BEFORE THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW

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In the Matter of

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Respondent.

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Application for Leave to File Brief *Amicus Curiae*

and

Brief of Proposed *Amici Curiae* Center for Human Rights & Constitutional Law and Immigration Law Clinic of the University of California Davis School of Law

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APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

COME NOW Center for Human Rights and Constitutional Law and Immigration Law Clinic of the University of California Davis School of Law and respectfully ask leave of this Court to file the annexed brief *amicus curiae*.

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to protecting and furthering the rights of immigrants, refugees, indigenous peoples, and the poor. Since 1985, the Center has served as lead counsel for plaintiffs in *Flores v. Sessions*, No. 85-4544 (C.D. Cal.) ("*Flores*").[1]

The Immigration Law Clinic of the University of California Davis School of Law is a public law school clinic that regularly represents indigent immigrant and refugee children in legal proceedings arising under the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq*.

The Center and the Clinic recently represented detained immigrant and refugee children in proceedings to enforce the nationwide class action settlement entered in *Flores* on January 28, 2017 ("*Flores* Settlement"). Those proceedings resulted in an order, recently affirmed on appeal, requiring the Office of Refugee Resettlement of the U.S. Department of Health and Human Services ("ORR") to afford juveniles in bond redetermination hearings. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

Proposed *Amici* are accordingly well versed in the long and complex history of the *Flores* litigation, the *Flores* Settlement, and subsequent litigation construing and applying the *Flores*

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[1] Opinions issued in *Flores* include *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1992) (en banc); *Reno v. Flores*, 507 U.S. 292 (1993); *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016); and *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

Settlement on behalf of both unaccompanied alien children ("UACs") in the custody of ORR, and accompanied alien children in the custody of U.S. Immigration and Customs Enforcement ("ICE"). Proposed *Amici* hope to provide a concise and accurate summation of that history as it bears on the Court's jurisdiction to redetermine Respondent's bond and conditions of custody.

Proposed *Amici* also have significant experience in representing immigrant and refugee children in bond and removal proceedings and offer the Court insight into best practices and procedures for ensuring that such proceedings take into account the particular vulnerabilities and needs of such children.

Respondent consents to the filing of the annexed brief *amicus curiae*.

On August 4, 2017, at 1:20 p.m. pacific, counsel for proposed *amici curiae* emailed Sarah Fabian and Vinita B. Andrapalliyal with the Office of Immigration Litigation, defense counsel in *Flores*, and Trial Attorney Keith Hopper to inquire as to the Government's position regarding the instant application. Counsel for proposed *amici curiae* received no response to that inquiry as of 5:00 p.m. pacific on August 4, 2017.

For the foregoing reasons, this Court should grant the instant application to appear as *amici curiae* and order the filing of the annexed brief of *amici curiae*.

Respectfully submitted.

Carlos Holguin
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Attorney for proposed *Amici Curiae*

August 4, 2017

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BRIEF *AMICUS CURIAE* OF

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW AND IMMIGRATION LAW CLINIC OF THE UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW

I INTRODUCTION

This matter is before this Court on Respondent's request for a bond redetermination hearing. Amici are informed and believe that the Court has doubts regarding its jurisdiction to redetermine the Respondent's bond and conditions of release. *Amici* urge the Court to find that it has such jurisdiction and to exercise the same to redetermine the Respondent's bond and conditions of release.

II THE *FLORES* SETTLEMENT APPLIES TO ALL JUVENILES IN IMMIGRATION-RELATED CUSTODY, INCLUDING ACCOMPANIED MINORS.

The *Flores* Settlement protects "all minors who are detained in the legal custody of the INS ..." *Flores* Settlement ¶ 1; *see also Bunikyte v. Chertoff,* 2007 WL 1074070 at *2 (W.D. Tex. 2007).

In *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), ICE argued that, this categorical class definition notwithstanding, the *Flores* Settlement should be construed to exclude accompanied minors—that is, juveniles such as the Respondent, who are apprehended as part of a family unit—from its protections. The court disagreed:

> We agree with the district court that "[t]he plain language of the Agreement clearly encompasses accompanied minors." First, the Settlement defines minor as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS"; describes its scope as setting "nationwide policy for the detention, release, and treatment of minors in the custody of the INS"; and defines the class as "[a]ll minors who are detained in the legal custody of the INS." Settlement ¶¶ 4, 9, 10. Second, as the district court explained, "the Agreement provides special guidelines with respect to unaccompanied minors in some situations," and "[i]t would make little sense to write rules making special reference to unaccompanied minors if the parties intended the Agreement as a whole to be applicable only to unaccompanied minors."

Id. at 905.

