic circumstances" that are appropriate for the Legislature or Executive to determine, not the Judiciary. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Flores*, 507 U.S. at 305–06; *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("power over aliens is of a political character and therefore subject only to narrow judicial review"). This concern has particular force with respect to a consent decree designed to address due process claims, where a range of circumstances and changing equities impact the basis for claims brought on a class-wide basis. *See Mathews*, 426 U.S. at 81 ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with

the greatest caution").

To avoid the long-term transfer of executive power to the judiciary or private groups, the Supreme Court mandates that federal courts take a "flexible approach" when deciding motions to modify or dissolve consent decrees. *Horne*, 557 U.S. at 450. These changed circumstances do not need to be either radical or sweeping; rather, it is sufficient that a "significant change" in factual circumstances or law "renders the continued enforcement of the judgment detrimental to the public interest." *Id.* at 453 (quoting *Rufo*, 502 U.S. at 384).

B. Significant Changes in the Regulatory and Operational Environment Necessitate Termination.

Under the standards set forth above, the Agreement should be terminated. In light of a plethora of significant changes, including the issuance of comprehensive new regulations, major shifts in migration patterns, intervening legislation, and flaws in the certified class, the public interest no longer justifies operating major portions of the immigration system pursuant to a 23-year-old agreement that by its terms was intended to be temporary.

The Agreement has now bound four Presidential administrations charged by the people with developing immigration policy, and two agency defendants—DHS and HHS—that were never defendants in Plaintiffs' complaint. In fact, Congress assigned HHS functions in direct response to the types of concerns raised in this litigation and charged HHS with improving the treatment of unaccompanied alien

children, a mission it takes seriously and of which the new regulations are a key part. The Agreement persisted despite a growing crisis at our southern border due to massive increases in family migration – circumstances never envisioned by government policymakers or Plaintiffs in 1997, and not addressed by the Agreement. By refusing to terminate the Agreement in such circumstances, the district court has effectively asserted control over a wide swath of federal immigration enforcement, a quintessential executive branch function. Authority over this large segment of immigration policy must now be returned to the normal democratic and administrative processes.

1. Termination is warranted because the statutory law governing immigration and alien minors has changed significantly since the Agreement. Congress has made major legislative changes restructuring the government's responsibility for the care and custody of minors.

The HSA transferred to HHS the responsibility for the care of "unaccompanied alien children" "who are in Federal custody by reason of their immigration status," including the responsibility for making all placement decisions for UACs. 6 U.S.C. § 279(a), (b). The TVPRA, like the *Flores* litigation that gave rise to the Agreement, is designed to create special protections for the most vulnerable minors – those who enter the United States unaccompanied by a parent or legal guardian. This enactment shows that Congress chose not to provide special

treatment to minors accompanied by their parents, and family units are therefore governed by existing law, including the law requiring detention for those seeking admission into the country. *See* 8 U.S.C. § 1225(b). For purposes of further review, the government maintains its position that these statutes, on their own, require termination of the Agreement: the material portions of the Agreement addressing unaccompanied children were implemented with the enactment of section 235 of the TVPRA, codified in principal part at 8 U.S.C. § 1232, and the Agreement was never intended to cover accompanied minors. In any event, these statutes reflect a new legal regime that calls for terminating the agreement under Rule 60(b).

2. The public interest further requires termination of the Agreement because the government has taken the significant step of issuing final, comprehensive regulations governing all aspects of the government's custody of minors—both accompanied and unaccompanied. It has done so as provided for in the Agreement itself, *see* ER 223 (¶ 40), and at the urging of both this Court, *Flores*, 862 F.3d at 869, and the district court. *See* ECF No. 177 at 24.

The promulgation of these regulations conformed to APA procedural requirements imposed by Congress for regulations having the force of law. These procedural requirements "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 764 (1969). The rule is more than a sufficient reason to terminate the Agreement, because it is a

fundamental change in law implementing the INA as well as the goals of the Agreement, and its effectiveness and legality can be evaluated on its own terms. The regulations, which reflect valuable input from the public, including Plaintiffs, embody the best judgments of government officials charged by Congress with responsibility for elucidating, assessing, and solving problems in this area of immigration enforcement.

The Agreement was drafted in an era when the governing policies were "ad hoc." *Flores*, 507 U.S. at 295. It's purpose, by its own terms, was therefore to *temporarily* "set[] out nationwide policy for the detention, release, and treatment of minors in the custody of the INS" (¶ 9) until rules were promulgated. Furthermore, the litigation at the time focused solely on *unaccompanied* minors, and the Agreement accordingly contains no provisions specifically addressing the distinct circumstances and issues concerning minors apprehended with their parents. *Flores*, 828 F.3d at 906–07, 09 (parties gave "inadequate attention" to these issues). Nor were parents involved in the class certification process. *Id.* ("parents were not plaintiffs . . . nor are they members of the certified classes"). The parties anticipated that rulemaking would be initiated and concluded decades ago, and would have been shocked to learn that, nearly 23 years later, the agencies are not free to consider the latest operational circumstances and update their policies accordingly. *See* ER 238, 254 (¶¶ 9, 40) (proposed rules to be promulgated "within 120 days" and agreement

originally set to terminate in January 2002).

