No. 25-6308

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, *et al.*,
Plaintiffs–Appellees,

v.

PAMELA BONDI, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Defendants–Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEFENDANTS–APPELLANTS' REPLY BRIEF

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INTRODUCTION

Courts must take a flexible approach to vacating institutional-reform decrees because of changed circumstances brought by the passage of time and concerns about judicial interference in elected officials' legitimate policymaking choices. *Horne v. Flores*, 557 U.S. 433, 447-50, 453 (2009). Dismissing enormous changes in both law and facts in the ensuing three decades as "nothing new under the sun" is wildly and wholly incompatible with that mandate. 1-ER-9; 1-ER-16-17.

Echoing the district court's maximalist-entrenchment position, Plaintiffs urge this Court to hold that the 1997 *Flores* Settlement Agreement (FSA or Decree) has become more rigidly fixed through waiver, forfeiture, and law of the case. According to Plaintiffs, because a previous administration declined to seek further review of this Court's decision in 2020, the current (and every future) Administration's hands are forever tied, and the government must either fully incorporate the 1997 Decree into regulations without any adjustment to reflect legitimate and lawful policy judgments, or remain bound to the FSA and the district court's perpetual, nationwide oversight. That is untenable, results in catastrophic consequences, and simply is not the law.

Plaintiffs fare no better in their other arguments. Plaintiffs do not refute that the district court's wide-ranging oversight of the Decree exceeds the traditional judicial role and interferes with the Executive's implementation of immigration policy. Plaintiffs also do not disprove that the FSA's termination provision violates the Administrative Procedure Act (APA) by mandating a predetermined result in rulemaking. Plaintiffs' argument boils down to saying that the government can consider public comments and depart from the FSA, but only if the district court or Plaintiffs agree. That condition is not consistent with the APA, separation-of-power principles, or even democracy itself.

As to changed circumstances, Plaintiffs do not contradict that border crossings have far exceeded the parties' expectations in 1997 and that the FSA is now mostly being enforced as to family detention, a situation the parties gave "inadequate attention to"—if the unlikely conceit that they considered it at all is indulged. *Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016). And, in the One Big Beautiful Bill Act, Congress expressly approved of family detention. The FSA should not interfere with carrying out Congress's expectation.

Moreover, because the Executive's policies and regulations are consistent with federal law, "continued enforcement of the order is not only unnecessary, but improper." *Horne*, 557 U.S. at 450. Plaintiffs do not address that argument as to the Department of Health and Human Services (HHS). Regarding the Department of Homeland Security (DHS), Plaintiffs allege that the government is committing constitutional violations. But Plaintiffs' scattered, anecdotal allegations do not justify continuing the 29-year-old nationwide Decree. Nor do Plaintiffs refute that DHS's enjoined regulations would adequately protect against alleged constitutional violations.

Termination is also warranted by the Supreme Court's decision in *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022). That precedent removed any doubt that the district court lacks jurisdiction under 8 U.S.C. §1252(f)(1) to enforce the FSA as to minors accompanied by their parent or legal guardian. Contrary to Plaintiffs' argument, the Court must consider §1252(f)(1) because the provision speaks to a court's jurisdiction to award specific relief, which is not subject to forfeiture.

Finally, Plaintiffs do not disprove that HHS is entitled to termination because it substantially satisfied the Decree.

The Court should reverse and remand with instructions to terminate the FSA, dissolve the 2019 injunction, and dismiss the case.

ARGUMENT

I. Under the *Horne* standard for Rule 60(b) motions in institutional-reform cases, terminating the FSA is required.

A. Enforcing the FSA indefinitely entangles the Judiciary in managing immigration policy.

The government showed that the FSA violates the separation of powers by improperly binding officials to their predecessors' policies and by permitting ongoing judicial micromanagement of immigration matters committed to the Executive. Opening Br. (O.B.) 34-48.

In response, Plaintiffs largely (and tellingly) ignore the government's argument. Instead, Plaintiffs note the many disputes arising under the Decree and label the district court's approach as "cautious and flexible." Answering Br. (A.B.) 42-43. That characterization is untenable, as the government illustrated. O.B.37-42. Additionally, Plaintiffs do not refute that the number and breadth of disputes reveal that this case seeks "wholesale improvement" of Executive agencies by court decree, a task well outside the "traditional, ... normal mode" of Article III courts. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1011-12 (9th Cir. 2021) (citation modified); *see*

Shakman v. Pritzker, 43 F.4th 723, 731 (7th Cir. 2022) ("[C]ase-by-case resolution and accountability is the norm from the perspective of our national Constitution."). At the urging of Plaintiffs' counsel, the district court has assumed "a role tantamount to serving as an indefinite institutional monitor … focused much more on ensuring that the [government] implements best practices rather than eliminates 'an ongoing violation of federal law.'" *Shakman*, 43 F.4th at 732 (quoting *Horne*, 557 U.S. at 454).

Plaintiffs also do not respond to the case law establishing that "[c]onsent alone is insufficient to support a commitment by a public official that ties the hands of his successor." *Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) (en banc) (plurality opinion); O.B.43-45. The FSA improperly binds current officials "to the policy preferences of their predecessors" and prevents implementing "new policy insights," such as holding alien families together at family residential centers for the duration of their immigration proceedings in light of the One Big Beautiful Bill Act, Pub. L. No. 119-21, §90003 (2025), and the Laken Riley Act, Pub. L. 119-1 (2025). *Horne*, 557 U.S. at 447-49.

Without elaboration, Plaintiffs assert that "[p]ermitting the Government to shirk its legal obligations would itself raise troubling concerns over the separation of powers." A.B.43-44. Plaintiffs cite an inapplicable case, *Nehmer v. U.S. Department of Veterans Affairs,* 494 F.3d 846 (9th Cir. 2007). In *Nehmer*, the VA issued a regulation to interpret a consent decree, but the VA did not file a Rule 60(b) motion for relief in the district court overseeing the decree. *Id.* at 857-61. After the plaintiffs moved to clarify and enforce the decree, the VA argued that the district court did not have jurisdiction because 38 U.S.C. §502 channels review of VA regulations to the U.S. Court of Appeals for the Federal Circuit. *Id.* at 856-57. This Court held that the VA could not "unilaterally eliminate" the district court's jurisdiction and "redirect what is effectively a motion to vacate an injunction" from the district court to the Federal Circuit. *Id.* at 860-61.

Here, in contrast, the government published regulations to comply with the FSA's rulemaking provisions, not to replace the district court's jurisdiction with another court's jurisdiction. And, unlike *Nehmer*, the government moved for relief under Rule 60(b) in the district court

overseeing the Decree. The district court should have granted that request and returned responsibility to Executive officials.

B. As construed by the district court, the FSA prescribes the substantive result of agency rulemaking.

Compounding the separation-of-powers concerns, the district court interpreted the FSA in a way that violates the APA and suggested that, even if it approves regulations, it may retain jurisdiction indefinitely to reimpose the FSA. O.B.51-55. Plaintiffs do not deny that they may ask the district court to reinstate the entire FSA as to HHS. A.B.39 n.13.

Plaintiffs assert that the APA "has existed for decades" and itself "supplies no change in law." A.B.36. True, but irrelevant. The district court's interpretations of the FSA in 2019 and 2024 newly reveal the conflict between the FSA and the APA. O.B.51-55.

Plaintiffs' waiver and law-of-the-case arguments get them no further. A.B.37-38. As discussed in Section IV, previous officials' agreement to the FSA and failure to appeal past orders are irrelevant to this Rule 60(b)(5) inquiry. *Horne*, 557 U.S. at 453. And the law-of-the-case doctrine does not apply because neither the district court nor this Court previously decided the relevant issues here. *See Mortimer v. Baca*, 594 F.3d 714, 720 (9th Cir. 2010). In 2019, the government argued about

how to interpret the Decree. 4-ER-873-79; FER-232. Now that the district court interpreted the Decree in 2019 and 2024 to require a foreordained outcome, the government asserts that the Decree is inequitable because its termination provision requires violating the APA.

Plaintiffs next contend that the FSA does not prevent the government from "following APA rulemaking procedures." A.B.38-39. Although the agencies may conduct the formal steps of rulemaking, if Plaintiffs challenge the final regulation, the district court will "strictly" construe the FSA's termination provision and may enjoin the regulation. *See Flores v. Barr*, 407 F. Supp. 3d 909, 925, 931 (C.D. Cal. 2019), *aff'd in part, rev'd in part sub nom. Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020). Thus, unless Plaintiffs or the district court agree to a departure from the FSA, the FSA's required rulemaking has a preordained outcome—complete consistency with the preferred policies of government officials in 1997. This would render "notice-and-comment procedure [] an empty, yet time-consuming, exercise." *Cf. Make the Rd. New York v. Wolf*, 962 F.3d 612, 635 (D.C. Cir. 2020).

Plaintiffs incorrectly suggest that the government wishes to exclude the public by following internal policies instead of rulemaking.

A.B.40-41. DHS and HHS both adopted notice-and-comment rules to govern their treatment of alien minors. HHS's Foundational Rule is in effect. DHS's 2019 Rule would govern its operations, except that the district court enjoined that rule at Plaintiffs' request. *Flores*, 407 F. Supp. 3d at 931.

Contrary to Plaintiffs' final argument, termination is the appropriate remedy if the FSA's rulemaking provisions violate the APA. A.B.41. Those provisions and the district court's reading of them are why the FSA has lasted so long. Apart from the rulemaking provisions in paragraph 9 and paragraph 40, as amended in 2001, the FSA would have terminated in 2002. *See* 4-ER-694 (original ¶40) ("All terms of this Agreement shall terminate … five years after the date of final court approval of this Agreement…."). Or the FSA would have terminated as to both DHS and HHS in 2019 when the agencies promulgated rules pursuant to the APA; or as to HHS in 2024, with the publication of the Foundational Rule. The current regulations accord with federal law and require humane treatment of minors. *See, e.g.*, 8 C.F.R. §236.3(g)(2)(i); *id.* §236.3(i)(4); 45 C.F.R. §410.1003(b). Plaintiffs received *far* more than the five years of court supervision for which they originally bargained,

and Plaintiffs got nationwide regulations governing the care and custody of alien minors. Modification is not needed for Plaintiffs to get the basic benefit of their bargain; they already have. Only termination would end the FSA's affront to the separation of powers.

C. Substantial changes in fact and law show that enforcing the FSA is contrary to the public interest.

The government explained the changed circumstances showing that enforcing the FSA is contrary to the public interest. O.B.57-63. The FSA introduces complex problems into family detention and constrains Executive officials in responding to fluctuations in unlawful migration. O.B.61-62. The FSA does so even though it "does not address the potentially complex issues" of housing family units, "does not contain standards related to the detention of … family units," and "gave inadequate attention to some potential problems of accompanied minors." *Flores*, 828 F.3d at 906. It is no surprise that the parties did not adequately account for minors accompanied by their parents or legal guardians because the underlying *Flores* litigation was about unaccompanied alien children—*not* families. O.B.8. Yet, most of the disputes in the last few years have been about issues arising from irregular family migration, especially since the FSA was partially

terminated as to HHS. Thus, enforcing the FSA today largely means engrafting it upon situations that the parties did not plan for in 1997. The FSA is so far removed from its original circumstances that prospective application is not in the public interest.

Plaintiffs mostly do not dispute those facts, instead arguing that the facts do not warrant terminating the Decree. A.B.20-23, 34-36. Plaintiffs are wrong.

Regarding the increase in border crossings, