

1 CHAD A. READLER
 Acting Assistant Attorney General
 2 SCOTT G. STEWART
 Deputy Assistant Attorney General
 3 WILLIAM C. PEACHEY
 Director
 4 Office of Immigration Litigation
 U.S. Department of Justice
 5 WILLIAM C. SILVIS
 Assistant Director
 6 Office of Immigration Litigation
 7 SARAH B. FABIAN
 Senior Litigation Counsel
 8 NICOLE MURLEY
 Trial Attorney
 9 Office of Immigration Litigation
 10
 11

U.S. Department of Justice
 Box 868, Ben Franklin Station
 Washington, DC 20442
 Telephone: (202) 532-4824
 Fax: (202) 616-8962

ADAM L. BRAVERMAN
 United States Attorney
 SAMUEL W. BETTWY
 Assistant U.S. Attorney
 California Bar No. 94918
 Office of the U.S. Attorney
 880 Front Street, Room 6293
 San Diego, CA 92101-8893
 619-546-7125
 619-546-7751 (fax)

12 *Attorneys for Federal Respondents-Defendants*
 13

14 UNITED STATES DISTRICT COURT
 15 SOUTHERN DISTRICT OF CALIFORNIA

16 MS. L, et al.,

Case No. 18cv428 DMS MDD

17 Petitioners-Plaintiffs,

18 vs.

**RESPONDENTS' NOTICE
 REGARDING COMPLIANCE AND
 REQUEST FOR CLARIFICATION
 AND/OR RELIEF**

19 U.S. IMMIGRATION AND CUSTOMS
 20 ENFORCEMENT, et al.,

21 Respondents-Defendants.
 22
 23
 24
 25
 26
 27
 28

1 **I. NOTICE REGARDING COMPLIANCE**

2 On June 26, 2018, this Court issued orders granting Plaintiffs’ motion to
3 certify a class, ECF No. 82, and ordering a preliminary injunction on behalf of that
4 class, ECF No. 83. After receiving the Court’s preliminary-injunction order,
5 Defendants immediately acted to implement and comply with it. As a result of that
6 prompt action, Defendants believe that they are in compliance with all aspects of
7 the Court’s injunctive order regarding the forward-looking policies on separation
8 and communication. Defendants have been working diligently on complying with
9 the Court’s reunification directives. Defendants understand the urgent concerns
10 underpinning the Court’s order. Defendants have dedicated immense resources and
11 effort to reunifying families, and personnel at the highest levels of the agencies
12 have been involved in implementing the Court’s directives. Defendants are
13 submitting declarations to explain the extensive efforts of the U.S. Department of
14 Health and Human Services (“HHS”) (declaration attached hereto) and U.S.
15 Immigration and Customs Enforcement (“ICE”) (declaration to follow) to identify
16 class members and their children and to reunify class members with their children.
17

18 In the preliminary-injunction order, the Court set a status conference for July
19 6. *Id.* Defendants have plans to comply with the injunction, and are prepared to
20 discuss those plans at the conference. To fully implement these plans, however,
21 Defendants may need clarification on or relief from certain parts of the order, so
22 that Defendants can safely reunite families. Among other issues, Defendants need
23
24
25
26
27
28

1 this Court’s guidance on issues that arise because of HHS’s understanding of its
2 statutory obligations to ensure the safety of children before transferring them out of
3 HHS custody. The processes that HHS has developed in order to fulfill its statutory
4 obligations are critical to protecting children against the well-documented risk of
5 trafficking or abuse, but they also require HHS to follow procedures that are time-
6 consuming, even in this unique context. Defendants thus seek confirmation about
7 the Court’s intent in its order as it relates to those procedures and, as appropriate,
8 relief from the Court’s deadlines.¹ Defendants also seek clarification regarding the
9 definition of the class certified by this Court.

10
11
12
13 **II. REQUEST FOR CLARIFICATION AND/OR RELIEF**

14 The Government respectfully requests the Court’s prompt resolution of
15 several critical implementation issues, at or soon after the July 6 status conference.
16 The Government anticipates that additional clarification or relief may be requested
17 as its implementation of the Court’s injunction proceeds. The Government will
18 bring any additional such requests to the Court’s attention promptly.
19
20
21
22
23
24

25 ¹ The Government also has advised the court in *Flores v. Sessions*, No. 85-4544
26 (C.D. Cal.), that the Flores Settlement Agreement permits the Government to use
27 ICE family residential centers to hold families together while in Government
28 custody. *See Flores*, ECF No. 447 (attached).