The final regulations now achieve the Agreement's original goal of a permanent set of standards governing the treatment of minors in immigration custody. The notice-and-comment process here was comprehensive, involving consideration of 100,073 comments from the public. The government, in turn, provided nearly 150 Federal Register pages of consolidated responses and made modifications to the proposed regulation based on public input. The rule explains in detail why the various approaches it takes are necessary considering the current circumstances facing the agencies and components responsible for the custody of minors. This is the fruit of the APA process Plaintiffs called for in the Agreement and have continued to call for since that time. *See* Flores Working Paper. The rigorous process that produced the rule involved a far more thorough, comprehensive analysis and review than that which shaped the Agreement, which provided no opportunity for public input. The rules are also far more comprehensive and protective than those proposed in 1998 immediately after the Agreement was reached, which, as just one example, did not include the protections in Exhibit 1. *See* 63 Fed. Reg. 39,763.

Further, had INS finalized those rules back in 1998 – or later in 2002 –nothing in the Agreement (or anything else) would prohibit the agencies from amending those regulations to take account of changed circumstances now. In this respect as

well, the Agreement necessarily contemplated that the regulations could and would depart from the Agreement formulated more than 20 years ago. The resulting regulations are necessarily different because those Departments are issuing the regulations now in light of current circumstances.

3. Termination of the Agreement is also in the public interest because of the dramatic changes in irregular family migration since 1997. The Supreme Court explained in this very case that "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Flores*, 507 U.S. at 305. Keeping the Agreement in place and thereby preventing the Executive from taking new approaches to addressing this unprecedented surge of family migration is inconsistent with that fundamental constitutional principle. Irregular family migration to the southern border has increased *more than 33 times* what it was as recently as 2013—from 14,855 in FY 2013, to over 500,000 in FY 2019. *See* https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019; 84 Fed. Reg. at 44,404. Tying the government's hands in addressing an immigration crisis of this magnitude is unprecedented and squarely contrary to the public interest.

4. Substantial flaws in the certified class also militate in favor of terminating the Agreement. First, given the multiple parties with affected interests, the multiple agencies involved, and the multiple circumstances and interests presented by minors

in immigration custody with or without parents, the class is far too unwieldy for management in a single litigation. Second, the class – as interpreted by the Court – includes accompanied minors, yet no parents were notified or involved in the highly abbreviated class certification process. *Flores*, 828 F.3d at 909 ("parents were not plaintiffs . . . nor are they members of the certified classes"). For example, the district court declined to terminate the Agreement in part based on a release provision in it that, if applied to accompanied minors, would provide for a child to be separated from the parent and transferred to an adult non-relative or shelter at DHS discretion and without parental consent. *See* ER 243 (¶ 14.E, F). Finally, Plaintiffs' lead class counsel has a serious conflict of interest, given that he operates a youth migrant facility, inspects facility conditions under the Agreement while defending against substantial violations relating to conditions at his own facility, and concedes that his facility is a direct beneficiary of the Agreement. *See* ER 33 (Schey Declaration ¶¶ 4-5) (Defendants are releasing children into the shelter counsel operates); https://www.latimes.com/projects/la-me-immigrant-children-group-home-casa-libre-peter-schey/ (May 22, 2019) (describing pattern of violations at counsel's migrant shelter).

C. The District Court Disregarded *Horne* and *Rufo* and Abused its Discretion In Declining to Terminate the Agreement.

The district court cited the Supreme Court's standard for terminating consent decrees in *Rufo* and *Horne*, Order at 20. But the court entirely ignored the import of

those decisions and their obvious application to the current evaluation of the nearly 23-year-old Agreement that fails to address significant aspects of what has now become a family migration crisis.

1. The district court nowhere assessed whether "applying [the Agreement] prospectively is no longer equitable." *Jeff D. v. Otter*, 643 F.3d 278, 283 n.4 (9th Cir. 2011). We have explained why it is not, given the change in the governing statutes, the issuance of comprehensive regulations, the dramatically different operational environment, the long passage of time, and the fact that the parties did not contend with important issues regarding family custody. The district court ignored those changes, concluding only that the parties in 1997 "expressly anticipated" them. ER 23.

The District Court's curt determination that a sustained family migration crisis that arose years after the Agreement and expanded exponentially since 2013 was anticipated by the parties in 1997 (*id.*) is wrong and, in and of itself, an abuse of discretion. The district court relied on the influx provision to contend that the parties actually anticipated increasing migration numbers. *Id.* This holding is remarkable given that the "influx" provision contemplates only *130 minors* awaiting placement, whereas this year 80,000 unaccompanied children arrived at the border, 10,000 unaccompanied children were at various times in HHS custody, and 500,000 members of family units arrived at our borders without documentation. *See* 84 Fed.

Reg. at 44,404. The district court's statement is even more remarkable in light of this Court's acknowledgement that the parties did not contend with the complex issues presented by irregular family migration or custody. *Flores*, 828 F.3d at 907-09. If the parties had anticipated 500,000 members of family units arriving, surely they would have made detailed provisions for accompanied minors. *See Rufo*, 502 U.S. at 385 (asking whether "it is clear that a party anticipated changing conditions"). The notion that the parties anticipated, or could have anticipated, this dramatic, sustained change in circumstances in 1997 and intentionally failed to address the complex issues it presents – and that Rule 60(b)(5) modification is now barred –is unfounded and contrary to law.

