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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA
19 WESTERN DIVISION

20 Jenny Lisette Flores., *et al.*,
21 Plaintiffs,
22 v.
23 William Barr, Attorney General of the
24 United States, *et al.*,
25 Defendants.

Case No. CV 85-4544-DMG-AGR_x

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE WHY A PRELIMINARY
INJUNCTION AND CONTEMPT
ORDER SHOULD NOT ISSUE**

Hearing: None set

[HON. DOLLY M. GEE]

26 Dated: June 26, 2019

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1 **I. INTRODUCTION**

2 This motion seeks emergency relief to remedy an imminent threat to the
3 health and welfare of class member children detained for days and weeks at
4 Customs and Border Patrol Protection (“CBP”) facilities in the El Paso and Rio
5 Grande Valley Border Patrol Sectors. Under the terms of the Stipulated Settlement
6 Agreement approved by this Court on January 17, 1997 (“Agreement”), these
7 children have the right to safe and sanitary conditions of detention and prompt
8 release or placement in a facility licensed for the care of dependent children.
9 Instead, class member children are held for weeks in deplorable conditions, without
10 access to soap, clean water, showers, clean clothing, toilets, toothbrushes, adequate
11 nutrition or adequate sleep. The children, including infants and expectant mothers,
12 are dirty, cold, hungry and sleep-deprived. Because the facilities deny basic
13 hygiene to the children, the flu is spreading among detained class members, who
14 also are not receiving essential medical assessments or prompt medical treatment.
15 Very young children are charged with responsibility for toddlers, with no adult or
16 family supervision.

17 With each passing day, more hospitalizations are occurring and more lives
18 are at risk. Immediate judicial intervention is necessary to compel immediate
19 compliance with the Agreement, end this health and welfare crisis, and prevent
20 more illness and child deaths at the border.

21 U.S. Customs and Border Protection claims that it “urgently need[s]
22 additional humanitarian funding to manage this *crisis*.” Statement of Customs and
23 Border Protection official to Jezebel dated June 23, 2019 (emphasis added),
24 [https://theslot.jezebel.com/i-have-never-seen-conditions-as-degrading-and-](https://theslot.jezebel.com/i-have-never-seen-conditions-as-degrading-and-inhumane-1835727893)
25 [inhumane-1835727893](https://theslot.jezebel.com/i-have-never-seen-conditions-as-degrading-and-inhumane-1835727893) (last checked on June 25, 2019). Yet this is a “crisis”
26 largely of CBP’s own making because it is not complying with its obligations under
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1 the Agreement and Order, including but not limited to its obligation to move
2 children out of these facilities promptly.

3 Unless these unsafe and unsanitary conditions at the El Paso and Rio Grande
4 sector facilities are cured right away, the spread of illness will continue,
5 endangering children’s lives. The non-compliance evidence is overwhelming and
6 should result in this Court ordering immediate intervention and holding Defendants
7 in contempt of Court.

8 As stated by a pediatrician who visited Ursula and examined the children at
9 that facility: “The conditions within which [children] are held could be compared
10 to torture facilities. That is, extreme cold temperatures, lights on 24 hours a day, no
11 adequate access to medical care, basic sanitation, water, or adequate food.” Exhibit
12 13, Declaration of Dr. Dolly Lucio Sevier (“Sevier Decl.”) ¶ 5. As a result of Dr.
13 Sevier’s visit, five infants were admitted to the Neonatal Intensive Care Unit at a
14 local hospital. Dr. Sevier declares that “not supply[ing] this basic necessity [of
15 hand-washing access after bathroom use] is tantamount to intentionally causing the
16 spread of disease.” Sevier Decl. ¶ 6; *see, also* Exhibit 24, Declaration of Dr. Nancy
17 Ewen Wang (“Wang Decl.”) ¶ 5 (“Children are also at increased risk to infectious
18 disease. The younger they are, the sicker they can get. In general, it is better to
19 prevent illness by avoiding exposure to infectious agents. Exposure to other people
20 with upper respiratory infections, and symptoms such as fever, cough, vomiting or
21 diarrhea, and drinking from the same water as those who are sick, are practices
22 guaranteed to spread infectious diseases.”). These conditions not only endanger the
23 children’s health and welfare, they undermine their human dignity and violate their
24 human rights. “[T]he United Nations Universal Declaration of Human Rights . . .
25 maintains that everyone is entitled to ‘. . . food, clothing, housing and medical
26 care[,]’ as well as to the avoidance of ‘cruel, inhuman or degrading treatment or
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1 punishment.” June 25, 2019 Letter from Concerned Bioethicists (signed by more
2 than 800 Bioethicists), Declaration of Elyse D. Echtman, Exhibit 3.

3 This application is supported by over 65 declarations from physicians,
4 attorneys, detained children and their parents that show the starkly unsanitary and
5 unsafe conditions at Border Patrol facilities.

