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-04554-DMG-AGR

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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February 23, 2016

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-3, the American Civil Liberties Union, the American Immigration Council, the Catholic Legal Immigration Network, Inc., the Refugee and Immigrant Center for Education and Legal Services, the American Immigration Lawyers Association, Detention Watch Network, the Columbia Law School Immigrants' Rights Clinic, and HIAS Pennsylvania (collectively referred to as "*amici*") move for leave to file the accompanying brief as *amici curiae* in support of Plaintiffs-Appellees. Plaintiffs-Appellees consent to the filing of this brief and do not oppose this motion. Defendants-Appellants ("the Government") stated that they take no position with respect to this motion or the filing of *amici*'s brief "so long as it is filed in time to permit [the Government] sufficient time to respond as needed in [its] Reply."[1] Individual statements of interest for each of the *amici* follow below.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. Through the ACLU Immigrants' Rights Project, the ACLU engages in a

[1] *Amici*'s brief is being filed seven days following that of the party it supports, Plaintiffs-Appellees, in accordance with the Rules of this Court, and therefore does not prejudice the Government's ability to respond in its Reply.

nationwide program of litigation and advocacy to enforce and protect the civil and constitutional rights of immigrants. ACLU attorneys litigated family detention in the Hutto detention center in 2007, and recently brought due process challenges on behalf of women and children detained in family detention centers since 2014.

The American Immigration Council ("Immigration Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council advocated and litigated to protect the due process rights of women and children detained in the federal family detention center in Artesia, New Mexico, which closed in December 2014.

The Catholic Legal Immigration Network, Inc. ("CLINIC") promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of more than 275 Catholic and community legal immigration organizations in 47 states, the District of Columbia, and Puerto Rico. Its major programs include advocacy, the BIA Pro Bono Project, the Center for Citizenship and Immigrant Communities, Religious Immigration Services, and Training and Legal Support.

The Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a non-profit, legal services agency with seven offices throughout Texas. RAICES seeks justice for immigrants through a combination of legal and social services, advocacy, policy, and litigation. In 2015, RAICES provided legal services to over 10,000 individuals, including an extensive number of detained children.

The American Immigration Lawyers Association (AILA) is a national association with more than 14,000 members, including lawyers and professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration and jurisprudence of immigration law, and to elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Since the Government increased its use of family detention in the summer of 2014, AILA attorneys have been involved with coordinated pro bono efforts seeking to provide detained women and children with competent representation and to advocate for humane asylum and deportation polices, including compliance with the *Flores* settlement agreement and adherence to due process protections.

CLINIC, the Immigration Council, RAICES, and AILA are the co-founders of the CARA Family Detention Pro Bono Project ("CARA")[2], which provides

[2] CARA is the acronym for the four project partners.

direct representation and undertakes advocacy and impact litigation on behalf of mothers and children held in the federal family detention centers in Dilley and Karnes City, Texas.

Detention Watch Network ("DWN") is a coalition of approximately 200 organizations and individuals concerned about the impact of immigration detention on individuals and communities in the United States. Founded in 1997, DWN has worked for nearly two decades to reduce the Government's use of detention as an immigration enforcement tool and to end the abuses of detainees. DWN members are lawyers, activists, community organizers, advocates, social workers, doctors, artists, clergy, students, formerly detained immigrants, and affected families from around the country. They are engaged in individual case and impact litigation, documenting conditions violations, local and national administrative and legislative advocacy, community organizing and mobilizing, teaching, and social service and pastoral care. Through its policy and organizing work, DWN continues to advocate for immigrant justice and for the end of arbitrary detention.

The Columbia Law School Immigrants' Rights Clinic ("Immigrants' Rights Clinic") is a nonprofit legal services clinic dedicated to representing indigent immigrants and advocating for the civil and constitutional rights of immigrants. Since January 2015, in cooperation with CARA, the Immigrants' Rights Clinic has

offered pro bono legal services to hundreds of mothers and children detained in family detention centers.

HIAS Pennsylvania (Hebrew Immigrant Aid Society) provides legal, resettlement, citizenship, and supportive services to immigrants, refugees, and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society. HIAS Pennsylvania advocates for just and inclusive practices.

Amici have a history of outreach, advocacy, and litigation on behalf of immigrant families and a strong and longstanding commitment to securing due process rights for immigrants in removal proceedings, including those in detention and those fleeing persecution. Accordingly, *amici* have a direct interest in ensuring that the children covered by the *Flores* settlement agreement (the "Settlement Agreement" or "Agreement"), as well as their accompanying mothers, are not subjected to unnecessary detention.

Amici submit their brief in response to the Government's suggestion that the Agreement must be amended in light of the purportedly overwhelming need to place Central American children and their mothers seeking asylum into expedited removal or reinstatement proceedings (collectively, "summary proceedings"). *Amici*'s brief makes two points: First, it refutes the Government's argument that the district court's limitations on detention of children interferes with the

Government's ability to use summary proceedings. The summary proceedings do not require detention; the Government retains authority to "parole" individuals out of detention for humanitarian and public interest purposes -- the precise concerns which led to the Agreement's limits on the detention of children. Second, the brief demonstrates that the Government exaggerates the necessity for and appropriateness of using summary procedures against this population in the first place because: (i) an overwhelming majority of *Flores* class members and their mothers have bona fide claims for protection, and as a result ultimately will be placed in regular removal proceedings; (ii) the Government's use of summary proceedings for asylum-seeking *Flores* class members and their mothers gives rise to serious due process concerns that lead to flawed evaluations of their legal claims; (iii) the Government has historically exercised its discretion *not* to use summary proceedings against *Flores* class members and their mothers; and (iv) the record lacks evidence that summary proceedings are necessary to control migration flows and does not satisfy the standard for reversing the district court's factual finding on this issue. *Amici*'s collective experience working with and advocating on behalf of *Flores* class members and their mothers held in family detention centers in Dilley and Karnes City, Texas, and Berks County, Pennsylvania, make them uniquely well-suited to refute the Government's arguments.

