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15 **UNITED STATES DISTRICT COURT**
 16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

17 JENNY LISETTE FLORES; *et al.*,

18 Plaintiffs,

19 v.

20 WILLIAM P. BARR, Attorney
 21 General of the United States; *et al.*,

22 Defendants.
23
24

Case No. CV 85-4544-DMG

25 **DEFENDANTS' OPPOSITION TO**
MOTION TO ENFORCE
SETTLEMENT OF CLASS
ACTION, ECF NO. 919

Hearing Date: Sept. 4, 2020

Hearing Time: 11:00am

Judge: Hon. Dolly Gee

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1 **I. INTRODUCTION**

2 Plaintiffs continue to contend (Motion, ECF No. 919) that the *Flores*
3 Settlement Agreement (“Agreement”) requires the government to implement a
4 process by which U.S. Immigration and Customs Enforcement (“ICE”) must offer
5 the choice to parents held with their children at an ICE family residential center
6 (“FRC”) whether they wish to remain in custody with their child, or have their child
7 released to a sponsor while the parent remains in ICE custody. The Agreement does
8 not require a parent to make such a choice. ICE evaluates all families for release
9 together in the first instance, but in situations where ICE determines that release of
10 the parent is not appropriate, continued custody of children with their parents is
11 appropriate and consistent with the Agreement. This Court should deny Plaintiffs’
12 motion and reject Plaintiffs’ continued campaign for this Court to impose protocols
13 that would, in effect, result in a family-separation mechanism.

14 **II. BACKGROUND**

15 In 2017, this Court ordered Defendants “to make individualized
16 determinations regarding a minor's flight risk rather than blanket determinations.”
17 *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1067 (C.D. Cal. 2017). The Court made
18 clear, however, that “[u]ltimately, based upon an individualized review of the facts,
19 Defendants may conclude that it is in the best interests of an accompanied minor to
20 remain with a parent who is in detention.” *Id.*

21 Since September 8, 2017, the ICE Juvenile Coordinator, Ms. Deane
22 Dougherty, has regularly reported to the Court regarding the manner by which ICE
23 is complying with the Court’s 2017 Order. *See* Defendants’ Supplemental Response,
24 ECF No. 746, April 6, 2020, at 31-35. Additionally, the Special Master/Independent
25 Monitor (“Monitor”) was appointed in 2018 to monitor, among other things, ICE’s
26 compliance with these provisions of the Agreement, and has been responsible for

1 ongoing monitoring of ICE’s compliance with these provisions of the Agreement
2 since that time. *See id.* at 35-36. The Monitor submitted two regular reports, neither
3 of which took issue with ICE’s manner of compliance with the Court’s orders *See*
4 ECF No. 528, March 6, 2019, at 31 (noting some “common reasons that
5 unaccompanied [sic.] children remain in [ICE] custody over 20 days” and stating no
6 concerns or opinions about those reasons); ECF No. 625, August 19, 2019, at 18-21
7 (stating no concerns about any reasons for continued custody past 20 days and not
8 opining on the reasons for custody or on ICE’s release processes in general). Thus,
9 the Court and the Monitor have, at least tacitly, approved of ICE’s processes for
10 complying with the 2017 order.

11 On several occasions, the Court has stated that, as a general matter, a parent
12 may choose, on behalf of the class member child, whether to exercise or waive a
13 class member child’s right to be released under the Agreement. But the Court has
14 left it to the parties to develop and implement any procedures by which such release
15 or waiver could occur and has acknowledged the inherent challenges in efforts by
16 ICE to obtain a waiver of the child’s rights, in this regard. *See Flores v. Sessions*,
17 No. CV 85-4544-DMG (AGRx), 2018 WL 4945000, at *4 (C.D. Cal. July 9, 2018)
18 (“[D]etained parents may choose to exercise their *Ms. L* right to reunification or to
19 stand on their children’s *Flores* Agreement rights. Defendants may not make this
20 choice for them.”); Order, ECF No. 784, April 24, 2020, at 15 n.6 (“Parents may
21 waive their children’s *Flores* rights.”); Order ECF No. 833, June 26, 2020 at 3
22 (requiring ICE to release class member children separately from their parents “with
23 the consent of their adult guardians/parents”); *id.* at 6 (requiring the parties to meet
24 and confer “regarding the adoption and implementation of proper written advisals
25 and other protocols to inform detained guardians/parents about minors’ rights under
26 the FSA and obtain information regarding, and procedures for placement with,

