

1 UNITED STATES DISTRICT COURT  
 2 CENTRAL DISTRICT OF CALIFORNIA

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4 HONORABLE DOLLY M. GEE, JUDGE PRESIDING

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 8 **JENNY L. FLORES, et al.,** )  
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 10 )  
 11 Plaintiffs, )  
 12 ) No. 85-4544DMG  
 13 VS )  
 14 )  
 15 **EDWIN MEESE, et al.,** )  
 16 )  
 17 )  
 18 Defendants. )  
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Reporter's Transcript of Proceedings  
**Plaintiffs' Motion to Enforce Settlement of Class Action**  
**Defendant's motion to Modify Settlement Agreement**  
 Los Angeles, California  
**FRIDAY, APRIL 24, 2015**

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1       **FRIDAY, APRIL 24, 2015**

3:00 P.M.

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3                       P R O C E E D I N G S

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5                       COURT CLERK: Calling Item No. 5. CV 85-4544DMG.  
6       Jenny L. Flores versus Edwin Meese.

7                       Counsel, your appearances please.

8                       **MR. HOLGUIN:** Carlos Holguin, Peter Schey and  
9       Wayne Harmen for plaintiffs.

10                      **MR. FRESCO:** Leon Fresco and Sarah Fabian for  
11       defendants, Your Honor.

12                      **THE COURT:** Good afternoon, counsel.

13                      Would the defendants like to address the  
14       Court's tentative?

15                      **MR. FRESCO:** Yes, Your Honor.

16                      May it please the Court, Your Honor. Lee  
17       Fresco from the Department of Justice.

18                      Your Honor, first of all, I appreciate very  
19       much the hard work that went into this order, and so I just  
20       want to address any questions the Court has but also specific  
21       aspects of this order.

22                      Your Honor, the Flores Settlement Agreement  
23       was signed in 1997 and didn't take into account the -- the  
24       factors that are in place today, and I want to get into where  
25       there were some things that we can look at in the Court's

1 order that I think we need to discuss.

2 The first, Your Honor, is that one of the  
3 things, if you look at plaintiffs' proposed order, it talks  
4 about the fact that a parent would have a role to play in one  
5 of our fatalities to determine if the parent wanted to stay  
6 with the child, the parent could stay with the child or the  
7 parent can ask for their child to be released from the  
8 facility, none of that is in the Flores Settlement Agreement,  
9 Your Honor.

10 **THE COURT:** Right. But that isn't really the  
11 material issue in dispute here.

12 **MR. FRESCO:** Well, Your Honor, so, the material  
13 issue in dispute is whether the Flores Agreement applies to  
14 all minors or to unaccompanied minors; and, Your Honor, there  
15 are four, I think, key facts that the order should take into  
16 account.

17 The first, Your Honor, is that we have been  
18 operating family residential facilities where parents are  
19 with minors in a secure facility since 2001, Your Honor.

20 For 14 years we've been operating these  
21 facilities, and the first time we got a lawsuit on this was  
22 in February of 2015 from the Flores counsel. And that I  
23 think is an -- I think that is evidence --

24 **THE COURT:** What about the January one from -- in  
25 DC?

1           **MR. FRESCO:** The January one in DC was not about  
2 us violating the Flores Agreement, Your Honor.

3           **THE COURT:** Oh, that's true.

4           **MR. FRESCO:** And so here is, I think, an important  
5 point about that. In 2004 the plaintiffs' counsel sued for  
6 violating the Flores Agreement, they sued the government. If  
7 you look at that lawsuit, there are 13 very technical  
8 violations, things are much less material than this larger  
9 issue of family detention; and family detention was not  
10 mentioned as one of the 13 items where we were in violation  
11 of the Flores Settlement Agreement.

12                       We have been engaging in family detentions  
13 since 2001, and under no circumstance had the agreement been  
14 read to preclude family residential facilities from  
15 operating. That's why we didn't think it was in violation of  
16 the Flores Settlement Agreement, Your Honor.

17           **THE COURT:** Wait. Let me see if I understand what  
18 you're saying. You're saying that these family residential  
19 centers have been in operation for 13 years?

20           **MR. FRESCO:** Since 2001, the Berks Residential  
21 Facility in Pennsylvania has been holding families: Mothers,  
22 fathers, and children. We've been doing it since 2001 for  
23 children and for families in removal proceedings.

24           **THE COURT:** Right, but that, again, I'm not sure  
25 is addressing the issue. The issue is whether during that

1 13-year period you had a blanket policy refusing to determine  
2 whether or not any of those people held in detention were a  
3 flight risk or a danger to the community.

4 **MR. FRESCO:** First of all, Your Honor, we do not  
5 have such a blanket policy, first of all. That was -- that  
6 claim was discredited by Judge Boasberg in the DC district  
7 court.

8 But second of all, Your Honor, this case is  
9 about the Flores Settlement Agreement, and what the four  
10 corners of the Flores Settlement Agreement mean, Your Honor.  
11 And the debate in the -- there is sort of two debates.

12 The first debate is: Does this mean all  
13 minors, or does this mean unaccompanied minors? And what  
14 we're saying is, the plaintiffs, themselves, showed that this  
15 meant just unaccompanied minors when we've been operating  
16 these facilities that have families in them since 2001, and  
17 they haven't objected until 2015, and they even filed the  
18 lawsuit in 2004, Your Honor, with 13 material violations of  
19 the Flores Settlement Agreement, many of which were a lot  
20 more minor than this large issue that we're debating today.  
21 It's an important issue. And they let that go, Your Honor.  
22 They did not say that there was a reason.

23 And I think it's important that we look at  
24 the Flores Settlement Agreement itself, Your Honor, for a  
25 second --

1           **THE COURT:** No, believe me, I've been studying it  
2 for quite some time.

3           **MR. FRESCO:** Yes -- no, I know you looked at it,  
4 Your Honor. I'm just going to cite a couple of points that I  
5 think are helpful here in terms of where the parties were  
6 impending.

7                       If you go to the first page where it says  
8 Stipulated Settlement Agreement, the "whereas" is, it says:  
9 "Whereas the district court has certified this case as a  
10 class action on behalf of all minors," that's actually not  
11 what happened.

12                      If Your Honor goes to the 1986 class  
13 certification, actual order, it wasn't -- so, "all minors" is  
14 a shorthand.

15           **THE COURT:** In fact, why don't you tell me where  
16 that is, because I was looking on the docket for it, and I  
17 couldn't find the order. So, I assumed that the parties had  
18 stipulated to the class.

19           **MR. FRESCO:** No, Your Honor, and there is actually  
20 not a merger clause in this Agreement, which means we can  
21 submit this kind of parole evidence. And I just found it  
22 recently, so I can put it in the record, Your Honor.

23           **THE COURT:** Well, I can take judicial notice of an  
24 order.

25           **MR. FRESCO:** Yes. Yes.

1           **THE COURT:** Well, where is it?

2           **MR. FRESCO:** It's -- well, we have it in our files  
3 in DC, and I have all the --

4           **THE COURT:** Is there a docket number of that  
5 order?

6           **MR. FRESCO:** Do you know the docket number?

7                     I mean, I can -- it's in the -- it's in --

8                     I mean I literally can get it scanned and  
9 into the Court's file in an hour.

10          **THE COURT:** Well, of all of the piles of documents  
11 that we received, we were looking for that order, and we  
12 couldn't find it.

13          **MR. FRESCO:** Yes, Your Honor, and I apologize.  
14 I -- it's not obviously available on the Pacer, and so we  
15 didn't have everything in our -- you know, we warehouse these  
16 things in the government, and we have to pick them up. So, I  
17 just recently saw them, Your Honor.

18                     But here is what's critical about the class  
19 that was certified in 1986. It was: "All persons under the  
20 age of 18 years who have been, are, or will be arrested and  
21 detained pursuant to 8 USC 1252 by the immigration service  
22 within the INS western region and who have been, are, or will  
23 be denied release from INS custody because a parent or legal  
24 guardian fails to personally appear to take custody of them."

25                     So, that's what we were talking about when it

1 says whereas, this is who the class that was certified was.  
2 It was people who were not with a parent, who didn't have a  
3 parent to come pick them up.

4 So, when they're talking about all of the  
5 minors, that's what this talks about in that second  
6 paragraph, all minors, those are the "all minors" that  
7 they're talking about, Your Honor.

8 **THE COURT:** So, then, why in your stipulated  
9 settlement agreement did you not limit it to "unaccompanied  
10 minors"?

11 **MR. FRESCO:** Because in 1997, unlike in 2001, we  
12 were not engaging in family detentions. Nobody knew about  
13 that concept. It didn't exist. There was no --

14 There was nothing to foreseeably see because  
15 no one -- that thought hadn't even occurred to anyone's mind.  
16 And that's what the judge ruled in the Bunikyte case which  
17 Your Honor's court order cites. If nobody thought of that,  
18 and there is no dispute that nobody thought about family  
19 detention, and here is why, Your Honor.

20 First of all, the word "parent" appears one  
21 time in this 30-page Flores Settlement Agreement. I did the  
22 math, and the only place the word "parent" appears is when it  
23 talks about --

24 **THE COURT:** -- releasing.

25 **MR. FRESCO:** Yes, releasing the child to the



1 parent. It doesn't appear anywhere else because the  
2 Agreement didn't contemplate people coming with their  
3 parents, people being detained with their parents, Your  
4 Honor. So, that's a critical point.

5 The second point, Your Honor, is, the  
6 solution for the fact that the Agreement doesn't contemplate  
7 parents, the only way the plaintiffs can square that is to  
8 write a whole new language in about the parent having now the  
9 say over where the kid is housed, which is not what this  
10 agreement talks about. It talks about the minor being in  
11 complete control and being able to file court actions and  
12 being able to do anything the minor chooses to get released.

13 Now, if you look at the plaintiffs' court  
14 order, Your Honor, it says: If a parent wants to stay with  
15 the child, the parent can stay about the child. That's  
16 rewriting this agreement. And the reason it has to rewrite  
17 this agreement is because the agreement didn't contemplate  
18 that, Your Honor.

19 **THE COURT:** I'm not sure that that means it's  
20 rewriting the agreement. They're asking you to comply with  
21 the terms of the agreement.

22 If someone voluntarily wants to excuse  
23 themselves from your implementation of this settlement  
24 agreement, they're saying there should be some accommodations  
25 for that. I'm not ordering it. I haven't ordered any remedy

1 yet. That's partly the reason, is because I don't think  
2 there has been sufficient briefing of what relief is  
3 appropriate once I found a breach.

4 **MR. FRESCO:** But that's the question, Your Honor.  
5 Is that only underscores the point. Who's choice is it? The  
6 entire Flores Settlement Agreement, talks about the choice  
7 being the minor's. The parent isn't in there at all. The  
8 parent is not contemplated. The child -- the idea that the  
9 child is coming with their parent is not taken into account  
10 anywhere, in the transportation section, in the housing  
11 section, anywhere.

12 So, that's what we're trying --

13 **THE COURT:** Well, isn't that presumed in  
14 paragraph 14, if the first category of preferred release  
15 custodian is the parent?

16 **MR. FRESCO:** I don't think so, Your Honor, and  
17 here is why I don't think so. Because it talks about  
18 releasing to the parent, not releasing simultaneously. But  
19 also it talks about the need to conduct a study of the home  
20 to determine if that home is going to be suitable.

21 **THE COURT:** But wasn't -- wasn't the statutory  
22 context in 1997 the same as it is now, which is, that people  
23 who are detained have to be determined to be either a flight  
24 risk or a danger to the community; and if they are not, then  
25 they must be released.

1           **MR. FRESCO:** Your Honor, the statutory framework  
2 is the same, but I would respectfully submit that's not the  
3 statutory framework. The statutory framework gives broad  
4 discretion to ICE to detain someone in removal proceedings.  
5 Those are two of the main factors, but the statute does not  
6 limit it to only those two factors.

7                       But I think this raises an important point,  
8 which is discussed in the Bunikyte case, and I think it's  
9 critical here that not just the broad discretion but  
10 paragraph 14 of Flores itself talks about being able to  
11 maintain the custody of the child if it's in the safety  
12 interest of the child.

13                      And what I fear about this draft order, Your  
14 Honor, is that now we've taken a situation where the child is  
15 safe, we don't have any allegations from the plaintiffs that  
16 a child has been harmed at one of our family -- physically  
17 harmed -- at one of our family residential facilities, and  
18 we're creating uncertainty in that process, because we're not  
19 going to -- we're not going to release the adults. The  
20 adults there are either reinstatement cases, meaning they've  
21 crossed a second time over the boarder which means -- one, we  
22 have to detain them, but second, it's clear they're a flight  
23 risk because now they've come back a second time in violation  
24 of the law, or they've been adjudicated in a bond proceeding  
25 to be a flight risk.

1                   So, we're not going to release the parents;  
2                   and so, now the question is, what the Court is potentially  
3                   doing is injecting uncertainty about what is going to happen  
4                   to these children into this proceeding.

5                   **THE COURT:** What is your practice with regard to  
6                   unaccompanied minors?

7                   **MR. FRESCO:** Unaccompanied minors, by definition,  
8                   do not have a parent. The parent has either abandoned,  
9                   abused or neglected them. So, we have to do something with  
10                  this unaccompanied minor.

11                  **THE COURT:** No, but don't you apply the Flores  
12                  Settlement Agreement to unaccompanied minors?

13                  **MR. FRESCO:** Your Honor, that is one of the  
14                  reasons the Flores Settlement Agreement needs to be updated,  
15                  because basically, the answer is no. It's now all done by  
16                  TVPPRA, the Trafficking Victims Protection and Reauthorization  
17                  Act of 2008.

18                  Everything the Flores Settlement Agreement  
19                  talks about is old and outdated. Now the child goes for HHS  
20                  custody. HHS is not anywhere in this agreement. There is  
21                  not contemplation of this.

22                  HHS then tries to figure out if there is a  
23                  guardian available, Your Honor; and if there is not a  
24                  guardian available, then HHS maintains the child in their  
25                  custody.

1           **THE COURT:** But there was a stipulation between  
2 the parties addressing that, wasn't there? Dealing with the  
3 change of the names of the parties.

4           **MR. FRESCO:** Your Honor, there is certainly  
5 continuity in -- in the enforceability of the Flores  
6 Agreement, but the Flores Agreement does not trump an act of  
7 Congress. And so the act of Congress, the TVPRA, changes how  
8 we are to handle children. And here is why this is critical,  
9 and why the Court's order is potentially difficult for us to  
10 implement in a way that preserves the safety of children.

11                   DHS no longer is in this business of trying  
12 to determine if you order a release of someone in their  
13 facility about whether that child is going to be safe.

14                   All of the expertise, all of the skill, all  
15 of that is now done by HHS, Your Honor. And Congress knew  
16 about accompanied minors in 2008 when they passed the TVPRA,  
17 and they say we're only going to have HHS do this for  
18 unaccompanied minors. We're not going to have a scenario  
19 where we're doing this analysis for accompanied minors,  
20 because they have a parent who's there.

21                   And so that's the fundamental flaw, I think,  
22 in this -- in this draft order, Your Honor, is, we're taking  
23 a situation where the parent is with the child, they're  
24 looking after the child, especially if you look at the Dilley  
25 facility, Your Honor, the new facility, there is almost no

1 evidence of any discord there. And, in fact, the mothers --  
2 I read this with great heartening, call their residences "my  
3 house," you know, "my home," because that -- the conditions  
4 in the Dilley facility are not even disputed in this  
5 recorded, Your Honor. So, we're going to be moving children  
6 from that safe and secure environment into one of potential  
7 uncertainty.

8 And then, second, what most worries me, Your  
9 Honor, is that once it's known that again we've returned to a  
10 situation where families are not able to be housed in these  
11 facilities, even as a discretionary basis -- I know the Court  
12 has a problem with blanket policy which we can discuss -- but  
13 even as a discretionary basis when necessary, then we allow  
14 dangerous smugglers to use children to fool the system and to  
15 say this is my child, and then we have no ability to house  
16 people to figure that out, Your Honor.

17 **THE COURT:** Well, what were you doing for the past  
18 13 years?

19 **MR. FRESCO:** Your Honor, if we couldn't verify  
20 this within the very short term custody of the CBP facility,  
21 we had to release those individuals. That's the problem,  
22 Your Honor.

23 **THE COURT:** And what evidence in the record is  
24 there that there was a raft of problems as a result of  
25 compliance with Flores during the past 13 years?

1           **MR. FRESCO:** Your Honor, with -- with which issue?  
2 With the issue of safety to the children?

3           **THE COURT:** Yes.

4           **MR. FRESCO:** Yes, Your Honor, the Tae Johnson  
5 affidavit talks about the fact that -- I will read -- I will  
6 read the affidavit.

7                       It talks about the fact that: "Unrelated  
8 children are at increased risk of trafficking by smugglers  
9 who bring them across the border in an attempt to avoid  
10 detention by representing themselves as a family unit."

11           **THE COURT:** That is what is called a conclusory  
12 statement.

13           **MR. FRESCO:** But, Your Honor, at this --

14                       First of all, we would -- we should have an  
15 opportunity to further develop the record here. This is sort  
16 of the equivalent of a complaint idea, and I don't view this  
17 as the end of the proceeding; I view this as the beginning of  
18 the proceeding. But second of all, discounting the person  
19 who Congress put in charge of making these tough choices when  
20 they're saying that this is what they've observed and they've  
21 seen, Your Honor, I think is a very dangerous step at this  
22 point.

23           **THE COURT:** Well, I'm not suggesting that I don't  
24 think it's true. I don't have anything in the record from  
25 which I can make a determination in that regard.

1                   What I'm saying is, if this is something that  
2 was of concern in the past 13 -- 18 years, since the Flores  
3 Settlement Agreement was entered into, why in the world  
4 didn't you seek to modify the agreement or promulgate  
5 regulations that would deal with the situation?

6                   **MR. FRESCO:** So, again, modifying the agreement  
7 presupposes something that we simply, categorically reject  
8 which is that family residential facilities for accompanied  
9 minors, as opposed to unaccompanied minors, violates this  
10 agreement. In 2001 we opened our first family residential  
11 facility, and we got no lawsuits from the plaintiff.

12                   There was a lawsuit in 2004 about 13 other  
13 factors, nothing about operating family residential  
14 facilities, Your Honor. So, we have operated family  
15 residential facilities. Their legality has not been  
16 questioned, Your Honor.

17                   Even in the Bunikyte case --

18                   **THE COURT:** But there is -- I don't think there's  
19 anybody who is saying that family residential centers per se  
20 are violative of anything. The question is, who are you  
21 putting in them and for how long?

22                   **MR. FRESCO:** Yes, but, Your Honor, the threshold  
23 question, believe it or the not, is if you say that family  
24 residential centers don't violate anything, it implicitly  
25 acknowledges that we're not in violation of the Flores --



1           **THE COURT:** No, it doesn't. I'm simply saying  
2 that just because you built these family residential centers  
3 alone doesn't mean that you've violated the Flores Agreement.

4                       What they're saying you violated is the  
5 requirement to exercise your discretion to determine on a  
6 case-by-case basis whether any of these minors are a flight  
7 risk or a danger to the community; and if so -- or if not,  
8 then they have to be treated in accordance with the  
9 requirement under the Flores Settlement Agreement.

10           **MR. FRESCO:** This is where I think I have to  
11 correct a few -- a few -- a misunderstanding here.

12                       The plaintiffs -- and I don't want to make  
13 their argument for them, would say, if we're housing children  
14 at all for any reason past 72 in a family residential  
15 facility, we're violating the Flores Settlement Agreement.  
16 And so that we're saying, is, we do not believe that. I  
17 don't know if the Court believes that.

18                       With regard to the reasons why we detain  
19 someone, everyone now who's at one of our family residential  
20 centers, Your Honor, the parents have been declared either in  
21 mandatory detention, meaning they can't leave because they're  
22 in a category that their detention is mandatory, or that  
23 parent has now been adjudicated as a flight risk, Your Honor,  
24 or potentially in some small situation a dangerous person.

25                       So, the question is, what do we do with the

1 child in that situation? And what VHS has decided, both  
2 consistently with paragraph 14 -- although we don't think the  
3 Flores Settlement Agreement applies -- but consistent with  
4 that paragraph and consistent with their congressionally  
5 mandated authority to make these tough choices, is that the  
6 child's best interests are maintained by keeping the child  
7 with that parent that we have to keep detained rather than  
8 turning that child into a de facto unaccompanied child.

9 What I would note, which is incredibly  
10 powerful to me, is that in that Bunikyte decision, the  
11 plaintiffs agreed with the government. They said it would be  
12 harmful to separate the parents with the children. Only now  
13 are we getting a claim where maybe that's not harmful; but I  
14 think any person of reasonable view here --

15 **THE COURT:** Well, I -- I think that even now  
16 they're not going to content that if a mother wants to assert  
17 her authority to keep her child with her that the Flores  
18 Agreement has to be imposed upon them involuntarily.

19 **MR. FRESCO:** But that only underscores the point,  
20 Your Honor, of where is any of that in the settlement  
21 agreement? We're just making this up as we go along. None  
22 of it is in there.

23 **THE COURT:** Isn't there something that says you  
24 have to take into account the wishes of the minor?

25 **MR. FRESCO:** The wishes of the minor, Your Honor.

1 Exactly. Here, the proposed order of the plaintiff says we  
2 take into account the wishes of the parent, not the wishes of  
3 the minor, Your Honor.

4 So, if the minor wants to stay, and the  
5 parent wants the minor released, what do we do then?

6 **THE COURT:** Well, generally it's consonant, but in  
7 the rare occasion when it's not, I suppose the Flores  
8 Agreement requires you to take into consideration the  
9 interests of the -- or the wishes of the minor.

10 **MR. FRESCO:** Okay. Now on the flip side, when the  
11 minor wants to be released and the parent doesn't want to  
12 be -- so the minor --

13 When the minor wants to be released, and the  
14 parent doesn't want the minor to released, what do we do  
15 there? That's -- those are -- those are the tough questions,  
16 Your Honor.

17 **THE COURT:** Well, the upshot of it is, I didn't  
18 draft this agreement.

19 **MR. FRESCO:** Yes, Your Honor.

20 **THE COURT:** You did.

21 **MR. FRESCO:** Yes, Your Honor.

22 **THE COURT:** So, if there is ambiguity in the  
23 agreement or if the parties think that they can mutually  
24 agree to revise the agreement so that it clarifies certain  
25 issues that have crystalized in the last 18 years that should

1 have been addressed sooner, you're free to do that.

2 This is -- this is a contract. You can  
3 modify the agreement if you wish. But what you're asking me  
4 to do is to unilaterally modify the agreement, and that I  
5 cannot do.

6 **MR. FRESCO:** Well, there's two steps, Your Honor;  
7 and, first, we're not asking you to -- the first step is not  
8 asking you to unilaterally modify the agreement.

9 The first step is saying, which I think is  
10 our threshold argument, that if you look at this agreement,  
11 it doesn't take into account the situation where a minor came  
12 to the United States with their parents, and the class  
13 certification definition there which we will file immediately  
14 after this hearing shows you that the fact that the word  
15 "parent" is only in that contract, the one that shows you  
16 that; the plaintiffs' interpretation of this contract for the  
17 last 15 years shows you that, Your Honor.

18 And I think it would be a manifest injustice  
19 to now, 15 years later, come back and say: Wait a second,  
20 you shouldn't have been having this family detention that  
21 you've had since 2001.

22 **THE COURT:** Well, it is not unusual, and I have  
23 had many a class action settlement come before me, that the  
24 class that is certified is not the class that is specified in  
25 the parties' settlement agreement.

1                   If the parties had wanted to limit the  
2                   settlement agreement to those minors who were unaccompanied,  
3                   why didn't they do that in the Flores Settlement Agreement?

4                   **MR. FRESCO:** Your Honor, the entirety of this  
5                   agreement is about unaccompanied minors. There is no even a  
6                   thought process that anybody here involved a parent coming  
7                   across with their child.

8                   Again, the best evidence of that, Your Honor,  
9                   was the class that was certified in the case. The  
10                  best evidence of --

11                  **THE COURT:** But there is a definition of what the  
12                  class is in the settlement agreement to which these  
13                  provisions apply; and it does not qualify it to accompanied  
14                  or unaccompanied minors. Even the Court in Bunikyte, or  
15                  however you pronounce it, made that finding.