For the foregoing reasons, *amici* request that the Court grant this motion for leave to file the accompanying brief in support of Plaintiffs-Appellees and affirmance of the district court's decision below.

Dated: February 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I electronically filed the foregoing Motion for Leave to File Brief as *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas W. Baruch
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Plaintiffs-Appellees,

v.

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ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04554-DMG-AGR

BRIEF OF IMMIGRANT RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT JUDGMENT

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU"), American Immigration Council ("Immigration Council"), Catholic Legal Immigration Network, Inc. ("CLINIC"), Refugee and Immigrant Center for Education and Legal Services ("RAICES"), American Immigration Lawyers Association ("AILA"), Detention Watch Network ("DWN"), Columbia Law School Immigrants' Rights Clinic ("Immigrants' Rights Clinic"), and HIAS Pennsylvania (collectively referred to hereinafter as "*amici*") file this brief as *amici curiae* in support of Plaintiffs-Appellees. *Amici* have sought leave to file this brief from the Court in an accompanying motion, which contains each *amici's* individual statement of interest.

The ACLU is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. Through the ACLU Immigrants' Rights Project, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the civil and constitutional rights of immigrants. ACLU attorneys litigated family detention in the Hutto detention center in 2007, and recently brought due process challenges on behalf of women and children detained in family detention centers since 2014.

The Immigration Council is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council advocated and litigated to protect the due process rights of women and children detained in the family detention center in Artesia, New Mexico, which closed in December 2014. The Immigration Council, along with the CLINIC, RAICES, and AILA, are partners in the CARA Family Detention Pro Bono Project (CARA"),[1] which provides direct representation and undertakes advocacy and impact litigation on behalf of mothers and children held in the federal family detention centers in Dilley and Karnes City, Texas.

The additional *amici* are nonprofit organizations and a legal services clinic that focus on one or more aspects of United States immigration policy, protection of the due process rights of detained immigrants, and/or the needs of specific vulnerable populations such as women and children in the immigration context.

This case is of critical concern to *amici* in light of their longstanding commitment to securing due process rights for immigrants in removal proceedings, including those subject to detention, and their advocacy on behalf of detained children and their mothers in particular. *Amici* seek to protect the rights of all

[1] CARA is the acronym for the four founding project partners.

immigrant children in accordance with the original *Flores* settlement agreement (the "Settlement Agreement" or "Agreement") and ensure that they are not subjected to unnecessary detention or summary removal proceedings that deprive them of due process.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Defendants-Appellants ("the Government") have urged this Court to reverse the district court's injunction, and to disregard the plain terms of the Settlement Agreement, so that they can subject accompanied immigrant children and their mothers seeking protection to either expedited removal or reinstatement of removal proceedings. According to the Government, the district court's limitations on detention for *Flores* class members and their mothers prevent the Government from utilizing such summary proceedings. These concerns are overstated and not persuasive.

As set forth below, the Government both exaggerates the conflict between the limitations on detention and the use of summary proceedings, and overstates the importance of using such proceedings in the first place. First, the Government

has discretion to release from custody accompanied minors and their mothers who are in summary proceedings, and permit them to undergo those proceedings in non-detained settings. The Government concedes that it has the authority to release these individuals, and it has previously allowed, and continues to allow, them to pursue their claims for relief outside of detention.

Second, summary proceedings are not appropriate for accompanied minors and their mothers in the first place. The vast majority of the accompanied minors and their mothers have bona fide claims for protection that should be adjudicated by immigration judges in regular removal proceedings. The Government's current summary removal practices risk denying these asylum seekers a meaningful opportunity to present their claims due to numerous due process concerns. In addition, the Government has used and continues to use its discretion to place accompanied minors and their mothers into regular removal proceedings, instead of summary proceedings. Further, there is insufficient evidence that placing accompanied minors and their mothers in summary proceedings deters future migration, and therefore this Court should affirm the district court's factual findings on this issue.

BACKGROUND TO *AMICI'S* ARGUMENTS

The 1997 Settlement Agreement prescribes national standards for the housing, detention and release of asylum-seeking children detained by the

Government.[2] For the reasons set forth in Appellees' Brief, the lower court properly found that the Settlement Agreement covers accompanied minors as well as unaccompanied minors. As the district court recognized, it is "wholly unambiguous" that the Settlement Agreement "encompasses all minors who are in custody, without qualification as to whether they are accompanied or unaccompanied." District Court Order, Appellants' Record Excerpts ("RE") 4-5; *see also* Appellees' Br. at 15-20.

Thereafter, the district court issued an order to show cause as to why the Government could not implement the court ordered remedies within 90 days to ensure compliance with the Settlement Agreement. In response, the Government effectively sought reconsideration (despite styling its filing as a response to the order to show cause), raising an entirely new argument that there is a "conflict" between applying the Settlement Agreement as written and the Government's "detention authority" under statutory procedures providing for expedited removal or reinstatement of prior removal orders. *See* ECF 184 at 23-33. *Amici* file this brief to address the Government's *post-hoc* "conflict" argument.

[2] The Department of Homeland Security ("DHS") divides its immigration functions among several agencies, including U.S. Customs and Border Protection ("CBP"), U.S. Citizenship and Immigration Services ("USCIS"), and U.S. Immigration and Customs Enforcement ("ICE").