1 A. Releasing Children From HHS Custody.

2 As this Court is aware, the class definition includes “[a]ll adult parents who
3 enter the United States,” whether at or between ports of entry, “who (1) have been,
4 are, or will be detained in immigration custody by the DHS, and (2) have a minor
5 child who is or will be separated from them by DHS and detained in ORR custody,
6 ORR foster care, or DHS custody.” Class-Certification Order, ECF No. 82 at 17.
7

8 The class excludes parents if there is “a determination that the parent is unfit or
9 presents a danger to the child.” *Id.* It also excludes parents “with criminal history
10 that prevents them from being released into the community along with their child
11 or housed together in a [family] detention center,” parents “with some kind of
12 communicable disease” raising safety concerns, or “parents who fall within the
13 [Family Separation Executive Order].” *Id.* at 4 n.5, 10. The Court’s preliminary
14 injunction, in turn, directs Defendants to “reunify all Class members with their
15 minor children” within 14 days for children under age 5 and within 30 days for
16 minor children age 5 and over, “[u]nless there is a determination that the parent is
17 unfit or presents a danger to the child, or the parent affirmatively, knowingly, and
18 voluntarily declines to be reunited with the child.” Preliminary-Injunction Order,
19 ECF No. 83 at 23 ¶ (3).
20
21
22
23
24

25 As explained in the attached declaration of Jonathan White, HHS
26 understands the Court’s order in light of its statutory mission, which requires HHS
27
28

1 to ensure child welfare and the safety of minors released from its custody. More
2 specifically, considering the order in light of its statutory obligations relating to the
3 release of unaccompanied alien children (UACs), *see* 6 U.S.C. § 279; 8 U.S.C.
4 § 1232, HHS understands the order to require three distinct findings before a child
5 can be released.
6

7
8 First, to confirm that an individual is, in fact, a class member as well as a
9 “parent” within the meaning of 6 U.S.C. § 279(g)(2), HHS first must determine
10 that the individual is the parent of the child with whom he or she seeks to be
11 reunified. White Declaration ¶¶ 20-26. HHS believes that this requirement applies
12 regardless of whether the parent is in federal custody or has been released into the
13 interior. To determine parentage, HHS is using DNA swab testing because it is a
14 reasonably prompt and efficient method for determining biological parentage in a
15 significant number of cases. White Declaration ¶¶ 21, 25. HHS is working
16 diligently to minimize the burdens of confirming parentage, and is expediting
17 DNA verification. White Declaration ¶¶ 20-24. But given the possibility of false
18 claims of parentage, confirming parentage is critical to ensure that children are
19 returned to their parents, not to potential traffickers. White Declaration ¶ 25.
20

21 Although HHS is moving expeditiously to undertake these DNA tests, that process
22 takes meaningful time, even when it is expedited—as this Court has implicitly
23 recognized. *See* Order on Motion to Dismiss 3-4, 8 (noting that on March 8, 2018,
24
25
26
27
28

1 the Court ordered that a DNA test for Ms. L. be completed by March 14—which
2 the Court described as “order[ing] an expedited DNA test”).

3
4 In many cases involving parents who are detained, this process will not
5 interfere with the Government’s ability to reunify families within the timelines
6 provided by the Court. In some cases, however, this process may not be conclusive
7 in establishing parentage, and further evaluation of available documentation may
8 be required. White Declaration ¶¶ 20, 45. Confirming parentage for adults who
9 have already been released may also take additional time, including for the parent
10 to appear for DNA testing or other confirmation. In those cases, it may be harder to
11 reunify some families within the Court’s timeline.
12

13
14 Accordingly, the Government respectfully requests clarification from the
15 Court as to whether the process for confirming parentage implemented by HHS is
16 consistent with the Court’s understanding of its mandate, and seeks clarification
17 that in cases where parentage cannot be confirmed quickly, HHS will not be in
18 violation of the Court’s order if reunification occurs outside of the timelines
19 provided by the Court. The Government can for the Court’s consideration prepare
20 a proposal for an alternative timeline.
21

22
23
24 Second, to confirm that an individual is neither “unfit [n]or presents a danger
25 to the child,” that the parent is “available to provide care and physical custody,” 6
26 U.S.C. § 279(g)(2), and that the parent “has not engaged in any activity that would
27
28