The Fourth Circuit's decision concerning Rule 60(b)(5) modification in the context of institutional reform litigation in *Small v. Hunt*, 98 F.3d 789, 792 (4th Cir. 1996), is instructive. *Small* was a suit involving prison conditions that resulted in a comprehensive settlement agreement. *Id.* Despite the parties' anticipation of growth in the prison population at rates between 3 and 5 percent, the population increased much faster, nearly doubling in four years. *Id.* at 793. The Fourth Circuit approved the modification, recognizing that institutional reform litigation requires "a more flexible approach to modification" because it is "aimed at achieving 'broad public policy objectives in a complex, ongoing fact situation.'" *Id.* at 795. Given the unique nature of institutional litigation, "consent decrees settling such litigation must

be viewed as embodying 'not so much peremptory commands to be obeyed' [but] 'future-oriented plans designed to achieve [those] objectives.'" *Id.* at 795. In this case, those larger objectives – regulations codifying a lasting care regime and release standards suited to minors in immigration custody that largely mirror the Agreement (*see* ER 239 (¶ 11)) – have been accomplished through the promulgation of the rule.

Despite the district court's passing reference to publicly available information about the characteristics of migration in recent years, and its incorrect assertion the government was "rely[ing] on 'dubious' . . . statistics," ER 23, the evidence of the sustained increase in family migration is unrefuted by Plaintiffs. Indeed, the exponential and protracted increase of irregular migration by families and minors far exceeds the prison population increase in *Small*, 98 F.3d at 793. *See* 84 Fed. Reg. at 44,404 (reflecting more than 10,000 unaccompanied minors under HHS care during periods in 2019, 76 times the "influx" number under the Agreement); https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019; 84 Fed. Reg. at 44,404 (in 2019, irregular family migration increased 33 times over 2013).

To be sure, in 2016 this Court concluded that the rising numbers of minors did not warrant equitable modification. *See Flores*, 828 F.3d at 910. But that was before HHS and DHS promulgated the comprehensive regulation that addresses the issues the Agreement was designed to address on a temporary basis more than 20 years ago. And in any event, the Court is free to reconsider that determination when

faced—more than three years later—with perpetually rising numbers and a sustained crisis that calls out for current policy makers to be able to devise solutions. *See City and County of San Francisco v. U.S.C.I.S.*, 2019 WL 6726131, at *27 (9th Cir. Dec. 5, 2019) (Bybee, J., concurring) ("In the immigration context . . . . [w]e are limited . . . in our ability . . . to shape our immigration policies. We lack the tools of inquiry, investigation, and fact-finding that a responsible policymaker should have at its disposal."). The district court's blanket refusal to consider whether significant changes in factual circumstances rendered the Agreement inequitable was an abuse of discretion. *See Rufo*, 502 U.S. at 392-93.

2. Although the inequity of continuing to enforce the Agreement is sufficient to terminate, Defendants' substantial compliance with the Agreement provides additional grounds for termination. The district court briefly discussed this issue, concluding "ongoing litigation in this case, more than 20 years after the Agreement was executed, evidence Defendants' lack of substantial compliance." ER 22. This was not a reasonable assessment of the government's actions under the Agreement over a two decade period. While the district court was the forum in which sharp disputes over application of the Agreement have recently arisen, the court gave short shrift to the fact that those disputes were the exception, not the norm. There were virtually no disputes during the first 15 years of the Agreement. In the last five years, disputes often involved discrete interpretive disagreements or the application of the

Agreement to family custody, a subject with which the parties undeniably never grappled in 1997. Others disputes involved border conditions in a recent operational environment of dramatic and dangerous increases in irregular family migration – the types of changes that, as explained above, militate in favor of termination, not the other way around.

In the meantime, HHS has developed a robust system for caring for unaccompanied minors that addresses the needs of tens of thousands of children annually – numbers beyond the realm of imagination in 1997. There have been few complaints about HHS's performance. And DHS has tackled crisis conditions at the border in good faith and in the face of enormous pressure. *See* 84 Fed. Reg. 44,403-05; ER 184 (Monitor Report) (extraordinary rise in the number of children crossing the border in FY2019 "is well known and has been dramatic" and undeniably affected the government's performance under the Agreement). These disputes do not justify the district court's fixation on alleged lack of compliance with the Agreement.

In any event, the district court limited itself to assessing "substantial compliance" when that is just one of several bases to terminate a long term consent decree. *Jeff D.* recognized termination upon substantial compliance, but also that a decree should be vacated when a party has accomplished "the more general goals of the [consent] decree which the terms were designed to accomplish" or when

"applying it prospectively is no longer equitable." 643 F.3d at 283 n.4. As we explained above, the district court did not assess whether the rules serve the "more general goals" of the Agreement or if it remained equitable. Instead, it focused on a few specific asserted conflicts, such as the challenge of family custody, that the Agreement did not address or where the government addressed challenges in new ways.

In addition to misconstruing *Jeff D.*, the district court misread the Agreement's own termination provision. The Agreement itself provided for termination not upon substantial compliance, but upon implementation of the Agreement through federal rulemaking. *Compare* ER 252 (¶ 35) (suit dismissed upon a finding of "substantial compliance") *with* ER 223 ¶ 40 (Agreement terminated upon promulgation of implementing rules). The overarching goal of the Agreement – establishing by rule special care and custody standards that "treat . . . all minors . . . with dignity, respect and special concern for their particular vulnerability" (ER 239 (¶ 11)) – has plainly been accomplished. And this Court has made clear that in considering a motion to terminate, a district court abuses its discretion when it "fail[s] to explicitly consider the goals of the decree and only evaluat[es] compliance with individual action items." *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016).