16                  **MR. FRESCO:** Yes, Your Honor. I know that it's  
17                  correct that the Court made that finding. And I think with  
18                  the all minor section --

19                         I'll tell you -- a few things.

20                         The *all minor* section, Your Honor, is  
21                         contemplating what the parties viewed at that time, and here  
22                         is how we know that, because of all the tough questions we  
23                         talked about would necessarily need to have been in the  
24                         agreement for us to figure out.

25                         What was going to be the role of a parent in

1 a situation where a parent wanted to keep the child in  
2 custody? What was going to be --

3 What were we going to have to do with the  
4 parent when we were transporting the child? What were we  
5 going to do with a parent when there was an objection that  
6 the child wanted --

7 None of that is in the agreement, Your Honor.

8 **THE COURT:** Well, that is the reason why  
9 agreements need to be clear, because apparently the  
10 plaintiffs don't agree with you that was their intent when  
11 they entered into the agreement.

12 **MR. FRESCO:** Well, of course, Your Honor. But  
13 then -- I would say this. If the Court thinks this agreement  
14 is ambiguous, which I think from the debates that we're  
15 having here are all of these very difficult, fundamental  
16 unanswered questions, an unambiguous agreement shouldn't be  
17 read to trump the congressionally mandated discretionary  
18 authority that DHS has to resolve these questions of who is  
19 going to be detained and when, Your Honor. That is a very  
20 dangerous precedent to read, and especially when we look at  
21 what the outcome is going to be.

22 The outcome of this is going to be to  
23 separate families, create uncertainty where we don't have  
24 that uncertainty now, and to endanger children in two ways,  
25 Your Honor, both from encouraging people, just as normal

1 family units that come across; but more importantly, Your  
2 Honor, these very dangerous smugglers who take children  
3 because they know that they won't then released, Your Honor.

4 All of that are legitimate, unavoidable  
5 consequences of a decision like the draft decision. And so,  
6 what I would ask the Court is, if the Court is not interested  
7 in reconsidering these arguments, to at least not issue the  
8 order and let us try to figure out some way that could work,  
9 you know, to satisfy some of the concerns of the plaintiffs.  
10 But to issue this order, Your Honor, I think would create a  
11 very difficult environment to resolve these very difficult  
12 security concerns.

13 The Department of Homeland Security  
14 doesn't -- is trying to do the best they can. This is a very  
15 difficult situation. What was happening last year, nobody  
16 was prepared for it, and --

17 **THE COURT:** I don't disagree with that.

18 **MR. FRESCO:** Yes. And so what we were trying to  
19 do, Your Honor, was to figure out how best to resolve the  
20 emergent situation in a way that respected both the family  
21 unit that was coming across the United States and the public  
22 safety interests, and that's why we did what we did, Your  
23 Honor. And it's worked to the extent that those numbers have  
24 gone down.

25 We're in the middle of the high season now,

1 the cert season, and so we should at least have the  
2 opportunity to get through this season, Your Honor, and we  
3 can work with the plaintiffs to try to figure out how to  
4 resolve these situations. But an order like this at this  
5 time creates a very difficult scenario.

6 **THE COURT:** You talk about this like it's salmon  
7 spotting or something. Is there a prescribed season?

8 **MR. FRESCO:** Your Honor, unfortunately, yes.  
9 During the spring -- this is -- this is the way these cycles  
10 have gone during the spring season when it's no longer too  
11 cold. March and April, you start to see, historically, the  
12 numbers pick up dramatically. And those numbers continue  
13 until September -- August, September and then those numbers  
14 drop down again.

15 I don't think the plaintiffs would dispute  
16 that. Those are -- or however -- however you want to  
17 describe that phenomenon, I just want to describe it  
18 numerically and statistically, and that is a well known  
19 statistical phenomenon.

20 **THE COURT:** And how long, approximately, do people  
21 remain in these residential centers?

22 **MR. FRESCO:** So, the current numbers that I have  
23 are -- just give me a second and I will -- at the Karnes  
24 facility, it's 60 days is the average length of stay. This  
25 is what I -- gave me a couple of days ago.



1                   At the South Texas, which is Dilley, the new  
2 one that I was talking to you about, where they don't have  
3 the complaints, is 41 days, Your Honor. And at Berks, which  
4 is the one that's been operating since 2001, it's a 116 days.

5                   And they're -- almost everybody is applying  
6 for asylum. So, when you have these asylum claims, Your  
7 Honor, they take longer because people get continuances to  
8 get lawyers, and you've got to get people time to marshal  
9 evidence, et cetera, et cetera. And so we can't, obviously,  
10 try to make people's cases go faster when they're trying to  
11 build their case.

12                  So, those are the average days that we have  
13 of detention there.

14                  If you look at the one case that talks about  
15 length of detention, the ^ Moore versus Kim, six months is  
16 what's considered an unreasonable amount of detention, same  
17 thing as if -- with post custody, we're not there with  
18 regard --

19               **THE COURT:** I'm familiar with it --

20               **MR. FRESCO:** Yes, yes --

21               **THE COURT:** -- (simultaneously speaking.)

22               **MR. FRESCO:** Sorry.

23               (Simultaneously speaking.)

24               **MR. FRESCO:** Yes, yes. I'm sure you have many  
25 cases --

1                   So, we're not anywhere near there, Your  
2 Honor, on -- on -- on those timings.

3                   And, again, one thing that's very important  
4 here is, people get bond hearings already, and people are  
5 winning in bond hearing cases at these facilities.

6                   Moms are getting released; children are  
7 getting released. What we're talking about is orders -- an  
8 order that doesn't -- which the draft order would currently  
9 do -- prevent us from -- in any circumstance housing people  
10 in this situation.

11                  We need to have the flexibility for, if a  
12 parent is considered a flight risk or if a parent is  
13 considered dangerous, or if we think it's safer to have the  
14 child with the parent to house -- and we've made the decision  
15 to house the parent, to house that child with that parent at  
16 this facility, Your Honor; and I'm very concerned that this  
17 order is now preventing us from doing that.

18                  **THE COURT:** All right, thank you.

19                  **MR. FRESCO:** Thank you, Your Honor.

20                  **THE COURT:** Would plaintiffs like to address those  
21 arguments?

22                  And I have some questions for the plaintiffs  
23 as well.

24                  **MR. HOLGUIN:** Yes, Your Honor, Carlos Holguin for  
25 the plaintiffs.

1 I think there's a number of items that  
2 Mr. Fresco asserted that I -- that simply aren't the way  
3 things are.

4 Berks has been in operation for a -- for a  
5 number of times, but it holds about 85 people. The process  
6 that we're confronting now is exponentially more difficult.  
7 Mr. Fresco talks about the dangers of separating -- of  
8 separating parents from children, and the --

9 **THE COURT:** Before you -- before you get to that --

10 **MR. HOLGUIN:** Yes.

11 **THE COURT:** During that 13-year period, when, I'm  
12 told, these were -- there were residential centers that were  
13 in operation, is it true that plaintiffs didn't think that  
14 they were in violation of Flores?

15 **MR. HOLGUIN:** Plaintiffs -- plaintiffs and lawyers  
16 on behalf of plaintiffs sued the government, federal  
17 government for the Huddle facility. That's the Bunikyte  
18 dictionary where all of a sudden they decided they were going  
19 to detain families.

20 They shuttered that facility. So, it's not  
21 as though these -- these residential facilities have gone on  
22 without challenge.

23 Berks is a special case, and Berks, we can  
24 submit a letter from the Pennsylvania Department of Social  
25 Welfare showing that it is not even a secure facility. In

1 addition to having a very small population, it is not a  
2 secure facility, and it has a license. In contrast to Huddle  
3 and in contrast to -- to Dilley and in contrast it on Karnes.

4 So, the -- but -- but the main problem here  
5 is that at the time that -- and for the many years that Berks  
6 has been in operation, the periods of detention were a week  
7 or two. We have declarations in the record showing from  
8 advocates who work and represent people at Berks that the  
9 period of detention there is very, very short.

10 And so, the question becomes the degree of  
11 harm to the class, because after all, we're talking about  
12 enforcing a settlement and asking for equitable relief. If  
13 it's a question of detaining a family for one week or so  
14 until they can be bonded out or paroled out, that is simply  
15 not the same sort of injury as we're talking about now, with  
16 thousands -- hundreds and thousands of mothers and children  
17 are being detained for up to ten months.

18 Now, we can talk about averages, but we can  
19 provide the Court with evidence showing that ten months  
20 that -- that these women and children have been  
21 languishing --

22 **THE COURT:** Then aren't they in violation of -- I  
23 mean they have other problems when they detain people for  
24 that long if they haven't found that they're a safety or  
25 flight risk problems.

1           **MR. HOLGUIN:** Well, the problem is this, is that  
2 these facilities are located in rural areas, far away from  
3 people. I know that American Immigration Lawyers Association  
4 and a number of other organizations have organized pro bono  
5 contentions to try to represent people in these facilities.  
6 It's extremely difficult.

7                       Without a lawyer, the chances of one of these  
8 mothers or their children being released on bail is virtually  
9 nil. Those few that can, do manage to get a pro bono lawyer,  
10 then there is an uphill fight against ICE as to whether  
11 they'll be granted bond or not.

12                      Now, I will say this, that many, many of  
13 these women and their children will pass credible fear  
14 interviews after which they are statutorily eligible to be  
15 released; and yet, even after passing those credible fear  
16 interviews, showing that they have a credible fear of being  
17 returned to their countries of origin, for most -- for many  
18 reasons but primarily for violence, fleeing extreme  
19 insecurity, poverty and -- and domestic violence and abuse,  
20 many, many of these women or a very high percentage are  
21 passing credible fear interviews, and the statistics show  
22 that once they do, 70 percent of them will be granted asylum.  
23 They'll be allowed to remain in the United States  
24 indefinitely.

25                      So, this entire period of detention that

1 they've gone through has been proven a complete waste of  
2 taxpayer money which runs about \$300 a day for taxpayers to  
3 keep women and children in these facilities.

4 Now, I'm surprised, because until now the  
5 main justification of the argument the government has offered  
6 for all of this detention is deterring others, okay?  
7 Apparently that is not something that -- that figures into  
8 their calculus at least at this point in time. It's all  
9 about trying to save families from separation.

10 **THE COURT:** Well, how about their argument that  
11 you never contemplated within the Flores Agreement covering  
12 unaccompanied minors?

13 **MR. HOLGUIN:** Your Honor, I've been working on  
14 this case since 1985. I was involved in the -- in  
15 negotiations that led to this. I know what went on in --  
16 during those negotiations.

17 The class definition expands and clearly  
18 protects all minors because the parties did agree and did  
19 anticipate that there would be children and mothers and --  
20 well, fathers as well, in detention for some periods of time.

21 The regulations -- it's -- at the time this  
22 settlement was negotiated specifically contemplated that  
23 families would be detained.

24 **THE COURT:** So, are you saying that if I look at  
25 the class certification order, it's not going to be limited

1 to unaccompanied minors?

2 **MR. HOLGUIN:** The class certification order that  
3 the Court initially entered, as I recall it, is as Mr. Fresco  
4 read it. However, it was also -- it was also limited to the  
5 western region.

6 The settlement clearly says -- this is going  
7 to go nationwide, and it's going to cover all minors. The --  
8 the -- and it's -- and -- and as the Court pointed out, it's  
9 certainly legitimate for -- for litigants to decide to expand  
10 the coverage of a class in doing -- when they wish to do so  
11 in the context of a settlement.

12 We have pointed out in numerous provisions of  
13 the settlement that it applies to all minors and not simply  
14 those who happen to be unaccompanied.

15 There is no reason why the plaintiffs would  
16 have allowed the intolerable conditions that generated this  
17 lawsuit to be visited upon simply because they had the chance  
18 of being arrested with their mothers or their fathers. That  
19 was not something we would have --

20 **THE COURT:** Let me ask you another question.

21 I don't have any questions about the fact  
22 that the -- the preexisting plaintiffs had standing would  
23 have standing now to say that the agreement that they agreed  
24 to was breached, but do they have standing to seek  
25 affirmative relief?

1           **MR. HOLGUIN:** The original plaintiffs --

2                       This is -- as a certified class action, the  
3 class itself becomes the plaintiff before the Court, and we  
4 can -- we're happy -- we're happy to submit legal authority  
5 to that effect.

6                       The original plaintiffs in this litigation  
7 has long reached the age of majority, but it is the class as  
8 a whole that continues to provide standing.

9           **THE COURT:** Right. But do -- is it -- do I need  
10 to have a plaintiff with standing in this action to enforce  
11 the agreement, or is it sufficient that because it's a  
12 certified class that a -- any class member who has suffered  
13 as a result of a breach would allow this case to go forward?

14           **MR. HOLGUIN:** Yes, Your Honor. There is no  
15 question that the numerous class members are being affected  
16 by this.

17           **THE COURT:** In other words, do you have to name  
18 one of them as a plaintiff, or do we simply assume that  
19 because they're class members that there is sufficient  
20 standing to go forward without a named plaintiff who has  
21 standing?

22           **MR. HOLGUIN:** Yes, there is sufficient standing,  
23 Your Honor, because the class itself is the entity, is the  
24 plaintiff now before the Court --

25           **THE COURT:** As far as the affirmative relief that



1 the plaintiffs seeks, does the Court have to consider that  
2 after the filing of a motion for a preliminary injunction  
3 or -- where you have to show likelihood of success on the  
4 merits and irreparable harm?

5 That's part of the reason why in my  
6 conclusion I did not issue specific remedies, because I  
7 wasn't entirely sure that you can simply file a motion for  
8 enforcement to seek affirmative relief as opposed to a  
9 declaration that the agreement has been breached.

10 **MR. HOLGUIN:** As a technical, matter, Your Honor,  
11 the settlement itself operates perspectively as an  
12 injunction. And we could have brought this motion as one for  
13 contempt. So, therefore, the same remedies that would be  
14 available to the Court on a motion for contempt are available  
15 to the Court Oat this time.

16 Nonetheless, plaintiffs are satisfied that  
17 the proposed order of the Court, which simply says to the  
18 parties: Meet and confer and come up with something to  
19 remedy the violations that the Court has found is -- is a  
20 reasonable remedy at this point in time.

21 If we cannot do that, then we'll have to  
22 trouble the Court with more; but we believe that it's worth  
23 the time to try to do this now that the Court has expressed  
24 its opinions on these matters and are hopeful that we'll work  
25 it out.

1           **THE COURT:** What do you think of Mr. Fresco's  
2 proposal that I should stay issuance of my order and allow  
3 the parties to meet and confer so that they can work out  
4 something mutually satisfactory without the need for my  
5 order?

6           **MR. HOLGUIN:** There is -- there is little -- I  
7 think there is little advantage to proceeding in that way.  
8 The advantage of a particular order is that we know what the  
9 Court's views are. There is a time limit in which we're  
10 required to act, and the parties are operating under a  
11 structure that we can then determine which way is best to go,  
12 given our various interests.

13                   To leave the matter pending, to leave it open  
14 strikes me as when the Court has already determined that  
15 there are violations of the settlement, strikes me as being  
16 something that simply delays and would not -- would not  
17 likely be productive in -- in the parties coming to an  
18 agreement on an actual form of relief.

19           **THE COURT:** Well, you already know what the  
20 Court's thinking is. You've read my tentative, and you know  
21 that I will give you a timeframe within which to try to knock  
22 out an agreement between the parties.

23                   Mr. Fresco is simply saying that he thinks  
24 that all hell will break loose if I issue my order and cause  
25 this whole system of residential centers to collapse of its

1 own weight.

2 **MR. HOLGUIN:** Well, Your Honor, the sky is not  
3 going to fall. The point here is that, where the parties are  
4 going to meet, that's the only substantive remedy that's  
5 being -- relief that the Court is granting at this time.

6 And -- and having the record, the Court on  
7 the record is saying that there are violations of the  
8 settlement, this is not the right thing to be doing, singling  
9 out women and children for this kind of treatment, it's  
10 not -- the sky is not going to fall on that.

11 It's simply a question of justice for a group  
12 of people that have been --

13 The way I would put it is that, you know,  
14 if -- the writing -- the -- the -- his -- his inferno today  
15 places like Dilley, Texas, places like Karnes City, places  
16 like these women are coming from, like -- and Honduras would  
17 be mentioned in those circles of medieval torment. This is  
18 something that should not go on indefinitely, should be --  
19 and should be -- and should be ended as quickly as possible.  
20 And we think -- plaintiffs believe that the process will be  
21 greatly expedited by the Court issuing the order in its form  
22 that it has -- it has provided tentatively today.

23 **THE COURT:** Would you agree with the Court's  
24 observation that these residential -- family residential  
25 centers would still -- could still be used as temporary

1 housing in situations where there is a search, such that they  
2 could be housed there pending a determination as to where  
3 they should be sent?

4 **MR. HOLGUIN:** Yes, Your Honor. The settlement --  
5 the settlement contemplates, and when there is a large number  
6 of individuals, then they can be housed in noncompliant  
7 facilities. But the government must be making efforts to  
8 either release or transfer the minors to properly licensed  
9 facilities.

10 And -- and that is something that we can work  
11 out if we're talking about with the -- with the defendants  
12 about how those facilities -- how long people could be kept  
13 there and so forth. As long as there is a good faith effort  
14 to minimize the amount of time that children spend in  
15 detention. That's the whole purpose of the settlement. And  
16 to keep them in properly licensed facilities.

17 And as long as the government is moving in  
18 that direction, the plaintiffs are willing to be reasonable  
19 in providing some kind of accommodations to allow the  
20 transition to take place in an orderly fashion.

21 **THE COURT:** And does the agreement as it stands  
22 allow for an accomodation to either a minor or a parent who  
23 wishes to remain in the facility?

24 **MR. HOLGUIN:** Your Honor, our -- the plaintiffs'  
25 position is, and we can provide authority to this, if we

1 haven't already done, I believe we have, is that whenever  
2 there is a settlement that confers rights on a class member,  
3 a class member is entitled to waive those rights.

4 Mothers and parents speak for children all  
5 the time. I don't really consider this to be an unusual  
6 situation or one that sets up some untenable chain of order  
7 where there's a conflict between a parent and a child.

8 I have children of my own, and the law is  
9 quite clear when I get to make decisions for them and when  
10 they get -- when they reach the age of maturity, when they're  
11 able to make their decisions.

12 So, this is -- this is something that I think  
13 can also be worked out.

14 **THE COURT:** All right, anything further?

15 **MR. HOLGUIN:** No, Your Honor.

16 **THE COURT:** Mr. Fresco?

17 **MR. FRESCO:** Just -- just a couple of notes, Your  
18 Honor, quickly. Plaintiffs' Exhibit 10, Paragraph 6 from  
19 their affidavit of Brigit Cambria, it says quote/unquote:  
20 "Berks is clearly a secure facility."

21 So, any evidence they're going to have now to  
22 be opposite will be in conflict with that statement, Your  
23 Honor.

24 Second of all, Your Honor, there is no  
25 dispute that Berks has been operating since 2001 as a secure

1 family residential facility and that the first time we have  
2 been sued by the Flores class about operating family  
3 residential facilities is in January, February of 2015.

4 **THE COURT:** Yeah, but what about Ms. Holguin's  
5 point that previously you were only engaging in de minimis  
6 violations and not wholesale violations?

7 **MR. FRESCO:** I think, Your Honor, the operation of  
8 family residential facilities is either a violation of the  
9 Flores Agreement or it's not. And the days in which how many  
10 people have been there has changed. Sometimes it was long,  
11 sometimes it was short. But it wasn't always one way, and it  
12 always wasn't at one time. And if they were going to have a  
13 lawsuit in 2004 with just --

14 I ask the Court to look at those 13  
15 violations. Some of them are extremely technical, something  
16 this massive, you know, of -- of: Can you operate a family  
17 detention facility or not? I think is important.

18 Second, Your Honor, on the class  
19 certification order, I think it's critical that the parties'  
20 understanding of that be framed by the second "whereas" on  
21 the first page of the agreement. Where it says: "Whereas  
22 the district court certified this case as a class action on  
23 behalf of all minors."

24 So, when they said "all minors," that's not  
25 what the class action said. It said what we both agree it

1 said. And so that's what people meant when they meant [sic]  
2 "all minors." They meant "All minors who don't have a parent  
3 to pick them up." That's what they meant. They didn't mean  
4 anybody else, Your Honor.

5 Having said all of that, we understand that  
6 Your Honor is concerned about this issue. I am very thrilled  
7 to convey Your Honor's concern to the Department of Homeland  
8 Security who's trying to do the best they can; but to have  
9 the order out I think is nonproductive. Your Honor can give  
10 us a deadline.

11 We know what the order says, theoretically,  
12 and we -- you know, I think we have good experience.  
13 Maybe -- I don't know if Judge Matz would want to do it again  
14 or not, but I heard that we had good experience with Franco  
15 litigation with him. We could try somebody else. And try to  
16 work this out with the plaintiffs.

17 But I think to have the order out makes the  
18 conditions of a settlement harder because the -- it's a  
19 complete capitulation to -- there is nothing in there for the  
20 government to point to about our interests. All of our  
21 interests are completely discounted in -- discounted in the  
22 sense that Your Honor can consider them, but we lost 100  
23 percent.

24 And so, it leaves us nowhere to go to take  
25 our legitimate security concerns about separating parents

1 from minors, about taking into account --

2 The plaintiffs say this hasn't happened. We  
3 have habeas cases currently, Your Honor, where we have  
4 situations where minors don't want to leave and the parents  
5 want the child to leave, and we have other situations where  
6 minors wants to leave, and the parents doesn't want us to  
7 leave, and we're betwixt in between trying to figure out what  
8 to do in those.

9 And what we've done is we've made the  
10 determination, that is both consistent with paragraph 14 of  
11 Flores, even though, again, different case in our opinion,  
12 but consistent with our congressionally mandated authority to  
13 say that we think the safest thing to do is not to have this  
14 uncertainty, to keep the parent with the child, which  
15 oddly --

16 I don't know why we're debating this because  
17 that wasn't a debate in the 2007 Huddle litigation. This  
18 idea now that we want to encourage separation of parents and  
19 children, that we want to turn accompanied minors into  
20 unaccompanied minors is completely anathema to me, but that's  
21 something I think we need to work out with the plaintiff to  
22 try to figure out are we really going to be encouraging that  
23 in situations where we have to detain the mother. This isn't  
24 a situation where we want to detain the mother; these are  
25 situations where we have to detain the mother, Your Honor.



1           **THE COURT:** All right. Well, I am going to ask  
2 you to lodge a copy of the Court's order certifying the  
3 class --

4           **MR. FRESCO:** Yes, Your Honor.

5           **THE COURT:** -- hopefully by next week.

6           **MR. FRESCO:** Oh, sure. I mean we're in Los  
7 Angeles, but maybe we can make a call to one of our people in  
8 DC. I mean I literally know where the document is sitting in  
9 our office, but we got -- we've got to just get it and put it  
10 in.

11           **THE COURT:** All right. And I am going to hold my  
12 order in abeyance, and I'm going to order the parties to meet  
13 and confer within 30 days and provide the Court with a joint  
14 status report within one week after 30 days.

15           **MR. FRESCO:** Yes, Your Honor. Thank you very  
16 much. I appreciate that.

17           **THE COURT:** All right?

18           **MR. FRESCO:** Thank you.

19           **MR. HOLGUIN:** Your Honor, may I?

20           **THE COURT:** Yes.

21           **MR. HOLGUIN:** Would we be able to retain a copy of  
22 the tentative so that we know -- during -- during the  
23 discussions? Whether -- the Court's thinking on the matter.

24           **THE COURT:** I will permit you to retain a copy of  
25 the tentative, but I would ask that you not share it with

1 anyone or publicize it in any way.

2 **MR. HOLGUIN:** Thank you, Your Honor.

3 **MR. FRESCO:** Thank you.

4 COURT CLERK: All rise.

5 This Court is now in recess.

6 (Recess taken.)

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## C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

Fees charged for this transcript, less any circuit fee reduction and/or deposit, are in conformance with the regulations of the judicial conference of the United States.

/S/Anne Kielwasser

05/01/2015

\_\_\_\_\_  
Anne Kielwasser, CRR, RPR, CSR  
Official Court Reporter

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Date

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