1 available and suitable sponsors”); Order, ECF No. 799, May 22, 2020, at 2
2 (“[A]lthough the Court finds that ICE did not seek or obtain formal waivers from
3 detained parents of their children’s *Flores* rights during ICE officers’ conversations
4 with detained parents on or about May 15, 2020, those conversations caused
5 confusion and unnecessary emotional upheaval and did not appear to serve the
6 agency’s legitimate purpose of making continuous individualized inquiries
7 regarding efforts to release minors.”); Order, ECF No. 887, July 27, 2020, at 2
8 (“[T]he Court cannot and will not dictate the results of the parties’ negotiations or
9 force an agreement where there is none. Nor should the parties seek the Court’s
10 approval of a protocol that they have not yet agreed upon. Until the parties evidence
11 some agreement regarding a know-your-rights protocol, there is none.”). The parties
12 have never agreed upon any protocols that would allow for a knowing and voluntary
13 waiver of a child’s *Flores* rights, or any rights that the child’s parent might have, and
14 the Court has never ordered the implementation of any such procedures. Defendants
15 also are not aware of any parent who has sought the release of his or her child to a
16 sponsor, but who has been unable to obtain such release because of the lack of
17 formalized procedures for such release. *See* August 7, 2020 Hearing Tr. at 20:6-9
18 (Amicus counsel explained that “because we represent whole families, we have at
19 times inquired about this very question with our families. At this time we have no
20 families who have indicated to us a desire to separate from their child.”).

21 The instant motion arises out of the Court’s June 26, 2020 Order, in which the
22 Court ordered ICE to:

23 transfer Class Members who have resided at the FRCs for more than 20
24 days to non-congregate settings through one of two means: (1) releasing
25 minors to available suitable sponsors or other available COVID-free
26 non-congregate settings with the consent of their adult
guardians/parents; or (2) releasing the minors with their
guardians/parents if ICE exercises its discretion to release the adults or

1 another Court finds that the conditions at these facilities warrant the
2 transfer of the adults to non-congregate settings.

3 Order, ECF No. 833, ¶ 1. The Court also ordered the parties to meet and confer and
4 file a status report “regarding the adoption and implementation of proper written
5 advisals and other protocols to inform detained guardians/parents about minors’
6 rights under the FSA and obtain information regarding, and procedures for
7 placement with, available and suitable sponsors[.]” *Id.* ¶ 6. The parties met and
8 conferred accordingly. *See* Joint Status Report, ECF No. 846.

9 On July 21, 2020, counsel, purporting to represent several *Flores* class
10 members along with their parents, filed a motion seeking to intervene in this
11 litigation. Application, ECF No. 854. In their Application, these counsel asserted
12 that the meet and confer process for developing protocols:

13 (1) is certain to further unnecessary delay of the release of Class
14 Members beyond this Court’s July 17, 2020 deadline, as no agreed-
15 upon waiver protocol has yet been presented to Class Members, their
16 parents, or legal counsel; (2) has not been shown to comply with the
17 existing Agreement and applicable portions of the INA; and (3) has not
18 been shown to afford Class Members and their parents due process of
19 law.

20 *Id.* at 10. In light of the concerns raised by the Proposed Intervenors, Defendants
21 sought to stay the litigation while the Application was resolved. Application for Stay,
22 ECF No. 879. The Court denied the government’s request, stating that a stay was
23 unnecessary because:

24 The plain language of Paragraph 1 of the June 26, 2020 Order premises
25 transfer or release of Class Members who have resided at the FRCs for
26 more than 20 days upon either (1) the consent of their guardians/parents
to release them to an available suitable sponsor, (2) the exercise of
ICE’s discretion to release minors with their guardians/parents, or (3) a
Court order requiring the transfer of the adults to non-congregate
settings due to conditions at the FRCs. There are currently 100 affected

1 Class Members. [Doc. # 882-1 at 3.] If none of these prerequisites has
2 been met by the July 27, 2020 deadline, Paragraph 1 of the June 26,
3 2020 Order is unenforceable by its own terms. There is therefore no
4 need for a stay.

5 Order, ECF No. 887, at 2. The Court further stated, regarding the parties' meet and
6 confer discussions:

7 If the parties solicit the Court's suggestions, it will endeavor to provide
8 constructive guidance. But the Court cannot and will not dictate the
9 results of the parties' negotiations or force an agreement where there
10 is none. Nor should the parties seek the Court's approval of a protocol
11 that they have not yet agreed upon. Until the parties evidence some
12 agreement regarding a know-your-rights protocol, there is none.

13 *Id.*

14 Understanding the Court's order to thus require voluntary agreement on the
15 part of the government before protocols can be finalized and implemented, the
16 government then explained:

17 In light of the Court's recent statement that Defendants' voluntary
18 agreement to these protocols is required for their implementation,
19 Defendants state that they do not believe that any voluntary agreement
20 can be reached. Specifically, Defendants will not voluntarily agree to
21 any protocol that would potentially provide for the separation of a
22 parent and child who are currently housed together in an ICE FRC.

23 Joint Status Report, ECF No. 902, at 6.

24 At the subsequent status conference on August 7, 2020, the Court asked the
25 government to confirm that there was no voluntary agreement on any protocols and
26 stated that "if there's no agreement in these areas, then I will impose a remedy, as I
have always done." August 7, 2020 Hearing Tr. at 16:9-10. Defendants' counsel
reiterated:

with regard to the protocols, the government -- there has been perhaps
exhaustion because the government does not -- does not find itself able

1 to agree to protocols [that] would result in a child being released
2 separately from their parents. I think that is a fundamental piece of what
3 the plaintiffs would require as part of those protocols. So based on that,
4 then the government would prefer that Your Honor impose a remedy.

5 *Id.* at 16:13-17. The Court therefore ordered Plaintiffs’ to “file a motion for
6 implementation of proposed remedy for findings of breach” Order, ECF. No.
7 912 at 2. Plaintiffs filed their motion seeking implementation of a proposed remedy
8 on August 14, 2020. Motion, ECF No. 919.

9 Plaintiffs’ motion seeks an order from this Court requiring Defendants to
10 provide “a proper advisal of rights and reasonable steps to implement Class
11 Members’ release” separately from their parents, where those class members
12 currently are housed with their parents at an ICE FRC. *Id.* at 1. Plaintiffs argue that
13 the extensive advisals, protocols, and procedures they are asking this Court to order
14 are simply an extension of the plain text of Paragraph 12.A of the Agreement, which
15 requires that, upon taking a minor into custody, Defendants must “provide the minor
16 with a notice of rights” Motion, ECF No. 919, at 15-22. Alternatively, Plaintiffs
17 assert that, even if the procedures they are asking the Court to order are not found
18 within the plain text of the Agreement, the Court can nonetheless order them by
19 finding Defendants in civil contempt, and ordering “more robust relief in order to
20 ensure FSA compliance.” *Id.* at 24-29. Plaintiffs’ Proposed Order includes an
21 attached “*Flores* Settlement Agreement Notice of Rights,” to be provided to parents
22 in ICE FRCs, a “*Flores* Class Member Release Protocol” that ICE would be required
23 to follow, and a worksheet for parents or guardians to fill out entitled “*Flores*
24 Settlement Parent/Guardian Release Decision.” ECF No. 921-1.
25
26

1 **III. ARGUMENT**

2 **a. Defendants Should Not Be Required To Implement the**
3 **Procedures Requested by Plaintiffs.**

4 This Court should deny Plaintiffs’ motion asking this Court to impose
5 procedures that put parents to a binary choice and might ultimately require the
6 separate release of class member children. Defendants have always objected—and
7 continue to object—to any reading of the Agreement that will require ICE to
8 implement a protocol to potentially separate a parent and child who are currently
9 housed together in an ICE FRC, and who both are subject to lawful detention by ICE
10 in accordance with the Immigration and Nationality Act.

11 Most fundamentally, nothing in the Agreement allows for a binary choice
12 such as the one proposed by Plaintiffs. *Contra* ECF No. 919, at 15-22. As Defendants
13 have explained:

14 Paragraph 14 does not require DHS to separate families and release
15 children—either on parole or to a non-relative—when they can remain
16 with their parent in a family residential center. Paragraph 14 states that
17 “INS shall release a minor from its custody without unnecessary delay,
18 in the following order of preference” with the “parent” being the first
19 priority. But Paragraph 14 does not address what to do when the child is
20 already in custody with the parent: it does not specify that separating the
21 child from the parent is required in this circumstance, or that release to
22 an unrelated adult or a foster home is instead required when the family
23 can stay together in a family residential center.