3. The district court also erroneously reasoned that *Horne's* "flexible

approach" was not warranted because the Agreement was the "bargained-for position[]" of the parties. ER 23. This is, of course, true of all consent decrees; that is what makes them consensual. The district court's reasoning also disregards the "flexible standard" mandated by the Supreme Court and, as explained above, the importance of applying that standard to government actors where a decree imposes significant limitations on their ability to address new, growing, and largely unforeseen problems in new ways. By refusing to free the government's hand in such circumstances, the district court has done precisely what *Horne* and *Rufo* warn against: blocking ordinary avenues of political change and wresting control over public policy from executive officials in an area where adaptability and accountability are of paramount concern.

4. The district court relied on an additional erroneous basis for refusing to consider modification, asserting that a Rule 60(b) motion based on a change in law requires "the moving party [to] establish that the provision it seeks to modify has become 'impermissible'" or "'an instrument of wrong.'" ER 21 (quoting *Flores*, 828 F.3d at 909–10 & *Flores*, 862 F.3d at 874). But while illegality is *a* basis for Rule 60(b) modification, it is not the *sole* basis, especially in institutional reform litigation. *Rufo*, 502 U.S. at 382-83. Rather, the Supreme Court and this Court have identified multiple situations in which a change of law that does not render the consent decree illegal, nevertheless justifies action under Rule 60(b)(5) because the

change alters "the legal landscape in the significant way required to modify a consent decree." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union*, 891 F.3d 1182, 1187 (9th Cir. 2018); *see Rufo*, 502 U.S. at 383–84.

Here, the TVPRA and the new rules plainly alter the legal landscape. For example, whereas the new rules comprehensively address family custody, the Agreement "does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children." *Flores*, 828 F.3d at 906. The rules are entitled to be evaluated on their own merits, which the district court refused to do, holding the government instead to an outdated Agreement that does not grapple with the most pertinent operational issues facing the agencies today. ER 18-19 (declining to address validity of regulations under the APA); ER 16 (disregarding TVPRA in concluding that "New Regulations' embrace of the TVPRA standard does not indicate . . . compliance with the Agreement").

D. The District Court Failed to Follow *Rufo* and Exaggerated Differences Between the Final Rule and the Agreement in Justifying its Decision Not to Terminate.

The new rule reflects the latest thinking of the relevant Departments in addressing current operational circumstances, the current governing statutes, and the input of the public under the APA rulemaking process. These solutions largely

mirror those of the Agreement in substance. In rejecting the rules, the district court exaggerated the limited distinctions between the rule and the Agreement. And in doing so, the court misapplied Rule 60(b) – the regulations are properly tailored to address current circumstances and terminating the Agreement will allow that goal to be achieved. *See Rufo*, 502 U.S. at 383-84, 391-92. Importantly, this litigation was intended to assure due process for Plaintiffs, the rule plainly accomplishes that, and indeed is far more protective than the constitutional floor. *Rufo*, 502 U.S. at 391; *Flores*, 507 U.S. at 302 (upholding much less protective prior version of regulations against constitutional challenge). In other words, with the new rule, "the [government is] fulfilling its obligations under the [law] by other means." *Horne*, 557 U.S. at 439.

1. HHS Custody of Unaccompanied Minors

The rules related to HHS and its custodial role with respect to unaccompanied minors are substantively identical to the relevant provisions of the Agreement with minimal exceptions to account for the HSA and TVPRA. The rules directly parallel provisions of the Agreement regarding prompt placement, licensed programs, and efforts at release, and make a regulatory requirement all of the services for minors set out in Exhibit 1 of the Agreement. *See* 45 C.F.R. § 410.202 (prompt placement in a licensed program); 410.101 (defining licensed program); § 410.402 (adopting standards paralleling Exhibit 1). HHS provisions on placement in secure facilities

are more protective of children than what is permitted under the Agreement. 45 C.F.R. § 410.203.[2] The provisions governing release to a sponsor, 45 C.F.R. § 410.301, do not differ from Paragraph 14 of the Agreement.

The district court invalidated these rules in their entirety based on three differences, none of which is substantive, and none of which suggests that the government will fail to satisfy its obligations under the Constitution and the TVPRA – or indeed, that it has not implement the Agreement.

First, the district court held that the provisions allowing an unaccompanied minor to be placed in a secure facility if he or she is "a danger to self or others" is inconsistent with Paragraph 21 of the Agreement. ER 14-15. But this standard comes directly from the TVPRA,[3] and implements Paragraph 21 (ER 244-45), which permits minors to be placed in secure facilities if they, *inter alia*, "committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others)."[4] The Court failed to explain how such language overreached, and the regulation is arguably narrower than the multiple similar grounds for secure

---

[2] For example, based on the TVPRA, the regulation does not include "escape risk" as a basis for making a secure placement, even though the Agreement allowed as much. *Compare* 45 C.F.R. § 410.203 *with* Agreement ¶ 21.
[3] *See* 8 U.S.C. § 1232(c)(2)(A) (unaccompanied child "shall not be placed in a secure facility absent a determination that the child poses a danger to self or others"); 84 Fed. Reg. at 44,455.
[4] Paragraph 21 (ER 244-45) also provides for secure placement when "removal is necessary to ensure the welfare of the minor or others" given disruptive behavior; or the child "must be held in a secure facility for his or her own safety."

placement set out in Paragraph 21. The district court contended that the TVPRA standard was a floor, but did not explain how HHS was failing to "fulfill[] its obligations under the [Constitution and statutes] by other means" (*Horne*, 557 U.S. at 439) by adopting the standard Congress selected. Nor did the court explain how abandoning this standard would account for the risks to other unaccompanied minors in the unsecure facility.

Second, the district court held that the new rule impermissibly shifts bond redetermination hearings from immigration judges to independent HHS hearing officers in violation of Paragraph 24.A of the Agreement. ER 16; *see* 45 C.F.R. § 410.810. But this change is not substantive. Instead, the rule reasonably allocates responsibility for these hearings to HHS given that Congress, in the HSA and TVPRA, made HHS – as an agency focused on public welfare rather than law enforcement – responsible for the custody and placement of UACs, including consideration of dangerousness and flight risk. 6 U.S.C. § 279; 8 U.S.C. § 1232(b)(1), (c)(2)(A). Importantly, HHS devoted pages of preamble language directly addressing these issues, yet the court failed to consider that agency expertise and explanation. 84 Fed. Reg. 44,476-84. The final regulations also directly address concerns this Court identified with respect to custody hearings. *See Flores*, 862 F.3d at 878 (noting that then-existing ORR procedures were "governed by a manual" and did not include various procedural protections).

The district court's references to an "opt-in rather than op-out right" also do not justify rejecting the new rule. ER 16. The regulations provide for each minor to receive "a notice of the procedures under this section and . . . a form . . . to make a written request for a hearing." 45 C.F.R. § 410.810(a)(2). Requests can be made by children or their "parents, legal guardians, or legal representatives." 84 Fed. Reg. 44,478. Given the required notice and form, there is no practical difference between opting in and opting out in this context, and this procedure was developed because many minors prefer *not* to have a custody hearing given that such a hearing can make placement more difficult, and make a minor's history of danger part of a permanent immigration record. *Id.* (hearings "provid[e] no benefit for the overwhelming majority of UACs" who "are not considered dangerous or flight risks to begin with").

Third, the district court believed that some of the HHS regulatory provisions were not mandatory because they did not use the term "shall" but instead used the present tense to describe HHS obligations. *See* ER 17-18 (comparing Paragraph 19, which states minor "shall be placed . . . in a licensed program" with new 45 C.F.R. § 410.201(a), which states that "ORR *places* each [class member] in the least restrictive setting"). Contrary to the district court's belief, the use of the present tense in this and other provisions does not render these provisions optional; they are mandatory. *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998).

("[t]he Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates").[5]

2. Initial DHS Custody of Accompanied and Unaccompanied Minors.

As was the case with the HHS rule, neither Plaintiffs nor the District Court quibbled with the vast majority of the provisions in the DHS rule. With respect to DHS's initial apprehension of minors—accompanied and unaccompanied—the rules are identical to those in the Agreement. The district court identified no issues with this aspect of the rules, yet declined to terminate the Agreement and invalidated these provisions in full.

The rules implement key protections for minors when they are initially encountered that mirror the Agreement. U.S. Customs and Border Protection (CBP) is frequently responsible for custodial care of a minor following apprehension and prior to transfer to U.S. Immigration and Customs Enforcement (ICE) (if accompanied) or HHS (if unaccompanied). ICE also is responsible for temporary

[5] The District Court relied on inapposite cases in evaluating whether these regulatory provisions are mandatory or aspirational. ER 18. The common aspirational future tense language ("will") in *Tin Cup, LLC v. United States Army Corps of Engineers,* 904 F.3d 1068, 1074-75 (9th Cir. 2018), is not like the present-tense, non-discretionary language used in a regulation. In *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016), the Court considered the "word 'may,' which implies discretion," and is not the language used here. In *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004)), the Supreme Court did not hold that "shall" is the only word capable of conveying a mandatory requirement but asked whether in the context of the provision, there is a "clear indication of binding commitment." 124 S. Ct. at 2382. There is such a commitment in the regulations at issue here.

care of an unaccompanied minor apprehended in the interior. Following initial apprehension, the transfer timeframe of the Agreement for UACs has been accelerated due to the intervening enactment of the TVPRA, requiring a transfer to HHS within 72 hours of determining that the alien is a UAC, absent exceptional circumstances. 8 U.S.C. § 1232(a), (b). That requirement is incorporated into the new rules. *See* 8 C.F.R. § 236.3(f)(3). The provisions regarding transportation and custody immediately following apprehension of minors with unrelated adults also present no substantive change from the Agreement. *See* 8 C.F.R. § 236.3(f)(4)(i); 8 C.F.R. § 236.3(g)(2)(i). Likewise, the provisions governing the conditions of custody upon initial apprehension, 8 C.F.R. § 236.3(g)(2), parallel the requirements in Paragraphs 11 and 12.A of the Agreement. The rules also provide ongoing monitoring and oversight by Juvenile Coordinators, just like Paragraph 28A of the Agreement. *See* 84 Fed. Reg. at 44,409. In sum, the rules implement the substantive provisions relating to initial custody by DHS under the Agreement verbatim. It is inequitable to invalidate these rules and leave the Agreement in place when they provide equivalent protections.

3. Provisions Relating to Accompanied Minors

The district court's primary rationale for invalidating the rules concerned the provisions relating to family custody and the release of children who are apprehended *with* their parent or legal guardian. The court both overstated the

impact of the new rules, and failed to afford the agency the flexibility necessary to address this evolving and persistent problem.

a. As this Court has held, the custody and care of family units was not addressed by the parties in the Agreement, and therefore must be subject to new regulatory provisions specifically designed to address those circumstances. That action will necessarily break new ground.[6] This Court explained that "the Settlement does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children." *Flores*, 828 F.3d at 906–07. For example, Exhibit 1 of the Agreement, which sets forth requirements for licensed programs, "does not contain standards related to the detention of adults or family units." *Id.* at 906. Indeed, this Court recognized that, in entering into the Agreement in 1997, the "parties gave inadequate attention to some potential problems of accompanied minors," and those problems have played out in litigation over the last several years. *Id.*

In turn, the Agreement does not require the release of parents or legal guardians who are apprehended with their children, *Flores*, 828 F.3d at 909, and requiring release in those circumstances would create "incentive[s] for adults to bring juveniles on the dangerous journey to the United States and then put them in

---

[6] The United States maintains its position for purposes of these proceedings that the Agreement does not apply to accompanied minors.

further danger by illegally crossing the United States border, in the expectation that coming as a family will result in an immediate release into the United States." 84 Fed. Reg. at 44,403. Numerous reports suggest children are injured or perish during this journey. *See* https://migrationdataportal.org/themes/migrant-deaths-and-disappearances (recording "minimum estimate" of nearly 3,000 migrant deaths at southern border and in Central America).

The rules satisfy the government's constitutional and statutory obligations with respect to children apprehended with a parent or legal guardian. First, the rules parallel key provisions from the Agreement regarding the conditions of custody and apply them to facilities housing accompanied children. Such facilities must satisfy all the requirements set forth in Exhibit 1 of the Agreement for licensed care facilities, and must be licensed by a State or, if such a licensing scheme is unavailable, comply with a process designed to provide independent review and similarly ensure compliance with the regulatory protections. *See* 8 C.F.R. § 236.3(b)(9), (i)(4).

Second, the rules account for the interest of family unity that were not considered or addressed by the parties in negotiating the Agreement. In June 2018, the President issued an Executive Order providing that it is the "policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources." Exe.

Order No. 13841, § 1, 83 Fed. Reg. 29,435 (June 20, 2018). Shortly thereafter, a district court in San Diego recognized a strong interest in family unity when parents are apprehended with their children and placed in immigration proceedings together. *See Ms. L. v. U.S Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1143–48 (S.D. Cal. 2018). This Court likewise recognized the interest in family unity that runs through the Agreement. *Flores*, 828 F.3d at 908. Commenters on the Flores rule also expressed significant concerns about family separation. *See*, *e.g.*, 84 Fed. Reg. at 44,392, 44,429.

b. These judgments by the President, the agencies, this Court, other courts, and commenters recognize that there are important issues to be addressed that were not faced by the parties to the Agreement. The rules protect children and address the interest in family unity in three ways. First, it sets out a regulatory regime for family residential centers wherein families can remain in custody together in non-secure, licensed facilities during the pendency of their immigration proceedings, with conditions suitable for the needs of children and derived from the Exhibit 1 of the Agreement.

Second, the rule clarifies and amends parole standards in a manner that parallels Paragraph 14 of the Agreement. Thus, for those minors in expedited removal proceedings who establish a credible fear, parole will generally serve an urgent humanitarian reason warranting release on parole "if DHS determines that

detention is not required to secure the minor's timely appearance before DHS or the immigration court, or to ensure the minor's safety and well-being or the safety of others." 8 C.F.R. § 236.3(j)(4). This release standard comes directly from the Agreement ¶ 14, which provides for release "[w]here 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." ER 241-42.

Third, the rules provide authority for DHS to release accompanied minors to another adult relative—including a relative identified by the parent in custody—who can provide appropriate care and treatment for the minor. 8 C.F.R. §§ 212.5(b)(3)(i), 236.3(j)(5)(i).

Together, these provisions protect children and address the interest in family unity within the larger context of immigration enforcement. As one court explained, when there is a legitimate need to detain a parent, family integrity is not threatened, as the legitimate goals of immigration detention can be met "by temporarily detaining families together in family residential facilities." *Nolasco v. ICE*, 319 F. Supp. 3d 491, 498 (D.D.C. 2018). There, parents may provide care to, and exercise custody and control over, their children in a facility licensed under the standards set forth in the rules.

The rules also account for the legitimate governmental interest in immigration

enforcement and the strong Congressional preference that applicants for admission at the border—including parents with accompanying children—be detained pending a determination of whether they may be admitted to the United States. 8 U.S.C. § 1225(b) (mandatory detention provisions); *see* 8 U.S.C. § 1232(b)(1) (excluding from Section 1225 detention provisions only *unaccompanied* alien children).

By better approximating the treatment of family units to the treatment of the parent, while ensuring family-appropriate conditions if detention is required, the rules address a substantial loophole. There has been a dramatic increase in irregular family migration—where the number of people encountered in family units has increased to *over 33 times* the number in 2013, from 14,855 that year to over 500,000 in fiscal year 2019. 84 Fed. Reg. at 44,404; *see Flores*, 507 U.S. at 296 (observing that around 2,500 children were apprehended with family in 1990). Adults who choose to travel with children subject those children to a dangerous journey, a substantial risk of injury or death, and in some cases, exposure to violent traffickers. *See* 84 Fed. Reg. at 44,403 (rule addresses "significant and ongoing surge of adults who have made the choice to enter the United States illegally with juveniles or make the dangerous overland journey to the border with juveniles, a practice that puts juveniles at significant risk of harm"); McAleenan Statement (Aug. 21, 2019) ("the new rule will protect children by reducing incentives for adults, including human smugglers, to exploit minors in the dangerous journey to our border"). Reducing the

scope of those problems is an important and legitimate purpose behind this regulation.

c. The district court rejected outright the effort by the government to devise a solution to this problem, thereby locking the government into rules that were not suited or designed to tackle immigration custody when a minor is with a parent or legal guardian. The district court identified three perceived flaws with the handling of family custody, but none of them justifies an inflexible approach that prevents the government from addressing this substantial immigration challenge through the very rulemaking process that was called for by the Agreement.

First, the district court concluded that DHS could not authorize family residential centers without a state license, even if the state has no licensing system for such facilities. In circumstances where the parties did not address the mechanics of family detention, demanding state licensing schemes that do not exist cannot be squared with the flexible approach to long-term consent decrees required by *Horne* and *Rufo*.

The new rules address this issue not contemplated in 1997 in a reasonable way. The new rule *fully defers* to states in licensing family residential centers, and provides an alternative independent review scheme only if a state declines to provide for licensing. As the rules explain, "to the extent state licensing is available, DHS will seek licensure." 84 Fed. Reg. 44,419. The rule also defers to the state in defining

when the facility is "non-secure." 8 C.F.R. § 236.3(b)(11). Further, as the rules explain, there are currently family residential centers in just two states. In Pennsylvania, the facility is currently licensed by the state and "continues to be regularly inspected by the Pennsylvania Department of Human Services." 84 Fed. Reg. 44,419. In Texas, state "authorities have inspected facilities . . . regularly," and litigation barriers have recently been lifted to permit state licensure. *Id*.

DHS addresses the state licensing requirement in detail in the rules, and explains that state licensure is preferred, but that if a state does not license, "DHS will require third parties to conduct inspections to ensure compliance with . . . the terms of this rule" and the requirements that derive from Exhibit 1. *Id*. at 44,418. This approach is both appropriately deferential to state regulators with the relevant expertise while preventing states from attempting to use their control over licensing to effectuate a state ban on federal immigration custody. *See California v. McAleenan*, No. 2:19-cv-7390 DMG(AGRx), ECF No. 32 at 18 (stating both that state licensure is required to preserve state regulatory interests and that family residential centers are "fundamentally incompatible with state licensing"). Indeed, it may be that once states and advocates realize they cannot use the absence of state licensing as a de facto ban on family custody, the states will be willing to perform the traditional licensing function. *See id*.

As this Court recently explained, while a state has "the general authority to

ensure the health and welfare of . . . detainees in facilities within its borders," there is a "clear interference with federal activity" that is preempted by federal law where a "state[] prevented the federal government from entering into agreements with its chosen contractors until the states' own licensing standards were satisfied." *United States v. California*, 921 F.3d 865, 885-86 (9th Cir. 2019) (discussing *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam)). This is because a state cannot engage in "active frustration of the federal government's ability to discharge its operations," which would happen when a state "require[s] that federal detention decisions . . . conform to state law . . . or mandate that ICE contractors obtain a state license." *Id.* Thus, a state cannot use its licensing scheme to bar a form of immigration custody it does not like, and DHS reasonably employed an alternative oversight methodology to avoid that result. As this Court explained, these are "potentially complex issues" that "the Settlement does not address," and it is in the public interest to allow the regulatory regime to govern now that comprehensive rules have been promulgated. *Flores*, 828 F.3d at 906–07.

Second, the district court viewed the revised parole standard to be narrower than the release standard in the Agreement in one limited circumstance – when a family is subject to expedited removal, is in custody together, and has not yet established a credible fear under 8 U.S.C. § 1225(b)(1)(B)(ii). During this short period, Congress has provided that individuals "shall be detained pending a final

determination of credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The new rules clarify that the parole standard that applies in this situation is the same for the child as it is for his or her accompanying parent or legal guardian. 84 Fed. Reg. at 44,393. This is not only consistent with the statute mandating detention, it ensures family unity during this short period and that the family's asylum request is considered together – a process that a certified class of parents have demanded in other litigation. *See Ms. L.*, 310 F. Supp. 3d at 1143-44, 1149. Remarkably, the district court invalidated the rules based in part on this difference even though it previously *approved* an interpretation of the Agreement to allow families to be held together in family custody during the short period it takes to make a credible fear determination. *See Flores*, 212 F. Supp. 3d at 914. The district court further drained *Horne* and *Rufo* of all meaning when it rejected the government's solution to a problem that the court itself endorsed just two years ago.

Third, the district court held that the rules were impermissible because of a second narrow circumstance that the court believed was inconsistent with the Agreement: where a child is in custody with a parent and the parent seeks release of his or her child to an adult non-relative while the parent remains in DHS custody. The new rule allows release of a minor in these circumstances to an adult relative – another parent or guardian, a sibling, a grandparent, or an aunt or uncle. *See* 8 C.F.R. §§ 236.3(j)(5)(i), 212.5(b)(3)(i). The district court believed that in these

circumstances, Paragraph 14 applies and requires release, if no such relative is available, to unrelated adults. ER 8-9. This conclusion was erroneous in the first place, and in any event should not have led the district court to invalidate the rules.

First, the district court was mistaken: the first release priority in Paragraph 14 is to the parent or legal guardian, thereby reuniting the direct family. ER 242 (¶ 14.A, B). Thus, the Agreement did not contemplate, and does not specifically address, what is required if the child can remain in custody with the parent – making it possible to keep the direct family together – rather than being separated from the parent and released to a non-relative.

