

1 BRIAN M. BOYNTON
2 Principal Deputy Assistant Attorney General
3 Civil Division
4 WILLIAM C. PEACHEY
5 Director, District Court Section
6 Office of Immigration Litigation
7 WILLIAM C. SILVIS
8 Assistant Director
9 SARAH B. FABIAN
10 Senior Litigation Counsel
11 FIZZA BATOOL
12 JOSHUA C. MCCROSKEY
13 Trial Attorneys
14 United States Department of Justice
15 Office of Immigration Litigation
16 P.O. Box 868, Ben Franklin Station
17 Washington, DC 20044
18 Telephone: 202-616-4863
19 Facsimile: 202-305-7000
20 Email: fizza.batool2@usdoj.gov
21 *Attorneys for Defendants*

22
23
24
25
26
27
28
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

21 JENNY LISETTE FLORES, *et al.*,
22 Plaintiffs,
23 v.
24
25 MERRICK GARLAND, Attorney
26 General of the United States, *et al.*,
27 Defendants.
28

) Case No. 2:85-cv-04544-DMG

)
) **DEFENDANTS' RESPONSE IN**
) **OPPOSITION TO PLAINTIFFS'**
) **MOTION TO ENFORCE, ECF NO.**
) **1392**

) Hearing Date: March 29, 2024
) Time: 9:30 a.m.
) Hon. Dolly M. Gee
)

TABLE OF CONTENTS

I. INTRODUCTION	1
II. BACKGROUND.....	3
A. Statutory Background.....	3
B. Factual Background.....	4
C. Plaintiffs’ MTE	8
III. ARGUMENT	9
A. This Court Lacks Jurisdiction Over Plaintiffs’ MTE	9
1. USBP Has Not Arrested or Apprehended Minors in these Areas	9
2. USBP Does Not Have Legal Custody Over Minors in these Areas.....	13
B. Defendants Should Not Be Required to Implement the Procedures Requested by Plaintiffs.....	22
IV. CONCLUSION	24
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

CASES

<i>Barton v. Barr</i> , 140 S. Ct. 1442 (2020).....	3
<i>Evans v. City of Bakersfield</i> , 22 Cal. App. 4th 321, 27 Cal. Rptr. 2d 406 (1994).....	11
<i>Flores v. Barr</i> , 407 F. Supp. 3d 909 (C.D. Cal. 2019).....	1, 10
<i>Flores v. Barr</i> , No. 85-4544-DMG, 2020 WL 5491445 (C.D. Cal. Sept. 4, 2020).....	13, 14, 20
<i>Flores v. Lynch</i> , 828 F.3d 898 (9th Cir. 2016)	16
<i>Flores v. Sessions</i> , 394 F. Supp. 3d 1041 (C.D. Cal. 2017).....	2
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991)	11, 12, 13
<i>Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.</i> , 109 Cal. App. 4th 944 (Cal. Ct. App. 2003).....	10
<i>I.N.S. v. Delgado</i> , 466 U.S. 210 (1984)	12
<i>In re Tony C.</i> , 21 Cal.3d 888, 148 Cal. Rptr. 366, 582 P.2d 957 (1978).....	11
<i>Orr v. Bank of America, NT & SA</i> , 285 F.3d 764 (9th Cir. 2002)	15
<i>DHS v. Thuraissigiam</i> , 140 S. Ct. 1959 (2020).....	3
<i>United States v. Armour & Co.</i> , 402 U.S. 673 (1971)	10

1	<i>United States v. Asarco, Inc.</i> ,	
2	430 F.3d 972 (9th Cir. 2005)	10

FEDERAL STATUTES

5	6 U.S.C. § 211(c)(8).....	3
6	6 U.S.C. § 211(e)(3)(A)-(B).....	3
7	8 U.S.C. § 1103	3
8	8 U.S.C. § 1103(a)(3).....	3
9	8 U.S.C. § 1103(a)(5).....	3
10	8 U.S.C. § 1225(a)(1).....	3
11	8 U.S.C. § 1225(a)(3).....	3
12	8 U.S.C. § 1226	3
13	8 U.S.C. § 1232	16
14	8 U.S.C. § 1357(a)(1)-(2).....	4

FEDERAL RULES OF EVIDENCE

19	FRE 801(c)	15
20	FRE 802.....	15

FEDERAL REGULATIONS

23	8 C.F.R. § 287.1(c)	4
----	---------------------------	---

STATE CODES

27	Cal. Penal Code § 834.....	10, 11
28	Cal. Civ. Code § 1636.....	10

MISCELLANEOUS

<i>DHS v. Texas</i> , No. 23A607, 2024 WL 51018 (U.S. Jan. 2, 2024)	17
<i>DHS v. Texas</i> , No. 23A607, 2024 WL 145108 (U.S. Jan. 10, 2024)	17
National Standards on Transport, Escort, Detention, and Search (“TEDS”) (Oct. 2015), https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf (last visited Mar. 4, 2024).....	16

1 **I. INTRODUCTION**

2 On February 29, 2024, Plaintiffs filed a Motion to Enforce Settlement
3 Regarding Open-Air Detention Sites (“MTE”) alleging violations of the *Flores*
4 Settlement Agreement (“FSA” or “Agreement”) and seeking an order against
5 Defendants U.S. Department of Homeland Security (“DHS”) and U.S. Customs and
6 Border Protection (“CBP”). ECF No. 1392-1. Plaintiffs allege that CBP has been
7 “holding *Flores* class members outdoors in open-air detention sites (“OADS”) along
8 the U.S. border in extraordinarily unsafe and unsanitary conditions.” *Id.* Plaintiffs
9 contend that minors in these areas are in the legal custody of CBP and are therefore
10 entitled to protections under the Agreement. *Id.* This Court should deny Plaintiffs’
11 MTE because *Flores* obligations have not been triggered and Plaintiffs’ proposed
12 relief is unwarranted.

13 As an initial matter, this Court lacks jurisdiction over Plaintiffs’ claims
14 because the minors in these areas—close to the California-Mexico border—have not
15 been arrested or apprehended by CBP and are not in the legal custody of CBP.
16 Therefore, these minors are not *Flores* class members. The Agreement defines
17 *Flores* class members as “[a]ll minors who are detained in the legal custody of the
18 [Immigration and Naturalization Service (“INS”)].” FSA at ¶ 10. Before an
19 individual is detained, he or she must first be arrested or apprehended. And detention
20 is a prerequisite to legal custody. But, here, Plaintiffs contend that CBP has legal
21 custody of minors who have not yet been arrested or apprehended. Moreover,
22 Plaintiffs attempt to insert new terms and procedures into the Agreement despite this
23 Court’s prior rulings regarding the binding contractual nature of a consent decree.
24 *Flores v. Barr*, 407 F. Supp. 3d 909, 931 (C.D. Cal. 2019).

25 CBP’s efforts to provide certain limited amenities and services prior to
26 minors’ arrest and apprehension do not trigger *Flores* obligations. CBP recognized
27 humanitarian concerns and, together with the assistance of volunteers, sought to
28 alleviate such concerns to the best of its ability when it could not immediately arrest

1 or apprehend minors due to a surge in migration. CBP’s provision of that
2 humanitarian assistance does not mean the noncitizens are in CBP’s custody. CBP
3 has been apprehending and transporting minors to safe and sanitary U.S. Border
4 Patrol (“USBP”) facilities in a prompt manner. But until that occurs, Plaintiffs are
5 not in DHS custody.

6 Further, the Court should decline Plaintiffs’ proposed relief as it is outside the
7 four corners of the Agreement, inconsistent with the Agreement, and in some
8 instances superfluous. Plaintiffs’ proposed order, ECF No. 1392-2, would have the
9 Court order extensive procedural relief that is outside the scope of the Agreement.
10 This Court has already held that procedural remedies are not available to Plaintiffs
11 for violations of the Agreement. *See* ECF No. 470 (July 30, 2018) at 2-3 (concluding
12 that Plaintiffs are entitled to only such relief as is explicitly or implicitly authorized
13 by the Agreement and not procedural remedies that are not set forth in the FSA).
14 Despite this previous ruling, Plaintiffs’ MTE asks the Court to order Defendants to
15 apply a novel standard—found nowhere in the Agreement—for the apprehension of
16 minors and asks the Court to impose an arbitrary “two hours after first discovery by
17 DHS” record-keeping process that is similarly unsupported. ECF No. 1392-2 at ¶ 4.
18 The Agreement did not contemplate, nor does it reflect any meeting of the minds
19 regarding, “discovery” of minors. Indeed, the term itself is nowhere to be found in
20 the Agreement. Plaintiffs also seek coercive remedies such as monthly reporting for
21 six months that go beyond the monitoring provisions of the Agreement, *see id.*,
22 despite having made no showing that Defendants are in violation of the Agreement.
23 *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1048–50 (C.D. Cal. 2017). This Court has
24 previously declined to order remedies that are outside of the four corners of the
25 Agreement, and it should again decline to do so here.

II. BACKGROUND¹

A. Statutory Background

The Secretary of Homeland Security has “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of [noncitizens].” 8 U.S.C. § 1103(a)(5).² The Secretary may “establish such regulations” and “perform such other acts as he deems necessary for carrying out his authority under” the Immigration and Nationality Act (“INA”). 8 U.S.C. § 1103(a)(3). CBP, an agency within DHS, is charged with “enforc[ing] and administer[ing] all immigration laws,” including “the inspection, processing, and admission of persons who seek to enter” the United States and “the detection, interdiction, removal. . . and transfer of persons unlawfully entering. . . the United States.” 6 U.S.C. § 211(c)(8). USBP is “the law enforcement office of [CBP] with primary responsibility for interdicting persons attempting to illegally enter. . . the United States” and for “deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband.” 6 U.S.C. § 211(e)(3)(A)-(B).

Congress has provided that a noncitizen “present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival. . .)” is “deemed. . . an applicant for admission.” 8 U.S.C. § 1225(a)(1); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (“[a noncitizen] who tries to enter the country illegally is treated as an ‘applicant for admission’” with certain statutory rights). The INA authorizes immigration officers to “inspect[.]” all such applicants. 8 U.S.C. § 1225(a)(3); *see also* 8 U.S.C. § 1226

¹ Given the history of the *Flores* litigation and this Court’s familiarity with this case, Defendants provide a summary tailored to the issues presented by Plaintiffs’ recent MTE, ECF No. 1392-1.

² Federal law refers to non-U.S. citizens or nationals as “aliens.” 8 U.S.C. § 1103. The Department of Homeland Security typically refers to such persons as noncitizens. *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020).

(authorizing apprehension and detention). Border Patrol agents have authority, without a warrant, “to interrogate any [noncitizen] or person believed to be [a noncitizen] as to his right to be or to remain in the United States” and “to arrest any [noncitizen] who in his presence or view is entering or attempting to enter the United States in violation of any law” where the individual is likely to abscond. 8 U.S.C. § 1357(a)(1)-(2). And Congress has specifically directed that “within a distance of twenty-five miles from any” external boundary to the United States, Border Patrol agents shall “have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of [noncitizens] into the United States.” 8 U.S.C. § 1357(a)(3).³

B. Factual Background

The USBP San Diego Sector (“SDC”) encompasses 56,831 square miles, including 931 miles of coastal border, from the California border with Mexico north to Oregon. *See* Declaration of Brent L. Schwerdtfeger (“Schwerdtfeger Decl.”) ¶ 3, attached hereto as Defs.’ Ex. A. SDC has seven stations: Imperial Beach, Chula Vista, Brown Field, Campo, Boulevard, San Clemente, and Newton-Azrak. *Id.* SDC also operates the San Diego Area Detention Facility, a temporary soft-sided structure (“soft-sided facility”) designed to increase the detention capacity and processing capability within SDC. *Id.* SDC has a total detention capacity of 2,716 across all facilities, including all stations and the soft-sided facility, and currently employs approximately 1,847 Border Patrol agents. *Id.*

Border Patrol agents identify, track, and arrest persons suspected of making unlawful entry into the United States. *Id.* ¶ 4. As part of these duties, Border Patrol agents conduct a “field interview” to determine whether an individual they encounter

³ “[P]atrolling the border to prevent the illegal entry of [noncitizens] into the United States. . . means conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of [noncitizens] into the United States.” 8 C.F.R. § 287.1(c).

1 is a noncitizen who entered the United States unlawfully. *Id.* ¶ 5. The field interview
2 consists of either a consensual encounter where the agents question the individual
3 regarding their nationality and immigration status, or an investigative stop based on
4 reasonable suspicion of an immigration violation. *Id.* If the agents establish probable
5 cause to believe the individual is subject to arrest, the individual is at that point
6 arrested and transported to a facility for processing. *Id.* Processing includes
7 conducting background checks, obtaining biometric data, and determining the
8 administrative pathway for the disposition of the individual's case. *Id.*

9 Around October 2022, large groups of individuals began to unlawfully enter
10 the United States from Mexico between the ports of entry within the Imperial Beach
11 Station's ("IMB") area of responsibility, an area west of the San Ysidro Port of Entry
12 and within five miles of the Pacific Ocean coastline. *Id.* ¶¶ 6, 7. Eventually, the
13 number of individuals arriving exceeded IMB's ability to immediately conduct a
14 field interview and arrest them, due to constraints in detention capacity, staffing, and
15 transportation. *Id.* ¶ 6. The detention capacity at IMB is approximately 205
16 individuals. *Id.* And, beginning in January 2023, SDC had seven buses available for
17 large group transportation across the entire Sector. *Id.* The maximum capacity based
18 on the safety rating for each bus is no more than 47 passengers. *Id.* From March
19 through December 2023, IMB alone made over 71,000 arrests, accounting for
20 approximately 32 percent of SDC's total arrests in that time. *Id.* In fiscal year 2023
21 (October 2022 to September 2023), IMB arrested 255 unaccompanied noncitizen
22 children ("UCs") and 5,366 noncitizens in family units. *Id.* A family unit is defined
23 as one or more noncitizen children under the age of 18 with one or more of their
24 noncitizen parent(s) or legal guardian(s). *Id.* In fiscal year 2024 (beginning in
25 October 2023), IMB has arrested 411 UCs and 3,588 persons in family units. *Id.*

26 The groups of individuals arriving in IMB consisted of dozens to hundreds of
27 individuals, who unlawfully entered the United States by crossing the primary fence
28 on the border with Mexico using ladders or other means. *Id.* ¶ 7. Such individuals

1 are often believed to be assisted by cartel-affiliated smuggling organizations. *Id.*
2 Over time, large groups of individuals began to concentrate primarily in two
3 locations within IMB's area of operations known as Whiskey 4 ("W4") and Whiskey
4 8 ("W8"). *Id.* ¶ 8. Individuals have also entered and congregated in areas known as
5 Spooner's Mesa and 91X. Spooner's Mesa is approximately one mile to the west of
6 W8 and 91X is approximately two and one-third miles to the west of W8. *Id.*

7 At W4, there is an International Boundary Barrier ("IBB") consisting of a 30-
8 foot-high primary fence on the south side of the Tijuana River on the border with
9 Mexico. *Id.* ¶ 9. At W8, the IBB consists of a 30-foot-high primary fence and a 30-
10 foot-high secondary fence that run parallel to each other along the boundary line
11 between the United States and Mexico. *Id.* ¶ 10. The area between the fences at
12 W8—which is restricted to authorized personnel with "No-trespassing" signage
13 posted—ranges in size from about 60 feet wide to about 120 feet wide, depending
14 on the location. *Id.* Individuals arriving in the area of W4 and W8 as part of these
15 large groups who surmounted the primary fence generally remained in the area in
16 which they entered until Border Patrol agents conducted a field interview, arrested
17 them, and transported them to a USBP facility for processing. *Id.* ¶ 11.

18 Beginning in approximately March 2023, large groups of individuals also
19 began to arrive in Jacumba, California, an area along the international boundary
20 between the United States and Mexico approximately 60 miles east of the Pacific
21 Ocean coastline. *Id.* ¶ 12. Both the Boulevard Station ("BLV") and Campo Station
22 ("CAO") areas of responsibility encompass parts of Jacumba. *Id.* Similar to what
23 occurred at IMB, the number of individuals arriving in large groups exceeded CAO's
24 and BLV's ability to immediately conduct a field interview and arrest them, due to
25 constraints in detention capacity, staffing, and transportation. *Id.* The detention
26 capacity at BLV is approximately 207 individuals and at CAO is approximately 246
27 individuals. *Id.* As noted above, during this period, SDC had approximately seven
28 buses available for large group transportation across the entire Sector, with a

1 maximum capacity of 47 passengers per bus. *Id.* From March through December
2 2023, CAO and BLV combined made over 96,000 arrests, accounting for nearly 43
3 percent of SDC's total arrests in that time. *Id.* In September 2023, BLV and CAO
4 made nearly 11,000 arrests for the month, and arrests increased each subsequent
5 month to over 20,400 arrests in December 2023. *Id.* The December 2023 arrests by
6 CAO and BLV accounted for nearly 60 percent of SDC's total arrests that month.
7 *Id.* In fiscal year 2023 (October 2022 through September 2023), CAO and BLV
8 combined arrested 130 UCs and 3,972 persons in family units. *Id.* In fiscal year 2024
9 (beginning October 2023), CAO and BLV combined have arrested over 697 UCs
10 and 13,274 persons in family units. *Id.*

11 In the Jacumba area, the IBB consists of a single 30-foot-high fence along the
12 international boundary between the United States and Mexico, with no secondary
13 fence. *Id.* ¶ 13. Therefore, once individuals have entered the United States across the
14 IBB in the Jacumba area, there is no further fencing restricting their movement. *Id.*
15 Again, many of the individuals entering in large groups are believed to be assisted
16 by cartel-affiliated smugglers who guide their unlawful entry into the United States.
17 *Id.* As in IMB, these large groups arrived in numbers that exceeded USBP's ability
18 to immediately conduct a field interview and arrest them. *Id.* Accordingly,
19 individuals began to congregate primarily in four locations known to SDC as the 75
20 Road, 177 Tower, Willows, and 121 Tower in Zone 28. *Id.* The area known as
21 "Moon Valley" or "Valley of the Moon Trail" was not an area that large groups
22 typically congregated. *Id.* The closest USBP Stations are BLV and CAO, within
23 approximately nine miles and twenty-one miles, respectively, from the locations
24 where individuals congregated. *Id.* Similar to the IMB area, individuals congregating
25 in Jacumba generally remained in the area in which they entered until Border Patrol
26 agents conducted a field interview, arrested them, and transported them to a USBP
27 facility for processing. *Id.* ¶ 14.

1 Congregation at any of the locations in IMB or Jacumba is believed to occur
2 under the direction of smugglers. *Id.* ¶ 15. SDC does not have a policy or practice of
3 directing or encouraging individuals to go to these locations, and does not have a
4 policy or practice of transporting or guiding individuals to these locations to await
5 arrest, transport, and processing. *Id.*

6 In 2023, Border Patrol agents generally arrested noncitizens that comprised
7 the large groups within 24 hours of their encounter. Currently and throughout 2024,
8 large groups of individuals arriving in the IMB and Jacumba areas are generally
9 arrested within 12 hours of encounter. *Id.* ¶¶ 11, 14, 27. Border Patrol agents
10 prioritize interviewing, arresting, and transporting vulnerable populations (UCs,
11 family units, pregnant individuals, and the elderly or infirm) from the field to the
12 nearest USBP station for processing as soon as possible. *Id.* ¶¶ 19, 22, 24, 31.

13
14 **C. Plaintiffs' MTE**

15 On February 29, 2024, Plaintiffs filed an MTE alleging that, since February
16 2023, CBP has been “holding *Flores* class members outdoors in open-air detention
17 sites (“OADS”) along the U.S. border in extraordinarily unsafe and unsanitary
18 conditions,” for “several hours to several days” before transporting them to “brick-
19 and-mortar facilities for formal processing” in violation of Paragraph 12.A. of the
20 Agreement. ECF No. 1392-1, at 1-2. Plaintiffs argue that minors in these sites are in
21 the legal custody of CBP and are therefore entitled to protections under the
22 Agreement. *Id.* Plaintiffs allege that they are currently aware of seven sites within
23 California, in CBP’s San Diego Sector: “Four of the OADS—Whiskey 8, Whiskey
24 4, Spooner’s Mesa, and 91X—are located west of the San Ysidro Port of Entry
25 between the primary and secondary U.S. border walls. [] The other three OADS—
26 Moon Valley, Tower 177, and Willows—are located outside the remote desert town
27 of Jacumba and are monitored by CBP agents and surveillance towers.” *Id.* at 2-3
28

1 (internal citations omitted). Plaintiffs assert that “[a]ll of these sites are under CBP
2 control.” *Id.* at 3.