24 *Flores v. Barr*, No. 19-56324, Defendants-Appellants’ Reply Brief, February 4,
25 2020, at 20. Paragraph 14 of the Agreement does not require the separation of a
26 parent and child who are housed together in an ICE FRC, and there is no sound basis
for imposing procedures that would implement such a requirement. Nor does
Paragraph 12.A—which Plaintiffs also invoke—require such procedures. As
discussed more fully below, the provision of Paragraph 12.A requiring Defendants

1 to provide class members with a notice of their rights upon apprehension is best read
2 to require Defendants to provide the specific notices of rights that are detailed
3 throughout the Agreement to the minor class member, not to broadly require that
4 parents, who are not class members, be offered the choice of remaining in custody
5 with their child or allowing their child to be separately released to a sponsor. Finally,
6 Paragraph 18 does not support Plaintiffs’ demand for their requested procedures:
7 that Paragraph simply expands on Paragraph 14 by requiring Defendants to “make
8 and record” its efforts at release under Paragraph 14. It does not create any
9 additional, or more extensive, rights to release than are already contained in
10 Paragraph 14. In fact, this court’s prior statements regarding this provision
11 establishes that keeping families together should be the first goal of the Agreement,
12 when the court previously stated that an approximately 20-day period for completing
13 the credible or reasonable fear process and removal for class members would be
14 permissible under the Agreement as long as Defendants were acting in good faith
15 and in the exercise of due diligence and “if the brief extension of time will permit
16 DHS to keep the family unit together.” *Flores v. Lynch*, 212 F. Supp. 3d 907, 914
17 (C.D. Cal. 2015).

18 Plaintiffs nonetheless ask this Court to read the Agreement to require that
19 parents—who are not class members—be offered the choice to separate from their
20 children. As explained above, this would be an unwarranted departure from the terms
21 of the Agreement. This Court should reject it.

22 It bears emphasizing that class counsel do not represent the parents of the
23 children at issue in this case and that, while this Court has said a parent may waive
24 the child’s rights on behalf of his or her child, this Court has not addressed—and,
25 given that this case involves a class of children only, cannot address—any separate
26 rights the parent may have which are not governed by the Agreement.

1 Indeed, this Court has, consistent with the Agreement, previously declined to
2 force a separation mechanism on the parties such as the one now proposed by
3 Plaintiffs. Order, ECF No. 887, at 2. Although, prior to June 26, 2020, Order, ECF
4 No. 833, at ¶ 1, this Court has recognized the right of a parent to waive his or her
5 child's *Flores* rights and keep his or her child in custody with the parent, or
6 conversely to consent to the separate release of his or her child, the Court has never
7 required Defendants to develop or implement any protocols for seeking such waiver
8 or consent, nor has the Court ever ordered that the absence of such protocols was a
9 violation of the Agreement. The Court should hold that line and reject Plaintiffs'
10 demand for a process that potentially results in the separation of parents from their
11 children.

12 Notably, Plaintiffs' ongoing effort to formalize a process for separating
13 children from their parents lacks support from the actual residents of ICE FRCs.
14 Counsel who represent the parents have made clear that the parents object to these
15 processes. *See* Application, ECF No. 854, at 7 (counsel for families argue that "any
16 waiver protocol would likely violate due process rights of Proposed Plaintiffs-
17 Intervenors and other accompanied Class Members"); August 7, 2020 Hearing Tr.
18 at 20:17-21 ("[A]ny protocol that would be placed on families regarding this specific
19 ask, this specific concern would be done while in detention and while ICE is the
20 custodian. So we have a lot of questions as to whether any kind of decision that could
21 be made could be knowing or voluntary."). In light of these objections, it is important
22 to consider that these parents are not class members, and this Court should exercise
23 extreme caution in ordering any relief that would impact their rights.

24 It is also notable that Plaintiffs have never brought to the attention of
25 Defendants or the Court any class member who wishes to be separated from his or
26 her parent or any parent who wishes to have a child released to a sponsor. In fact, at

1 the most recent hearing, counsel representing families in the ICE FRCs made clear
2 that no parent in an ICE FRC seeks to have his or her child released separately.
3 August 7, 2020 Hearing Tr. at 20:6-9 (“[B]ecause we represent whole families, we
4 have at times inquired about this very question with our families. At this time we
5 have no families who have indicated to us a desire to separate from their child.”).
6 Nothing prevents children in this circumstance from coming to this Court to request
7 relief and release separately from their parents, yet none (other than class counsel)
8 have done so, and other counsel purporting to represent those individuals have
9 instead told this Court that such a remedy is unwanted. There is thus no evidence
10 establishing that the absence of any such protocols has resulted in a violation of any
11 class member’s rights under the Agreement; Plaintiffs are therefore seeking an order
12 for a remedy without presenting any evidence of harm. Plaintiffs’ suggestion that
13 Defendants’ failure to put the parents of class members to this choice has violated
14 any class members’ rights under the Agreement (ECF No. 919 at 15-22) is therefore
15 unsubstantiated by any evidence—and their suggestion that it is somehow a
16 sanctionable offense (ECF No. 919 at 24-29) is baseless. This is particularly true
17 because this Court has previously made clear that it was not directing the parties to
18 adopt the separation mechanism that Plaintiffs continue to demand. *See* ECF No.
19 887 at 2.

20 **b. Defendants Have Made Good Faith Efforts To Comply With**
21 **The Court’s Orders, And A Procedural Remedy Is Not**
22 **Appropriate.**

23 Defendants’ compliance with this Court’s orders also decisively cuts against
24 the relief that Plaintiffs seek. Defendants have always made good faith efforts to
25 comply with the Court’s 2017 Order regarding the release of class members. Since
26 at least September 8, 2017, Defendants have made clear the manner by which they

1 were complying with the Court’s June 27, 2017, directive to make individualized
2 determinations regarding the release of class members. *See* Defendants’
3 Supplemental Response, ECF No. 746, April 6, 2020, at 31-35. As this Court has
4 recognized, almost all family units have been released together from FRCs, and only
5 a small number remain. *See* Order, ECF No. 784, at 14. In every case wherein the
6 family remains in custody, this court has required a detailed parole assessment and
7 with the assistance of the Monitor has conducted ongoing oversight over the parole
8 process.

9 Prior to the filing of Plaintiffs’ TRO Motion on March 26, 2020, and despite
10 the ICE Juvenile Coordinator’s filing regular reports and the Court-appointed
11 Monitor conducting ongoing monitoring of ICE’s compliance, neither the Court nor
12 the Monitor ever raised any issues or concerns with the manner of Defendants’
13 compliance. At no time during that time period did this Court issue an order directing
14 ICE to obtain the consent of parents to separately release their children to a sponsor.
15 Moreover, no Court order has ever provided any guidance as to how ICE could do
16 so, particularly in light of the strenuous objections of numerous advocates to the
17 implementation of such procedures, and the fact that parental interests are not
18 addressed by the Agreement and no parents are represented before this Court.
19 Plaintiffs suggest that Defendants have somehow failed to heed a clear prior
20 directive from the Court to separate children from their parents by releasing them to
21 sponsors. ECF No. 919 at 24-25. But that ignores the long history of this case
22 regarding the release of class member children who are in custody at ICE FRCs with
23 their parents. *See* ECF No. 746 at 31-36.

24 Even the Court’s June 26, 2020, Order, requiring that the parties meet and
25 confer to develop protocols to release a child separately from his or her parent,
26 requires the release of a child class member only after Defendants obtain “consent

1 of [a class member's] guardians/parents to release them to an available suitable
2 sponsor." ECF No. 833, at ¶ 1. The Order provides no guidance as to how such
3 consent can be obtained if the parties do not reach voluntary agreement on protocols
4 to do so. *Id.* at ¶¶ 1, 6. Numerous advocates, including the proposed intervenors in
5 this case, have taken the position that "any waiver protocol would likely violate due
6 process rights of Proposed Plaintiffs-Intervenors and other accompanied Class
7 Members." Application, ECF No. 854, at 7. The Court has stated that it "cannot and
8 will not dictate the results of the parties' negotiations or force an agreement where
9 there is none. Nor should the parties seek the Court's approval of a protocol that they
10 have not yet agreed upon. Until the parties evidence some agreement regarding a
11 know-your-rights protocol, there is none." ECF No. 887 at 2. The Court has also
12 acknowledged that in the absence of any procedures by which ICE can obtain the
13 "consent" of a parent to separately release his or her child, "Paragraph 1 of the June
14 26, 2020 Order is unenforceable by its own terms." *Id.*

15 As previously stated, ICE cannot and will not voluntarily agree to the
16 procedures proposed by Plaintiffs in their Motion to Enforce, which Defendants
17 contend are not required by the Agreement. As the Court indicated at the August 7,
18 2020 hearing, because the parties cannot reach any voluntary agreement, the Court
19 must issue a remedy on its own. August 7, 2020 Hearing Tr. at 15:8-9. But the fact
20 that the Court has not yet done so is a clear refutation of Plaintiffs' position that
21 Defendants' failure to already have in place such procedures, even prior to the
22 Court's order, is somehow a violation of prior orders of the Court.