1 indicate a potential risk to the child,” 8 U.S.C. §1232(c)(3)(A), ICE and HHS must
2 confirm whether an individual has any criminal history, including a history
3 indicative of abuse. White Declaration ¶¶ 27, 29. To expedite those determinations
4 in the unusual context of reunification following government separation, the
5 agencies are relying on summaries of criminal background checks run by ICE,
6 which are in turn shared with HHS. White Declaration ¶ 29. That process is not
7 currently anticipated to delay reunification.
8
9

10 Third, before releasing any child to a class member who is not in
11 government custody, HHS understands that the determination that a parent is not
12 “unfit or presents a danger to the child,” Preliminary-Injunction Order at 23 ¶ 2,
13 must be read in conjunction with the TVPRA, 8 U.S.C. § 1232, which imposes
14 additional safety requirements before “plac[ing]” a child with someone outside
15 federal custody. Specifically, a UAC “may not be placed with a person or entity
16 unless [HHS] makes a determination that the proposed custodian is capable of
17 providing for the child’s physical and mental well-being,” which must include “an
18 independent finding that the individual has not engaged in any activity that would
19 indicate a potential risk to the child.” 8 U.S.C. § 1232(c)(3)(A). HHS believes that,
20 in the context of reunifying a parent with a child following government separation,
21 when the parent has since been released into the interior and the child remains in
22 HHS custody, HHS remains obligated to apply existing HHS procedures under the
23
24
25
26
27
28

1 TVPRA. *See* White Declaration ¶¶ 33-44 for an explanation of such procedures.

2 The processes involved in applying these provisions have developed to ensure that
3 HHS does not inadvertently release a child in its custody into a situation that will
4 expose him or her to trafficking or abuse. White Declaration ¶¶ 45-46.
5

6 HHS has worked diligently to expedite these processes to enable the
7 Government to comply with the timelines in the Court’s order. HHS anticipates,
8 however, in some instances it will not be able to complete the additional processes
9 within the timelines the Court prescribed, particularly with regard to class
10 members who are already not in Government custody (*e.g.*, because they have
11 previously been paroled or released). White Declaration ¶¶ 45-46.
12

13 Accordingly, HHS seeks clarification from this Court that it intended for
14 HHS to follow such procedures in the somewhat unique context of reunification
15 following government separation, and in particular for reunification with class
16 members who have been released into the interior. If the Court intended for HHS
17 to follow a different approach, the Government requests clarification regarding the
18 precise inquiry that HHS should be making in these circumstances.²
19
20
21

22
23 ² HHS’s aim it to comply with the Court’s injunction, while also following its
24 normal processes under the TVPRA that HHS has implemented to ensure the
25 safety of children upon placement by HHS with a parent or other sponsor.
26 Accordingly, HHS asks that if the Court concludes that HHS must truncate those
27 normal TVPRA processes to meet court-ordered deadlines, then the Court should
28 so order in a manner that provides HHS full clarity with regard to its court-ordered
obligations.

1 Further, if the Court concludes that HHS is properly proceeding in light of
2 the Court's order and the relevant statutory provisions, then HHS seeks partial
3 relief from the timelines in the Court's order to allow HHS to comply with these
4 obligations and to safely achieve the reunifications that the order directs,
5 particularly for parents who have previously been released. The Government does
6 not wish to unnecessarily delay reunifications or burden class members. At the
7 same time, however, the Government has a strong interest in ensuring that any
8 release of a child from Government custody occurs in a manner that ensures the
9 safety of that child. The Government can, for the Court's consideration, prepare a
10 proposal for an alternative timeline that that takes HHS's procedures into account.
11
12
13

14 Thus, Defendants seek clarification to ensure that the Government can
15 comply with and implement the Court's order consistent with federal laws
16 protecting child safety in implementing reunification plans.
17

18 B. ICE's Obligations Under Paragraph (1) Of The Preliminary
19 Injunction.

20 As described in the Government's declarations, the reunification process
21 implemented by ICE and HHS for parents who are now in ICE custody requires
22 extensive and careful coordination between the two agencies so that HHS can
23 reunify the child with his or her parent in ICE custody. White Declaration ¶¶ 13-
24 14, 29. HHS is able to reunify families in such cases much faster than it is able to
25 do so for class members who have already been released from ICE custody. *Id.*
26
27
28