3 Plaintiffs further assert that minors are held in unsafe and unsanitary
4 conditions at these sites. *Id.* 3-7. Specifically, Plaintiffs allege that CBP does not
5 provide shelter to minors, and volunteers have provided tents and tarps, but there are
6 not enough. *Id.* at 3. Plaintiffs allege that minors are exposed to harsh fluctuations
7 in temperature, and individuals have burned brush and garbage to stay warm. *Id.* at
8 4. Plaintiffs allege that “[t]here are no permanent toilets or showers,” at these sites,
9 and CBP does not provide basic hygiene items. *Id.* Plaintiffs allege that CBP does
10 not provide adequate and consistent food and water, and CBP “depends on
11 volunteers to provide basic provisions” for individuals at these sites. *Id.* at 5.
12 Plaintiffs allege that CBP does not provide first aid or medical care for minors at
13 these sites, and CBP “rel[ies] on humanitarian volunteers to provide first aid.” *Id.* at
14 6. Plaintiffs contend that CBP directs minors to these sites, asserts its authority at
15 these sites, and does not permit individuals to leave these sites. *Id.* at 7-10.

16 17 **III. ARGUMENT**

18 **A. This Court Lacks Jurisdiction Over Plaintiffs’ MTE.**

19 This Court should deny Plaintiffs’ MTE. Federal immigration law provides
20 CBP with wide discretion in carrying out its law enforcement duties for the arrest
21 and apprehension of noncitizens. And the Agreement does not encompass—and it
22 was not intended to encompass—the process and procedures prior to and for the
23 arrest and apprehension of minors. The Agreement “sets out nationwide policy for
24 the detention, release, and treatment of minors in the custody of the INS.” FSA ¶ 10.
25 With regards to minors at issue in the MTE, the *Flores* obligations provided under
26 the Agreement have not been triggered because USBP has not arrested or
27 apprehended any of the minors, nor has USBP assumed legal custody of such
28 minors. Plaintiffs’ MTE would impose *Flores* obligations *before* minors have even

1 been arrested or apprehended by USBP, without considering the legal and practical
2 implications. The Court should reject such claims.

3 *1. USBP Has Not Arrested or Apprehended Minors in these Areas.*

4 This Court has recognized that “[t]he *Flores* Agreement is a binding contract
5 and a consent decree”; “[i]t is a creature of the parties’ own contractual agreements
6 and is analyzed as a contract for purposes of enforcement.” *Flores v. Barr*, 407 F.
7 Supp. 3d 909, 931 (C.D. Cal. 2019). Like a contract, a consent decree “must be
8 discerned within its four corners, and not by reference to what might satisfy the
9 purposes of one of the parties to it.” *United States v. Armour & Co.*, 402 U.S. 673,
10 681 (1971); *United States v. Asarco, Inc.*, 430 F.3d 972, 980 (9th Cir. 2005) (a
11 consent decree “must be discerned within its four corners, extrinsic evidence being
12 relevant only to resolve ambiguity in the decree.”). The “basic goal of contract
13 interpretation” is to give effect to the parties’ mutual intent “at the time of
14 contracting.” *Founding Members of the Newport Beach Country Club v. Newport*
15 *Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 955 (Cal. Ct. App. 2003) (citing
16 Cal. Civ. Code § 1636).

17 The Agreement defines *Flores* class members as “[a]ll minors who are
18 detained in the legal custody of the INS.” FSA ¶ 10. Further, Paragraph 12.A.
19 specifically provides that “[f]ollowing arrest, the [DHS] shall hold minors in
20 facilities that are safe and sanitary and that are consistent with the [DHS]’s concern
21 for the particular vulnerability of minors.” FSA ¶ 12.A. (emphasis added). Black’s
22 Law Dictionary defines arrest as “[a] seizure or forcible restraint [especially] by
23 legal authority,” and “the apprehension of someone for the purpose of securing the
24 administration of the law [especially] of bringing that person before a court.” Black’s
25 Law Dictionary (11th ed. 2019). Similarly, the California Penal Code defines arrest
26 as “taking a person into custody, in a case and in the manner authorized by law.” *See*
27 Cal. Penal Code § 834 (West). It is made by “an actual restraint of the person, or by
28 submission to the custody of an officer. The person arrested may be subjected to

1 such restraint as is reasonable for his arrest and detention.” *Id.* § 835. A detention
2 occurs “if the suspect is not free to leave at will—if he is kept in the officer’s
3 presence by physical restraint, threat of force, or assertion of authority.” *Evans v.*
4 *City of Bakersfield*, 22 Cal. App. 4th 321, 330, 27 Cal. Rptr. 2d 406, 411 (1994)
5 (citing *In re Tony C.*, 21 Cal.3d 888, 895, 148 Cal. Rptr. 366, 582 P.2d 957 (1978)).

6 In SDC, when encountering an individual, Border Patrol agents first conduct
7 a “field interview” to ask questions pertaining to the individual’s nationality and
8 immigration status to determine if the individual is subject to arrest under the federal
9 immigration laws. Schwerdtfeger Decl. ¶ 5. If a Border Patrol agent has probable
10 cause to believe that the individual is subject to arrest, then *at that point*, the
11 individual is arrested and transported to the nearest station or soft-sided facility for
12 processing. *Id.* Processing includes conducting background checks, obtaining
13 biometric data, and determining the administrative pathway for the disposition of the
14 individual’s case. *Id.* Here, given the large number of individuals arriving in the IMB
15 and Jacumba areas, Border Patrol agents could not immediately conduct a field
16 interview and arrest individuals due to constraints in detention capacity, staffing, and
17 transportation. *Id.* ¶¶ 6, 12, 16.

18 Prior to a field interview and arrest, minors are not detained in the legal
19 custody of DHS. FSA ¶ 10; *see also* Schwerdtfeger Decl. ¶¶ 11, 14. Relevant to the
20 parties’ understanding of the Agreement, Fourth Amendment case law developed in
21 the 1980s and 1990s explains that an individual is detained by the government
22 “[o]nly when the officer, by means of physical force or show of authority, has in
23 some way restrained the liberty” of an individual. *Florida v. Bostick*, 501 U.S. 429,
24 433–34 (1991) (internal quotation marks and citation omitted). “[A] court must
25 consider all the circumstances surrounding the encounter to determine whether the
26 police conduct would have communicated to a reasonable person that the person was
27 not free to decline the officers’ requests or otherwise terminate the encounter.” *Id.*
28 at 439–40. In *Bostick*, police interacted with passengers on a bus that was about to

1 depart. *Id.* at 436. The Supreme Court held that a passenger on the bus may have felt
2 confined, but he felt that way because he did not want to miss the departure of the
3 bus, not because of police coercion. *Id.* Thus, his freedom of movement “was
4 restricted by a factor independent of police conduct.” *Id.* at 436–37.

5 Moreover, government agents may interact with and question individuals
6 without detaining them. *See I.N.S. v. Delgado*, 466 U.S. 210, 215–17 (1984). In
7 *Delgado*, INS agents systematically questioned workers at a factory while other
8 agents were stationed at the doors to the building. *Id.* at 217–18. The Supreme Court
9 found that there was no seizure because the workers continued to be free to move
10 about their workplace. *Id.* at 218. The Supreme Court noted that the agents at the
11 doors simply made sure that everyone was questioned and did not appear to prevent
12 anyone from leaving. *Id.* The Court reasoned that the workers may have felt
13 obligated to stay at the factory, but that obligation came from their employment, not
14 from the INS agents. *Id.* While the INS may have apprehended individuals who fled,
15 the Court held that the detention of those individuals did not mean that everyone else
16 at the factory was detained. *Id.* at 220–21.

17 Here, individuals who have unlawfully crossed the border and seek to be
18 processed may wish to stay in one of these areas near IMB or Jacumba, but any
19 compulsion they may subjectively feel does not come from USBP’s physical force
20 or display of authority. If an individual decided to leave one of those areas, “there is
21 no direct consequence for such an action, but if they are encountered by USBP, they,
22 like any individual suspected of unlawfully entering the United States, may be
23 subject to a field interview and when appropriate, arrest.” Schwerdtfeger Decl. ¶ 18.
24 Individuals appear to be staying in these areas for reasons independent of agency
25 conduct, such as the provision of supplies from volunteers, and the desire to be
26 arrested and processed by USBP. Even in areas where there are no fences or other
27 barriers restricting their movement, the individuals congregating in IMB and
28

1 Jacumba generally wait to be arrested and do not further their entry into the United
2 States. *Id.* ¶ 18.

3 While Border Patrol agents often patrol these areas, they do so pursuant to
4 their statutory duties and obligations as they are “responsible for safeguarding all
5 areas between the ports of entry.” *Id.* ¶ 4. USBP is tasked with the deterrence,
6 detection, and arrests of terrorists, undocumented noncitizens, and human smugglers
7 who are entering or attempting to enter the United States, and with seizing terrorist-
8 related weapons, illicit drugs, and other contraband. *Id.* However, patrol and
9 surveillance of the border alone does not trigger arrest or detention. While
10 individuals who attempt to further their entry into the United States may be subject
11 to arrest and detention, like *Delgado*, this does not mean that USBP has arrested and
12 detained individuals who voluntarily choose to remain in these areas. Finally,
13 individuals who have unlawfully crossed the border and congregate in these areas
14 may subjectively feel compelled to follow an agent’s instructions, but the reasonable
15 person test for detention presupposes a person who has not violated the law. *Bostick*,
16 501 U.S. 437-38. None of USBP’s actions in these areas, as explained *supra*, would
17 make a person feel that he or she was not at liberty to leave. On the contrary, the
18 situation on the ground demonstrates that individuals wait to be arrested and
19 transported to a USBP facility for processing. Schwerdtfeger Decl. ¶ 18.
20

21 *2. USBP Does Not Have Legal Custody Over Minors in these Areas.*

22 Contrary to Plaintiffs’ assertion, the Agreement does not encompass and was
23 not intended to encompass the legal custody of minors from the point of discovery
24 or encounter. Plaintiffs primarily rely on the Court’s Order from the Title 42
25 litigation where this Court held that “[t]he Agreement employs the formal meaning
26 of ‘legal custody,’ derived from family law, signifying the right and responsibility
27 to care for the well-being of the child and make decisions on the child’s behalf.” *See*
28 *Flores v. Barr*, No. 85-4544-DMG, 2020 WL 5491445, at *3 (C.D. Cal. Sept. 4,

2020) (“Title 42 Order”). In assessing legal custody in the Title 42 context, this Court focused on the degree of control the government maintained over minors processed under Title 42. *Id.* at *4-5. Specifically, the Court noted that “DHS agents have near complete control over whether, when, and how they apprehend individuals under Title 42,” “DHS also has complete control over where and under what conditions to detain minors under Title 42, including over the decision to house them in hotels,” and “DHS has wide discretion to determine when and whether minors held under Title 42 leave their custody.” *Id.*

Critically, the issue before the Court during the Title 42 litigation was not *whether* minors were in legal custody, but rather *who* had legal custody—DHS or the Centers for Disease Control and Prevention (“CDC”). The Court noted that “Defendants do not dispute the degree of control DHS exercises over the minors. They also rightly recognize that the Agreement contemplates a definition of ‘legal custody’ distinct from physical custody [...]” Title 42 Order, at *5 (internal citations omitted). The Court determined that DHS maintained legal custody of minors subject to Title 42 expulsion because “[f]rom the moment they are *first apprehended* until they are released or expelled, DHS has the authority to make decisions relating to the welfare and legal status of the children.” *Id.* at *4 (emphasis added). Again, here, USBP has not arrested or apprehended any minors in these areas. Moreover, USBP does not exercise control—much less “near complete control”—over minors in these areas, and therefore minors are not in CBP’s legal custody as defined by the Court. *Id.* at *4. Plaintiffs’ allegations that Defendants are violating the Agreement rely on strained readings of its terms and this Court’s prior Title 42 Order.

To begin, Plaintiffs describe these areas as “open-air detention sites,” which is inaccurate. These are open areas in the field near the California – Mexico border where individuals began congregating around October 2022 (in IMB) and March 2023 (in Jacumba). The areas are in the vicinity of the IBB, but, in Jacumba, in particular, there is a single 30-foot-high IBB with no further fencing. Schwerdtfeger,

Decl. ¶ 13. Plaintiffs assert four allegations in support of their contention that CBP has legal custody over minors in these areas, namely: (1) CBP has custody of minors from the moment of first discovery; (2) CBP has authority to determine where minors are detained; (3) CBP controls conditions in these areas; and (4) CBP unilaterally determines when minors leave these areas. ECF No. 1392-1, at 12-18.⁴ Defendants address each in turn.

