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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JENNY LISETTE FLORES, *et al.*,

Plaintiffs,

v.

MERRICK GARLAND, Attorney General of
the United States, *et al.*,

Defendants.

No. CV 85-4544-DMG-AGR_x

MOTION TO MODIFY 2022 CBP
SETTLEMENT

JUDGE: Hon. Dolly M. Gee

Hearing: January 24, 2024
Time: 9:30 a.m.

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1 **I. INTRODUCTION**

2 For years, U.S. Customs and Border Protection (“CBP”) detained children in
3 deeply inhumane and unsafe conditions in violation of the *Flores* Settlement
4 Agreement (“FSA”). In 2019, after multiple Court orders finding CBP in violation
5 of the FSA, Plaintiffs requested a temporary restraining order to address
6 emergency circumstances in CBP facilities in the El Paso and Rio Grande Valley
7 (“RGV”) sectors. Specifically, children were unnecessarily separated from family
8 and held for weeks without basic sanitation, nutrition, or the essential requirements
9 for sleep. A dangerous flu was spreading and CBP was failing to provide necessary
10 medical treatment. Mem. of P. & A. in Supp. of Pls.’ Ex Parte App. [Doc. No. 572-
11 1] (“Pls.’ TRO App.”).

12 In 2022, after years of court-ordered mediation, the Court approved a
13 settlement agreement clarifying CBP’s obligations under the FSA for children in
14 the RGV and El Paso sectors. The 2022 CBP Settlement Agreement
15 (“Settlement”), provides for a 2.5-year term and requires independent monitoring
16 and the creation of self-monitoring protocols to ensure that children continue to be
17 held in compliant conditions following the termination of the Settlement. [Doc.
18 No. 1254-1].

19 Despite the Settlement’s clear instructions, CBP continues to hold children
20 in an environment that disregards their fundamental needs and causes harm. CBP
21 has never substantially complied with the Settlement, as reflected in the Juvenile
22 Care Monitor (“JCM”)’s consistent reports of non-compliance. In violation of the
23 Settlement, CBP routinely separates children from parents and trusted family
24 members, denies access to legal counsel, denies clean and warm clothing, and
25 provides limited or no child-friendly activities, recreation, or trauma-informed
26 care. The harms caused by these violations are exacerbated by prolonged periods
27 of detention—often a week or longer, even during periods of low census. Finally,
28 despite some important new protocols, CBP is not yet capable of self-monitoring.

1 CBP’s lack of substantial compliance is a significant changed circumstance
2 that justifies modifying the Settlement under Federal Rule of Civil Procedure
3 60(b). It is vitally important that the Court and JCM continue to oversee the CBP
4 Settlement. To ensure CBP achieves substantial compliance with the Settlement
5 and the FSA, Plaintiffs request the Court modify the Settlement’s termination date
6 and extend the Settlement for an additional 2.5 years, or for however long the
7 Court deems appropriate.

8 **II. BACKGROUND**

9 **A. Overview of 2022 CBP Settlement**

10 On July 29, 2022, the Court approved a settlement agreement representing
11 the Parties’ “understanding of the meaning of certain provisions” - Paragraphs 11
12 and 12A - “of the Flores Settlement Agreement (“FSA”), as they apply to
13 conditions of CBP detention” and specifically in the El Paso and RGV sectors.
14 CBP Settlement 1; *see also* Order Re Pls.’ Ex Parte App. for TRO 1 [Doc. No.
15 576]; Pls.’ TRO App. 1-2.

16 The Settlement requires access to sanitation, hygiene, and basic physical
17 accommodations (CBP Settlement § VII.4-7); a child-friendly, trauma-informed
18 environment (*Id.* at §§ VII.3.D.7, VII.7.7, VII.8.B.C.2); family unity while in CBP
19 custody and visitation with family members held apart from class members (*Id.* at
20 § VII.8.B); a caregiver program (*Id.* at § VII.9); access to phones and a list of legal
21 service providers (*Id.* at § XI, Exhibit 3); and medical protocols (*Id.* at § VII.3).

22 The Court appointed Dr. Paul Wise as JCM on August 3, 2022 for a 16-
23 month term. *Id.* at § IX; Order Appointing JCM [Doc. No. 1280]. The Court
24 appointed Andrea Ordin as Legal Advisor and then as JCM, with Dr. Wise serving
25 as Medical Expert and Dr. Nancy Ewen Wang serving as Medical Advisor. *See*
26 Order Granting Legal Advisor [Doc. No. 1320]; Order Approving Medical
27 Professionals [Doc. No. 1389]; Order Approving Extension of JCM Term 1-2,
28 May 23, 2024 [Doc. No. 1426] (“May 2024 JCM Extension”). The Monitors have

1 filed seven reports with the Court, each highlighting areas of continued
2 noncompliance. *See* JCM Report, January 30, 2023 [Doc No. 1326] (“Jan. 2023
3 JCM Rep.”); JCM Report, July 18, 2023 [Doc. No. 1352] (“July 2023 JCM Rep.”);
4 JCM Report, September 15, 2023 [Doc. No. 1360] (“Sept. 2023 JCM Rep.”); JCM
5 Report, November 13, 2023 [Doc. No. 1372] (“Nov. 2023 JCM Rep.”); JCM
6 Report, May 6, 2024 [Doc. No. 1412] (“Apr. 2024 JCM Rep.”); JCM Report,
7 September 10, 2024 [Doc. No. 1468] (“Aug. 2024 JCM Rep.”); JCM Report,
8 December 13, 2024 [Doc. No. 1522] (“Dec. 2024 JCM Rep.”).

9 The Settlement establishes a process for transitioning monitoring from the
10 JCMs to CBP. CBP Settlement § IX.12-13. CBP must develop internal protocols
11 that the JCM must approve. CBP Settlement § IX.12. The Settlement provides for
12 a transition period of 30 days during which the JCM will help “ensure an effective
13 transition of monitoring functions.” *Id.* at § IX.13.

14 The Court has extended the JCM’s term three times because of a need for
15 continued monitoring. *See* Order for Extension of JCM, December 14, 2023 [Doc.
16 No. 1381]; May 2024 JCM Extension; Order for Extension of JCM, September 11,
17 2024 [Doc. No. 1470] (“Sept. 2024 JCM Extension”). Most recently, the Court
18 extended the term until December 27, 2024, to allow the Monitors to “make a
19 judgment about whether the existing and new internal protocols are sufficiently
20 robust” to allow monitoring responsibilities to be transferred to CBP. Sept. 2024
21 JCM Extension 2. In her final report, the JCM did not affirmatively “provide final
22 approval of” CBP’s internal monitoring protocols, in part because some protocols
23 remain in the development stage. *Id.* at 6, 26.

24 The Settlement’s original termination clause provided for 2.5 years of
25 compliance. CBP Settlement § II.8. It is currently scheduled to terminate on
26 January 29, 2025. Sept. 2024 JCM Extension 6.

27 **B. CBP Continues to Hold Class Members for Extended Periods in RGV**
28 **and El Paso Thereby Exacerbating Harms of Detention**

1 Compliance with the Settlement is especially important because children –
2 particularly accompanied children – are commonly detained for prolonged periods
3 well-exceeding 72 hours. *See, e.g.*, Aug. 2024 JCM Rep. 5-6 (60 children held
4 from six to 14 days in RGV in June and 151 children held between five and 14
5 days in El Paso in May); Jan. 2023 JCM Rep. 14 (half of the accompanied children
6 in custody over 72 hours were under 7 years old). Most recently, despite no
7 overcrowding, some families “had been in custody as long as 15 to 20 days.” Dec.
8 2024 JCM Rep. 5; *see also* Sept. 2024 JCM Rep. 8, 10 (most children held for
9 prolonged periods are of tender age).

10 While the Settlement did not resolve Plaintiffs’ claims regarding prolonged
11 stays in CBP custody (CBP Settlement Preamble), prolonged detention compounds
12 the harm of Settlement violations. Separating children from family and holding
13 them in windowless pods with little or no recreation or activities is exponentially
14 more concerning when, each month, hundreds of accompanied children are
15 spending between four and 20 days in facilities intended for short-term use (72
16 hours or less). *See* Aug. 2024 JCM Rep. 6, 8; Dec. 2024 JCM Rep. 5; *see also* FSA
17 ¶ 12A; CBP Settlement § VIII.

18 **C. Brief History of CBP Non-Compliance**

19 **1. CBP’s failure to comply with key terms of the Settlement**

20 The JCM has filed seven reports, each identifying non-compliance with key
21 terms of the Settlement. The violations identified include: (1) routine separation of
22 children from their family members with no articulated reason; (2) lack of
23 visitation with family members; (3) insufficient warm clothing; (4) practices
24 inconsistent with a child-friendly, trauma-informed environment; and (5) failure to
25 properly implement the Settlement’s caregiver program. *See* Jan. 2023 JCM Rep.,
26 July 2023 JCM Rep., Sept. 2023 JCM Rep., Nov. 2023 JCM Rep., Apr. 2024 JCM
27 Rep., Aug. 2024 JCM Rep., Dec. 2024 JCM Rep.

28

1 In 2023 and 2024, Plaintiffs documented and raised with Defendants these
2 violations as well as CBP’s failure to provide clean and warm clothing, legal
3 service provider lists, and access to telephones, particularly for accompanied
4 children. *See* Pls.’ Resp. to JCM Report, September 22, 2023 [Doc. No. 1362]
5 (“Pls.’ Sept. Resp.”); Pls.’ Resp. to JCM Report, November 17, 2023 [Doc. No.
6 1374] (“Pls.’ Nov. Resp.”); *see also* Ex. 1, Decl. of Sarah Kahn, December 12,
7 2024 (“Kahn Decl.”); Kahn Decl. Ex. 1B, 1C; Ex. 2, Decl. of Rebecca Wolozin,
8 December 20, 2024 (“Wolozin Decl.”); Wolozin Decl. Ex. 2A, 2C.

9 Although CBP has made progress with regard to medical care, the final JCM
10 report reveals serious concerns that require ongoing monitoring, including for
11 example (1) resistance from CBP agents to some medical transfers and a “system
12 for conveying medical information to CBP personnel [that is still] in transition;”
13 (2) use of small medical isolation rooms that “requires immediate reconsideration;”
14 (3) inadequate communication with hospitals regarding a child’s medical
15 information, and “no process requiring notification [to] the parent of results of
16 medical examination or procedures;” (4) custodial policies that fail to protect the
17 privacy of minors during medical procedures; (5) incorrect medical information
18 provided to ORR; and (6) CBP having “no standard protocol” to “ensure
19 appropriate referral for . . . children at significantly elevated risk who require
20 specialized care soon after release.” Dec. 2024 JCM Rep. 14-19.

21 **2. The transition to internal monitoring remains incomplete**

22 CBP has not yet finalized how it will monitor compliance with its newly
23 developed policies and protocols. Because of CBP’s limited progress toward
24 creating adequate internal monitoring protocols, the JCM term has been extended
25 for a full year beyond the initial 16-month term. Sept. 2024 JCM Extension 1-2;
26 *see also* Aug. 2024 JCM Rep. 22; Apr. 2024 JCM Rep. 28; CBP Settlement §§
27 XIII, IX.10.
28

1 The final JCM report identifies some areas where CBP has developed
2 monitoring protocols and other areas where protocols are absent or under
3 development. Dec. 2024 JCM Rep. 19-28. The final report highlights the need for
4 continued monitoring of time in custody, general conditions and amenities,
5 caregivers, housing and visitation practices, and medical care. *Id.* at 19-28.
6 Importantly, the JCM has been unable to evaluate the implementation of CBP’s
7 monitoring protocols in critical areas, including caregivers, provision of urgent
8 medical care and medical surveillance of children at elevated medical risk. *Id.* at
9 24-28; *id.* at 28 (“[M]any of the *most important* components of the system are still
10 being implemented or have had only minimal operational experience in actual
11 facility settings.”) (emphasis added).

12 **III. ARGUMENT**

13 **A. Legal Standard**

14 The FSA and Settlement are consent decrees. *See Flores v. Lynch*, 828 F.3d
15 898, 905 (9th Cir. 2016). The Court has inherent power—codified at Federal Rule
16 of Civil Procedure 60(b)—to modify a consent decree in response to changed
17 circumstances, including by extending the termination date of the decree in whole.
18 *Kelly v. Wengler*, 822 F.3d 1085, 1097-98 (9th Cir. 2016).

19 Modification is warranted if the moving party establishes “that a significant
20 change in circumstances warrants revision of the decree” and the Court finds that
21 the “proposed modification is suitably tailored to the changed circumstance.” *Rufo*
22 *v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). Changed factual
23 circumstances justify modification if compliance with the original terms is “more
24 onerous, unworkable, or detrimental to the public interest.” *Labor/Cnty. Strategy*
25 *Ctr. v. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir.
26 2009) (internal quotation omitted).

27 “The failure of substantial compliance with the terms of a consent decree
28 can qualify as a significant change in circumstances that would justify the decree’s

1 temporal extension.” *Id.* at 1120-21; *see also Kelly*, 822 F.3d at 1098 (“Under well
2 established law, substantial violation of a court order constitutes a significant
3 change in factual circumstances.”); *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*,
4 404 F.3d 821, 834 (4th Cir. 2005); *David C. v. Leavitt*, 242 F.3d 1206, 1211-12
5 (10th Cir. 2001); *United States v. California*, No. 06-CV-2667, 2012 WL
6 12906030, at *1 n.1, 3 (C.D. Cal. Sept. 25, 2012). This type of change in
7 circumstances is an unanticipated one. *See Thompson*, 404 F.3d at 828-29
8 (“Plaintiffs would not have given up their claims in exchange for an agreement that
9 they anticipated would not be followed”).

10 “[D]istinct provisions of consent decrees are independent obligations, *each*
11 *of which* must be satisfied” to achieve substantial compliance. *Rouser v. White*, 825
12 F.3d 1076, 1081 (9th Cir. 2016) (emphasis added). Substantial compliance also
13 requires that “the larger purposes of the decrees have been served.” *Jeff D. v. Otter*,
14 643 F.3d 278, 288 (9th Cir. 2011). Even where a party has complied with some
15 terms of a settlement, “there can be no ‘substantial performance’ where the part
16 unperformed touches the fundamental purpose of the contract and defeats the
17 object of the parties.” *Id.* (internal citation omitted). “[M]erely taking significant
18 steps toward implementing the decree falls far short of ‘substantial compliance.’”
19 *Rouser*, 825 F.3d at 1082 (internal citations omitted).

20 “[A] modification of a court order is ‘suitably tailored to the changed
21 circumstance’ when it ‘would return both parties as nearly as possible to where
22 they would have been absent’ the changed circumstances.” *Kelly*, 822 F.3d at 1098
23 (citations omitted). Extending the termination date of a consent decree is a
24 common modification when a party has failed to substantially comply. *See, e.g.*,
25 *Kelly*, 822 F.3d at 1098; *Labor/Cmty. Strategy Ctr.*, 564 F.3d at 1120-21; *see also*
26 *Thompson*, 404 F.3d at 834; *David C.*, 242 F.3d at 1211-12. Extension of a
27 settlement can be a suitably tailored remedy to provide Plaintiffs with the original
28 bargained-for period of compliance. *Kelly*, 822 F.3d at 1097-98 (full extension

1 equal to the initial two-year term of the agreement justified where non-compliance
2 with one provision raised concerns about compliance in other respects of the
3 settlement).

4 Because CBP has never substantially complied with key terms of the
5 Settlement, changed circumstances justify an extension of the Settlement for an
6 additional 2.5 years and a six-month extension of the JCM term.

7 **B. CBP Has Failed to Substantially Comply with the Settlement**

8 **1. CBP has never substantially complied with the family unity**
9 **provisions of the Settlement**

10 The Settlement requires class members be held together with accompanying
11 family members, including non-parents or legal guardians, “absent an articulable
12 operational reason” that has been recorded for each individual family that has been
13 separated. CBP Settlement §§ VII.8.B.1-3. “Family member” includes relatives
14 like grandparents, aunts, and uncles. *Id.* at §§ VII.8.B.2-3.

15 “The essential context for these [family unity] Settlement provisions and
16 their legal assessment is the fundamental understanding that hold[ing] a child
17 separately while in custody is bad for children. Separating a child from a parent
18 can be profoundly traumatic for children and can have lasting, harmful effects.”
19 Sept. 2023 JCM Rep. 28. Conversely, “there is likely no greater contributor to the
20 well-being of children in custody than holding them together with a parent or
21 trusted adult.” Jan. 2023 JCM Rep. 49.

22 Family unity is also required by CBP’s National Standards on Transport,
23 Escort, Detention, and Search (“TEDS”). CBP Settlement § VIII.8.B.1. TEDS
24 provide that “CBP will maintain family unity to the greatest extent operationally
25 feasible, absent a legal requirement or an articulable safety or security concern that
26 requires separation,” and “family units with juveniles should not be separated,”
27 including holding unaccompanied children with siblings or non-parental adult
28

1 relatives. U.S. CUST. AND BORDER PROT., NATIONAL STANDARDS ON TRANSPORT,
2 ESCORT, DETENTION, AND SEARCH (2015) §§ 1.9, 4.3, 5.6.

3 Being forcibly separated from a close family member is an extremely
4 distressing experience for a child. *See, e.g.,* Carlo Schuengel et al., *Children with*
5 *Disrupted Attachment Histories: Interventions and Psychophysiological Indices of*
6 *Effects*, 26 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 2 (2009),
7 (separations may inhibit children’s regulatory processes including temperature
8 regulation, nutrition, and emotional regulation, in addition to causing the
9 perception of danger on a neurological level).

10 a. CBP routinely separates class members from their family
11 members in detention.

12 The JCMs have identified unjustified, routine separation of children and
13 their family members in every JCM report. *See* Jan. 2023 JCM Rep. 50 (young
14 children held in different pods than their caregiving adult relatives and, “CBP
15 personnel could not provide a particular reason for these separations while in
16 custody”); July 2023 JCM Rep. 27; Sept. 2023 JCM Rep. 6, 23 (documenting “the
17 regular practice of separating children from their parents while in custody” in the
18 RGV sector, including young children of the same gender as their parent); Nov.
19 2023 JCM Rep. 6; Apr. 2024 JCM Rep. 15-16; Aug. 2024 JCM Rep. 12-14 (“The
20 holding of children apart from a trusted adult . . . occurs in both JPFs”); Dec. 2024
21 JCM Rep. 5 (“CBP personnel were unclear about the protocol being used to
22 determine when to hold children separately from trusted adults”).

23 The practice of routinely separating minors from their parents, siblings, and
24 other family members remains especially pervasive in the RGV sector. *Flores*
25 counsel interviews in September 2024 revealed routine separation of families
26 based on age (older than 12) and regardless of gender. *See, e.g.* Ex. 3, Declaration
27 of C.N.T.F. ¶¶ 5-6, 8, September 18, 2024 (“C.N.T.F. Decl.”); Ex. 4, Declaration of
28 N.M.F.C. ¶ 4, September 18, 2024 (“N.M.F.C. Decl.”) (13-year-old-girl separated

1 from mother and younger sister); Ex. 5, Declaration of M.A.A. ¶ 4, September 18,
2 2024 (“M.A.A. Decl.”) (13-year-old girl separated from mother and younger
3 sister).

4 CBP’s insistence on separating children from their family members
5 undermines the broader purpose of the Settlement by causing class members to
6 experience “significant emotional distress related to separation.” Sept. 2023 JCM
7 Rep. 29-30; *see also* Dec. 2024 JCM Rep. 6; Ex. 6, Declaration of F.J.D.A. ¶ 4,
8 September 19, 2024 (“F.J.D.A. Decl.”) (“I felt terrible when they forced me to go
9 without [my mom]. I was scared but I had no choice.”); Ex. 7, Declaration of B.B.
10 ¶¶ 9-10, September 18, 2024 (“B.B. Decl.”); Ex. 8, Declaration of K.P.I.C. ¶¶ 8-9,
11 September 18, 2024 (“K.P.I.C. Decl.”); Ex. 9, Declaration of D.L.P ¶ 4, September
12 19, 2024 (“D.L.P. Decl.”); Ex. 10, Declaration of B.M.M.C. ¶ 6, November 20,
13 2024 (“B.M.M.C. Decl.”); Ex. 11, Declaration of W.O.R.P. ¶ 13, November 20,
14 2024 (“W.O.R.P. Decl.”).

15 In violation of § VII.8.B.3 of the Settlement, CBP has not provided
16 documentation justifying “operational need[s]” for holding children apart from
17 family members.¹ *See, e.g.*, Aug. 2024 JCM Rep. 12-13; Jan. 2023 JCM Rep. 50;
18 Sept. 2023 JCM Rep. 30; Pls.’ Resp. to Sept. 2023 JCM Rep. 4; Pls.’ Resp. to Nov.
19 2023 JCM Rep. 3; *see also* Wolozin Decl. ¶ 6.B. No such operational necessity
20 appears to exist, given that CBP previously housed families together at the Donna
21 facility despite a high census. Sept. 2023 JCM Rep. 31.

22 In contrast to the routine separations at Donna, the El Paso sector’s juvenile
23 care facility appears to hold some families together. *See, e.g.*, Ex. 12, Declaration
24

25
26 ¹ Contrary to Defendants’ assertion, the Prison Rape Elimination Act (PREA), 34
27 U.S.C. § 30301 *et seq.*, does not require CBP to separate children from their
28 families and does not provide an operational reason justifying separation of
children from their accompanying family members. *See* Defs.’ Resp. to Sept. 2023
JCM Rep. 2 [Doc. # 1361]; 6 C.F.R. § 115.114.

1 of M.L.R. ¶ 8, November 20, 2024 (“M.L.R. Decl.”); July 2023 JCM Rep. 13
2 (“Families were held with adult males and females (parents) in the same pods”). In
3 the Tucson soft-sided facility, operational concerns were also addressed while
4 largely preserving family unity.²

5 To be clear, the limited instances in which CBP preserves family unity do
6 not amount to substantial compliance with the family unity terms and the
7 agreement as a whole. *Rouser*, 825 F.3d at 1082. Rather, certain sectors’ ability to
8 hold families together in facilities similar or identical to Donna underscores the
9 lack of justification for CBP’s consistent non-compliance with this central
10 component of the Settlement. *Jeff D.*, 643 F.3d at 288.

11 b. CBP does not comply with family visitation requirements of
12 the Settlement.

13 The FSA requires class members have “contact with family members who
14 were arrested with the minor.” FSA ¶ 12.A. The Settlement similarly requires
15 children receive visits with separated family members detained in the same facility.
16 CBP Settlement § VII 8.B.3. The Settlement envisions separated children being
17 able to spend time with family “throughout the day” in “common area[s] with
18 benches for visiting,” by “sharing meals together,” and by “participating in
19 recreation time together.” *Id.* at § VII 8.B.5. Internal CBP guidance issued in
20 October 2023 requires three visitations for at least an hour each time, in each 24-
21 hour period of custody. *See* Apr. 2024 JCM Rep. 16-17.

22 Neither the El Paso nor RGV sectors have substantially complied with the
23 family visitation requirements of the Settlement. *See, e.g.*, July 2023 JCM Rep 27;
24 Sept. 2023 JCM Rep. 6, 30 (finding “minimal or no opportunities for phone
25

26
27 ² Class members in the Tucson sector are sometimes held in pods together with
28 their family members within soft-sided facilities like those used in RGV and El
Paso. *See, e.g.*, Ex. 13, Declaration of M.T. ¶¶ 12-17, May 17, 2024.

1 contact or direct interaction between parent and [separated] child” in the RGV
2 sector); Nov. 2023 JCM Rep. 21-22 (finding “children and parents were not
3 regularly provided with opportunities to interact while separated” at Donna); Dec.
4 2024 JCM Rep. 5-6 (noting some trusted adults transferred to a different facility,
5 preventing any contact or visitation). Despite the October 2023 CBP guidance,
6 monitors found that *neither* sector had complied with this directive, even when the
7 census was low. Apr. 2024 JCM Rep. 16.

8 Nor does CBP ensure children and their family members are aware that they
9 may visit. *See* May 2024 JCM Rep. 16; Aug. 2024 JCM Rep. 13 (in El Paso,
10 “children did not appear to know that they could request visits. Parents and
11 caregivers who did ask for visitation often emphasized that they were told to
12 wait.”).

13 Class members in the RGV sector who were separated from their family
14 members—including from their siblings and parents—report no contact with their
15 family members for days at a time. *See* N.M.F.C. Decl. ¶¶ 5-6; Ex. 15, Declaration
16 of Y.T.C.R. ¶¶ 5, 8, September 18, 2024 (“Y.T.C.R. Decl.”); D.L.P. Decl. ¶¶ 4-5.
17 Class members who request visits are told to wait until undetermined future times.
18 *See* Ex. 16, Declaration of A.N.H.S. ¶ 11, September 18, 2024 (“A.N.H.S. Decl.”);
19 F.J.D.A. Decl. ¶ 5; M.A.A. Decl. ¶ 5; K.P.I.C. Decl. ¶ 17.

20 Similarly, in El Paso, children separated from one or more family members
21 were unable to visit with those family members, causing them distress. *See, e.g.*
22 B.M.M.C. Decl. ¶¶ 4-6 (three-year-old had no visitation with separated father for
23 seven days); W.O.R.P. Decl. ¶¶ 5, 13 (no visits with aunt and uncle for nine days
24 despite repeated requests).

25 The lack of visitation compounds the profound trauma of being separated
26 from family, further undermining Defendants overall substantial compliance. *See*
27 *Rouser*, 825 F.3d at 1081. CBP has never shown consistent compliance with the
28 visitation requirements in the Settlement and therefore has not shown substantial

1 compliance with the Settlement as a whole. *See* CBP Settlement § VII 8.B.5; *Jeff*
2 *D.*, 643 F.3d at 288.

3 **2. CBP has never substantially complied with the phone and legal**
4 **counsel access provisions of the Settlement**

5 The Settlement requires CBP provide children with a list of free legal
6 services and an advisal of the right to make phone calls. CBP Settlement § XI,
7 Exhibit 3 (“You may use the telephone to call a lawyer or other legal
8 representative at any time . . .”). Section XI “goes hand-in-hand” with the Exhibit 3
9 advisal. *Flores v. Sessions*, 394 F.Supp.3d 1041, 1062 (9th Cir. 2017) (“Paragraph
10 24D(c) goes hand-in-hand with the Notice of Right of Judicial Review (Exhibit
11 6)”). The Settlement’s exhibits are enforceable parts of the contract. *Kerr v. Brede*,
12 180 Cal. App. 2d 149, 151 (1960).

13 Furthermore, the FSA “contemplates attorneys having near-unfettered access
14 to minors in custody.” *Flores v. Barr*, 2020 WL 5491445 at *10 (C.D. Cal. Sept. 4,
15 2020). The Court has found that one phone call a day without being informed of
16 the right to call a lawyer, or having to choose between calling a lawyer or family,
17 is “woefully inadequate.” *Id.* at *10, *7.

18 Children consistently report they have not received lists of legal service
19 providers while detained in the RGV and El Paso sectors. *See, e.g.*, Y.T.C.R. Decl.
20 ¶ 10; M.A.A. Decl. ¶ 13; C.N.T.F. Decl. ¶ 19; N.M.F.C. Decl. ¶ 6; Ex. 18,
21 Declaration of M.A.C.M. ¶ 9, November 20, 2024 (“M.A.C.M. Decl.”); Ex. 19,
22 Declaration of A.I.P.P. ¶ 14, November 20, 2024 (“A.I.P.P. Decl.”); B.M.M.C.
23 Decl. ¶ 13; Ex. 20, Declaration of P.O. ¶ 10, November 20, 2024 (“P.O. Decl.”).

24 In further violation of the Settlement, children often do not know they have
25 the right to make phone calls. Dec. 2024 JCM Rep. 10 (recommending
26 reevaluating phone access systems and noting “[o]n the posted *Flores* poster, the
27 section regarding rights to phone access was crossed out.”). CBP routinely denies
28 class members calls to counsel. *See, e.g.*, C.N.T.F. Decl. ¶¶ 19-20, 22; Ex. 17,

1 Declaration of G.N.P.C. ¶ 23, September 19, 2024 (“G.N.P.C. Decl.”); M.A.C.M.
2 ¶¶ 8-9; M.L.R. ¶ 14; W.O.R.P. Decl.¶¶ 10-11; Ex. 23, Declaration of W.O.C.M. ¶
3 15, (“W.O.C.M. Decl.”); P.O. ¶ 10. Repeated efforts to address these violations
4 with Defendants have been unsuccessful. Kahn Decl. ¶ 6; Wolozin Decl. ¶¶ 6, 12,
5 16; Ex. 2B.

6 Failing to provide children a legal service provider list and access to calls to
7 counsel impermissibly frustrates the purpose of the Settlement’s terms designed to
8 ensure access to counsel. *Jeff D.*, 643 F.3d at 288; *see also Serpa v. Cal. Sur.*
9 *Investigations, Inc.*, 215 Cal. App. 4th 695, 706 (2013).

10 **3. CBP has never substantially complied with requirements to**
11 **provide sufficient clean or warm clothing**

12 The Settlement requires CBP provide children “clean, dry clothing if their
13 clothing is wet or soiled.” CBP Settlement § VII.5.B.2. CBP must either launder
14 children’s own clothing or provide new, clean clothing, including “sweatpants, t-
15 shirts, socks, and underwear.” *Id.* at § VII.7.6. The Settlement further requires that
16 class members be provided additional blankets and warm clothing when needed.
17 *Id.* at §§ VII.5.B, VII.6.2.

18 CBP has not consistently complied with these requirements. Children in the
19 El Paso sector have been forced to remain in dirty clothes for over a week, even
20 after requests for clean clothes. *See* W.O.C.M. Decl. ¶ 8 (no clean shirt or sweater
21 in 16 days); M.A.C.M. Decl. ¶ 11 (no clean clothes for 15 days despite requests);
22 *see also* Ex. 24, Declaration of S.Y.A.R. ¶¶ 5, 11, November 20, 2024 (“S.Y.A.R.
23 Decl.”); B.M.M.C. Decl. ¶ 11; Ex. 25, Declaration of G.O.F.F. ¶ 14, November 20,
24 2024 (“G.O.F.F. Decl.”); W.O.R.P. Decl. ¶ 7; P.O. Decl. ¶ 7; A.I.P.P. Decl. ¶ 5;
25 M.L.R. Decl. ¶ 6. Not surprisingly, children’s clothes became smelly or itchy after
26 such continuous wear. *See* W.O.C.M. Decl. ¶ 8; W.O.R.P. Decl. ¶ 7. Class
27 members similarly reported a lack of clean clothing in El Paso in June 2023. *See*
28 Ex. 26, Declaration of Y.D.P.G. ¶ 10, June 27, 2023 (“Y.D.P.G. Decl.”); Ex. 27,

1 Declaration of N.A.D.P. ¶ 12, June 27, 2023 (“N.A.D.P. Decl.”); *see also* Kahn
2 Decl. Ex. 1C.

3 CBP also consistently failed to provide class members with blankets and
4 additional warm clothing as required by the Settlement. Aug. 2024 JCM Rep. 15;
5 Apr. 2024 JCM Rep. 18; Nov. 2023 JCM Rep. 32; Dec. 2024 JCM Rep. 7-8.
6 Children in the RGV sector regularly report being cold and having insufficient
7 clothing. *See, e.g.*, Ex. 21, Declaration of C.A.C.M. ¶¶ 10, 19, September 19, 2024
8 (“C.A.C.M. Decl.”); C.N.T.F. Decl. ¶ 14; M.A.A. Decl. ¶ 6; B.B. Decl. ¶¶ 14-15;
9 K.P.I.C. Decl. ¶ 13; G.N.P.C. Decl. ¶ 15. Children in El Paso similarly reported
10 insufficient warm clothing and blankets. *See, e.g.*, W.O.C.M. Decl. ¶ 9; A.I.P.P.
11 Decl. ¶ 7 (child very cold at night and experiencing respiratory issues).

12 CBP has not substantially complied with these Settlement terms or with the
13 larger purpose of ensuring a safe and sanitary environment for class members. *See*
14 *Jeff D.*, 643 F.3d at 284, 288.

15 **4. CBP has never substantially complied with the child-friendly,**
16 **trauma-informed approach required by the Settlement**

17 To treat children “with special concern for their particular vulnerability,” the
18 Settlement requires CBP to provide a “child-appropriate environment,” to take a
19 “trauma-informed approach to class members in custody,” and to “foster
20 reassurance, resilience, orientation, recreation, and distraction” for class members.
21 FSA ¶ 11; CBP Settlement §§ VII.3.D.7, VII.8. A “critical component” of meeting
22 the unique needs of minors in custody under the Settlement is the use of caregivers
23 to meet children’s needs and to support a child-friendly environment. *Id.* at §
24 VII.9.A.

25 Unfortunately, CBP has persistently separated children from trusted adults,
26 failed to ensure that caregivers understand and effectuate their responsibilities,
27 failed to provide children with required child-friendly activities and recreation, and
28

1 failed to offer children reassurance, information, and trauma-informed
2 communication.

- 3 a. CBP’s violation of family unity provisions prevent substantial
4 compliance with the requisite child-friendly, trauma-informed
5 approach.

6 As explained above, family unity is central to both a trauma-informed
7 approach to custody and to fostering resilience in class members. *See* Sept. 2023
8 JCM Rep. 10 (“[E]fforts to provide trauma-informed care and a child-friendly
9 environment have been rendered irrelevant for children who have been separated
10 from their parents while in custody.”). CBP’s persistent non-compliance with the
11 Settlement’s family unity provisions is incompatible with trauma-informed, child-
12 friendly approaches to custody. Part III.B.1, *supra*.

- 13 b. CBP fails to provide class members with regular recreation and
14 child-friendly activities.

15 The Settlement contemplates that CBP will provide toys and activities and
16 hire caregivers who will support “class members during recreational and exercise
17 activities.” CBP Settlement §§ VII.8.C.2, VII.9.D.2.c; *see also* §§ VII.9.D.3.a,
18 VII.3.D.7, Exhibit 4(d). When a child is in CBP custody for longer than 72 hours,
19 the Settlement requires CBP “provides opportunities for recreation and other child-
20 appropriate activities daily” and “make all reasonable efforts to provide class
21 members with outdoor recreation.” *Id.* at § VIII.7.

22 CBP has persistently failed to provide child-appropriate activities and
23 regular recreation or outdoor time to class members, especially as to accompanied
24 children. *See* Dec. 2024 JCM Rep. 9 (“The activities . . . for the accompanied
25 children were extremely limited, primarily including paper and crayons.”); Aug.
26 2024 JCM Rep. 17, 19 (“persistent failure” to provide child-friendly materials);
27 Apr. 2024 JCM Rep. 21-22. Many children spend most of the day in their pods
28

1 with limited recreational support. *See* Dec. 2024 JCM Rep. 9; Aug. 2024 JCM
2 Rep. 17, 19; Apr. 2024 JCM Rep. 21-22.

3 In violation of the Settlement, children detained over 72 hours in both
4 sectors do not consistently receive daily recreation, child-appropriate activities, or
5 regular outdoor recreation. *See* Dec. 2024 JCM Rep. 9-10 (“All forms of indoor
6 recreation are extremely limited” at both JPFs, and “[o]utdoor activities were not
7 observed at Donna during the month of September”); *see also* A.N.H.S. Decl. ¶¶
8 25-26 (“I don’t see the sun.”); G.N.P.C. Decl. ¶¶ 11, 17 (“[W]e cannot go outside,
9 we cannot see the sun, there is no fresh air.”); B.M.M.C. Decl. ¶ 12; B.B. Decl. ¶¶
10 5, 11-12 (five-year-old boy detained for 10 days with only coloring); G.O.F.F.
11 Decl. ¶¶ 12, 15 (four-year-old girl detained for ten days with only coloring);
12 S.Y.A.R. Decl. ¶ 7 (child experiencing emotional breakdowns from confinement
13 and lack of activity); W.O.R.P. Decl. ¶ 6; A.I.P.P. Decl. ¶¶ 9-10; W.O.C.M. ¶¶ 10-
14 11 (four-year-old detained for 16 days, request for toys denied); M.L.R. Decl. ¶ 11;
15 M.A.C.M. Decl. ¶ 12; Ex. 28, Declaration of T.K. ¶¶ 7, 9-10, November 20, 2024
16 (“T.K. Decl.”).

17 As a result, children in both sectors feel bored, lethargic, and unsupported by
18 adults. *See, e.g.* G.N.P.C. Decl. ¶ 17; C.A.C.M. Decl. ¶¶ 8, 11-12, 17; Ex. 30,
19 Declaration of H.J. ¶ 6, September 18, 2024 (“H.J. Decl.”); Ex. 22, Declaration of
20 K.A.C.M. ¶ 4, September 18, 2024 (“K.A.C.M. Decl.”); F.J.D.A. Decl. ¶ 6;
21 W.O.R.P. Decl. ¶ 6; Ex. 29, Declaration of Y.A.C.M. ¶¶ 14, 16, September 18,
22 2024 (“Y.A.C.M. Decl.”). Worse, staff actively prevent children from entertaining
23 themselves and playing. *See* B.B. Decl. ¶ 11; C.A.C.M. Decl. ¶ 12 (at Donna,
24 “staff yells at the kids, or goes to the parents and yell at them to ‘control your
25 kids.’”); B.M.M.C. Decl. ¶¶ 8, 12 (children are scolded for playing in El Paso);
26 W.O.C.M. ¶ 12 (same). The “persistent failure” to address the absence of “basic
27 child-friendly materials” in all JPFs “undermines the implementation of trauma-
28 informed elements of CBP custodial care.” Dec. 2024 JCM Rep. 11.

1 c. CBP’s lack of communication with class members is inconsistent
2 with a trauma-informed approach.

3 The Settlement requires CBP to take a trauma-informed approach while
4 engaging with children to “foster reassurance, resilience, [and] orientation.” CBP
5 Settlement § VII.3.D.7. They must also provide children notice of their rights both
6 orally and by poster. CBP Settlement §§ VII.8.C.4, XI.

7 The JCM reports that CBP staff and caregivers have failed to inform,
8 reassure, or orient class members, leading children to consistently express anxiety
9 because of a lack of information. *See* Apr. 2024 JCM Rep. 22-24; Aug. 2024 JCM
10 18-19; Dec. 2024 JCM Rep. 10.

11 Children and parents in both sectors report that CBP staff respond to them
12 rudely or do not explain anything to them at all. *See, e.g.*, G.N.P.C. Decl. ¶ 18;
13 W.O.C.M. Decl. ¶¶ 6, 16; Ex. 14, Declaration of R.E.Z. ¶ 6, September 18, 2024
14 (“R.E.Z. Decl.”). This lack of information exacerbates children’s stress and fear,
15 often compounding extreme trauma they experienced on their journey to the
16 United States. *See, e.g.*, G.O.F.F. Decl. ¶¶ 4, 7-9, 11; P.O. Decl. ¶¶ 3, 5-6; Ex. 31,
17 Declaration of M.R.K. ¶¶ 4, 6-8, November 20, 2024 (“M.R.K. Decl.”); *see also*
18 CBP Settlement § VII.3.D.7.

19 d. CBP’s limited implementation of the caregiver program does not
20 constitute substantial compliance.

21 CBP’s caregivers have a responsibility to “meet the unique needs and
22 vulnerabilities of class members in custody” and are required to “have sufficient
23 experience and training to provide general support to class members in custody.”
24 CBP Settlement § VII.9.A.1-2; *see also* Apr. 2024 JCM Rep. 24 (“Caregiver
25 training on communication . . . is critical to successfully implementing trauma-
26 informed custodial care.”).

27 Prior JCM reports have consistently found that caregivers are poorly trained,
28 fail to care for accompanied children, fail to provide sufficient information

1 regarding children’s rights in custody, and fail to facilitate children getting clean
2 and dry clothing, timely medical responses, and recreation. Dec. 2024 JCM Rep. 8-
3 10; Aug. 2024 JCM Rep. 15, 17-18; Apr. 2024 JCM Rep. 20-24. The written
4 protocol has not yet resulted in effective implementation of the program and the
5 JCM’s Final Report indicates that caregiver duties “have still not yet been
6 implemented in any uniform manner” and CBP acknowledges its need to improve
7 caregivers’ training but has not yet done so. Dec. 2024 JCM Rep. 9, 24-25.

8 For these reasons, CBP has not substantially complied with the Settlement’s
9 purpose to create a child-friendly and trauma-informed environment or its detailed
10 requirements. *Jeff D.*, 643 F.3d at 284, 288.

11 **5. CBP has not implemented satisfactory self-monitoring policies**
12 **and protocols**

13 Despite an additional year of support from the JCMs, CBP is still not ready
14 for “an effective transition of monitoring functions.” CBP Settlement § IX.13; Dec.
15 2024 JCM Rep. 14-28 (finding numerous policies and procedures that require
16 review, revision, and continued external monitoring). The Settlement provides the
17 JCM must approve Defendants’ final monitoring protocols and contemplated that
18 the Settlement would remain in effect for multiple months after CBP adopted and
19 implemented effective self-monitoring protocols. CBP Settlement §§ IX.12-13.

20 The JCMs are still unable to certify the efficacy of CBP’s self-monitoring
21 protocols. *See, e.g.*, Dec. 2024 JCM Rep. 14 (“The system for conveying medical
22 information to CBP personnel is in transition . . . the JCM was not able to assess its
23 use or impact on CBP procedures. Further monitoring is required . . .”). Essential
24 self-monitoring protocol development is still in progress. *See id.* at 26, 28
25 (“OCMO’s monitoring protocols are being developed,” and “the JCM cannot
26 provide an assessment of the ‘efficacy’ of the CBP medical monitoring system”).
27 Nor has CBP planned for robust monitoring by the Juvenile Coordinator Division
28 (“JCD”), which is tasked with monitoring after the JCM’s term. Dec. 2024 JCM

1 Rep. 24 (raising concerns about the JCD’s ability to self-monitor because of “the
2 relative infrequency” of visits, with a proposed 2025 schedule to conduct only
3 three visits, compared to the 23 visits conducted by JCMs over the course of a
4 year). Further, CBP has shown “little progress over the past year in optimizing
5 uniformity in caregiver contributions,” and JCMs “have noted considerable lag
6 times between the documentation of noncompliance and improvements in family
7 housing and visitation practices.” *Id.* at 25.

8 CBP is not yet able to effectively self-monitor. *See* Dec. 2024 JCM Rep. 24
9 (“Without a monitoring capability that can conduct regular visits or respond in a
10 timely manner to emerging concerns in a particular sector or facility, it remains
11 unclear how general conditions and amenities will be monitored appropriately.”).
12 Failings in CBP’s implementation of self-monitoring protocols highlight the
13 serious risks of premature termination of the Settlement. *See id.* at 22 (JCM
14 analysis of data provided about children’s time in custody has “raised questions”
15 about the data’s accuracy and “[t]he termination of the JCM role would effectively
16 eliminate [a central] mechanism for informing Plaintiffs [and the Court] of
17 overcrowded conditions and the impact of any CBP ameliorative response.”).

18 For these reasons, an additional six-month extension of the JCM term is
19 necessary and warranted, with the opportunity for additional extensions as needed,
20 to ensure effective implementation of CBP’s new and developing protocols. *See*
21 *Kelly*, 822 F.3d at 1098.

22 **C. Extending the CBP Settlement is a Suitably Tailored Modification in**
23 **the Public Interest**

24 Plaintiffs could not have anticipated CBP would fail to comply with the
25 Settlement consistently throughout its term. Under well-established Ninth Circuit
26 precedent, this lack of compliance is a significant changed circumstances that
27 justifies extension of the Settlement. *Kelly*, 822 F.3d at 1098. CBP’s partial
28

1 progress toward compliance does not amount to substantial compliance with the
2 Settlement as a whole. *Rouser*, 825 F.3d at 1081; *Jeff D.*, 643 F.3d at 284.

3 Over the past 2.5 years, CBP has failed to comply with the Settlement’s
4 provisions requiring family unity, consistent family visitation, lists of legal service
5 providers and phone access, clean and warm clothing, caregivers, and child-
6 friendly activities and recreation. CBP has not accomplished the broader goals of
7 the Settlement to provide safe and sanitary conditions and a child-friendly, trauma-
8 informed environment and to develop effective self-monitoring protocols to ensure
9 compliance after the Settlement’s termination. These violations throughout the full
10 term of the Settlement undermine the fundamental object the parties agreed to at
11 the outset, and therefore CBP has not substantially complied with the Settlement as
12 whole. *Rouser*, 825 F.3d at 1081-82; *Jeff D.*, 643 F.3d at 284.

13 Although CBP has made progress in implementing some portions of the
14 Settlement focused on medical care and meeting basic physical needs, “merely
15 taking significant steps toward implementing the decree falls far short of
16 substantial compliance.” *Rouser*, 825 F.3d at 1082 (internal citations omitted).

17 Extending the Settlement in its entirety for 2.5 years is suitably tailored to
18 address the varied interrelated and ongoing violations. A 2.5-year extension is
19 necessary to provide Plaintiffs with the promised-for compliance period in service
20 of the larger stated purposes of the agreement. *See Kelly*, 822 F.3d at 1098 (“[T]he
21 court’s extension of the settlement agreement [by the original two-year term]
22 returned Plaintiffs to the position they would have occupied had [Defendants] not
23 violated the agreement from its inception.”); *David C.*, 242 F.3d at 1211-12
24 (“[E]xtension of the term of the Agreement to allow Utah to fulfill the very
25 obligations it voluntarily undertook when it entered into the Agreement is not itself
26 an imposition of additional, material obligations on Utah.”); *Dep’t of Fair Emp.*
27 *and Hous. v. Law Sch. Admission Council*, 12-CV-01830-JCS, 2018 WL 1156605,
28

1 at *26 (N.D. Cal. Mar. 5, 2018) (extending decree by two years because “the most
2 significant violation . . . spanned approximately two years”).

3 A full extension of the Settlement is also suitably tailored because “[t]he
4 requirements of the Decree in large part support and depend on one another”
5 making severance neither “warranted [n]or useful.” *Dep’t of Fair Emp. and Hous.*,
6 2018 WL 1156605, at *26. The Ninth Circuit has held that the full extension of a
7 settlement can be justified even when Plaintiffs demonstrated only one primary
8 violation, where that violation led the district court to doubt compliance in other
9 areas. *Kelly*, 822 F.3d at 1098. Here, Plaintiffs have shown multiple persistent
10 violations of the Settlement in key areas essential to children’s well-being. These
11 violations, coupled with CBP’s lack of demonstrated effective self-monitoring
12 protocols, also creates reason to doubt CBP’s compliance with other requirements
13 of the Settlement, including accurate data provision. *Id.*; *see also* Dec. 2024 JCM
14 Rep. 23-24.

15 An extension of the JCM term is also necessary as a suitably tailored
16 modification. The JCMs have made clear that CBP is not currently prepared to
17 effectively self-monitor and ensure compliance with the requirements of the
18 Settlement. *See* Part III.B.5, *supra*. Premature termination of the JCM will almost
19 certainly lead to further noncompliance given the well-documented lack of
20 effective self-monitoring protocols. It is also in the public interest to extend the
21 Settlement so that CBP can achieve compliance and finally provide “safe and
22 sanitary” conditions of confinement to children in the RGV and El Paso sectors.
23 CBP Settlement § II.1. CBP’s continued failure to abide by its commitments has
24 harmed children’s psychological and physical wellbeing. Enforcing the original
25 termination date would be “detrimental to the public interest.” *Labor/Cnty.*
26 *Strategy Ctr.*, 564 F.3d at 1120 (internal quotation omitted); *see also Flores v.*
27 *Barr*, 2020 WL 5666550 at *3 (C.D. Cal. Oct. 4, 2020) (“The public has an interest
28 in protecting the welfare of children.”). The Settlement—and particularly its

1 enhanced monitoring provisions—has shown its value in improving some basic
2 conditions for minors in CBP custody, and it should be extended to provide time
3 for achieving substantial compliance with the Settlement as a whole.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court should extend the 2022 CBP
6 Settlement in its entirety for an additional 2.5 years, including an additional
7 6-month term of the JCM, with optional extensions to ensure compliance. In
8 the alternative, Plaintiffs request the Court extend the Settlement and JCM
9 term as it deems appropriate.

10
11
12 Dated: December 20, 2024

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CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record for Plaintiffs, certify that this brief contains 6,988 words, which complies with the word limit of Local Rule 11-6.1.

Dated: December 20, 2024

/s/ Mishan Wroe
Mishan Wroe