No. 17-55208

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

JEFFERSON B. SESSIONS III,
Attorney General of the United States, et al.
Defendants-Appellants.

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

APPELLANTS' BRIEF

CHAD A. READLER
Acting Assistant Attorney General,
Civil Division

AUGUST E. FLENTJE
Special Counsel to the Assistant
Attorney General

WILLIAM C. PEACHEY
Director

SARAH B. FABIAN
Senior Litigation Counsel

VINITA B. ANDRAPALLIYAL
Trial Attorney
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Fax: (202) 305-7000
Email:
Vinita.b.andrapalliyal@usdoj.gov

Attorneys for Defendants-Appellants

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INTRODUCTION

This appeal concerns the continued applicability of Paragraph 24A of the 1997 *Flores* Settlement Agreement ("Agreement"), in light of intervening changes in the law that governs the custody and release of unaccompanied alien children ("UACs") in the United States. When it was signed in 1997, the Agreement resolved a lawsuit brought by detained unaccompanied minors in the custody of the legacy Immigration and Naturalization Service ("INS"). Paragraph 24A required all minors in deportation proceedings before the INS, who INS determined should remain in its custody during those proceedings, to be accorded a bond redetermination hearing before an immigration judge, unless the minor refused such a hearing.

Today, however, the structure that existed in 1997 at the time the Agreement was signed—in which the INS was responsible for the care and custody of minors who remained in Government custody, while at the same time responsible for their deportation proceedings—no longer exists. Instead, Congress has passed the Homeland Security Act of 2002 ("HSA") and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), which together entirely restructured the immigration system as it pertains to the custody of UACs. Specifically, this legislation separated the care and custody of UACs—now the responsibility of the U.S. Department of Health and Human Services ("HHS"), Office of Refugee Resettlement ("ORR")—from the immigration enforcement

functions performed by the U.S. Department of Homeland Security ("DHS"). The HSA further mandated that "the interests of the child are considered in decisions and actions relating to [his or her] care and custody." 6 U.S.C. § 279(b)(1)(B). And the TVPRA set up a comprehensive statutory scheme for the care and custody of UACs by HHS. 8 U.S.C. § 1232. Thus, today, UACs are not placed in DHS immigration detention facilities. Rather, they are placed into the custody of ORR, and then released to suitable custodians after ORR ensures that each custodian can care for the child and would not place him or her at risk. In the alternative, where no suitable custodian is available, UACs may remain in ORR custody in a setting appropriate for their care, which can include foster care facilities, group homes, residential treatment facilities, or, when determined by ORR to be a danger to self or community, non-punitive secure custody. 8 U.S.C. § 1232(c)(2)(A). Any placement in secure custody requires that HHS review such custody, at a minimum, on a monthly basis, using procedures prescribed by the Secretary of HHS. *Id*.

As described below, this new statutory scheme, which vests sole authority for the care and custody of UACs with HHS and requires HHS to follow specific statutory requirements when making any decision to release a UAC, leaves no room for any UAC who remains in HHS custody to receive a bond hearing from an immigration judge, because such a bond hearing is not contemplated by – and would serve no purpose within – the statutory scheme of the TVPRA. Moreover, the fact

that the TVPRA separates the care and custody of UACs entirely from the statutory and regulatory scheme that governs immigration detention, leaves no authority for immigration judges to review placement decisions for UACs. This is not only because immigration judges have no authority to review or dictate placement decisions made by HHS, but also because the TVPRA prohibits HHS from releasing an unaccompanied minor from HHS custody unless and until a suitable custodian has been identified by the agency as provided in the carefully crafted mandates of the TVPRA, which were designed specifically to protect UACs.

The district court's January 2017 order upends the statutory scheme created by the HSA and the TVPRA by finding that Paragraph 24A of the Agreement still applies to UACs in the custody of HHS, and ordering the Government to comply by providing these UACs with bond hearings before immigration judges. In doing so, the district court erred in three respects. First, the district court erred because it concluded that Paragraph 24A of the Agreement is still applicable, even though there is no authority or purpose for immigration judges to hold bond hearings for UACs in HHS custody under the statutory scheme created by the HSA and the TVPRA. Second, the district court improperly applied the canon of constitutional avoidance by ignoring the clear differences between immigration detention for adult detainees, and the care and custody of UACs described in the TVPRA. And third, the district court erred because it failed to address the Government's multiple procedural

arguments urging against proceeding to the merits of Plaintiffs-Appellees' motion to enforce, where it was brought many years after the passage of the HSA and the TVPRA. The resulting order from the district court leaves multiple agencies trying to create a system of bond hearings—where none has existed previously—which is at odds with the clear mandate of the TVPRA with regard to the manner in which custody and release decisions should be made for UACs. Because this result is against the purposes of the TVPRA, and the Agreement itself, the Court should reverse the district court's decision.

JURISDICTIONAL STATEMENT

On August 12, 2016, Plaintiffs filed a motion to enforce the Agreement. *See Flores v. Johnson*, No. 85-cv-4544 (C.D. Cal.), ECF No. 239. The Government responded on August 26, 2016, opposing Plaintiffs' motion. ECF No. 247. On January 20, 2017, the district court issued a final decision disposing of the parties' claims regarding Plaintiffs' enforcement motion in a minute order, granting Plaintiffs' motion to enforce.[1] Record Excerpt ("R.E.") 45–53.

On February 17, 2017, the Government timely filed a Notice of Appeal of the district court's order. R.E. 1–5. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[1] The Government notes that another, prior-filed motion to enforce is still pending in the district court. *See* ECF No. 201.

STATEMENT OF THE ISSUES

This appeal raises the following issues:

1) Did the district court err in concluding that Paragraph 24A of the Agreement requiring bond redetermination hearings for unaccompanied minors in INS custody remains applicable, even though the comprehensive statutory scheme of the HSA and the TVPRA governing the care and custody of UACs has created an entirely new framework under which HHS makes all decisions regarding the custody and placement of UACs?