⁴ Defendants object to certain declarations submitted in support of Plaintiffs' motion on the ground of hearsay under Federal Rules of Evidence 801(c) and 802. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773–74 (9th Cir. 2002) (Evidence submitted to the Court on motion practice must meet all requirements for admissibility if offered at the time of trial.). *First*, regarding the allegation that minors have spent multiple nights in these areas, three of the cited declarations rely on inadmissible hearsay. *See* Pinheiro Decl. ¶¶ 7, 12-13, 26-27 (“[An individual] told me I spoke to migrants”); Rios Decl. ¶¶ 19-20 (“I spoke to several people”); Serrano Decl. ¶ 18 (“according to what migrants have shared with me”). Although Plaintiffs present one example of two minors who allegedly stayed at a site for multiple nights, *see* Cheng Decl. ¶ 12, it is ambiguous whether the declarant is relying on personal knowledge or hearsay, *see id.* ¶ 1, and the declarant does not even identify at which area minors were allegedly located, *see id.* ¶ 12 (referring to “Jacumba OADS” after previously naming three separate sites near Jacumba). Plaintiffs also refer to minors staying “overnight,” but the specific examples found in Plaintiffs' declarations are of minors who *arrived* in the middle of the night. *See* Jasso Decl. ¶ 28 (family arrived at 10:30 p.m.); Saulo Decl. ¶¶ 9 (family arrived around 3:00 a.m.); E.G. Decl. ¶¶ 7 (family arrived at 2:00 a.m.). *Second*, regarding the allegation that minors are separated from their parents, Plaintiffs' sole example is based on inadmissible hearsay about what an individual said to the declarant. *See* Jasso Decl. ¶ 15. *Lastly*, regarding the allegation that Border Patrol agents tell minors to remain in these areas and return those who leave, Plaintiffs rely on hearsay statements. *See* Pinheiro Decl. ¶¶ 26–27, 29 (“[M]igrants have consistently told me that Border Patrol agents tell them that they have to stay in the camps, or they will be deported. . . . Contractors and volunteers have observed migrants being apprehended and brought back to the OADS.”); Serrano Decl. ¶¶ 9, 12 (“Migrants in Jacumba have also told me”). While the statements of Border Patrol agents are not themselves hearsay, the statements of non-declarants about what agents allegedly said to them are hearsay.

1 *First*, Plaintiffs incorrectly assert that “CBP authority over a noncitizen
2 child’s welfare and legal status begins when CBP agents first encounter the child,”
3 or upon “first discovery.” ECF No. 1392-1, at 12. The terms “encounter” and
4 “discovery” do not exist within the four corners of the Agreement. Plaintiffs cannot
5 now insert or implicitly read in terms that were never included in the consent decree
6 to advance their arguments. The terms that do exist in the Agreement are
7 “apprehension,” “arrest,” “detention,” and “processing.” Plaintiffs cite the
8 Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), codified
9 at 8 U.S.C. § 1232, in support of the proposition that “CBP’s legal powers and
10 responsibilities related to unaccompanied children [UCs] begin at the time of
11 discovery of the child.” *Id.* at 13. However, the Ninth Circuit already determined
12 that the TVPRA—which specifically provides protections for UCs—did not modify
13 the Agreement. *See Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016) (stating that
14 the “TVPRA partially codified the [FSA] by creating statutory standards for the
15 treatment of [UCs].”). And, moreover, the TVPRA’s timelines keyed to “discovery”
16 of a UC relate solely to DHS’ obligation to *notify* the U.S. Department of Health and
17 Human Services’ Office of Refugee Resettlement of the discovery of that child. It
18 does not speak to or provide any obligations related to whether the child must be
19 arrested by CBP. Plaintiffs also cite CBP’s National Standards on Transport, Escort,
20 Detention, and Search (“TEDS”),⁵ which provide that USBP agents “will consider
21 the best interest of the juvenile at all decision points beginning at the first encounter
22 and continuing through processing, detention, transfer, or repatriation.” U.S.
23 CUSTOMS AND BORDER PROTECTION, October 2015, at 4. USBP’s actions are
24 consistent with TEDS because USBP continues to prioritize the transportation of
25 minors to a USBP facility. More importantly, the Agreement predates both the
26 TVPRA and TEDS, and they cannot be read as to retroactively apply to a consent
27

28 ⁵ October 2015, available at <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf> (last visited Mar. 4, 2024).

1 decree. By extension, neither the TVPRA nor TEDS informed the parties’
2 understanding of the Agreement in 1997.

3 Plaintiffs also mischaracterize the government’s position before the U.S.
4 Supreme Court in *DHS v. Texas*, No. 23A607, 2024 WL 145108 (U.S. Jan. 10,
5 2024). At issue in that case were specific instances when Border Patrol agents cut
6 concertina wire to apprehend particular migrants or to provide emergency assistance.
7 The government noted that *those noncitizens* were *apprehended* after they exited the
8 river and then directed to an area “where other agents were present to begin the
9 intake process in a controlled and orderly setting, before the migrants were
10 transported by bus to a processing center to complete inspection and processing.” *Id.*
11 at *8. Not only were noncitizens not free to further their entry into the United States,
12 but they also “were not free to leave during their transit to the processing site.”
13 Application to Vacate the Injunction Pending Appeal Entered by the United States
14 Court of Appeals for the Fifth Circuit, *DHS v. Texas*, No. 23A607, 2024 WL 51018,
15 at *21–22 (U.S. Jan. 2, 2024). Plaintiffs assert that “[l]ike individuals *apprehended*
16 while crossing the Rio Grande River, noncitizens that CBP *encounters* along the
17 border and directs to wait in OADS have been apprehended and detained.” ECF No.
18 1392-1 at 14. However, “apprehended” and “encounter[ed]” are not synonymous
19 terms. An encounter could lead to an arrest, but it is *not* an arrest. Further, as
20 discussed above, USBP has not arrested minors at these areas. Schwerdtfeger, Decl.
21 ¶¶ 6, 11, 12, 14. Defendants recognize that arrest may include “temporary
22 detainment” and “detention includes ‘[r]estraint from freedom of movement.’” But
23 USBP does not restrict the movement of individuals in the areas addressed in the
24 MTE. *Id.* ¶ 18. At the same time, SDC is not aware of individuals in large groups in
25 the IMB and Jacumba areas leaving or walking beyond the immediate border area
26 in those locations, although there are options to do so. *Id.* For example, in Jacumba,
27 there are roads and gas stations within walking distance of the locations where large
28 groups congregate, and the town of Jacumba is less than two miles from individuals

1 congregating near Tower 75. *Id.* In IMB, individuals arrive in locations that are
2 immediately adjacent to major metropolitan areas. *Id.* However, individuals
3 generally remain in the locations where large groups congregate and do not further
4 their entry into the United States. *Id.*

5 *Second*, Plaintiffs allege that CBP has transported noncitizens to these areas
6 in CBP vehicles, used CBP vehicles to escort noncitizens to these areas, and directed
7 noncitizens to walk to a specific area and remain there, and even separated families
8 into different areas. ECF No. 1392-1, at 14-15. CBP does not have a policy or
9 practice of directing or encouraging individuals to go to these locations, and does
10 not have a policy or practice of transporting or guiding individuals to these locations
11 to await arrest, transport, and processing. Schwerdtfeger, Decl. ¶¶ 8, 15. However,
12 to the extent that Border Patrol agents did direct or escort individuals to these areas,
13 it would be no different than any law enforcement officer directing heightened traffic
14 to avoid disorder and disarray. Further, family units congregating in these areas are
15 not separated from each other. *Id.* ¶ 19. However, “*single adult men* congregating
16 with large groups are at times instructed to move to a different location within the
17 same area, away from other populations such as UCs and family units, within a few
18 hundred yards of the location at which they arrived.” *Id.* (emphasis added). These
19 instructions to *single adult men* are issued for humanitarian and safety reasons, and
20 to prioritize UCs and family units for field interviews, arrest, and transportation. *Id.*