23 Moreover, to the extent that Plaintiffs' motion now asks this Court to order
24 Defendants to implement Court-approved procedures to obtain "consent" from non-
25 class member parents on the grounds that Defendants should be found in civil
26 contempt, such procedural remedies are not appropriate here, because Plaintiffs have

1 not met the standard for such a remedy. Motion, ECF No. 919, at 24-28. As discussed
2 above, Defendants have not violated—and have in fact made good faith efforts to
3 comply with—the Court’s orders. *See Kelly v. Wengler*, 822 F.3d 1085, 1097 (9th
4 Cir. 2016) (discussing how court-ordered remedies designed to ensure compliance
5 with a settlement agreement, and to cure breach, are properly considered under civil
6 contempt standards). And to establish that such remedies are required, Plaintiffs
7 must first show by clear and convincing evidence that a violation of the Agreement
8 has actually occurred. *See Bailey v. Roob*, 567 F.3d 930, 934-35 (7th Cir. 2009)
9 (“The parties agree that this circuit’s case law requires the party seeking sanctions
10 to demonstrate that the opposing party is in violation of a court order by clear and
11 convincing evidence.”); *see also United States v. N.Y.C. Dist. Council of N.Y.C.*, 229
12 F. App’x 14, 18 (2d Cir. 2007).

13 Plaintiffs have provided no evidence of any class member who has sought to
14 be released separately from his or her parent, and separate counsel for the parents
15 and class member children have repeatedly maintained that no child would choose
16 such a release. *See August 7, 2020 Hearing Tr. at 20:6-9* (“[B]ecause we represent
17 whole families, we have at times inquired about this very question with our families.
18 At this time we have no families who have indicated to us a desire to separate from
19 their child.”). Thus, there has been no clear and convincing showing that ICE is
20 breaching the Agreement by not developing procedures to which class members
21 themselves have objected, and that this Court has previously said it will not impose
22 upon the parties.

23 **c. Defendants Are Not in Breach of Any Notice Requirement.**

24 To the extent that Plaintiffs’ Motion tries to paint the issue as a violation of
25 the Agreement’s notice provisions, Plaintiffs’ argument is incorrect and ignores the
26 reality that they are in fact asking the Court to order extensive procedural remedies.

1 Plaintiffs argue that Defendants are violating Paragraph 12.A of the Agreement,
2 which requires Defendants, upon taking a minor into custody, to process the minor
3 and “provide the minor with a notice of rights, including the right to a bond
4 redetermination hearing if applicable.” Agreement, ¶ 12.A. Plaintiffs contend that
5 the language of Paragraph 12.A should be interpreted to say “that Defendants are
6 obligated to provide all detained Class Members or, if accompanied, their parents,
7 with an advisal regarding their rights *under the FSA* rather than the totality of their
8 rights under the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101, et seq.”
9 Motion, ECF No. 919, at 16.

10 Plaintiffs are wrong. Like a contract, a consent decree “must be discerned
11 within its four corners, extrinsic evidence being relevant only to resolve ambiguity
12 in the decree.” *United States v. Asarco, Inc.*, 430 F.3d 972, 980 (9th Cir. 2005); *see*
13 *also United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (“[T]he scope of a
14 consent decree must be discerned within its four corners, and not by reference to
15 what might satisfy the purposes of one of the parties to it.”). As Plaintiffs point out,
16 Motion at 8, the Agreement details specific notices of rights that Defendants are
17 required to provide. *See* Agreement ¶¶ 24.C, 24.D. Plaintiffs’ suggestion that this
18 language should be read to require generalized provisions of rights that are not
19 detailed anywhere in the Agreement is inconsistent with the parties’ identification
20 of the specific notices that they agreed were required. The Agreement “should be
21 read to give effect to all of its provisions and to render them consistent with each
22 other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).
23 Plaintiffs acknowledge that several of their “proposed advisals and protocols” are in
24 fact “not required by the text of the FSA,” Motion, ECF No. 919, at 20, which makes
25 it that much clearer that what Plaintiffs are seeking to label as “notices of rights” are
26

1 in fact substantive procedural documents designed to obtain a waiver of rights from
2 parents, who are not even parties to the Agreement.

