No. 15-56434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

LORETTA E. LYNCH, Attorney General of the United States, et al.,
Defendants-Appellants.

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

MOTION PURSUANT TO CIRCUIT RULES 27-12 AND 34-3 TO EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL

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Defendants-Appellants ("Appellants" or the "Government"), through undersigned counsel, respectfully move to expedite the briefing and hearing of this appeal pursuant to Ninth Circuit Rules 27-12 and 34-3. Counsel for Plaintiffs-Appellees have stated that they anticipate opposing this motion but have reserved decision until they have the opportunity to review it.[1]

This case implicates the United States' ability to respond nimbly and effectively to a potential surge of migrants traveling as family units seeking to cross the southwest border. Migrant flows over the last 90 days suggest a significant surge of accompanied and unaccompanied migrant children.[2] The Government has a compelling interest in being prepared for and addressing such a surge, and in having available—if necessary—all of the legal authorities that Congress and the Constitution provide the Executive Branch to meet the substantial challenge that such a surge would present. Because the District Court

[1] On December 1 2015, in accordance with Ninth Circuit Rule 27-12, counsel for the Government spoke with counsel for the Plaintiffs-Appellees ("Appellees") who stated that they anticipate opposing the Government's motion to expedite this appeal, but will make a final determination upon being provided and reviewing the motion. This Court authorizes expedited consideration upon a showing of good cause, including a showing of irreparable harm. *See* Circuit Rule 27-12(3).

[2] *See* Declaration of Woody Lee, Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate (attached as Ex. A). *See also* Julia Preston, *Number of Migrants Illegally Crossing Rio Grande Rises Sharply*, New York Times, November 26, 2015, *available at* http://www.nytimes.com/2015/11/27/us/number-of-migrants-illegally-crossing-rio-grande-rises-sharply.html?_r=0.

Order significantly constrains that authority and flexibility based on what the Government submits is legal error, we respectfully request expedited consideration of this appeal.

BACKGROUND AND PROCEDURAL HISTORY

On August 21, 2015, the District Court held that the 1997 settlement agreement in this case—which resolved Appellees' legal challenge to the authority of the legacy Immigration and Naturalization Service to hold *unaccompanied* minors in *discretionary* detention pending the outcome of their removal proceedings—must also be interpreted to govern and severely restrict the detention of family units during their removal proceedings, even if they are in statutorily mandated immigration detention. *See* Order, Aug. 21, 2015, District Court ECF No. 189. Although the District Court's August 21, 2015 Order provides "some latitude" for the Government to detain family units for brief periods at its family residential facilities, the Order's ruling that the 1997 Settlement now also applies to *accompanied* children, and thereby to their parents, creates significant operational burdens that impair the Government's flexibility to respond to changing circumstances. For instance, the Order raises the threshold the Government must meet in order to detain accompanied children and their

parents; restricts the duration of such detention; limits the types of detention facilities that may be used for families; and imposes a legal requirement on the Government to process all members of family units—including adults—"as expeditiously as possible." *Id.* at 10 n.7.[3]

Since the District Court's Order was entered, the Government has come into compliance with the Court's new requirements through a major undertaking to process and either release or return family units as expeditiously as possible. To do so, the Government has employed significant additional personnel and resources to the Southwest Border to complete interviews and assessments for credible and reasonable fear in a highly expedited manner. For the Government to sustain that level of expedition in the face of a new surge of children and families would almost certainly require the Department of Homeland Security (DHS) to divert substantial resources away from other critical immigration, humanitarian, national security, and border security-related operations.

ARGUMENT

Since the Government filed its notice of appeal on September 18, 2015, the number of family units apprehended while illegally crossing the Southwest Border has increased to a level that makes expedited resolution of this appeal imperative.

[3] In response to the Court's initial ruling on July 24, 2015, the Government unsuccessfully sought modification of

Accompanying this brief is the declaration of Woody Lee, Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate. *See generally* Lee Decl., attached as Ex. A. As Chief Lee describes—and as the charts accompanying his Declaration show—the number of apprehensions on the Southwest Border has been rising steadily, and this rise has been the most pronounced when it comes to families. *See id.* ¶ 6; *see also generally id.* (including attached charts). While still lower than during the highest surge period of last summer (from approximately April to July 2014), the number of family units began to rise in July and August 2015, and has continued rising at a substantial rate through the date of filing of this motion. *See id.* at ¶ 7.