21 *Third*, Plaintiffs’ allegation that CBP controls conditions in these areas is
22 unsupported. Plaintiffs assert that CBP monitors and orders noncitizens to comply
23 with CBP orders. USBP does count the individuals in these locations, but only to
24 “determine the number of individuals in need of transportation and compare that
25 number with available detention space at the SDC facilities.” *Id.* ¶ 18. This is a
26 process antecedent to arrest, but not part of an arrest itself. From approximately May
27 9, 2023, to December 14, 2023, SDC provided colored wristbands to individuals
28 arriving at areas in Jacumba and IMB to identify how long individuals had been

1 present, to help prioritize their arrest and transport to a USBP station. *Id.* ¶ 24. As
2 provided above, USBP has and continues to prioritize the arrest, transportation, and
3 processing of vulnerable populations. Moreover, individuals were not required to
4 put on a wristband and could decline a wristband if they chose to do so. *Id.* Declining
5 a wristband would likely have delayed their arrest and transportation. But passing
6 out wristbands was not tantamount to taking individuals into custody.

7 Importantly, Plaintiffs’ claims regarding monitoring and surveillance fail to
8 consider that USBP must “patrol these areas, along with others, as part of its general
9 duty to patrol and secure the border.” *Id.* ¶ 21. At IMB, cameras were already in
10 place prior to the recent arrival of large groups of individuals. *Id.* The cameras are
11 part of the Remote Video Surveillance System (“RVSS”) designed to detect
12 unlawful entries into the United States. *Id.* The RVSS camera feeds are constantly
13 monitored by SDC personnel in the Tactical Communications Center. In Jacumba,
14 Anduril Surveillance Towers (“ASTs”) are capable of providing surveillance in
15 some areas, including 121 Tower and 177 Tower. *Id.* The RVSS and ASTs were put
16 in place prior to the arrival of large groups, to assist in detecting unlawful entries to
17 the United States in accordance with USBP mission. *Id.*

18 Given the unprecedented numbers of individuals entering these areas, which
19 have overwhelmed CBP’s operations and systems at various points, CBP attempted
20 to redress humanitarian concerns. *Id.* ¶¶ 25-26. Specifically, SDC provides water
21 and snacks to noncitizens in the large groups at the IMB and Jacumba areas if arrest
22 and transportation to a USBP facility is not immediately available. *Id.* ¶ 25. SDC has
23 also placed portable toilets, hand wash stations, and dumpsters in these areas, to
24 alleviate humanitarian needs for those whom SDC could not immediately interview
25 and arrest. USBP funded most of the amenities, except four dumpsters were provided
26 by external entities, including a local elected official and a Non-Government
27 Organization. *Id.* ¶¶ 25-26. As Plaintiffs acknowledge, volunteers have provided and
28 continue to provide supplies and services to individuals in these areas. ECF No.

1 1392-1, at 16. And as Chief Schwerdtfeger attests, the public has access to the IMB
2 and Jacumba areas to provide individuals with water and food, and supplies such as
3 tents and other aid. Schwerdtfeger Decl. ¶ 20. SDC does not have a policy or practice
4 of impeding or restricting public access to the Jacumba areas. Further, at W8,
5 individuals waiting within the IBB (in between the primary and secondary fence) to
6 be interviewed, arrested, and transported to a USBP station, may speak with
7 members of the public, because SDC permits members of the public to approach the
8 IBB in the IMB area. *Id.*

9 Further, if SDC encounters a person in the field—including in one of the IMB
10 or Jacumba areas—who is in apparent medical distress, emergency medical
11 assistance is provided, consistent with agency practice. However, full medical
12 assessments are not conducted unless and until a person is in SDC custody. *Id.* ¶ 23.

13 *Finally*, Plaintiffs assert that CBP unilaterally determines when minors leave
14 these areas for processing. Like any individual who is encountered by USBP, before
15 he or she can be processed, they must first be arrested. Any delays in arrest are due
16 to operational realities such as constraints in detention capacity, staffing, and
17 transportation. It is by no means a delay tactic or means to assert control over
18 individuals. Further, “SDC does not instruct its [Border Patrol agents] to tell the
19 individuals congregating in the IMB and Jacumba areas that their immigration cases
20 will be negatively impacted if they leave those areas.” *Id.* ¶ 18. Presumably,
21 however, if individuals left these areas on their own account, it would delay their
22 arrest, which by extension may affect their ability to seek immigration relief or
23 protection in the United States.

24 In sum, nothing Plaintiffs point to regarding how CBP interacts with minors
25 in these areas rises to the level of establishing that CBP has the “right and
26 responsibility” to care for minors in these areas, or the ability to “make decisions on
27 the child’s behalf.” *See* Title 42 Order, at *3.
28

1 CBP does not manage or make decisions about the movement of individuals
2 in these areas. While individuals at these areas may be subject to encounter and later
3 arrest if they choose to further proceed into the United States, they are otherwise not
4 restricted in their movement. It is only after CBP arrests noncitizens at these areas
5 that CBP will then transport them to a CBP facility and process them, and it is only
6 from the point of arrest that CBP has the ability to make decisions on behalf of *Flores*
7 class members. Up until that point they are free to move around at will, beyond being
8 subject to encounter and arrest if they further proceed into the United States. While
9 the possibility of arrest may function as a form of restriction, it is no different from
10 anyone in Mexico or Canada who may wish to unlawfully enter the United States,
11 and who similarly would be subject to arrest if they did so.

12 Further, CBP's efforts at organizing individuals prior to their arrest do not
13 amount to custody, and in any event, some of those efforts have since ceased. Early
14 on, CBP provided colored wristbands to individuals. Indeed, Plaintiffs recognize that
15 when CBP does not use wristbands, "processing is chaotic." *See* *Pinheiro* Dec. ¶ 32;
16 *Cheng* Dec. ¶¶ 17-20. The wristbands were provided not to exercise control over
17 these individuals, but rather to try to expedite CBP's ability to arrest them.
18 Individuals were free not to take a wristband or to decline to go where CBP told
19 them, and thus CBP did not exercise control over individuals through these actions.