Second, the district court should not have invalidated the rules based on the way DHS addressed this issue. There is nothing improper about DHS addressing a problem the parties did not contemplate in this manner. This is particularly true given that the Supreme Court recognized the significance of the identified relations; the inherently higher risk that arises – and additional vetting required – when placing a child with a non-relative; and the government's legitimate interest in not separating families when the child is safe with a parent in DHS custody during immigration proceedings. *See Flores*, 507 U.S. at 304-05 (discussing release to an "available parent, close relative, or legal guardian"); *id.* at 311 n.6 ("[c]ategorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody"); *see*

also Exe. Order No. 13841, § 1; 84 Fed. Reg. 44,415. Indeed, releases of this sort to adults who are not close relatives – even for unaccompanied children – require additional vetting and are unusual; sponsors are nearly always a parent, legal guardian, or other close relative. *See* https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html. Invalidating these rules because of how DHS handled this complex situation, unforeseen by the parties in the Agreement, was in error. *See Flores*, 828 F.3d at 906–07.

E. The District Court Should Have At Least Terminated the Agreement In Part.

Finally, the district court failed to address whether the Agreement could be terminated, in part, by modifying the decree as required under *Rufo*. As discussed above, the regulations governing the initial apprehension of minors by DHS and those governing HHS care and custody of unaccompanied minors largely track the Agreement verbatim. *See* ER 153-58 (side by side chart of provisions) (84 Fed. Reg. at 44,511). At a minimum, the Agreement should have been terminated as to those provisions and the district court abused its discretion in declining to let those rules go into effect.

II. THE AGREEMENT TERMINATES BY ITS OWN TERMS.

Terminating the Agreement under Rule 60(b) is particularly appropriate given that the Agreement itself (¶ 40) states that it terminates upon the promulgation of

"final regulations implementing [the] Agreement." But even in the absence of equitable relief under Rule 60(b), the Agreement has terminated under the plain meaning of that provision in light of the promulgation of final rules. As this Court explained, the Agreement "would remain in effect until '45 days following defendants' publication of final regulations' governing the treatment of detained minors." *Flores*, 862 F.3d at 869. In any event, the district court lacked authority – under the All Writs Act or any other source of authority – to invalidate the regulations in their entirety when, except for a few minor differences, they are consistent with the Agreement.

By providing for termination upon the promulgation of final rules, the parties accepted the propriety of an APA rulemaking process, and the reality that those rules would reflect the judgments of the relevant agencies at the time of promulgation, together with the consideration of public input through the notice and comment process. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (agencies "examine[] 'the relevant data' and articulate[] 'a satisfactory explanation' for [the] decision, 'including a rational connection between the facts found and the choice made'"); *Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

The district court reasoned that the regulations were inconsistent with

Paragraph 9 of the Agreement, which required INS to, "[w]ithin 120 days of . . . approval of the Agreement . . . publish the relevant and substantive terms as a service regulation" and that the final rules "not be inconsistent with the terms of this Agreement." ER 6; *see* ER 29. But Paragraph 40 is the operative termination provision for the Agreement, not Paragraph 9, which concerned implementation and proposed rules to be published in 1997. Thus, this in itself is a legal error that requires reversal of the Court's holding regarding the termination provision. In any event, the new rules are consistent with both Paragraph 40 and Paragraph 9 – the new rules are consistent with the Agreement, as we have explained, and both provisions implicitly envision an APA process whereby the agency will address current circumstances and public input.

Plaintiffs have understood all along that the APA rulemaking process would involve this kind of judgment by government officials and input from the public, not just the imprimatur of the Plaintiffs. Plaintiffs agreed that regulations "need not 'mirror' the Settlement." ECF No. 668 at 9. In fact, Plaintiffs commented on the original proposed rules nearly 20 years ago – proposed rules that themselves differed from the Agreement in significant respects. Flores Working Paper at 12. Those proposed rules explained that the agencies were seeking comment on "issues that have come to the public's attention since the close of the original comment period in 1998." 67 Fed. Reg. 1670 (2002). Plaintiffs in 2003 stated that final rules must

be "based on [the agency's] own experience," and in 2018, Plaintiffs explained that some provisions were "out of date and must be revised to reflect operational realities." Plaintiffs Comments at 14 (2018); Flores Working Paper at 12.

The regulations undeniably implement the core goal of the Agreement, to establish by rule a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS." ER 238 (¶ 9). The regulations treat minors in custody with "dignity, respect, and special concern for their particular vulnerability as minors." ER 239 (¶ 11); *see* 84 Fed. Reg. 44,392; 44,525; 44,531 (Aug. 23, 2019). 45 C.F.R. § 410.102; 8 C.F.R. § 236.3(a)(1). As explained *supra*, the rules are virtually identical to the Agreement with respect to unaccompanied minors. And for accompanied minors, the changes are limited in scope and the agency provided a thorough explanation of those limited differences. The district court gave short shrift to that extensive APA process in concluding, based on a few limited differences from the Agreement, that it had not been implemented. This legal ruling was in error.

CONCLUSION

For all the reasons discussed herein, the district court judgment should be reversed.

Dated: December 20, 2019 Respectfully submitted,

JOSEPH HUNT
Assistant Attorney General

Civil Division

/s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 514-3309
Fax: (202) 305-7000
Email: august.flentje@usdoj.gov

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
JEFFREY ROBINS
DEPUTY DIRECTOR
WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation
SARAH B. FABIAN
Senior Litigation Counsel
Office of Immigration Litigation
District Court Section
Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 12,969 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel to the Assistant
Attorney General
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ August E. Flentje
AUGUST E. FLENTJE
Special Counsel to the Assistant
Attorney General
United States Department of Justice