6 Counsel sent a Notice of Non-Compliance to the court-appointed Monitor,
7 Andrea Sheridan Ordin, on June 19, 2019, in accordance with the Dispute
8 Resolution procedures contained in the Court’s October 5, 2018 Order (Dkt. # 494)
9 and provided a Supplement to the Notice of Non-Compliance on June 23, 2019.
10 The Notice of Non-Compliance and Supplement were accompanied by over 50
11 declarations that detail the overwhelming evidence of Defendants’ violations of the
12 Agreement and the Order. The content of the Notice and Supplemental Notice is
13 summarized in the Summary of Evidentiary Record (“Record Summary”)
14 accompanying Plaintiffs’ filing.

15 Because this is an emergency, Counsel requested that the Monitor waive the
16 time periods set forth in Section D.3 of that Order. Dkt. #494 at D.3(b). To date,
17 the Monitor has not agreed to expedite resolution of the non-compliance. The class
18 now seeks immediate relief from this Court to mandate swift compliance and hold
19 Defendants in contempt.

20 Plaintiffs seek an emergency order requiring Defendants to bring the CBP
21 facilities in the El Paso and RGV sectors into immediate compliance with the
22 Agreement and Order. In furtherance of that goal, Plaintiffs seek (1) immediate
23 inspection of all El Paso and RGV sector facilities by a public health expert
24 authorized to mandate a remediation plan that Defendants must follow to make
25 these facilities safe and sanitary, (2) immediate access to the facilities by
26 independent medical professionals appointed by Plaintiffs’ class counsel or the
27 court-appointed Special Master who can assess the medical and psychological
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1 needs of the children and triage appropriately, and (3) deployment of an intensive
2 case management team to focus on expediting the release of Category 1 and 2
3 children (as classified in the Trafficking Victims Protection Reauthorization Act) to
4 alleviate the backlog caused by the inadequate Office of Refugee Resettlement
5 placement array. Finally, as a deterrent to future violations, Plaintiffs request that
6 Defendants be held in contempt for their flagrant and persistent violations of the
7 Agreement and the June 27, 2017 Order.

8 **II. STATEMENT OF FACTS**

9 **A. CBP Facilities Are Unsafe and Unsanitary**

10 **1. The children are denied access to basic hygiene, including soap, 11 showers, toothbrushes and clean clothing**

12 This Court's Order provides that "safe and sanitary" conditions require that
13 detained children be provided with "soap, towels, showers, dry clothing, [and]
14 toothbrushes." Order at 13. The children at CBP facilities are not provided with
15 soap, clean and dry clothing, regular showers, toothbrushes, towels or sanitary toilet
16 facilities. *See* Record Summary at 1-4. The bathroom facilities are filthy and there
17 is no soap to wash hands after using the toilet. *See id.* Some children are
18 showering and brushing their teeth once every 4-5 days, while others are going
19 weeks without a shower or the opportunity to brush their teeth. *See id.*

20 **2. The children are denied clean clothing**

21 The children and infants are forced to wear soiled and inadequate clothing.
22 *See* Record Summary at 4-5. Everyone is wearing the same thing they crossed the
23 border in, and their clothing is dirty because there is no place to wash clothing. *See*
24 *id.* Some of the children are wearing clothing stained with vomit or breastmilk.
25 *See id.* There is no clean clothing available for the children. *See id.*

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3. The children’s supplies, including medicine, have been taken away

Extra clothing, medicine and supplies that the children have brought with them has been taken away. *See* Record Summary at 5-6. Many detainees testified that the officers threw away any extra clothing, medicine, and baby supplies that they brought with them. *See id.* Some of the children were wet when they arrived, but they were not permitted to change clothing before being put into freezing cold holding cells. *See id.* Babies are being kept in these freezing cold conditions, and some of them have only a diaper and a t-shirt to wear. *See id.*

4. The children do not have adequate access to sanitary toilet facilities

Children are given either limited access to toilets or are outright refused access. *See* Record Summary at 6-7. Where the toilets are outside the cells, the children have to ask permission to use the bathrooms, and permission is granted at the discretion of the guard. *See id.* Sometimes the guards punish the children by “closing” the bathrooms. *See id.* In other instances, the toilets are in the same cell where children sleep and they have no privacy while using the toilet. *See id.* Sometimes the children try to cover themselves with a blanket for privacy while they use the toilet. *See id.*

5. Young children are irresponsibly and dangerously tasked with the care of very young children and toddlers, endangering the children’s welfare.

In violation of the obligation to provide “safe” facilities, the CBP has young children taking care of toddlers and other very young children, in conditions that constitute child endangerment. *See* Exhibit 41, A.M.O.R. Decl. ¶¶ 3-5 (“A Border Patrol Agent came in our room with a two-year-old boy and asked us, ‘Who wants to take care of this little boy?’ Another girl said she would take care of him, but she lost interest after a few hours and so I started taking care of him yesterday. His bracelet says he is two years old. I feed the 2-year-old boy, change his diaper, and

1 play with him. . . . The little boy that I am taking care of never speaks. He likes for
2 me to hold him as much as possible.”) (Clint); Exhibit 52, G.S.C.C. Decl. ¶ 12
3 (“Most of the children are all alone. One was only two years old. She came to the
4 U.S. with her aunt, but they separated her. One of the girls tried to take care of
5 her.”) (Clint); Exhibit 64, K.A.R.L. Decl. ¶ 7 (“There are young children with no
6 parents. There was an 8-year-old with no parent here who was trying to take care of
7 a little 4-year-old girl. She did not know how to take care of a little girl so she kept
8 asking me what to do, . . .”) (Clint); Exhibit 49, E.Y.F.C. Decl. ¶ 16 (“There are
9 children who are very young here, only two or three years old, and their mother is
10 not with them. . . . Other children who are older try to take care of the little
11 ones.”) (Clint).

12 **B. CBP Denies Children Access to Clean Drinking Water**

13 The Agreement and this Court’s Order require Defendants to provide
14 children with adequate access to clean drinking water. Order at 11-12. The
15 children’s declarations make clear that they are not provided with regular or
16 sufficient access to clean water to drink, make formula with, or to sanitize baby
17 bottles. *See* Record Summary at 7-8. Often the water that is available in the cells
18 tastes like chlorine or bleach and is not potable. *See id.*

19 Dr. Sevier recounts that “all parents of infants drinking formula from a bottle
20 reported having no ability to wash bottles.” Sevier Decl. ¶ 7. “Re-feeding a child
21 spoiled formula is a significant health hazard that can cause severe infectious
22 diarrhea and death in this vulnerable population. . . . Many mothers regularly boil
23 their infant’s bottles to ensure there is no chance of their infant acquiring an
24 infection. . . ., to deny parents the ability to wash their infant’s bottles is
25 unconscionable.” *Id.*

26 In addition, nursing mothers at Ursula are experiencing an inadequate milk
27 supply from lack of drinking water. *Id.* at 11. The nursing mothers reported to Dr.

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1 Sevier that they are “drinking only 1.5L of water per day (offered at meals)” and
2 that “they would drink more if they had more access to water.” *Id.* “All felt that
3 the water in the cells was undrinkable due to taste.” According to Dr. Sevier, “[a]n
4 average-sized adult requires 2L of water per day to maintain adequate hydration. A
5 breast-feeding woman requires at least 3L per day and extra caloric needs to
6 maintain adequate hydration.” *Id.* “Breast-feeding mothers should be offered . . .
7 extra bottled water and extra calories since they are producing the primary source of
8 nutrition for their children.” It is Dr. Sevier’s medical opinion that Defendants are
9 “endangering the health of these infants” by providing “breastfeeding mothers less
10 than adequate supplies of fluids and nutrition.” *Id.* “An infant without adequate
11 nutrition is at risk of complications from even the most minor of illnesses.” *Id.*

12 **C. The Children are Hungry and Malnourished.**

13 The Agreement and this Court’s Order require the Defendants to provide the
14 children with adequate access to edible food. *See* Order at 8-11. The children’s
15 declarations attest that the food is inadequate and often inedible. *See* Record
16 Summary at 9-11. They are often given food that is not fully cooked or still frozen.
17 *See id.* There is an insufficient quantity of food provided, and many children
18 reported that they are hungry all the time. *See id.* The teen mothers who are
19 nursing their babies do not have enough to eat or drink, and as a result, they are not
20 producing enough breast milk to feed their babies. *See id.*

21 Additionally, babies and children are not given age-appropriate food that
22 they can or will eat, and the age-appropriate food that they are given is not provided
23 in sufficient quantity. *See* Record Summary at 11-14. Many babies are not being
24 provided with baby food, and they are unable to stomach the adult food they are
25 provided. *See id.* The food they are provided is of inferior quality and not
26 appropriate for babies or toddlers. *See id.* Some babies are not provided with
27 formula at all, and others are provided with less formula than they need. *See id.*

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1 Many infants and children are losing weight because of the quality and quantity of
2 food being provided. *See id.*

3 Dr. Sevier reports that “[i]nfants between 6-12 months should be fed pureed
4 foods in addition to formula.” Sevier Decl. ¶ 9. But, the infants in that age range
5 are only being provided with “infant formula, apple sauce and solid foods.” *Id.*
6 This improper nutrition of formula and apple sauce “leaves a child at risk for
7 developing nutritional deficiencies, including but not limited to iron deficiency
8 anemia. This can cause serious health and developmental consequences given
9 anemia in infancy is linked to reduced standardized testing scores in school-aged
10 children.” *Id.* (citation omitted).

11 The CPB’s own standards require access to food that is “in edible condition
12 (not frozen, expired, or spoiled)” and provide that minors “must have regular access
13 to snacks, milk, and juice.” CBP National Standards on Transport, Escort,
14 Detention, and Search (“TEDS Manual”) §§ 4.13, 5.6. These conditions are
15 particularly dangerous for the youngest detained children:

16 Age appropriate nutrition and hydration are essential to avoid serious
17 sequelae such as dehydration, electrolyte imbalance, and growth and
18 developmental delay. Nutrition offered must be appropriate for a
19 child’s developmental age. Babies require adequate quantities of
20 breast milk or formula. Breast milk is the ideal food for infants. It is
21 the most nutritious, offers immunologic defenses, and is the most
22 available and affordable but requires adequate nutrition and hydration
23 of the lactating motion. Formula can be adequate, but must be given in
24 appropriate quantities and be mixed with clean water in the right
25 proportions, otherwise formula can cause electrolyte imbalance,
26 dehydration, and malnourishment. Young children, as they transition
27 to solid food, are particularly vulnerable to lack of appropriate
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1 nutrition. In addition to breast milk or formula, young children require
2 baby food of the appropriate nutritional value and texture (so it can be
3 swallowed safely without the need to chew). Children, after the age of
4 about one, require continued and adequate amounts of nutritious,
5 uncontaminated food, milk and adequate hydration.

6 Wang Decl. ¶ 4. These concerns are amplified when children are suffering from
7 gastrointestinal illnesses. *See id.* ¶ 7 (“Children with gastrointestinal disease
8 (vomiting and/or diarrhea) are particularly vulnerable to dehydration. Children who
9 are malnourished are at increased risk of severe disease and complications from
10 diarrhea.”).

11 **D. CBP Keeps the Facilities Unreasonably Cold**

12 This Court’s Order requires the Defendants to provide “adequate temperature
13 controls at a reasonable and comfortable range.” *See* Order at 16. The declarations
14 show that children are held in cages that are described as incredibly cold and
15 crowded with nowhere to sit. *See* Record Summary 15-17. There are not sufficient
16 beds for the children and many of the children sleep either on mats on the floor or
17 sleep directly on the cold concrete floor. *See id.* The air conditioning is turned up
18 very high, but the children are given only thin mylar blankets, which are not
19 sufficient to keep them warm. *See id.* They have a hard time sleeping because they
20 are so cold. *See id.*

21 These conditions have been independently verified by visiting attorneys.
22 While the attorneys were not permitted to view the living or sleeping quarters, they
23 nonetheless found the temperatures in office spaces to be very cold and noted the
24 children were “visibly chilled and complained of cold temperatures.” *See* Exhibit
25 22, Declaration of Toby Gialluca (“Gialluca Decl.”) ¶ 4; Exhibit 21, Declaration of
26 Genevieve Grabman (“Grabman Decl.”) ¶ 6 (noting she was forced to wear a
27 sweater and a suit jacket during interviews with detainees). In addition, the
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1 attorneys noted many children were dirty and without clothing. Gialluca Decl. ¶ 5
2 (“Most children are wearing filthy clothing and have not bathed or been provided
3 clean clothing since crossing the river. Many of the babies and toddlers are dirty
4 and most are not fully clothed as a result of CBP confiscating their clothing and
5 failing to provide new clothing.”); Grabman Decl. ¶ 9 (discussing K.B.A.J.’s
6 premature infant daughter who was “swaddled in a dirty towel.”).

7 **E. CBP Denies the Children Reasonable Sleeping Conditions**

8 This Court’s Order requires that Defendants provide the detained children
9 with reasonable sleeping conditions that allow them to sleep. *See* Order at 16-18.
10 Numerous children have testified that the conditions at the CBP facilities make it
11 impossible to sleep. Children consistently report that bright lights are on 24 per
12 hours per day, and they are forced to sleep in crowded cages, often sharing blankets
13 or mats that are taken away from them early. *See* Record Summary 18-20. They
14 also cannot sleep because it is noisy, in part because the guards enter the cells and
15 wake them up by yelling at or to the children through the night. *See id.* In addition,
16 minors and infants often sleep on hard concrete floors and benches, including
17 pregnant mothers. *See id.* at 20-21

18 Dr. Sevier also reports that the lights are kept on all night long in the Ursula
19 daycare which interferes with the ability of the children to sleep. Sevier Decl. ¶ 12.
20 “This is a serious detriment to a child’s developing brain.” *Id.*

21 **F. CBP Denies Emergency Medical Care to Detained Children**

22 The Agreement requires Defendants to provide the detained children with
23 access to medical care in the case of a medical emergency. *See* Flores Agreement
24 ¶ 12. Conditions at Ursula have led to rampant sickness, as reported by the media
25 and documented firsthand by attorneys and physicians visiting the facility. *See*
26 Cohen Decl. ¶¶ 3-5 (noting observations of “a number of what appeared to be
27 profoundly ill infants and children as well as a pregnant teenager whose toddler has
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1 tested positive for flu, which may be fatal to pregnant women and their fetuses” and
2 discussing media reports of flu outbreak); Grabman Decl. ¶¶ 8-11 (discussing
3 illnesses of six Ursula child detainees, including K.B.A.J. who was confined to a
4 wheelchair following an emergency caesarian section and her premature infant who
5 was “listless”); Gialluca Decl. ¶¶ 6-10 (describing ill minors, including infants who
6 were “listless,” “sallow,” and “frail.”). *See also* Exhibit 35, W.A.C.L. Decl. ¶ 7
7 (“The conditions are very crowded in the cage where I am at. There are about 75
8 people each night that I have been here. We sleep literally stacked on top of each
9 other should to shoulder. So many are sick. On any given day there are at least 20
10 that are sick. They try to separate the ones that are sick, so that means people come
11 and go. But not everyone goes if they are sick.”).

12 There are numerous sick class members (*see* Sevier Decl. at ¶¶ 7-48 (listing
13 details of medical examinations)), but despite that the flu and other sicknesses are
14 rampant throughout the facility, testimony of numerous declarants shows that there
15 is no access to emergency care. *See* Record Summary at 22-25.

16 The existing medical issues can only be remedied via immediate care. *See*
17 Wang Decl. ¶ 22 (“These minor children and infants should have immediate access
18 to emergency medical services.”) The CBP facility conditions, especially when
19 combined with the weakened immune systems of children, are causing a genuine
20 public health crisis that will persist and worsen if left untreated. *See id.* ¶¶ 4-11, 22
21 (“In my professional opinion as a pediatric emergency physician, the appropriate
22 place for these children to receive the services that they need is the emergency
23 department of a hospital, which has the needed capacity and capability to
24 appropriately evaluate and treat these children.”).

25 In short, the children need immediate access to emergency care and improved
26 living conditions to prevent more illness and even death.

27 **G. CBP Improperly Separates Children from Family Members**

1 Paragraph 12A of the Agreement requires that Defendants keep children in
2 contact with their family members. In violation of that provision, CBP is
3 separating children from their families. *See* Exhibit 3, J.I.L.Z. Decl. ¶¶ 3, 5-6 (“The
4 immigration agents separated me from my father right away. I was very frightened
5 and scared. I cried. I have not seen my father again...I have been at this facility for
6 several days. I have not been told how long I have to stay here. I am frightened,
7 scared, and sad.”) (Clint); Exhibit 9, M.F.M.O., K.M.N.O. and S.N.M.O. Decl. ¶ 6
8 (“At 3 AM the next day the officers told us that our grandmother would be taken
9 away. My grandmother tried to show the officers a paper signed by my parents
10 saying that my grandmother had been entrusted to take care of us. The officers
11 rejected the paperwork saying that it had to be signed by a judge. Then the officers
12 took my dear grandmother away. We have not seen her since that moment...The
13 officers didn’t give us any information about how we could reunite with our
14 grandmother.”) (Clint); Exhibit 2, C.A.H.H. Decl. ¶¶ 3-4 (“[T]hey separated me
15 from my aunt. I cried and they did not tell me where I was going. I was taken to this
16 place [Clint CBP] where I have been for 3 days.”) (Clint); Exhibit 8, L.G.L.L. Decl.
17 ¶ 5 (“There have been boys as young as 3 or 4 years old in the cell with me. The 3
18 year old had a brother with him. The 4 year old came to the United States with an
19 uncle but they separated him so he has no one here. It is very sad here. We all want
20 to leave.”) (Clint).

21 **H. Defendants do not Make and Record Efforts Aimed at the Prompt**
22 **Release of Minors or their Placement in Licensed Facilities.**

23 The Agreement requires that, from the time of apprehension, Defendants
24 make and record continuous efforts to release class members to parents or sponsors
25 and if they do not have sponsors then to expeditiously transfer them to licensed
26 facilities. It is undisputed that Defendants are ignoring the Agreement’s terms with
27 regard to children held for weeks in CBP facilities in the El Paso and RGV Sectors.
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1 Class member declarations confirm that detention in CBP custody is
2 lengthened, and their exposure to unsanitary, unsafe, unhealthy conditions
3 increased, because Defendants are not making or recording prompt and continuous
4 efforts to reunify minors with sponsors under Paragraph 14 or to place them in
5 licensed programs under Paragraph 19 of the Agreement.

6 S.N.A.M., a 16-year-old class member who fled Guatemala with her son, had
7 been detained at the Clint CBP facility for 17 days when she declared:

8 When arriving at the Clint facility, I informed officers that my father lives in
9 Nebraska. I gave officers my father’s name and contact information. Since I
10 gave that information to officers, no one has discussed anything further with
11 me. I have not heard of a release. I have no idea what is going on. I have not
12 been told of any other optional facilities where I can live.

13 Exhibit 66, S.N.A.M. Decl. ¶ 6.

14 Class members routinely report this violation: “I don’t know why they have
15 kept us here for so long. I gave them the information for my cousin who lives in the
16 U.S. the first day arrived here in the morning....She says that I can live with her.
17 They never called even called her until two days ago. They said that they cannot
18 send me to go live with her, but have to send me and my baby somewhere else and
19 the people at that facility will decide where I go next.” Exhibit 52, G.S.C.C. Decl. ¶
20 13. S.N.A.M.M. (age 16), left Guatemala with her son to flee violence, and made
21 this declaration at the Clint CBP facility: “When arriving at the Clint facility, I
22 informed officers that my father lives in Nebraska. I gave officers my father’s name
23 and contact information. Since I gave that information to officers, no one has
24 discussed anything further with me. I have not heard of a release. I have no idea
25 what is going on. I have not been told of any other optional facilities where I can
26 live.” Exhibit 66, S.N.A.M.M. Decl. ¶ 6.

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1 **III. ARGUMENT**

2 **A. Legal Standard.**

3 **1. Standard for Contempt.**

4 This Court has “inherent power to enforce its judgments. Without jurisdiction
5 to enforce a judgment entered by a federal court, ‘the judicial power would be
6 incomplete and entirely inadequate to the purposes for which it was conferred by
7 the Constitution.’” *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). Among the
8 enforcement remedies available to this Court is the power to have another party
9 perform the required duties, Fed. R. Civ. P. 70(a), and to hold a noncompliant
10 defendant in contempt, Fed. R. Civ. P. 70(e). “[C]ourts have inherent power to
11 enforce compliance with their lawful orders through civil contempt.” *Shillitani v.*
12 *United States*, 384 U.S. 364, 368 (1966). This Court has “wide latitude in
13 determining whether there has been a contemptuous defiance of its order.” *Gifford*
14 *v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). The law applicable to civil contempt
15 proceedings is summarized as follows:

16 If a person disobeys a specific and definite court order, he may
17 properly be adjudged in contempt. A person fails to act as ordered by
18 the court when he fails to take all the reasonable steps within his power
19 to insure compliance with the court's order. It does not matter what the
20 intent of the appellants was when they disobeyed the court’s order.
21 The Ninth Circuit has also explained that “[s]ubstantial compliance
22 with the court order is a defense to civil contempt, and is not vitiated
23 by a few technical violations where every reasonable effort has been
24 made to comply. The standard for finding a party in civil contempt is
25 well settled: The moving party has the burden of showing by clear and
26 convincing evidence that the contemnors violated a specific and
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1 definite order of the court. The burden then shifts to the contemnors to
2 demonstrate why they were unable to comply.

3 *Lancaster v. Tilton*, 2007 U.S. Dist. LEXIS 48403, *13-*14 (N.D. Cal. June 21,
4 2007) (citations omitted). Good faith attempts at compliance are not a defense to a
5 claim of civil contempt. *Stone v. City and County of San Francisco*, 968 F.2d 850,
6 856 (9th Cir. 1992). For the reasons discussed below, the clear and convincing
7 evidence before the Court demonstrates that Defendants are in blatant violation of
8 the Agreement and the Order, which require that children be kept in “safe and
9 sanitary” facilities. There can be no reasonable dispute that the Ursula, Clint and
10 Weslaco CBP facilities are not “safe and sanitary.” This evidence also entitles
11 Plaintiffs to injunctive relief.

12 **2. Standard for Injunctive Relief Under Fed. R. Civ. P. 65.**

13 A plaintiff seeking preliminary relief under Federal Rule of Civil Procedure
14 65 must establish “that he is likely to succeed on the merits, that he is likely to
15 suffer irreparable harm in the absence of preliminary relief, that the balance of
16 equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
17 *Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Washington v. Trump*, 847
18 F.3d 1151, 1159 n.3 (9th Cir. 2017) (noting standards for issuing temporary
19 restraining orders and preliminary injunctions are “substantially identical”).
20 Because these elements are balanced against each other, “a stronger showing of one
21 element may offset a weaker showing of another.” *All. For The Wild Rockies v.*
22 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, when the likelihood of grave
23 irreparable injury is palpable and the balance of equities tips sharply in plaintiffs’
24 favor, the plaintiff need only “demonstrate a fair chance of success on the merits or
25 questions serious enough to require litigation.” *Arc of Cal.*, 757 F.3d at 993-94
26 (internal quotations and citation omitted).

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1 **B. Defendants’ Treatment of Children at CBP Facilities is Inflicting**
2 **Irreparable Injury on Class Members.**

3 The irreparable harm prong of the *Winter* test requires that a plaintiff
4 “demonstrate immediate threatened injury as a prerequisite to preliminary
5 injunctive relief.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674
6 (9th Cir. 1988). “Irreparable harm is the single most important prerequisite for the
7 issuance of a preliminary injunction.” *Spark Indus., LLC v. Kretek Int’l, Inc.*, No.
8 CV 14-5726-GW(ASX), 2014 WL 12600262, at *3 (C.D. Cal. July 29, 2014)
9 (citations omitted); *see also* 11A Charles A. Wright & Arthur R. Miller, Federal
10 Practice and Procedure § 2948.1 (3d ed. rev. 2014) (“Perhaps the single most
11 important prerequisite for the issuance of a preliminary injunction is a
12 demonstration that if it is not granted the applicant is likely to suffer irreparable
13 harm before a decision on the merits can be rendered.”). This case presents a
14 paradigmatic example of imminent irreparable harm and also clear and convincing
15 evidence of Defendants’ violations of the Order and Agreement. By failing to
16 maintain safe and sanitary conditions for children in facilities where disease is
17 rampant, and depriving them of basic hygiene needs such as soap, showers, clean
18 clothing, adequate nutrition, and sleep, Defendants increase the risk of additional
19 deaths—“an irremediable and unfathomable” harm. *Garcia v. Google, Inc.*, 743
20 F.3d 1258, 1268 (9th Cir. 2014) (internal quotations marks omitted).

21 It is beyond dispute that imminent threats to health and safety present
22 irreparable harm. In a similar context, the court in *Unknown Parties v. Johnson*,
23 No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *15 (D. Ariz. No. 18, 2016),
24 *aff’d sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017), issued an injunction to
25 curb inhumane treatment of civil immigration detainees where evidence
26 demonstrated “the physiological effects of sleep deprivation or constant discomfort
27 that comes from an inadequate food supply, or health risks related to exposure due
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1 to contaminated water or unsanitary cells, or medical risks associated with being
2 unable to continue taking prescription medications or being exposed to
3 communicable diseases.” Likewise, in *Harris v. Bd. of Supervisors, Los Angeles*
4 *Cty.*, 366 F.3d 754, 756 (9th Cir. 2004), the Ninth Circuit found budget cuts would
5 result in closure of a hospital and bed reductions at another constituted irreparable
6 injury to chronically ill indigent patients who relied on county health services.
7 Among the injuries identified as warranting an immediate injunction were “pain,
8 infection, amputation, medical complications, and death due to delayed treatment.”
9 *Id.* at 766; *see also Jones v. Tex. Dep’t. of Crim. Justice*, 880 F.3d 756, 760 (5th
10 Cir. 2018) (denial of adequate medical care for prisoner’s diabetes constituted
11 irreparable harm).

12 The unsafe and unhygienic conditions detailed above pose a continuing threat
13 to the health and well-being of class members. As Dr. Sevier noted during her
14 investigation, “The conditions within which [the children] are being held could be
15 compared to torture facilities. That is, extreme cold temperatures, lights on 24
16 hours a day, no adequate access to medical care, basic sanitation, water, or adequate
17 food.” Sevier Decl. ¶ 5. All of the detainees Dr. Sevier saw “had no access to
18 hand-washing during their entire time in custody, including no handwashing
19 available after bathroom use.” *Id.* ¶ 6. “All parents of infants drinking formula
20 from a bottle reported having no ability to wash bottles.” *Id.* ¶ 7. Two thirds of the
21 infants Dr. Sevier examined had a respiratory infection (including two infants with
22 acute respiratory distress), and all of the children she observed showed evidence of
23 trauma. *Id.* ¶¶ 10, 13. Dr. Sevier’s observations led her to “question whether there
24 is an infections control system in place in these facilities” at all. *Id.* ¶ 8. These
25 dangerous and unsanitary conditions, along with denial of medical care pose an
26 extremely high likelihood of irreparable harm to Plaintiffs, satisfying the first
27 *Winter* factor.

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1 **C. The Equities Weigh Heavily in Plaintiffs’ Favor and The Issuance**
2 **of The Temporary Restraining Order and Preliminary Injunction**
3 **Is In The Public Interest.**

4 Here, weighing of the equities and determination of the public interest merge
5 into a single balancing test because the Defendants are the government. *See Nken v.*
6 *Holder*, 556 U.S. 418, 435 (2009); *see also California v. Azar*, 911 F.3d 558, 581
7 (9th Cir. 2018) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th
8 Cir. 2014)). In balancing the equities, “[a] court must balance the competing claims
9 of injury and must consider the effect on each party of the granting or withholding of
10 the requested relief.” *Arc of Cal.*, 757 F.3d at 991 (quoting *Amoco Prod. Co. v. Vill.*
11 *of Gambell*, 480 U.S. 531, 542 (1987)). In performing this balancing, “the Ninth
12 Circuit expects lower courts to protect physical harm to an individual over monetary
13 costs to government entities.” *McNearney v. Washington Dep’t of Corr.*, No. 11-cv-
14 5930 RBL/KLS, 2012 WL 3545267, at *15 (W.D. Wash. June 15, 2012).

15 The balance of the equities tips decidedly in favor of Plaintiffs’ interest in their
16 health and safety, which Defendants are placing at unnecessary risk. As shown
17 above, Plaintiffs are likely to suffer serious and severe irreparable harm, including
18 potentially deadly infections, unless this Court intervenes. *See Cohen Decl.* ¶ 7–8.
19 No purported government interest could justify Defendants’ subjecting vulnerable
20 children and youth to these wholly preventable conditions. *See Norsworthy v. Beard*,
21 87 F. Supp. 3d 1164, 1193 (N.D. Cal. 2015) (holding equities sharply favored
22 detainee who “established that she is suffering and is likely to continue to suffer
23 *unnecessary* pain”) (emphasis added); *see also Lopez v. Heckler*, 713 F.2d 1432,
24 1437 (9th Cir. 1983) (“Faced with [] a conflict between financial concerns and
25 *preventable* human suffering, [the court has] little difficulty concluding that the
26 balance of hardships tips decidedly in plaintiffs’ favor.”) (emphasis added) *quoted by*
27 *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). It is hardly difficult for
28 Defendants to provide class members with soap, showers, food, clean clothing,

1 reasonable temperature control, and reasonable sleeping conditions. Moreover,
2 individuals across this country are ready and willing to donate supplies to have them
3 delivered to the children.

4 Granting Plaintiffs’ motion would not subject Defendants to any identifiable
5 hardship outweighing the irreparable harm to Plaintiffs’ health and safety. Indeed,
6 Defendants cannot point to *any* harm because they “cannot suffer harm from an
7 injunction that merely ends an unlawful practice.” *Ms. L. v. ICE*, 310 F. Supp. 3d
8 1133, 1147 (S.D. Cal. 2018) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145
9 (9th Cir. 2013)). Moreover, “it is obvious that compliance with the law is in the
10 public interest.” *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dep’t of*
11 *Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010); *see also Small v. Avanti Health Sys.,*
12 *LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) (The “public interest favors applying
13 federal law correctly.”). Because the requested temporary restraining order and
14 preliminary injunction would simply mandate compliance with the *Flores* Settlement
15 Agreement, which is “enforceable as a judicial decree,” *Labor/Cnty. Strategy Ctr. v.*
16 *Los Angeles Cty. Metro. Transp. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001), the
17 Government could suffer no harm as a result. Granting Plaintiffs’ request for
18 preliminary relief serves the public interest, and the balance of equities strongly
19 weighs in Plaintiffs’ favor.

20 **D. Plaintiffs Are Likely to Succeed on the Merits of Their Claims**

21 Having demonstrated the threat of irreparable injury to their health and safety
22 and given that the balance of the equities tips sharply in Plaintiffs’ favor, Plaintiffs
23 need only demonstrate “a fair chance of success on the merits or questions serious
24 enough to require litigation” to successfully secure preliminary relief here. *Arc of*
25 *Cal.*, 757 F.3d at 993-94 (internal quotations and citation omitted); *All. for the Wild*
26 *Rockies*, 632 F.3d at 1132 (“[S]erious questions going to the merits’ and a hardship
27 balance that tips sharply toward the plaintiff can support issuance of an injunction,
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1 assuming the other two elements of the *Winter* test are also met.”¹ Plaintiffs’
2 prospects here far exceed a “fair chance” given the evidence that Defendants
3 entirely fail to make and record efforts aimed at the release of children and continue
4 to maintain detention facilities in the El Paso and RGV sectors in an unsafe and
5 unhygienic state, all while denying Plaintiffs access to urgently needed medical
6 care. The conclusion Defendants are currently in violation of the *Flores* Settlement
7 Agreement is compelled not only by the plain meaning of the Agreement, but by
8 this Court’s prior Orders interpreting the Agreement.

9 Regarding CBP’s duties to release class members or transfer them to licensed
10 facilities, the Settlement is clear. It provides: “Upon taking a minor into custody,
11 [Defendants] ... shall make and record the prompt and continuous efforts on its part
12 toward family reunification and release of the minor pursuant to Paragraph 14
13 above. Such efforts at family reunification shall continue so long as the minor is in
14 [Defendants’] custody. Agreement ¶ 18 (emphasis supplied). “In any case in which
15 [Defendants] do[] not release a minor pursuant to Paragraph 14 ... such minor shall
16 be placed temporarily in a licensed program ...” *Id.* ¶ 19. “[A]ll minors [shall be
17 placed in licensed facilities] pursuant to Paragraph 19 as expeditiously as possible.”
18 *Id.* ¶ 12.A. CBP is either intentionally ignoring or abysmally ignorant of the plain
19 terms of the Agreement. Its failure to comply with the Agreement has caused and is
20 causing massive overcrowding at the agency’s El Paso and RGV sectors, and that in
21 turn triggers further violations (lack of sleep, lack of sanitation, etc.), which in turn
22 has led to serious illness.

23 Paragraph 12A of the *Flores* Settlement Agreement provides that:
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28 ¹ Plaintiffs’ evidence meets and exceeds even the higher “likelihood of success of
the merits” standard that applies when the equities are not as starkly balanced as
they are here. Preliminary relief is therefore appropriate under either standard.

1 Following arrest, the INS^[2] shall hold minors in facilities that are *safe*
2 *and sanitary* and that are consistent with the INS’s concern for that
3 particular vulnerability of minors. *Facilities will provide access to*
4 *toilets and sinks, drinking water and food* as appropriate, medical
5 assistance if the minor is in need of emergency services, adequate
6 temperature control and ventilation

7 Agreement at ¶ 12A (emphases added). This Court has already held that these
8 provisions require that Defendants provide soap, showers, toilet access, clean
9 clothing, toothbrushes and toothpaste, edible food in sufficient quantities, clean
10 drinking water, reasonable temperatures and nighttime conditions that allow for
11 sleep. Order at 8-18.

12 The evidence is overwhelming that CBP currently holds minors in conditions
13 manifestly unsuitable for the detention of children. Because Plaintiffs are likely to
14 prevail in their claim that Defendants are in violation of the Agreement, this factor
15 weighs in favor of the Court granting a temporary restraining order and preliminary
16 injunction. The record also amply supports a finding of contempt.

17 **VII. CONCLUSION**

18 For the foregoing reasons, the Court should grant this application for a
19 temporary restraining order and preliminary injunctive relief to remediate the
20 unsafe and unhygienic conditions, and to address the public health emergency at
21 CBP facilities in the El Paso and Rio Grande sectors, and should also find
22 Defendants in contempt.

23

24

25 ² CBP is a successor agency of INS bound by these provisions of the *Flores*
26 Settlement Agreement. *See, e.g., Flores v. Sessions*, 2017 WL 6060252, at *5-12,
27 22 (C.D. Cal. June 27, 2017) (enforcing other Paragraph 12A requirements against
28 CBP).

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