20 USBP has also observed members of the public access these areas to provide
21 individuals with water and food. Plaintiffs assert that at various points USBP
22 restricted volunteers' access who wanted to provide food, water, and medical care
23 to minors at these areas. But USBP does not impede or restrict access to the Jacumba
24 areas by members of the public. Further, individuals who are waiting within the IBB
25 at W8 to be encountered, arrested, and transported to a USBP station may speak with
26 and receive aid from members of the public. Indeed, Plaintiffs' counsel have also
27 been visiting these areas, as evidenced by two declarations submitted in support of
28 their MTE. *See* ECF Nos. 1392-12, 1392-13; Ex. 9, 10. Notably, Plaintiffs' counsel

1 did not need to follow the procedures outlined in the Agreement for attorney-client
2 visits of *Flores* class members, such as formal notification to Defendants to arrange
3 the attorney-client visits, because these areas are not USBP facilities and CPB does
4 not in fact have legal custody over minors in these areas. FSA ¶ 32.A.; *Id.* Ex. 2 (m).

5 Ultimately, Plaintiffs seek to frame Defendants’ good-faith humanitarian
6 efforts to respond to a large number of unlawful crossings into the United States as
7 an indication of legal custody under the Agreement. This cannot pass muster under
8 the Agreement because the consent decree simply does not address processes and
9 procedures prior to arrest and apprehension.

10 **B. Defendants Should Not Be Required to Implement the Procedures**
11 **Requested by Plaintiffs.**

12 This Court should deny Plaintiffs’ motion asking this Court to impose
13 procedures that are outside the four corners of the Agreement. In addition to the
14 reasons provided above why Plaintiffs’ MTE should be denied, the Court should
15 further consider the following specific errors and concerns that should preclude the
16 entry of Plaintiffs’ requested relief.

17 *First*, Plaintiffs request that all minors “discovered” by DHS in these areas
18 and other locations are *Flores* class members as defined by Paragraph 10 of the
19 Agreement. ECF No. 1392-2 (“Proposed Order”) ¶ 1. This proposed relief—
20 presented as a matter-of-fact statement—is, in fact, not supported nor required by
21 any provision of the Agreement and seeks to broaden the definition of a *Flores* class
22 member beyond the plain terms of the Agreement. Notably, Plaintiffs’ use of the
23 term “discovery” of a minor demonstrates that Plaintiffs cannot point to any
24 definitive point at which CBP assumes legal custody of a minor.

25 *Second*, Plaintiffs request that DHS expeditiously process all minors and place
26 minors in facilities that are safe and sanitary and that are consistent with DHS’s
27 concern for the particular vulnerability of minors. *Id.* ¶ 2. This proposed relief is
28 superfluous as DHS is *already* promptly apprehending and processing minors and

1 transporting them to USBP facilities that are safe and sanitary and that are consistent
2 with DHS's concern for the particular vulnerability of minors. Currently, individuals
3 who congregate in these areas are generally arrested by Border Patrol agents within
4 12 hours of encounter. *See* Schwerdtfeger Decl. ¶ 27.

5 *Third*, Plaintiffs request that DHS cease directing minors to these areas or
6 holding minors in these areas "except for the amount of time DHS is actively
7 preparing the minor for transport or transporting the minor." Proposed Order ¶ 3.
8 This proposed relief is unnecessary as DHS is not directing minors to these areas, it
9 is not CBP policy or practice to do so, and, even if it occurred in the past, it was part
10 of USBP's efforts to triage individuals to avoid disorder. Again, DHS is not *holding*
11 minors in these areas. Once transportation and space at a USBP facility is available,
12 USBP transports minors from the field to a USBP facility for further processing.

13 *Fourth*, Plaintiffs request a record system for minors following two hours of
14 their discovery by DHS. *Id.* ¶ 4. This proposed relief is not required by the
15 Agreement, is wholly inconsistent with the Agreement, and asks the Court to impose
16 an arbitrary "two hours after first discovery by DHS" record-keeping process.
17 Moreover, it seeks to impose a coercive remedy of reporting that is not contained in
18 the Agreement, and is not based on any establishment of breach by a preponderance
19 of the evidence. Instead, as Defendants have shown, CBP is taking comprehensive
20 actions to facilitate the prompt arrest and transportation of minors. For example,
21 SDC has increased the capacity of the soft-sided facility to 750 and has received
22 approval to upgrade the total detention capacity at the soft-sided facility to 1,000
23 individuals when funding becomes available. *See* Schwerdtfeger Decl. ¶ 31. SDC
24 also now has 15 buses to provide transportation for large groups. *Id.* Further, the
25 proposed relief is not, on its face, limited to SDC, and thus would apply to each
26 USBP sector, despite Plaintiffs' allegations relating to SDC only. This proposed
27 relief would be unduly burdensome for USBP and dismissive of the operational
28 realities of each USBP sector. Nothing in the Agreement, or common sense, suggests

1 that a Border Patrol agent in the field must (or even could) conduct the necessary
2 questioning, review any relevant documents, and record information at the precise
3 spot after two hours of “discovery of a minor.”

4 *Finally*, Plaintiffs request that DHS provide minors contact with family
5 members who are arrested with the minor. Proposed Order ¶ 5. This proposed relief
6 is, again, superfluous as DHS does not separate family units, and prioritizes the arrest
7 and transportation of minors (UCs and family units) to a USBP facility.

8 For the reasons explained above, Plaintiffs’ proposed relief is inconsistent
9 with the terms of the Agreement and unwarranted—particularly when Plaintiffs have
10 failed to show a breach of the Agreement. Because the Agreement does not apply to
11 minors who have not been arrested or apprehended by USBP, they are not in the
12 legal custody of CBP, and therefore are not *Flores* class members at this juncture.

13 **IV. CONCLUSION**

14 For all of the above reasons, the Court should deny Plaintiffs’ MTE and their
15 proposed relief.

16
17 Dated: March 15, 2024

Respectfully submitted,

18
19 BRIAN M. BOYNTON
20 Principal Deputy
21 Assistant Attorney General
22 Civil Division

23 WILLIAM C. PEACHEY
24 Director
25 District Court Section
26 Office of Immigration Litigation

27 WILLIAM C. SILVIS
28 Assistant Director

SARAH B. FABIAN
Senior Litigation Counsel

/s/ Fizza Batool
FIZZA BATOOL
JOSHUA C. MCCROSKEY
Trial Attorneys
United States Department of Justice
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: 202-616-4863
Facsimile: 202-305-7000
Email: fizza.batool2@usdoj.gov

Attorneys for Defendants

1 **CERTIFICATE OF SERVICE**

2 IT IS HEREBY CERTIFIED THAT:

3
4 I, Fizza Batool, am a citizen of the United States and am at least eighteen years of
5 age. My business address is 450 Fifth Street, NW, Washington, DC 20001. I am not
6 a party to the above-entitled action. I have caused service of the accompanying
7 **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION**
8 **TO ENFORCE, ECF NO. 1392**, on all counsel of record, by electronically filing
9 the foregoing with the Clerk of the District Court using its ECF System, which
10 electronically provides notice. I also notified Plaintiffs' counsel by electronic mail.
11 I declare under penalty of perjury that the foregoing is true and correct.
12

13 DATED: March 15, 2024

14
15 /s/ Fizza Batool
16 FIZZA BATOOL
17
18
19
20
21
22
23
24
25
26
27
28