3 Plaintiffs have previously complained that “Defendants routinely fail to
4 advise class members of their rights under the Agreement[,]” but this Court
5 disagreed, and made clear that “[t]he Agreement does not provide for ‘advisals of
6 rights about the *Flores* case’ *per se*.” ECF No. 363, at 18. Plaintiffs have provided
7 nothing that requires a different result here.

8 **d. Plaintiffs’ Proposed Documents Contain Legal Errors And Would**
9 **Cause Further Confusion.**

10 Defendants oppose Plaintiffs’ proposed documents in full as discussed above,
11 but also more specifically provide the examples below which show that requiring
12 the use of these documents would cause confusion and create further problems
13 because they contain legal errors, would require the government to provide sensitive
14 information about unrepresented parties to lawyers without the consent of those
15 individuals, and would require the government to release minors to un-vetted
16 individuals.

17 First, in the protocols document, in the section entitled
18 “Custody Determinations” Plaintiffs propose the ICE instruct its personnel that “8
19 C.F.R. § 1236.3 requires ICE to assess and document whether an adult parent should
20 be released from ICE custody to effectuate the release of a child from custody.” ECF
21 No. 921-1, ¶ 3. This statement is confusing and potentially inaccurate because the
22 cited regulation is not a release authority, and therefore does not instruct agents in
23 the authority under which they may consider individuals for release. ICE will apply
24 its usual custody decision making procedures to the parent or legal guardian at the
25 appropriate point in the process (e.g., decide whether to parole under INA §
26 212(d)(5) after a positive credible fear finding, conditionally release under INA §

1 236(a) pending INA § 240 removal proceedings, or release on an order of
2 supervision under INA § 241(a) because execution of a final removal order will not
3 happen for some time).

4 Second, Plaintiffs would require that “[a]ny documents provided to a parent
5 or a minor to implement this protocol or comply with the FSA shall be forwarded by
6 email or mailed by first class mail to the parent’s and minor’s attorney(s) of record.”
7 ECF No. 921-1, ¶ 11. This requirement would exceed the authority of this Court to
8 the extent that it provides a right to the parent to have documents served on his or
9 her counsel, and it would likely create delays by adding an unnecessary
10 administrative step to ICE’s processes where there is no reason to believe that the
11 parent cannot provide such information to his or her counsel if he or she so chooses.
12 More importantly, though, this provision might at times require ICE to provide
13 confidential or sensitive information about the sponsor, who is unrepresented and
14 providing information voluntarily to the government, to counsel who do not
15 represent the sponsor and to whom the sponsor has not authorized its release. This
16 requirement therefore may violate the privacy rights of sponsors.

17 Third, Plaintiffs propose that ICE instruct its personnel as follows:

18 A parent may designate an adult who will transport their child to any
19 sponsor the parent identified and ICE has approved to care for the child.
20 ICE may run a background check on any such adults designated by a
21 parent and decline to transfer the child to the adult’s custody for
22 transportation to the approved sponsor if the adult has a criminal history
23 or an outstanding arrest warrant such that the child may not be safe
being transported by the adult. Alternatively, ICE may transport the
child to the approved sponsor’s home.

24 ECF No. 921-1, ¶ 6. This provision would require ICE to either undertake
25 transportation of a minor alone, or transfer custody of a minor to an adult who is not
26 fully vetted by ICE based solely on a “background check,” but then still appears to

1 place on ICE the responsibility to decide whether “the child may not be safe being
2 transported by the adult.” *Id.* If Plaintiffs wish to require that ICE release a child to
3 an un-vetted individual, then Plaintiffs will bear responsibility if that release is
4 unsafe for the child.

5 **IV. CONCLUSION**

6 For all of the above reasons, the Court should deny Plaintiffs’ Motion, and
7 should not order the procedures proposed by Plaintiffs that would require
8 Defendants potentially to separate children and parents who are currently housed
9 together at an ICE FRC.
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1 DATED: August 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I served the foregoing pleading on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

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