2) Did the district court err in invoking the doctrine of constitutional avoidance in a manner that ignores fundamental differences between the statutory framework governing immigration detention for adults, and the comprehensive statutory scheme of the HSA and the TVPRA governing the care and custody of UACs?

3) Did the district court err in failing to address the Government's procedural arguments against considering Plaintiffs-Appellees' enforcement motion on the merits?

STATEMENT OF THE CASE

I. Factual and Legal Background

a. The Original Flores Litigation

The original complaint in this action was filed on July 11, 1985. At issue were the practices of the legacy INS[2] regarding unaccompanied minors subject to removal in the INS's Western Region who were eligible for discretionary release from

[2] In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress abolished the legacy INS, and transferred the majority of the immigration enforcement functions of the INS to the newly-formed DHS and its components. Responsibility for the care of UACs was transferred to HHS. 6 U.S.C. § 279. The immigration courts remained part of the U.S. Department of Justice ("DOJ"), and continue in operation under DOJ's Executive Office for Immigration Review ("EOIR").

detention but who could not be released because there were no immediately available custodians to whom the INS could release them. *See Reno v. Flores*, 507 U.S. 292, 294–95 (1993). The Government could not "simply send them off into the night on bond or recognizance [but] must assure itself that someone will care for those minors pending resolution of their deportation proceedings." *Id.* at 295. To address this problem, the INS's Western Regional Office "adopted a policy of limiting the release of detained minors to a parent or lawful guardian, except in unusual and extraordinary cases, when the juvenile could be released to a responsible individual who agrees to provide care and be responsible for the welfare and well-being of the child." *Id.* at 295–96 (quoting *Flores v. Meese*, 934 F.2d 991, 994 (9th Cir. 1990), *vacated*, 942 F.2d 1352 (9th Cir. 1991) (en banc)) (internal quotations omitted).

The *Flores* lawsuit challenged this policy, and sought to compel the release of unaccompanied minors to non-parental guardians or private custodians. *Id.* at 302. The lawsuit was brought on behalf of a certified class of minors "who have been, are, or will be denied release from INS custody because a parent or legal guardian failed to personally appear to take custody of them." *See also Flores*, 507 U.S. at 296. The original complaint asserted two claims challenging the INS's release policy related to unaccompanied minors, and five claims challenging detention conditions for unaccompanied minors not released. *Flores*, 507 U.S. at 296. In 1993, the Supreme Court rejected Plaintiffs-Appellees' facial challenge to the constitutionality

of INS's regulation concerning care of juvenile aliens, *id.* at 305, and remanded the case for further proceedings.

b. Relevant Provisions of the Flores Settlement Agreement

In 1996, the parties entered into the Agreement to resolve the case, and it was approved by the district court in 1997. The Agreement addressed the procedures and practices that the parties agreed should govern the INS's discretionary decisions to release or detain these unaccompanied minors, and to whom they should or may be released.[3] *See* Agreement ¶¶ 14–18, R.E. 15–18 (describing the general framework for release of unaccompanied minors from INS custody and the procedures and priorities for release).

Paragraph 14 of the Agreement provides the order of preference for the persons into whose custody these unaccompanied minors should be released provided that the INS determined detention was not required to secure their appearance or to ensure their safety or the safety of others.[4]

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[3] Exceptions apply, however, such as in the case of an emergency influx. *See* R.E. at 35.

[4] Specifically, paragraph 14 of the Agreement states:

> Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary

The Agreement also addresses what to do in a situation where a minor cannot be released and must remain in the custody of the INS. *See* Agreement ¶¶ 12A, 19–24, R.E. 7, 12–14. In such a situation, the Agreement states that the minor must be placed in a licensed facility, unless an exception applies. Agreement ¶ 19. R.E. Where a minor has committed certain crimes, or otherwise been determined to be a danger or an escape risk, the Agreement further allows that he or she "may be held in or transferred to a suitable State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility, having separate accommodations for minors . . . ." Agreement ¶¶ 21–22, R.E. 12–14. A secure facility should not be used, however, if there is a less restrictive alternative such as a medium-security facility or another licensed program that is "available and appropriate in the circumstances

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> delay, in the following order of preference, to: A) a parent; B) a legal guardian; C) an adult relative (brother, sister, aunt, uncle, or grandparent); D) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant's paternity or guardianship; E) a licensed program willing to accept legal custody; or F) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

Agreement ¶ 14, R.E. 15.

. . . .” Agreement ¶ 23, R.E. 14. The Agreement provides that for minors in “deportation”[5] proceedings, a bond redetermination hearing should be provided in all cases unless waived by the minor. Agreement ¶ 24A, R.E. 14.

A. Relevant Changes in the Legal Framework For The Custody of Minors Since the Agreement

i. The Homeland Security Act of 2002

In 2002, Congress enacted the HSA. The HSA created DHS, transferring most immigration enforcement functions formerly performed by the legacy INS to the newly-formed DHS and its components, including U.S. Citizenship and Immigration Services (“USCIS”), U.S. Customs and Border Protection (“CBP”), and U.S. Immigration and Customs Enforcement (“ICE”). *See also* Department of Homeland Security Reorganization Plan Modification of January 30, 2003, H.R. Doc. No. 108-32 (2003) (also set forth as a note to 6 U.S.C. § 542).

Notably, Congress also transferred to HHS ORR the responsibility for the ***care and placement*** of UACs “who are in Federal custody by reason of their immigration status.” HSA § 462(a), (b)(1)(A), (b)(1)(C); 6 U.S.C. § 279(a), (b)(1)(A), (b)(1)(C). The HSA further mandates that the ORR Director “shall be responsible for . . . ensuring the interests of the child are considered in decisions and

[5] Proceedings to determine an alien’s removability from the United States have been since been re-designated “removal proceedings,” rather than “deportation proceedings”. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, Div. C. 309(a), 110 Stat. 3009 (1996).

actions relating to the care and custody of an unaccompanied alien child." HSA § 462(b)(1), (b)(1)(B); 6 U.S.C. § 279(b)(1), (b)(1)(B). The HSA defined an "unaccompanied alien child" as:

> a child who-
> (A) has no lawful immigration status in the United States;
> (B) has not attained 18 years of age; and
> (C) with respect to whom-
> (i) there is no parent or legal guardian in the United States; or
> (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2). The HSA transferred to HHS the responsibility for making all placement decisions for UACs, and required HHS to consult with DHS and others in making such decisions.[6] 6 U.S.C. § 279(b)(l)(C), (D), (b)(2)(A). The HSA also prohibited HHS from releasing UACs on their own recognizance. 6 U.S.C. § 279 (b)(2)(B). Notably, the HSA contained a "[r]ule of construction" providing that, "Nothing in paragraph (2)(B) may be construed to require that a bond be posted for

[6] The HSA specifically states that in making placement and care decisions for UACs, HHS is to consult with juvenile justice professionals and DHS in ensuring that UACs "(i) are likely to appear for all hearings or proceedings in which they are involved; (ii) are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and (iii) are placed in a setting in which they are not likely to pose a danger to themselves or others . . . ." HSA § 462(b)(2)(A).

an unaccompanied alien child who is released to a qualified sponsor." 6 U.S.C. § 279(b)(4).[7]

ii. Trafficking Victims Protection Reauthorization Act of 2008

The TVPRA, Pub. L. No. 110-457, was signed into law on December 23, 2008. The TVPRA codified protections related to the processing, custody, and detention of UACs that encompass several material terms of the Agreement.[8] "The intricate web of statutory provisions relating to UACs reflects Congress's unmistakable desire to protect that vulnerable group." *D.B. v. Cardall*, 826 F.3d 721, 738 (4th Cir. 2016).

The TVPRA built on the HSA, and further required that "the ***care and custody*** of all unaccompanied alien children, including responsibility for their detention, where appropriate, ***shall be*** the responsibility of the Secretary of Health and Human Services." 8 U.S.C. § 1232(b)(1) (emphasis added). Further, the TVPRA requires that:

> Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien

[7] HHS does not charge bond when children are released, and does not have any mechanism for charging or collecting bond. *See* de la Cruz Decl. at ¶ 9, ECF No. 2-4.

[8] As Senator Diane Feinstein, one of the bill's sponsors, stated, "This bill deals with how these thousands of children will be treated while awaiting a final decision on their immigration status in this country . . . . This legislation also requires, whenever possible, family reunification or other appropriate placement in the best interest of the unaccompanied alien children." 154 Cong. Rec. S10886–87, 2008 WL 5169970.

> child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

8 U.S.C. § 1232(b)(3).

The TVPRA makes clear that HHS, and not DHS or DOJ, is responsible for all placement decisions for UACs in Government custody, and provides guidelines for placing UACs with suitable custodians, including dictating the requirements for HHS to evaluate the suitability of any placement. 8 U.S.C. § 1232(c)(3). The TVPRA prohibits releasing to a proposed custodian:

> unless [HHS] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

8 U.S.C. § 1232(c)(3)(A). In some instances, HHS must conduct a home study before placing a UAC with a proposed custodian. 8 U.S.C. § 1232(c)(3)(B). In the event that the proposed custodian is found to be a suitable custodian to whom an unaccompanied child may be released, the custodian receives a legal orientation presentation addressing their responsibility to ensure the juvenile's appearance at all immigration proceedings, and to protect the child from mistreatment, exploitation, and trafficking. *See* 8 U.S.C. § 1232(c)(3)–(4). Finally, when reunification is complete, HHS must conduct follow-up services, during the pendency of removal

proceedings, on children for whom a home study was conducted, and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency. 8 U.S.C. § 1232(c)(3)(B).

The statute further requires that UACs who remain in HHS custody must be "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). It delegates to the Secretary of HHS the authority to make such placement decisions, considering "danger to self, danger to the community, and risk of flight." *Id.*

The TVPRA also explicitly delegated to the Secretary of HHS the authority to create review "procedures" to be used when a UAC is placed in a secure facility.[9] Specifically, secure placements "shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted." 8 U.S.C. § 1232(c)(2)(A).

[9] Notably, the TVPRA limits the use of "secure" custody to a narrower population than did the Agreement, providing another example of how the TVPRA in many respects superseded such Agreement. Specifically, the Agreement permits placement in a juvenile detention facility if a minor is an escape risk. Agreement ¶ 21. By contrast, the TVPRA only permits the use of a secure facility to place a child who "poses a danger to self or others or has been charged with having committed a criminal offense." 8 U.S.C. § 1232(c)(2)(A). HHS follows the more restrictive requirement of the TVPRA—and not the broader terms of the Agreement—in making placement determinations.

In any case where HHS denies the release of a child to a parent or legal guardian, HHS offers an internal appeal process, recently revised in January of 2017. Under such process, the parent or legal guardian may request a review and independent reconsideration of the denial, first by the ORR Director, and then by an independent Reconsideration Officer. *See* ORR Guide: Children Entering the United States Unaccompanied § 2.78, U.S. Department of Health and Human Services, Office of Refugee Resettlement, last revised Jan. 9, 2017, available at: http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied (last visited February 6, 2017) ("ORR Guide"). Under such procedures, a child whose denial is for the sole reason that the unaccompanied child is a danger to himself/herself or the community also receives such a review and independent reconsideration.[10]

[10] In fiscal year 2014, approximately 57,000 minors were placed into ORR care. U.S. Dep't of Health and Human Servs., ACF Fact Sheet, https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf (last accessed Feb. 28, 2017). In fiscal year 2015, approximately 34,000 minors were placed into ORR care. *Id.* In fiscal year 2016, almost 60,000 minors were referred to ORR care. U.S. Dep't of Health and Human Servs., Office of Refugee Resettlement, Facts and Data, https://www.acf.hhs.gov/orr/about/ucs/facts-and-data (last accessed Mar. 3, 2017).

I. Proceedings Below

On August 12, 2016, Plaintiffs-Appellees filed a motion to enforce the Agreement, challenging HHS's position that the TVPRA requires HHS to serve as the final administrative decision-maker regarding the care and custody of UACs such that UACs are not entitled to bond hearings before immigration judges employed by an entirely different Department as otherwise stated under Paragraph 24A of the Agreement.[11] Specifically, Plaintiffs-Appellants argued that the Flores Agreement "guarantee[s] children whom the Government refuses to release the right to a bond redetermination hearing . . . ." R.E. 46 (internal quotation marks omitted). In opposing the enforcement motion, the Government argued that Paragraph 24A of the Agreement is no longer applicable because the TVPRA created a comprehensive statutory scheme in which HHS is entirely responsible for custody and release decisions for UACs in a manner that is not necessarily linked to the minor's immigration proceedings, and such a scheme is inconsistent with bond determinations being made by an immigration judge employed by a separate Department. Further, the Government noted that Congress provided no authority for an immigration judge to hold a bond hearing for, or to order HHS to release, a minor

[11] Paragraph 24A of the Agreement states that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."

in ORR's care and custody. Finally, the Government argued that Plaintiffs-Appellees' constitutional arguments concerning the sufficiency of HHS review procedures were not properly raised in the context of a motion to enforce the Agreement, but should instead be raised—if at all—in a separate action.

On January 20, 2017, the district court granted Plaintiffs-Appellees' motion to enforce. R.E. 46–53. The court found that the bond hearing provision of the Agreement was not superseded by operation of law. First, the district court found that the HSA's "savings clause" preserves Paragraph 24A of the *Flores* Settlement Agreement. R.E. 50; 6 U.S.C. § 552(a). Second, the district court found that both the TVPRA and the HSA, in relevant part, are silent on the subject of bond hearings. R.E. 52. Next, the district court found that the Agreement remains consistent with federal immigration laws requiring bond hearings for immigrant detainees and poses no irreconcilable conflict with the TVPRA's safety and placement provisions. *Id.* Finally, the district court concluded that the Government's construction of the TVPRA so as to preclude UACs in ORR custody from bond hearings should be rejected under the canon of constitutional avoidance because it could result in the indefinite detention of UACs without the due process protection offered to adult detainees through a bond hearing. R.E. 52–53.

SUMMARY OF THE ARGUMENT

The district court materially erred in at least three respects. First, the district court committed legal error by finding that Paragraph 24A of the Agreement still applies in the face of the comprehensive statutory scheme created in the HSA and the TVPRA for the care and custody of UACs. By the terms of the HSA and TVPRA, HHS has exclusive authority over the care and placement of UACs, and a bond redetermination hearing before a Department of Justice immigration judge is neither contemplated by, nor has any function within, the TVPRA's exhaustive framework governing HHS's placement decisions for UACs. The district court glossed over the fact that HHS is prohibited from releasing a UAC from its custody unless and until HHS finds a suitable custodian—capable of caring for, and presenting no risk to the UAC—to take custody, and ignores the important fact that HHS decisions regarding custody, placement, and release to a suitable custodian are inextricably tied to the process of locating a suitable custodian for each UAC. Moreover, the inapplicability of Paragraph 24A is even more evident when it is considered that neither the HSA nor the TVPRA provided immigration judges with any authority to review HHS's custody and release determinations or otherwise play a role in the custody and release framework provided in the TVPRA. *See* 6 U.S.C. § 279(a), (b)(1)(A); (b)(1)(C), (b)(1)(D), (b)(2), (g)(2); 8 U.S.C. § 1232(b)(1), (b)(3), (c)(2), (c)(3), (c)(4).

Second, the district court committed legal error in applying the canon of constitutional avoidance. The court provided no basis for its conclusion that due process mandates that UACs receive a bond hearing before an immigration judge, even where such a result is entirely inconsistent with the statutory scheme governing custody and release decisions for UACs laid out in the TVPRA. The court's conclusion that UACs in HHS custody are entitled to bond hearings simply because bond hearings are available to adults in immigration detention ignores the primary reasons behind Congress's decision in the HSA and the TVPRA to remove decisions regarding the custody and release of UACs from the agencies responsible for immigration proceedings, and to place those decisions entirely within the purview of HHS, as the agency uniquely suited to make safe and proper placements.

Finally, the district court committed legal error by failing to consider the Government's invocation of laches, equitable estoppel, and waiver where Plaintiffs-Appellees did not file their motion to enforce the Agreement until 2016, fourteen years after the passage of the HSA. This delay occurred despite the facts that HHS policy has never been to provide UACs in its custody with bond hearings, and that since 2008, HHS has made all custody and release decisions in accordance with the provisions of the TVPRA. This lengthy delay should preclude Plaintiffs-Appellees from now raising these claims.

For all of the above reasons, the district court's decision should be reversed.

ARGUMENT

II. Paragraph 24A of the Agreement Is No Longer Applicable In Light Of The Comprehensive Statutory Framework of the HSA and the TVPRA That Governs the Care and Custody of UACs.

Contrary to the district court's findings, Paragraph 24A of the Agreement is no longer applicable to UACs in HHS custody because in enacting the HSA and the TVPRA, Congress has created a new statutory scheme governing the custody, placement, and release to suitable custodians, of UACs who are in immigration proceedings. That new framework removes UACs from the scheme of immigration detention found in the Immigration and Nationality Act ("INA"), and instead places all authority for custody decisions for UACs in the hands of HHS, the agency that has developed unique expertise and experience in making placement decisions that are in the best possible interests of UACs in federal custody. *See* 6 U.S.C. § 279(a), (b)(1)(A); (b)(1)(C), (b)(1)(D), (b)(2), (g)(2); 8 U.S.C. § 1232(b)(1), (b)(3), (c)(2), (c)(3), (c)(4).