1 Paragraph (1) of the Court’s preliminary-injunction order prohibits ICE
2 “from detaining Class Members in DHS custody without and apart from their
3 minor children.” Preliminary-Injunction Order at 22 ¶ (1). Consistent with that
4 command, reunification could occur in ICE custody in a family residential center,
5 or by reunifying the parent and child at release. But this paragraph could
6 potentially be read to require that if HHS has not been able to reunify a child with a
7 parent in ICE custody by the deadlines ordered by the Court, ICE would still be
8 required to release the parent from custody before that deadline even without
9 reunification. Such a requirement would, in most cases, delay reunification because
10 release of a parent before HHS completes its suitability determination would
11 trigger additional obligations for HHS to comply with the procedures it has
12 developed to ensure safe release in accordance with the TVPRA. White
13 Declaration ¶¶ 33-45.

14
15
16
17
18 If, as discussed above, the Court determines that HHS should continue to
19 follow its TVPRA procedures in making its release decisions, then the Government
20 further asks the Court to clarify whether: (a) Paragraph (1) of the preliminary-
21 injunction order requires that ICE release the parent by the compliance deadlines
22 even if HHS has not completed its processes and where such release might slow
23 reunification; or (b) ICE may continue to hold parents beyond the current deadlines
24 until HHS’s processes are complete.
25
26
27
28

1 C. Scope Of The Class Definition.

2 The Government also respectfully requests clarification on the scope of the
3 Court's class definition.
4

5 First, as issued, the class definition contains no date limitations. It thus could
6 be read to cover individuals who were separated from their children long before
7 this case began, and long before the May 2018 policy that prompted the Court's
8 injunction. The absence of any date limitations, moreover, makes it difficult for the
9 Government to ensure that it has identified all class members.
10

11 Accordingly, the Government respectfully requests that the Court clarify a
12 start date for separations that would result in class membership for the separated
13 parent. The Government proposes that the Court use March 9, 2018, as the starting
14 point for the reunification requirement, because that is the date of filing for
15 Plaintiffs' amended complaint which added the class claims in this case.
16
17

18 Relatedly, the class definition does not specify whether it includes parents
19 who had been removed from the United States prior to the issuance of the Court's
20 class-certification order. The order itself does not address such individuals, nor did
21 either named Plaintiff experience such a situation. Moreover, the timelines for the
22 relief ordered by the Court could not encompass such a scenario given the
23 complexities involved in locating individuals who have been removed, determining
24 whether they wish to be reunified with their child, and facilitating such a
25
26
27
28

1 reunification outside of the United States. Accordingly, the Government requests
2 that the Court clarify that such individuals are not included within the class
3 definition or, if the Court believes that they are, that the Court allow the
4 Government the opportunity to brief the matter or that the Court at least provide
5 the Government relief from the timelines in the order with regard to the
6 reunification of such individuals, and instead allow the Government the
7 opportunity to propose a timeline to pursue reunifications for removed individuals.
8
9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: July 5, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
WILLIAM C. SILVIS
Assistant Director

/s/ Sarah B. Fabian
SARAH B. FABIAN
Senior Litigation Counsel
NICOLE MURLEY
Trial Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4824
(202) 616-8962 (facsimile)
sarah.b.fabian@usdoj.gov

ADAM L. BRAVERMAN
United States Attorney
SAMUEL W. BETTWY
Assistant U.S. Attorney

Attorneys for Respondents-Defendants

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3
4 MS. L., et al.

Case No. 18-cv-428 DMS MDD

5 Petitioner-Plaintiff,

6
7 vs.

CERTIFICATE OF SERVICE

8 U.S. IMMIGRATION AND CUSTOMS
9 ENFORCEMENT, et al.,

10 Respondents-Defendants.

11
12 IT IS HEREBY CERTIFIED THAT:

13 I, the undersigned, am a citizen of the United States and am at least eighteen years
14 of age. My business address is 450 Fifth Street, NW, Washington, DC 20001. I am
15 not a party to the above-entitled action. I have caused service of the accompanying
16 RESPONDENTS' NOTICE REGARDING COMPLIANCE AND REQUEST FOR
17 CLARIFICATION AND/OR RELIEF on all counsel of record, by electronically
18 filing the foregoing with the Clerk of the District Court using its ECF System, which
19 electronically provides notice.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 DATED: July 5, 2018

22 */s/ Sarah B. Fabian*
23 SARAH B. FABIAN
24 Senior Litigation Counsel
25 Office of Immigration Litigation
26 Civil Division, U.S. Department of
27 Justice

Attorney for Respondents-Defendants