III PARAGRAPH 24A OF THE *FLORES* SETTLEMENT GUARANTEES ALL JUVENILES, INCLUDING ACCOMPANIED MINORS, THE RIGHT TO A BOND HEARING.

The Settlement accordingly obliges both ORR and ICE to pursue a "general policy favoring release" of juveniles except where their continued detention is "required either to secure [their] timely appearance ... or to ensure the minor's safety or that of others," Settlement ¶ 14, and guarantees all detained children the right to a bond redetermination hearing as a procedural check against confinement that violates this general policy: "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." Settlement ¶ 24A.

In *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), ORR argued that the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044, vested it with exclusive authority to determine whether unaccompanied alien children committed to its care and custody should be released and had effectively superseded ¶ 24A. Again, the court of appeals disagreed:

> By their plain text, neither law explicitly terminates the bond-hearing requirement for unaccompanied minors. Moreover, the statutory framework enacted by the HSA and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors. Rather, the statutes leave ample room for immigration judges to conduct bond hearings for these children.

Id. at *5.

Although *Flores v. Sessions* does not directly address the right of accompanied minors to bond hearings, the Government never disputed that accompanied minors do have that right, and if anything, their entitlement to bond hearings is even clearer than that of unaccompanied children committed to ORR's custody and care: "Moreover, we note that providing unaccompanied minors with a bond hearing under Paragraph 24A ensures that they receive *the same procedural protections as accompanied minors*. The government does not contest that

accompanied minors remain entitled to bond hearings." *Id*. at *36-37 and n.20 (emphasis added).

Read together, *Flores v. Lynch* and *Flores v. Sessions* make plain that the bond hearing requirement of the *Flores* Settlement applies to *all* minors in immigration-related custody, whether they be ICE's or ORR's. *Flores v. Lynch, supra,* 828 F.3d at 910 ("there is no reason why [the] bureaucratic reorganization" following dissolution of the INS "should prohibit the government from adhering to the [*Flores*] Settlement.").

IV AS A JUDICIALLY APPROVED CONSENT DECREE, THE *FLORES* SETTLEMENT HAS THE LEGAL FORCE AND EFFECT OF AN INJUNCTION REGARDLESS OF SUBSEQUENT ORDERS ENFORCING IT.

Nor should the Court decline jurisdiction as the *Flores* Settlement requires because the lower court's order affirmed in *Flores v. Sessions*, *supra*, 862 F.3d 863, is directed at ORR and not ICE.

As has been seen, the court of appeals has held that the *Flores* Settlement applies without distinction to all minors, unaccompanied as well as accompanied, and the Settlement, standing alone, has the force and effect of an injunction regardless of subsequent orders enforcing it. *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

V THE *FLORES* SETTLEMENT IS BINDING ON THE DEPARTMENT OF JUSTICE AND THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW.

The *Flores* Settlement binds the INS and Department of Justice, as well as "their agents, employees, contractors, and/or successors in office." Settlement ¶ 1.

In 2002, the Homeland Security Act, Pub. L. 107-296 (H.R. 5005) ("HSA"), dissolved the former Immigration and Naturalization Service ("INS") and transferred most of its functions to the Department of Homeland Security ("DHS") and its subordinate agencies, including CBP and ICE. 6 U.S.C. § 279. The HSA included "savings" provisions providing, *inter alia,* that the *Flores* Settlement should remain in effect as to the successor agencies. HSA §§ 462(f)(2), 1512(a)(1), 1512.

The HSA, of course, did not dissolve the Department of Justice. The Attorney General, as an original *Flores* defendant and party to the ensuing agreement, as well as subordinate entities of the Department of Justice, including EOIR, are accordingly bound by the *Flores* Settlement.

VI THIS COURT SHOULD ADOPT AND FOLLOW PROCEDURES AND PRACTICES IN BOND HEARINGS FOR JUVENILES THAT TAKE INTO ACCOUNT THEIR SPECIAL NEEDS AND VULNERABILITIES.

It is virtually self-evident that indiscriminately applying practices and procedures developed for bond redetermination involving adults to hearings for children and youth would be inappropriate. *Amici curiae* accordingly worked with Prof. Lenni Benson of New York Law School to develop recommended best practices for bond and custody hearings involving children and youth. Those recommendations are attached to this brief, and *Amici* encourage the Court to consider them in exercising jurisdiction to redetermine Respondent's bond and conditions of release.

VII CONCLUSION

For the foregoing reasons, this Court should find it has jurisdiction to redetermine the Respondent's bond and conditions of release and exercise the same.

Dated: August 4, 2017.

Carlos Holguín
Center for Human Rights &
Constitutional Law

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