When the Agreement was finalized, the INS was responsible for the care and custody of all UACs, and had the authority to make all decisions regarding their custody and release. It was also the agency responsible for holding immigration proceedings for those same UACs. However, when Congress created DHS, through the HSA, it transferred the care of UACs from the INS to HHS. 6 U.S.C. § 279(a), (b)(1)(A). The legislative history of the HSA shows that this was a deliberate attempt

by Congress to protect UACs, and keep them out of the framework of immigration detention by DHS. *See Role of Immigration in the Dep't of Homeland Sec. pursuant to H.R. 5005, the Homeland Sec. Act of 2002: Hearing Before the Subcomm. On Immigration, Border Sec. & Claims of the H.R. Comm. on the Judiciary*, 107th Cong., 2d Sess. 38, 53 (2002), reprinted in Homeland Security Act Legislative History, 2002 WL 32516537, at *48, *61 (2002) (hearing testimony that unlike DHS, ORR "has the child welfare expertise to properly care for these vulnerable children" and can "take care of children, their psychological, emotional and other material needs, [which] is very vital to how these children are treated and their wellbeing").

Then, in 2008, the TVPRA further established that "the ***care and custody*** of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services." 8 U.S.C. § 1232(b)(1) (emphasis added). In the TVPRA, Congress expressly authorized the Secretary of HHS to make placement decisions for UACs, and to prescribe review procedures for those placement decisions. 8 U.S.C. 1232(c)(2)(A). Thus, the TVPRA conclusively separated the care and custody of UACs from the framework of immigration removal and detention, and eliminated any existing authority held by DHS to make custody decisions for UACs. Instead, Congress created an entirely new statutory framework governing the care and

custody of UACs, and placed all responsibility for decisions regarding custody and release in the hands of HHS, along with the responsibility for developing procedures to review those decisions.[12]

The TVPRA made no provision for UACs in HHS custody to receive a bond hearing before an immigration judge. The district court concluded that this silence meant that Paragraph 24A of the Agreement continues to apply. *See* R.E. 50–51. However, the better conclusion is that Congress did not mention bond hearings because they had no place in the new statutory framework it developed. As the district court notes, there are many mentions of bond hearings in the INA and its implementing regulations. *Id.* In the same manner, Congress easily could have explicitly provided for bond hearings as part of the review framework it was developing in the TVPRA, but chose not to. This makes sense, because the legislative history of the HSA and TVPRA suggests that Congress never intended

[12] Notably, the TVPRA cemented HHS's full responsibility for not just care, but also custody, of unaccompanied children by also amending section 1101(a)(27)(J) of Title 8, United States Code. Whereas prior to the TVPRA, children in HHS custody required the "specific consent" of DHS to alter their custodial setting when petitioning for special immigrant juvenile status, the TVPRA vested the specific consent function with the Secretary of HHS for all UACs in the custody of HHS. Section 235(d)(1)(B)(i) Pub. L. 110-457. This change demonstrates Congress' recognition that the TVPRA finally made HHS the sole agency responsible for the custody of UACs not returned to their home countries.

for UACs to remain within the statutory framework of detention under the INA that did include bond hearings.[13] A plain reading of the TVPRA makes clear that Congress was creating a separate framework of rules for the custody and release of UACs, separate from the INA, and with review procedures that were entirely in the hands of HHS.

It must also be considered that when Congress enacted the HSA and the TVPRA, it should be assumed that it knew the currently-existing law and procedures governing the custody and release of UACs. *See, e.g., Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 683-84 (9th Cir. 2006) ("Faced with statutory silence on the burden issue, we presume that Congress is aware of the legal context in which it is legislating.") (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.")). Thus it was aware that bond hearings were available to individuals in immigration detention, and that when minors were held by INS, bond

[13] Defendants-Appellants do not dispute that the savings clause maintained the Agreement in effect as a consent decree. 6 U.S.C. § 552(a). However, the consent decree applies to HHS only to the extent it was not superseded or in conflict with subsequent laws. The savings clause, in itself, should not be viewed as rendering immutable those provisions aimed at the now defunct INS, or as creating free-standing authority for actions Congress did not authorize in either statute.

hearings were provided to UACs in accordance with the Agreement. Yet the legislative history of the TVPRA reflects that Congress's goal was to "improve[] procedures for the placement of unaccompanied children in safe and secure settings." *See* H.R. REP. 110-430(I); 154 Cong. Rec. H10888-01. In making these improvements, not only did Congress not include even one provision regarding bond hearings, but it made a conscious decision to state that procedures for reviewing secure placements, at least, would have a sole "prescribe[r]": the Secretary of HHS. 8 U.S.C. § 1232(c)(2)(A).[14] Thus, contrary to the conclusion of the district court, this silence on the subject of bond hearings gives every reason to construe the HSA and the TVPRA as intentional decisions by Congress to place UAC custody decisions,

[14] Even the TVPRA's statutory provision referring to UACs in removal proceedings makes no mention of a bond redetermination hearing; 8 U.S.C. § 1232(a)(5)(D). Rather, the provision merely states:

> Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be—
>
> (i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);
> (ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and
> (iii) provided access to counsel in accordance with subsection (c)(5).

8 U.S.C.A. § 1232.

and the review procedures for those decisions, in the hands of HHS, and out of the hands of immigration judges and other agencies outside of HHS.[15]

Such a presumption—that the TVPRA placed exclusive authority for the placement and release of UACs in the hands of HHS—is not only the most sound reading of the statute, but also accords with the purposes of the HSA and the TVPRA, because Congress determined that HHS is the agency with expertise in child-welfare issues, including in making release determinations that are in best interest of the child.[16] Further, HHS serves an exclusively child-welfare-related

[15] Notably, the Fourth Circuit recently found that HHS's authority to make custody decisions for UACs is not tied to the pendency of removal proceedings. *See D.B. v. Cardall*, 826 F.3d 721, 735–39 (4th Cir. 2016). That interpretation of the statutory scheme consistent with the Government's position that Congress did not intend that an immigration judge would have jurisdiction to review HHS's custody decisions, because it recognizes the purpose of the HSA and the TVPRA to separate the care and custody functions of HHS from the immigration enforcement functions of DHS and the immigration courts. *See* 153 Cong. Rec. S3001, S3004 (daily ed. Mar. 12, 2007) (statement of Sen. Feinstein) ("This change [transferring to HHS the care of UACs that was formerly performed by INS] finally resolved the conflict of interest inherent in the former system that pitted the enforcement side of the [INS] against the benefits side of that same agency in the care of unaccompanied alien children."). There is nothing in the record to suggest that HHS has an interest in maintaining UACs in their custody unnecessarily, or that their custody determinations are designed to further anything other than the best interests of the child.