In August 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border was 5,159. *See id*. at ¶ 8. This was approximately 57% higher than August 2014, when the number was 3,296. In September 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border increased further to 5,273, and this represented more than a doubling (approximately 129%) over September 2014, when the number was 2,301. *See id*. at ¶ 9. In October 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border

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the key provisions of the Order.

again increased further to 6,026, which is approaching a 200% (nearly a 179%) increase from October 2014, when the number was 2,162. *See id*. at ¶ 10. Finally, through November 28, 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border was approximately 6,000, which is nearly 165% more than the same period in 2014, when those apprehensions totaled 2,274. *See id*. at ¶ 11.

Even more concerning is that, within the last 15-20 days, there have been multiple days in which the number of individuals in family units apprehended at the Southwest Border has surpassed 300 in a single day. *See id*. at ¶ 12. On November 21, the number apprehended was 344, the highest single day number since July 2014. *See id*. at ¶ 13. This is especially concerning to the Government because it is typically the case that in fall/winter months, illegal migration on the Southwest Border is lower than spring/summer. If historical patterns continue, these numbers will only increase in the spring.

This case warrants expedited consideration because the decision below has severely constrained DHS's flexibility to respond to an increasing flow of illegal migration into the United States through the appropriate use of immigration detention, expedited removal, and the reinstatement of existing orders of removal.

See 8 U.S.C. §§ 1225, 1226, 1231. The Government is preparing for any anticipated increases, but also believes that having the full array of legal tools available is an essential component to addressing increased flows of family units seeking to unlawfully enter the United States. Moreover, a key part of any long term solution to the challenge of migrant children involves disrupting human trafficking and smuggling organizations; public information campaigns to combat misperceptions about U.S. immigration laws;[4] and cooperative strategies to address the root "push" causes in the migrants' countries of origin. To maintain and increase these necessary efforts—which may in some instances include the detention and return of family units to their countries of origins—the United States needs the full flexibility Congress provided to use legally-authorized detention as a tool of immigration enforcement. Past experience has shown the Government that it will be difficult to have and maintain a firm and humane response to the challenge of mass family migration, if we do not have the legal authority and nimbleness to strike the right balance in the face of a constantly changing landscape.

[4] *See* Alicia Caldwell, *Immigrants caught at border believe families can stay in US*, Associated Press, October 31, 2015, *available at* http://www.denverpost.com/ci_29046254/immigrants-caught-at-border-believe-families-can-stay (stating that "Most of the immigrants interviewed, or 181 of them, said reports about the release of immigrant families influenced their decision to come to the United States").

The Government continues to believe that the District Court erred in its holding that the 1997 settlement addressing a case involving the detention of *unaccompanied* minors must now govern today's situation involving entire family units (including adults) that illegally enter the United States. Prompt resolution of that question is essential for DHS to plan and respond to evolving migration numbers and issues. But, regardless of how this Court may resolve the merits of this appeal, the Government no longer believes it is in a position to wait an additional 12-24 months to obtain a decision.[5]

For these reasons, the Government respectfully asks that the Court expedite the briefing, hearing, and consideration of this appeal under Ninth Circuit Rule 27-12. The Government notes that the transcripts for this appeal have already been filed by the court reporter, and proposes the following briefing and argument

[5] The Government filed its notice of appeal of the District Court's order on September 18, 2015. *See* Order, Sept. 18, 2015, District Court ECF No. 191. On the same date, this Court entered a Time Schedule Order which set the deadline for Appellants' opening brief on February 29, 2016, and gave Appellees until March 30, 2016, to file their answering brief. Under the original schedule, assuming no extensions of time were sought and granted, all briefing would conclude sometime in mid-April 2016. *See* Order, Sept. 18, 2015, Ninth Circuit ECF No. 1-4. According to this Court's website, this means that oral argument, if granted, would likely occur sometime between January and April 2017. *See* Ninth Circuit Court of Appeals "Frequently Asked Questions," updated August 2015, *available at* *http://www.ca9.uscourts.gov/content/faq.php*, at Question 16 (stating that oral argument is typically held "approximately 9-12 months from completion of briefing."). A decision would likely be expected to issue sometime between July 2017 and December 2017. *See id.* at Question 17 (stating that "most cases are decided within 3 months to a year" from the time of argument).

schedule:

Fri., January 15, 2016	Defendants-Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
Mon., February 15, 2016	Plaintiffs-Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
Mon., February 29, 2016	Defendants-Appellants' reply brief shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
March-April 2016	Oral Argument

DATED: December 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2015, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sarah B. Fabian

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