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the Immigration and Nationality Act ("INA") to create expedited removal for persons lacking proper entry documents and reinstatement of removal proceedings for those previously removed from the United States (collectively referred to herein as "summary proceedings" or "summary removal"). These summary proceedings allow the Government to remove certain asylum seekers without affording them the opportunity to litigate their claims in a full removal hearing before an immigration judge, as provided for under 8 U.S.C. § 1229a (INA § 240) (referred to herein as "regular removal proceedings"). Under the procedures for expedited removal, an asylum seeker will be referred to regular removal proceedings before an immigration judge only if an asylum officer first determines that she has a "credible fear" of persecution if she were to return to her home country. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B); 8 C.F.R. §§ 235.3(b)(4), 208.30(f). Similarly, in reinstatement of removal, because the Government believes that previously deported individuals with fear-based claims are ineligible for asylum pursuant to 8 U.S.C. § 1231(a)(5), the procedures require an interview to determine whether the applicant can establish a "reasonable fear of persecution or torture." 8 C.F.R. § 208.31(e). If so, she will be referred to an immigration judge for "withholding-only proceedings" where she can pursue withholding of removal or relief pursuant to the Convention Against Torture

("CAT"). *Id.*[3] The Government argues that it must detain individuals who it determines are subject to expedited removal or reinstatement proceedings, in supposed "conflict" with its obligations under the Settlement Agreement.

Notably, the district court rejected the Government's tardy "conflict" argument, finding that the INA's "provisions for expedited removal and reinstatement . . . existed well before the Court's July 24, 2015 Order,"[4] ECF 189 at 5, and that, in any event, nothing in its interpretation of the Agreement contravenes the summary removal statutes, *id.* at 9.

The Government yet again advances this "conflict" argument on appeal, asserting that the district court's interpretation of the Agreement prevents it from using the summary removal tools that Congress has provided. *See* Appellants' Br. at 53-54. The Government describes these summary proceedings – and in

[3] Withholding of removal is a more limited form of relief than asylum but demands proving more likely than not that the applicant would be persecuted if returned. *See* 8 U.S.C. § 1231(b)(3). Withholding or deferral of removal under the CAT requires showing that it is more likely than not the applicant would be tortured if returned to her home country, and affords the most limited protection of all. *See* 8 C.F.R. §208.16-17.

[4] Indeed, the Government was aware that these summary proceedings had been incorporated into the INA even before the district court approved the Settlement Agreement. While IIRIRA was enacted on September 30, 1996, the district court did not approve the Settlement Agreement until January 28, 1997. *See* Appellants' Br. at 9, 13. The Government took no action in the intervening four months to change the Agreement to allow it to more broadly detain individuals pursuant to the expedited removal and reinstatement procedures created by IIRIRA.

particular the detention of accompanied minors and their mothers that it claims is necessary during these proceedings – as "essential" to combating "surges" of immigrants attempting to cross the border. *Id.* at 1-2, 68. The Government asserts that this "essential" need to detain accompanied minors and their mothers at the border necessitates either a novel interpretation of or an amendment to the Settlement Agreement in order to exclude accompanied children from its protections.

ARGUMENT

I. DETENTION IS NOT REQUIRED DURING SUMMARY PROCEEDINGS

The Government can avoid any supposed tension or "conflict" between the application of the Settlement Agreement to all minors in custody and the Government's summary removal authority pursuant to the INA by releasing accompanied minors and their mothers from detention pending their credible and reasonable fear interviews. Indeed, the Government concedes that it has statutory authority to grant release to individuals in summary proceedings. In addition, in some cases the Government has conducted credible and reasonable fear screenings in non-detained settings. Thus, the conflict the Government posits between the Agreement and its summary removal authority is entirely of its own making.

First, the Government asserts throughout its brief that detention pending the credible fear process is "mandatory" under 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). *See,*

e.g., Appellants' Br. at 13-14, 31; *see also id.* at 19 (referring to "detention requirements"). This is incorrect. As the Government ultimately acknowledges—albeit in passing—such detention is *not* mandatory, since individuals in expedited removal proceedings are eligible for release on humanitarian parole. *Id.* at 53-54; *see also* 8 U.S.C. § 1182(d)(5)(A) (providing that DHS may "in [its] discretion parole into the United States temporarily . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . .").[5]

Second, detention pending the reasonable fear process is discretionary as well. The Government claims authority to detain individuals pending a reasonable fear screening pursuant to 8 U.S.C. § 1231(a)(2). *See* Appellants' Br. at 56. While this statute authorizes detention "[d]uring the removal period," defined as the 90-

[5] Similarly, the implementing regulations provide that asylum seekers are eligible for parole pending a determination of credible fear where "parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." 8 C.F.R. §§ 235.3(b)(2)(iii), 235.3(b)(4)(ii). Here, compliance with the Settlement Agreement clearly constitutes a "legitimate law enforcement objective" that permits the release of families seeking asylum. *Cf.* Memorandum from Jeh Johnson, Secretary of Homeland Security, re: *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 20, 2014) ("Johnson Memorandum"), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (noting that persons who "qualify for asylum" or are "primary caretakers of children" are not law enforcement priorities). To the extent that the Government contends that the regulation does not permit such release, the regulation would violate the Settlement Agreement and would be invalid as applied to *Flores* class members.

day period following the entry of a final order of removal, it only prohibits the Government from releasing those individuals who were ordered removed on criminal or terrorist grounds—and *not* the mothers and children presently held at the Government's family detention centers. *See* 8 U.S.C. § 1231(a)(1)-(2) (citing 8 U.S.C. §§ 1182(a)(2), 1182(a)(3)(B), 1227(a)(2), 1227(a)(4)(B)); *see also* Memorandum from Bo Cooper, INS General Counsel, re: *Detention and Release of Aliens with Final Orders of Removal*, HQCOU 50/1.1, at 1-2 (Mar. 16, 2000).[6] Moreover, for nearly all individuals placed in reinstatement proceedings, the 90-day removal period has already elapsed, given that prior orders of removal are reinstated as of their original date. *See* 8 U.S.C. § 1231(a)(5). After the 90-day removal period, detention is entirely discretionary, and the regulations provide for individuals' release where they pose no danger or flight risk warranting their

[6] Notably, the Ninth Circuit held in *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012), that asylum-seeking individuals do not have a "final" order of removal until the conclusion of reasonable fear and withholding-only proceedings. *Id*. at 958. Thus, detention pending such proceedings arguably is not even authorized by Section 1231—the post-final order detention statute—but instead authorized by the pre-final order detention statute, Section 1226(a). *See, e.g.*, *Lopez v. Napolitano*, No. 1:12-CV-01750 MJS HC, 2014 WL 1091336, at *3 (E.D. Cal. Mar. 18, 2014) (holding that Section 1226(a) applies in these circumstances); *accord Guerra v. Shanahan*, No. 14-CV-4203 KMW, 2014 WL 7330449, at *3-5 (S.D.N.Y. Dec. 23, 2014); *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931, at *3-9 (D.N.J. Oct. 30, 2014). Regardless of which statute applies, it is clear that the Government has discretion to release an individual pending a reasonable fear determination. *See* 8 U.S.C. § 1226(a)(2) (providing that the Government "may release" an individual on bond or conditional parole).

detention. *See* 8 U.S.C. § 1231(6) (stating that individuals "*may* be detained *beyond* the removal period") (emphasis added); 8 C.F.R. §§ 241.4(d)(1), (e). The statutes governing reinstatement clearly permit the Government to release individuals from custody where detention is not warranted.

Third, the Government has previously allowed, and continues to allow, individuals to undergo credible fear and reasonable fear interviews in non-detained settings. *See, e.g.*, Decl. of Denise Gilman ¶¶ 3-4, ECF 187-7, Ex. 96 (describing instances where asylum seekers were placed in expedited removal but paroled pending their credible fear interviews); Arlington Asylum Office [ZAR] Stakeholder Engagement Meeting Minutes (Feb. 25, 2015) at 6, http://www.ga-al.com/wp-content/uploads/2015/08/2015-02-25-Stakeholder-Meeting-Minutes.pdf (reporting number of pending non-detained reasonable and credible fear cases of 138 and 308, respectively). Thus, the Government is wrong to assert that the Agreement interferes with its ability to subject minors and their mothers to summary proceedings if it so chooses. *See* Appellants' Br. at 53-57. Rather, the Settlement Agreement can be given full force and effect, even in the context of expedited removal and reinstatement, if the Government simply releases *Flores* class members and their mothers pending the adjudication of their claims.

II. THE SUMMARY REMOVAL STATUTES PROVIDE NO JUSTIFICATION FOR INTERPRETING OR AMENDING THE AGREEMENT TO EXCLUDE ACCOMPANIED MINORS

The Government also drastically overstates the importance of using summary proceedings in the first place against asylum-seeking children and their mothers. There is no dispute that the Government has discretion *not* to place *Flores* class members and their mothers in summary proceedings, and that it retains the authority to refer them for regular removal proceedings where they can receive full hearings on their claims for protection. Appellants' Br. at 55 (describing "the Government's *prerogative* to use the reinstatement [and] expedited removal procedures") (emphasis added); *id.* ("Congress clearly intended to *give the Government the authority* to place aliens into expedited removal . . . rather than regular removal proceedings . . ."); *see also Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) ("[A]n ICE officer may decide to forgo reinstatement of a prior order of removal in favor of initiating new removal proceedings, with the accompanying procedural rights to counsel and a hearing in immigration court."); *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (holding that "DHS has discretion to put aliens in section 240 removal proceedings even though they may also be subject to expedited removal"). Instead, the Government argues that its urgent need to place accompanied children

and their mothers in summary proceedings warrants the exclusion of such children from the Settlement Agreement's protections. Appellants' Br. at 1-2.

As set forth below, the Government exaggerates the necessity for and appropriateness of placing mothers and children held in family detention centers in summary proceedings since: (i) most *Flores* class members and their mothers have bona fide claims for protection, and as a result will ultimately end up in regular removal proceedings in any event; (ii) the Government's application of summary removal against asylum-seeking children and mothers raises serious due process concerns that often lead to flawed evaluations of their legal claims; (iii) the Government has historically exercised its discretion *not* to use summary proceedings against *Flores* class members and their mothers; and (iv) the Government has failed to produce evidence demonstrating that summary proceedings are necessary to control migration flows. Consequently, the Government should use its discretion to refer *Flores* class members and their mothers to regular removal proceedings, instead of subjecting them to needless fast-track removal proceedings and unnecessary periods of detention.

A. The Vast Majority Of Individuals In Family Detention Have Bona Fide Claims For Protection That Should Be Heard in Full Hearings Before Immigration Judges

The Government's proposed interpretation of the Settlement Agreement is unwarranted in light of the fact that the large majority of children and mothers held

in family detention centers have strong claims for protection. As set forth in Appellees' Brief, the *Flores* class members and their families that the Government is currently subjecting to summary proceedings are fleeing horrific conditions of violence in El Salvador, Guatemala, and Honduras. Appellees' Br. at 40-41. These countries are currently some of the most violent places in the world, where powerful transnational criminal organizations ("TCOs") (often referred to as "gangs" or "maras") hold substantial power. Governments in those countries have repeatedly demonstrated their unwillingness or inability to control the violence perpetrated by TCOs, as numerous reports and media outlets have documented.[7]

[7] *See, e.g.*, U.N. High Comm'r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and the Need for International Protection* at 16 (2014),http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf (stating that Central American gangs perpetrate "pervasive, pernicious, and often uncontrollable violence and disruption in the region"); Women's Refugee Comm'n, *Forced from Home: The Lost Boys and Girls of Central America* at 7–8 (2012), https://womensrefugeecommission.org/resources/document/844-forced-from-home-the-lost-boys-and-girls-of-central-america ("Previously, youth gangs used a variety of tactics to put pressure on children to join; now, the gangs operate under a ruthless 'join or die' policy."); Joshua Partlow, *Why El Salvador became the hemisphere's murder capital*, Wash. Post (Jan. 5, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/ ("With more than 6,600 homicides last year in a population of 6 million, El Salvador has surpassed its violent neighbors and seized the unfortunate title of the hemisphere's murder capital, according to police statistics, a situation that has contributed to a mass migration to the United States."); Randal C. Archibald, *Hope Dwindles for Hondurans Living in Peril*, N.Y. Times (Aug. 2, 2014),

The women and children held in the family detention centers have strong claims for asylum or other forms of relief from persecution—some because they were directly targeted by gang members in their home countries, others because they are survivors of severe domestic violence, and others who have suffered different forms of persecution. Multiple circuit courts and the Board of Immigration of Appeals have recognized asylum claims based on similar grounds. *See, e.g.*, *Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (finding that agency erred in failing to address Guatemalan petitioner's claim that he was persecuted by gang members based on family relationship); *Ortega Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015) (finding, in the case of Salvadoran's petition for withholding of removal, that extortion may be persecution, especially where physical harm results from a failure to pay); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) (determining that Salvadoran mother of son who was targeted for and resisted gang recruitment could establish asylum claim); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc) (granting asylum and approving social group based on persecution after petitioner "testified in a criminal trial against members of a gang who killed her father in El Salvador"); *Valdiviezo-Galdamez v. Att'y*

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http://www.nytimes.com/2014/08/03/world/americas/hope-dwindles-for-hondurans-living-in-peril.html ("[I]n Honduras, with the political instability, deeper poverty and a history of willfully weak judicial and security forces, the gangs have exploded in power and readily acquire military-grade weaponry.").

Gen., 663 F.3d 582 (3d Cir. 2011) (holding that Honduran man who had resisted gang recruitment could demonstrate asylum eligibility); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 393-94 (BIA 2014) (finding that married women in Guatemala who cannot leave their abusive relationships could establish eligibility for asylum).

As a result, most of the children and mothers held in the Government's detention centers have strong claims for protection that should ultimately be heard in regular removal proceedings before immigration judges, rather than resolved in summary proceedings in remote detention facilities where access to counsel is limited.

The Government's own statistics indicate that the large majority of *Flores* class members and their mothers have been able to establish bona fide claims for protection from persecution, despite the many due process problems in the extremely truncated summary removal process. *See* Section II.B., *infra*. One of the Government's own declarants, the Chief of the Asylum Division at USCIS, testified that nearly 87% of families in expedited removal pursuant to 8 U.S.C. § 1225 who were referred for credible fear interviews received positive determinations. Decl. of John F. Lafferty ("Lafferty Decl.") ¶ 8, RE 177. And USCIS's publicly available statistics show that, over a three-month period, as many as 87.9% of families in expedited removal received positive credible fear findings, and 79.1% of families in reinstatement proceedings received positive

reasonable fear findings.[8] Families receiving positive fear determinations are referred for full removal proceedings under 8 U.S.C. § 1229a (INA § 240) and typically released from detention during that process. *See* Background, *supra*; Decl. of Thomas Homan ("Homan Decl.") ¶ 8, RE 161.

The Government claims that applying the Settlement Agreement to accompanied minors and their mothers "improperly limits the Government's ability to fully use expedited removal and the reinstatement of prior removal as tools to respond to violations of immigration law." Appellants' Br. at 53-54. Yet, because of the overwhelming strength of their claims for relief, and notwithstanding the many challenges they face in the expedited removal process, the vast majority of those minors and their mothers end up in regular removal proceedings before an immigration judge even if they are placed in summary proceedings at the outset. Consequently, forcing these families into summary proceedings is counterproductive and adds an unnecessary step to the process – one that further prolongs the detention of children and their mothers.[9]

[8] *See* USCIS Asylum Division, Family Facilities FY 2015 2nd Quarter Statistics, https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-familiy-facilities-FY2015Q2.pdf.

[9] In addition, the Government's overbroad use of summary proceedings for *Flores* class members and their mothers in family detention centers is drawing critical resources away from other areas of the immigration system, including the adjudication of affirmative asylum claims. Although the INA contemplates the scheduling of affirmative asylum interviews within forty-five days of the filing of

Accordingly, to the extent the Government is arguing that the use of summary proceedings allows it to more quickly adjudicate claims, that simply is not true for the majority of the *Flores* class members and their mothers.

B. Due Process Concerns In The Summary Removal Process Weigh Against Applying Such Proceedings To *Flores* Class Members

The relevant facts not only fail to provide any support for the Government's proposed interpretation of the Settlement Agreement, but actually counsel *against* the application of expedited removal and reinstatement to *Flores* class members and their mothers held in family detention centers. Ample evidence demonstrates a myriad of due process problems in the summary removal process for children and mothers in detention, which can mean that despite the strength of their asylum

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the application, *see* 8 U.S.C. § 1158(d)(5)(A)(ii)), asylum applicants now regularly wait over two years for their initial interviews. *See* Affirmative Asylum Scheduling Bulletin, updated monthly at https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin (last accessed Feb. 22, 2016) (showing that asylum applicants at six of the eight asylum offices wait two or more years for an interview, and that the wait at the Los Angeles asylum office is four and a half years); *see also* U.S. Citizenship & Immigration Services Ombudsman, *Annual Report 2015* ("Ombudsman Report") at 61 (June 29, 2015), http://www.dhs.gov/publication/cis-ombudsman-2015-annual-report-congress. These delays have been directly linked to the Government's increased use of expedited removal and reinstatement proceedings because asylum officers, who are normally tasked with conducting affirmative asylum interviews, must now conduct credible and reasonable fear interviews and issue written decisions in each case. *See* Lafferty Decl. ¶¶ 3-4, RE 174-75 (explaining responsibilities of asylum officers); Ombudsman Report at xi ("Spikes in requests for reasonable and credible fear determinations . . . along with an uptick in new affirmative asylum filings, are largely responsible for the backlog and processing delays.").

claims, some families are deprived of a meaningful opportunity to be heard and are erroneously issued expedited removal orders.

Those *amici curiae* who are partners in the CARA Family Detention Pro Bono Project, which provides legal services at the family detention centers in Dilley and Karnes City, Texas, have firsthand experience with the due process concerns that arise when class members and their mothers are subject to summary proceedings. In a recent letter to USCIS and ICE, the CARA Project partners described how initial credible fear interviews are frequently flawed as a result of language barriers, as well as the trauma experienced by asylum-seeking mothers and children, who are often initially reluctant to reveal personal details of rape or other abuse in front of their children, mothers, and/or a male asylum officer. *See Letter to USCIS and ICE Concerning Due Process Violations at Detention Facilities* at 2-5 (Dec. 24, 2015), http://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process.[10] Although USCIS has the authority to reconsider a negative fear finding even after an immigration judge's affirmance, the agency seemingly changed its policy in late 2015 and tightened the

[10] The CARA Project also recently filed a complaint with DHS's Office of Civil Rights and Civil Liberties ("CRCL") and Office of Inspector General ("IG") detailing challenges in procuring access to justice faced by indigenous language-speaking mothers and children in family detention centers. *See CRCL Complaint on Challenges Faced by Indigenous Language Speakers in Family Detention* (Dec. 10, 2015), http://www.aila.org/advo-media/press-releases/2015/crcl-complaint-challenges-faced-family-detention.

showing necessary to obtain reconsideration. *Id.* at 3. CARA Project data show that this apparently new heightened standard has coincided with a substantial increase in denials of requests for reconsideration of negative fear determinations. *Id.* at 3-4. The experiences of CARA Project clients confirm that many mothers and children have received final negative fear determinations without an opportunity to present a full account of the circumstances supporting their asylum applications. *Id.* at 4-5.

Children in particular often are disadvantaged during initial fear screenings. Since 1998, USCIS has had a special set of guidelines in place for evaluating children's asylum claims, recognizing that their unique vulnerabilities and developing physical and psychological capacities might result in claims distinct from their parents. *Id.* at 8.[11] However, the claims of the children in family detention are almost entirely overlooked or given short shrift. CARA Project attorneys have observed that (i) requests for independent initial interviews or re-interviews of children are often denied; (ii) many initial "interviews" of children

[11] *See* Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, re: *Guidelines for Children's Asylum Claims* (Dec. 10, 1998), https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf;

Asylum Officer Basic Training Course Lesson Plan, *Guidelines for Children's Asylum Claims* at 37 (Sept. 1, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf.

last only a few minutes and involve only brief, perfunctory questioning in the middle of, or immediately after, the mother's interview; and (iii) immigration judges often affirm negative fear determinations without ever speaking with the affected children. *Id.* Thus, many children are denied a fair opportunity to independently present their asylum claims during summary proceedings.[12]

These issues often are compounded by families' lack of consistent access to legal counsel during summary proceedings. *Id.* at 3. In many cases, detained children and their mothers face affirmative interference by ICE or CBP officers with their ability to access counsel.[13] The record below is filled with reports of

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[12] In addition, the credible and reasonable fear screening process fails to assess the potential eligibility of detained children for Special Immigrant Juvenile status, denying them another avenue of protection. Special Immigrant Juvenile status can be requested from USCIS following a finding by a state court with jurisdiction over juveniles that a child has been abused, abandoned, or neglected by at least one parent; that reunification with the parent(s) is not viable; and that it is not in the child's best interests to be returned to the home country. *See* 8 U.S.C. § 1101(a)(27)(J).

[13] These restrictions on access to counsel occur largely as a result of the policies of secure (as opposed to non-secure) detention facilities. However, the placement of *Flores* class members only in secure detention facilities, none of which are currently licensed to care for children, is a further violation of the Settlement Agreement. *See* District Court Order, RE 12-15 (finding that the Karnes City and Hutto centers were unlicensed and secure, in violation of the Settlement Agreement); *id.* at 15 ("Defendants do not dispute that the facilities are secure."); *Public Hearing Regarding Proposed 40 TAC § 748.7 before the TX Dep't of Family and Protective Services*, (Tx. Dec. 9, 2015) (statement of Paul Morris, Assistant Comm'r for Child Care Licensing) (confirming that the Dilley and Karnes City centers remain unlicensed); Letter from Pa. Dept. of Human Services re: *Berks County Residential Center* (Jan. 27, 2016),

attorneys who have been obstructed from providing effective legal representation to children and mothers in family detention centers and detained individuals who have been misadvised of their rights by ICE officials.[14] Moreover, the remote

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http://services.dpw.state.pa.us/Resources/Documents/Pdf/ViolationReports/20160128_22458.pdf (stating that effective Feb. 21, 2016, the Berks center's license as a child residential facility was revoked and not renewed).

[14] *See, e.g.*, Decl. of R. Andrew Free ¶¶ 6-19, ECF 187-6, Ex. 90 (reporting that ICE summons groups of detained mothers to courtrooms at the Dilley center without counsel present to discuss bond orders and terms of release and describing how ICE makes it impossible for attorneys to consult with clients prior to bond hearings); Decl. of Brian Hoffman ("Hoffman Decl.") ¶¶ 7-10, ECF 187-6, Ex. 92 (describing occasions where CARA Project legal volunteers have been arbitrarily denied access to the Dilley detention center); Decl. of Carol Anne Donohoe ¶ 6, ECF 187-6, Ex. 93 (explaining that at the Berks, PA detention center she must list the names of detainees in order to speak to them and cannot speak to existing clients or new detainees without having them on a list submitted to the facility ahead of time); Decl. of Elora Mukherjee ¶¶ 5-11, ECF 187-7, Ex. 99 (detailing difficulties experienced at Dilley in conducting legal calls with detained mothers by phone, wait times of three to four hours to see clients, and an inability to use a cell phone within the facility); Decl. of Katherine J. Park ¶ 4, ECF 187-8, Ex. 102 (explaining that she had to wait between four and five hours to meet with a detained mother at Dilley to prepare for a hearing occurring the very next day); Decl. of Kimberly Hunter ¶¶ 2-6, 14-16, ECF 187-8, Ex. 103 (explaining that she faced serious impediments to accessing the Dilley detention center, providing legal services and meeting with clients during her four trips as a volunteer attorney); Decl. of Laura Lichter ("Lichter Decl.") ¶¶ 12-31, ECF 187-8, Ex. 104 (detailing myriad ways in which ICE and CCA, the private for-profit company running the Dilley center, have impeded access to the provision of legal services); Decl. of Robyn Barnard ¶ 8, ECF 187-10, Ex. 110 (explaining that mothers detained at Dilley reported that their requests to have counsel present when meeting with ICE regarding the terms of their release were denied); Decl. of Scott H. Coomes ¶ 8, ECF 187-10, Ex. 111 (explaining that access to the Karnes center was denied for an individual without a Texas driver's license). Additionally, in September 2015, the CARA Project filed a complaint with DHS's CRCL and IG offices documenting intimidation, misinformation and violations of the right to counsel at

location of family detention centers further impedes individuals' ability to access counsel and makes long-term pro bono services to detained families unsustainable.[15]

Excluding accompanied children from the Agreement's protections severely disadvantages these children and their mothers and places them at a much higher risk of deportation without due process.[16] The Government should be required to fully comply with the plain terms of the Agreement.

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the Dilley center. *See Public Complaint Regarding Coercion and Violations of the Right to Counsel at the South Texas Family Residential Center in Dilley* (Sept. 30, 2015), http://www.aila.org/advo-media/press-releases/2015/coercion-intimidation-detained-mothers-children/complaint-regarding-residential-center-in-dilley.

[15] *See, e.g.*, Hoffman Decl. ¶ 4, (explaining that seven to twenty five volunteers travel weekly from around the country at their own expense to try to provide services to the detained families at Dilley); Lichter Decl. ¶¶ 8-9 (explaining the expense and challenging logistics involved for volunteer pro bono attorneys to travel to Dilley).

[16] By using summary proceedings to keep families in detention, the Government is also indirectly pressuring mothers and children to abandon their bona fide asylum claims through lack of adequate medical care and nutrition. *See* Human Rights First Brief, *Health Concerns at the Berks Family Detention Center* (Feb. 2016), http://www.humanrightsfirst.org/sites/default/files/HRF-Berks-Brief-final.pdf (sharing complaints written by several mothers detained at the Berks County detention center to ICE regarding inadequate medical care for their children, and ICE's responses, which encouraged them to accept a removal order or "dissolve their case" at any time). The inadequate medical care received by detained families is well-documented in the record below. *See* Pls.' Resp. to Order to Show Cause, ECF 187, at 20 n. 26 and evidence cited therein. These issues have been ongoing. Since summer 2015, the CARA Project has filed a second complaint with DHS's CRCL and IG offices regarding inadequate medical care at the Dilley detention center. *See Complaint: ICE's Continued Failure to Provide*

C. The Government Historically Has Processed Claims Of Accompanied Minors And Their Mothers Without The Use Of Summary Proceedings

The Government acknowledges that it has discretion to place an accompanied minor and her mother in regular removal proceedings rather than summary proceedings.[17] Indeed, prior to 2014, the Government consistently placed children and their mothers in regular removal proceedings.

After accepting the terms of the Settlement Agreement in 1997, the Government usually released accompanied children and their mothers into the community to await their immigration hearings. *See* Decl. of Barbara Hines ("Hines Decl.") ¶ 8, Appellees' Supplemental Record Excerpts ("SRE") 29; Homan Decl. ¶ 9, RE 161-62. Before 2014, the Government placed only a limited number of families into summary proceedings, while detaining them at the Hutto facility in Texas, and the Berks facility in Pennsylvania. Hines Decl. ¶ 9, SRE 29; Homan Decl. ¶ 9, RE 161-62. Only after 2014, when the number of Central

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Adequate Medical Care to Mothers and Children Detained at the South Texas Family Residential Center (Oct. 6, 2015), http://www.aila.org/advo-media/press-releases/2015/crcl-complaint-family-detention/cara-jointly-filed-a-complaint.

[17] Memorandum from John Morton, Director of ICE, re: *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens* at 2 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; *accord* Johnson Memorandum at 2.

American asylum seekers began to increase, did the Government start placing accompanied minors and their mothers in summary proceedings on a larger scale as part of a new "no release" policy. Hines Decl. ¶ 10, SRE 30.

As part of this shift, the Government opened several large family detention centers, first in Artesia, New Mexico (which has since closed), and then in Karnes City, Texas and Dilley, Texas. Homan Decl. ¶ 17, RE 165. These new family detention centers have the capacity to hold thousands of children and their mothers, and represent a massive expansion of the Government's family detention initiatives. *Id*. ¶ 18, RE 166. Even with this increase in capacity, the Government still releases 80% of accompanied minors and their mothers and places them in regular removal proceedings. *Id*. ¶ 19, RE 166.

D. There Is No Basis To Overturn The District Court's Finding That Summary Proceedings Are Not Necessary To Control Migration Flows From Central America

The Government has attempted to justify its extensive use of summary proceedings, and the detention that it claims is mandated under these proceedings, by referencing a "surge" of Central American immigrants in 2014, which it claims is continuing today. *See* Appellants' Br. at 68-69; *but see* Appellees' Br. at 37-38 (refuting the Government's suggestion of a continuing upward trend in apprehensions of immigrant families). The thrust of the Government's argument appears to be that summary proceedings serve a deterrent function; it argues that

family detention centers "are an essential component of an integrated response designed to signal to potential illegal entrants that individuals who do not make meritorious[18] claims for relief will not be permitted to remain in the United States." Appellants' Br. at 23.[19]

But the district court properly rejected this contention, stating that it was "not persuaded by the evidence presented in support of Defendants' policy argument" and that Defendants' statistical evidence was "insufficient to establish

[18] Separate and apart from its "deterrence" argument, the Government's suggestion that summary proceedings are used for non-"meritorious" claims is misleading. Whether or not an asylum claim is meritorious cannot be determined until after the credible or reasonable fear screening is completed and, if there are positive findings, a formal application is filed with the court and an immigration judge conducts a full adjudication on the merits.

[19] While the Government has elsewhere professed its abandonment of a deterrence rationale in support of family detention, it is clear that any such policy changes have been made solely in the context of individual custody decisions or in response to litigation. For example, the Government informed the lower court that "ICE no longer considers general deterrence as a factor *in individual bond determinations* for Central American women and children." Defs.' Resp. to Court's Order to Show Cause, ECF 184 at 6 (emphasis added). In addition, in a May 13, 2015 press release, ICE stated that it had "discontinue[d] invoking general deterrence as a factor in custody determinations in all cases involving families," but the press release makes clear that this decision was made in response to a February 20, 2015 court order that "enjoined ICE from invoking general deterrence in custody determinations where an individual from Central America in a family residential center is found to have a credible fear of removal." *See* ICE Press Release, May 13, 2015, ECF 153-1; *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C 2015).

causation between Defendants' current policy of detaining female-headed families in family detention centers and the decline in family units apprehended at the border." District Court Order, RE 11. That factual finding, which this Court cannot overturn unless it is left with "the definite and firm conviction that a mistake has been committed," *see, e.g.*, *Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002), was not clearly erroneous.

Indeed, the Government has provided no evidence that the use of expedited removal and reinstatement deters future migration. *See* District Court Order, RE 23 ("Nor do Defendants proffer *any* competent evidence that ICE's detention of a subset of class members in secure, unlicensed facilities has deterred or will deter others from attempting to enter the United States.") (emphasis in original). As set out more fully in Appellees' Brief and the Brief of Social Scientists as *Amici Curiae*, the Government has utterly failed to prove, and cannot prove, that family detention pursuant to summary proceedings has *any* impact on future migrants' decisions to seek entry to the United States. *See* Appellees' Br. at 39-42.

Moreover, recent data confirm that the new deterrence policies implemented by the Government in 2014 – including the family detention policy at issue in this case and other "awareness" campaigns designed to inform migrants of the dangers of attempting to cross the U.S. border – have not influenced Central Americans' migration decisions. *See generally* American Immigration Council Special Report,

Understanding the Central American Refugee Crisis: Why They Are Fleeing and How U.S. Policies are Failing to Deter Them (Feb. 2016), http://www.immigrationpolicy.org/sites/default/files/docs/understanding_the_central_american_refugee_crisis.pdf. To the contrary, data collected in the summer of 2014 show that, even though Central Americans were well aware of the dangers involved in migrating to the United States, this knowledge did not deter them from making plans to migrate. *Id.* at 8-9. Instead, the findings reveal that violence in the countries of origin is a much stronger indicator of migration intentions. *Id.* at 9-10.

Given these facts, the Government's claim that a new interpretation or amendment of the Settlement Agreement is necessary to deter any "surge" of Central American families rings hollow. In other words, there is no evidence that placing *Flores* class members and their mothers in summary proceedings has deterred or will deter other immigrants from attempting to enter the country.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellees' Brief, the Court should affirm the decision below.

Dated: February 23, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a), 29(c), AND 29(d)

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a) and 29(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) because it contains 6,964 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Douglas W. Baruch
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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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