[16] *See* ORR Guide § 2.1 ("The process for the safe and timely release of an unaccompanied child from ORR custody involves many steps, including: the identification of sponsors; the submission by a sponsor of the application for release and supporting documentation; the evaluation of the suitability of the sponsor, including verification of the sponsor's identity and relationship to the child,

function, as opposed to the INS (or today, DHS and the immigration courts), and is not a part of the immigration enforcement scheme. *See, e.g.*, *D.B. v. Poston*, 119 F. Supp. 3d 472, 485 (E.D. Va. 2015), *aff'd in part by D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016) (stating that UACs are not "in 'immigration detention,'" but rather "in the custody of HHS/ORR, a federal agency that has no responsibility for adjudicating the immigration status of any individual.").

Once in HHS custody, a UAC cannot be released "unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). By contrast, an immigration judge is not best equipped to make the type of assessments that the TVPRA requires HHS to make before releasing a UAC from custody. Rather, an immigration judge's authority to conduct a bond hearing is

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background checks, and in some cases home studies; and planning for post-release."); § 2.3 ("ORR's sponsor assessment and release decision process requires coordination among care provider staff, nongovernmental third-party reviewers (Case Coordinators), ORR staff, other Federal agencies, stakeholders, and Child Advocates, where applicable. Case Managers communicate with potential sponsors, gather necessary information and documentation, talk to any relevant stakeholders, and assess sponsors to formulate a recommendation to the Case Coordinator. Case Coordinators concurrently review all assessment information on an unaccompanied child and sponsor to also make a recommendation. Once Case Managers and Case Coordinators agree on a particular recommendation for release, the recommendation will be sent to the ORR/FFS for a final release decision. If the Case Manager and Case Coordinator cannot agree on a recommendation, the case is elevated to the ORR/FFS for further guidance.").

governed by 8 U.S.C. § 1226(a) (which is inapplicable to UACs), and his or her scope of review is limited to considering whether or not the alien is a present danger to persons or property, a threat to national security, or a flight risk. *Matter of Guerra*, 24 I.&N. Dec. 37, 38 (BIA 2006) (internal citations omitted).

Congress's intent to set up a statutory scheme that did not include review of HHS's custody decisions by an immigration judge is further evident from the fact that Congress did not provide any statutory authority for either bond or bond hearings for UACs in the TVPRA. As a result, immigration judges lack the statutory and regulatory authority to conduct bond hearings for UACs in HHS custody. "Immigration judges only have the authority to consider matters that are delegated to them by the Attorney General and the Immigration and Nationality Act."[17] *Matter of A-W-*, 25 I. & N. Dec. 45, 46 (BIA 2009) (citing 8 C.F.R. § 1003.10(b) (2009); *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (A.G. 2003); *Matter of Cazares*, 21 I. & N. Dec. 188, 193 (BIA 1996)). The authority of an immigration judge to redetermine

[17] Notably, neither the HSA nor the TVPRA amended the INA in relevant part; both are free standing statutory authorities. *See* TVPRA Pub. L. 110-457, 122 Stat. 5044 § 235, (Dec. 23, 2008); HSA Pub. L. 107-296, 116 Stat. 2135 § 462 (Nov. 25, 2002); *see also* Immigration and Nationality Act, *available at* https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html. Other ORR authorities *are* part of the INA—for example, refugee resettlement authority is authorized under section 412 of the INA, 8 USC § 1522, as added by the Refugee Act of 1980. Had Congress wished to make ORR custody of UAC part of the INA, it knew how to do that—as shown by the Refugee Act of 1980.

custody status under 8 C.F.R. § 1236.1(d) is also limited to initial custody decisions made by DHS. *See* 8 C.F.R. § 1003.19(a).[18] Because DHS does not set custody conditions for UACs, under current law, the immigration judges have nothing to review. Thus, although the TVPRA does not explicitly reference bond hearings, it clearly renders ineffective Paragraph 24A's requirement that bond hearings be held for UACs in immigration detention, because UACs are no longer in immigration detention, and custody reviews before an immigration judge therefore are not available under the existing statutory and regulatory scheme.[19]

Moreover, the district court is incorrect that a decision regarding whether a UAC should remain in custody can (or should) be made separately from a decision regarding the suitability of a custodian to whom the UAC might be released. *See*

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[18] In cases decided between the enactment of the HSA and the TVPRA, the Board of Immigration Appeals ("BIA") appears to have taken inconsistent positions on whether some authority remained for immigration judges to conduct bond hearings for UACs in the custody of HHS. *Compare Matter of Rodriguez-Lopez*, 2004 WL 1398660 (BIA Mar. 29, 2004) ("The Immigration Judge's authority to redetermine conditions of custody under 8 C.F.R. § 1236.1(d) extends only to certain custody determinations by the Attorney General, not the ORR. Thus, the Immigration Judge is wholly without authority to make any determination regarding the placement of the respondent."), *with A-R-* (BIA Sept. 23, 2005), R.E. 76–77. However, since the enactment of the TVPRA, in the only case to address the issue, the BIA has made clear that the HSA and the TVPRA superseded Paragraph 24A of the Agreement, and eliminated the authority of immigration judges to hold bond hearings for UACs in HHS custody. *See Matter of A-R-* (BIA June 28, 2016).

[19] As stated *supra* note 7, HHS does not charge bond when children are released from its custody to suitable custodians, and has no mechanism by which to do so.

R.E. 51. As a threshold matter, HHS may not release children upon their own recognizance. 6 U.S.C. § 279(b)(2)(B). The TVPRA does provide that a child may be placed with a proposed custodian, however, the UAC may not be:

> placed with a person or entity unless [HHS] makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

8 U.S.C. § 1232(c)(3)(A). In some instances, HHS must conduct a home study for certain UACs before placing the UAC with a proposed custodian. 8 U.S.C. § 1232(c)(3)(B). In the event that the proposed custodian is found to be a suitable custodian to whom an unaccompanied child may be released, there is a legal orientation program addressing the custodian's responsibility to ensure the juvenile's appearance at all immigration proceedings, and to protect the child from mistreatment, exploitation, and trafficking. *See* 8 U.S.C. § 1232(c)(4). Finally, when placement with a suitable custodian is complete, HHS must conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted. 8 U.S.C. § 1232(c)(3)(B).

The Government cannot "simply send [UACs] off into the night on bond or recognizance [but] must assure itself that someone will care for those minors pending resolution of their deportation proceedings." *Flores*, 507 U.S. at 295. The

TVPRA sets up a framework that favors the release of UACs, while at the same time it is designed to ensure that a UAC "shall be promptly placed in the least restrictive setting ***that is in the best interest of the child*** . . . ." 8 U.S.C. § 1232(c)(2)(A) (emphasis added). Separating the decision on release from the determination of suitability for any custodian who is requesting custody over a child ignores that the TVPRA is designed to ensure that both functions are conducted together, by the agency that is best situated to recognize and adapt to the unique needs of UACs. Often, a decision whether to release a child who has factors that suggest that he may be a risk to himself or others will be inextricably tied to a determination of whether a proposed custodian has the resources and ability to mitigate those risks. *See* ORR Guide § 2.4.1, R.E. 60. Injecting the opinions of immigration judges, who have no expertise in assessing the suitability of releasing a child to a given custodian, provides minimal, if any, benefit to the process, and contravenes the clear purposes of the HSA and the TVPRA.

Because Paragraph 24A has been rendered inconsistent and incompatible with the existing statutory and regulatory scheme, this Court should find that Paragraph 24A is no longer applicable, the district court's decision should be reversed, and Plaintiffs-Appellees' motion to enforce should be denied. *See Syst. Fed'n No. 91, Ry. Emps. Dep't v. Wright*, 364 U.S. 642, 652 (1961) ("The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.");

see also State of Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 433 (1855).

III. The District Court Erroneously Applied the Canon of Constitutional Avoidance.

The district court improperly applied the canon of constitutional avoidance in determining that due process requires the continued application of Paragraph 24A. Under the canon of constitutional avoidance, a court will "read [a challenged] statute to eliminate" any constitutional doubt "so long as such a reading is not plainly contrary to the intent of Congress." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 60 (2010) (internal quotations omitted). Constitutional avoidance applies when a statute can be construed in more than one way using ordinary interpretive methods, with the canon instructing selection of the constitutionally permissible construction. *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 237–38 (1998); *United States v. Rumely*, 345 U.S. 41, 45 (1953). As a result, a court is bound not only to choose a construction that is consistent with the plain text of the statute, *see, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009), but also one that is consistent with the larger statutory scheme of which the provision is part. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also United States v. Broncheau*, 645 F.3d 676, 686 (4th Cir. 2011) ("[T]he district court erred by invoking the canon of constitutional avoidance to justify creation of its alternative commitment scheme. This canon has no application to the construction of a statute in a manner that is

incompatible with its plain terms."). At bottom, constitutional avoidance "is an interpretive tool, counseling that *ambiguous statutory language* be construed to avoid serious constitutional doubts." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The "doctrine does not apply where, as here, congressional intent is clear from the text and purpose of the statute." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009). Nor is it intended to "limit the scope of authorized executive action." *Fox Television Stations*, 556 U.S. at 516.

The district court erroneously applied the canon of constitutional avoidance in reaching its conclusion that reading the TVPRA to preclude bond hearings for UACs in HHS custody could result in the indefinite detention of unaccompanied children without the due process protection offered to adult detainees through a bond hearing. Specifically, the court provided no basis for its conclusion that a bond hearing, which is part of the statutory and regulatory scheme of immigration detention in the INA, is constitutionally essential in the context of the TVPRA.[20] Paragraph 24A represents agreement by the parties to provide a bond hearing to unaccompanied minors in discretionary immigration detention – a review that was

[20] Indeed, the plain language of the TVPRA and its structure precludes application of the constitutional avoidance cannon here. *See* 8 U.S.C. § 1232(b)(1) ("[T]he care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, *shall be the responsibility of the Secretary of Health and Human Services*.") (emphasis added); *see also Ileto*, 565 F.3d at 1143.

statutorily available to them already at the time the Agreement was signed. As discussed above, under the statutory framework of the HSA and TVPRA that exists today, no such review is contemplated. There is simply no basis in the context of this enforcement motion proceeding for the district court to conclude that such review is constitutionally required to be found within the review procedures laid out by the TVPRA. Any challenge to the constitutionality of the TVPRA and/or HHS's review procedures under that statute should come—if at all—in the context of a separate and independent proceeding.

IV. The District Court Erred in Failing to Address the Government's Procedural Arguments, Which Give Good Reason for the Court to Deny Plaintiffs-Appellees' Enforcement Motion on Equitable Grounds.

The district court erred in not addressing the Government's procedural arguments that equitable rules of contract enforcement provide good reason to deny Plaintiffs-Appellees' enforcement motion, given that Plaintiffs-Appellees waited eight years after the enactment of the TVPRA to bring their Motion despite having filed at least two other enforcement motions under the Agreement over the past two years. As the Government explained, the doctrines of laches, equitable estoppel, and waiver all apply to bar Plaintiff-Appellees' motion from being considered on the merits.

a. Laches

While a motion to enforce a settlement agreement, which operates like a consent decree, may be treated according to breach of contract principles governing in the situs state of California, *see Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990); July 24, 2015 Order ECF 177, at 3, multiple circuit courts of appeal have held that because the requested enforcement in such cases is an equitable remedy, that remedy is "subject to the usual equitable defenses." *Bergmann v. Michigan State Transp. Comm'n*, 665 F.3d 681, 683 (6th Cir. 2011) (quoting *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999)). Those courts therefore have held that the equitable doctrine of laches, rather than the state statute of limitations, applies. *Bergmann*, 665 F.3d at 683; *Brennan v. Nassau Cnty.*, 352 F.3d 60, 63–64 (2d Cir. 2003) (per curiam); *see also Cook*, 192 F.3d 693, 695 (7th Cir. 1999); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). This defense is governed in such instances by federal common law. *See Holmberg*, 327 U.S. at 397 (applying federal common law to laches defense).

Under the doctrine of laches, Plaintiffs-Appellees' claims should be precluded because of their unreasonable delay in asserting their claims, to Defendants' prejudice. "Laches is an equitable defense that prevents a plaintiff, who 'with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.'" *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950–51 (9th Cir. 2001) (quoting S. *Pac.*

Co. v. Bogert, 250 U.S. 483, 500 (1919) (McReynolds, J., dissenting)).” The doctrine bars an action where a party's unexcused or unreasonable delay has prejudiced his adversary.” *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979). The Ninth Circuit has stated that “[w]hile laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable.” *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). Here, the analogous statute of limitations would be one for breach of contract in California, which is four years. Cal. Code of Civ. P. § 337.

The Government has taken the position that the TVPRA supersedes the Agreement at least since the TVPRA’s enactment in 2008 and, thus, that (1) UACs in ORR’s care and custody are not entitled to a bond hearing, and (2) immigration judges lack jurisdiction to review the continued placement of a UAC in HHS’s care and custody. Plaintiffs-Appellees’ lack of formal opposition to this position during the past eight years has led Defendants to invest significant administrative resources in solidifying its policies and procedures governing the care and custody of UACs as separate and apart from the Agreement’s terms, and it is patently unreasonable for Plaintiffs-Appellees to wait so long to assert this claim, and unfair for Defendants to have to defend their policies under the TVPRA at this late juncture. *See Jarrow*,

304 F.3d at 840. Therefore, the Court should find that the doctrine of laches bars Plaintiffs-Appellees' claims.

b. Equitable Estoppel and Waiver

The doctrines of equitable estoppel and waiver also provide this Court with good reason to deny Plaintiffs-Appellees' Motion. "Equitable estoppel is a doctrine adjusting the relative rights of parties based upon consideration of justice and good conscience." *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 95 (9th Cir. 1970). The doctrine "prevents a party from assuming inconsistent positions to the detriment of another party." *Id* .at 96. Under California law,

> equitable estoppel requires that:(1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.

Lukovsky v. City & Cnty. of San Francisco, 535 F.3d 1044, 1051–52 (9th Cir. 2008) (quoting *Honig v. San Francisco Planning Dep't*, 127 Cal. App. 4th 520 (2005)).[21] The Government asserts a specific type of equitable estoppel, "codified in Evidence Code section 623, which provides that whenever a party has, by his own statement

[21] The Ninth Circuit has found that "California equitable estoppel is . . . similar to and not inconsistent with federal common law, as both focus on actions taken by the defendant which prevent the plaintiff from filing on time." *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1052 (9th Cir. 2008).

or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." *San Francisco Bay Area Rapid Transit Dist. v. Gen. Reinsurance Corp.*, 111 F. Supp. 3d 1055, 1070 (N.D. Cal. 2015) (quoting *Superior Dispatch, Inc. v. Ins. Corp. of N.Y.*, 181 Cal. App. 4th 175, 186–87 (2010)).

Meanwhile, "[t]o establish a waiver by [an opposing party] of its right to enforce the settlement agreement, [the movant] must show either: that the [the opposing party], with full knowledge of the facts and an intent to waive the right, made a clear expression of its intent; or that [it] has carried his burden of establishing that the [opposing party's] conduct warrants the inference that it has relinquished that right." *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1395 (9th Cir. 1991) (applying California law and stating that a waiver argument "may alternatively be characterized as one of estoppel").

Here, both doctrines preclude Plaintiffs-Appellees from bringing their motion to enforce. There is no basis on which it can be found that Plaintiffs-Appellees were not aware that the Government does not provide bond hearings to UACs in HHS custody, and has not done so since even before the enactment of the TVPRA. Yet Plaintiffs-Appellees chose not to litigate the issue until now, while bringing multiple other enforcement motions in the meantime. Defendants have operated consistent

with their interpretation of the TVPRA unchallenged for years, and have invested significant administrative resources in establishing the policies and procedures governing custody decisions for UACs, and related review procedures. *See e.g.*, ORR Guide. Plaintiffs-Appellees' conduct warrants the inference that Plaintiffs-Appellees agreed with Defendants' interpretation of the TVPRA, and Defendants have acted in reliance by proceeding to implement those provisions of law. Thus, the Court should further deny Plaintiffs-Appellees' motion on waiver and equitable estoppel grounds. *See Watkins v. U.S. Army*, 875 F.2d 699, 701 (9th Cir. 1989) (equitable estoppel); *AirWair Int'l Ltd. v. Schultz*, 84 F. Supp. 3d 943, 958 (N.D. Cal. 2015) (waiver).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants-Appellants' appeal.

STATEMENT OF RELATED CASES

There are no known related cases currently pending in this Court. However, on July 6, 2016, this Court decided the Government's appeal of the district court order granting Plaintiffs-Appellees' prior motion to enforce other Paragraphs of the Settlement Agreement against Immigration and Customs Enforcement ("ICE"). *Flores v. Lynch*, No. 15–56434, 828 F.3d 898 (9th Cir. 2016). The Court affirmed the district court's decision in part, reversed in part, and remanded for further proceedings. *Id.* at 910. Those proceedings are separate from the motion to enforce that is the subject of the current appeal.

Dated: March 3, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel to the Assistant Attorney General

WILLIAM C. PEACHEY
Director

COLIN KISOR
Deputy Director

WILLIAM C. SILVIS
Assistant Director

SARAH B. FABIAN
Senior Litigation Counsel

By: /s/ Vinita B. Andrapalliyal
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 598-8085
Facsimile: (202) 305-7000
Email: Vinita.b.andrapalliyal@usdoj.gov

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I certify that on March 3, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

/s/ Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL

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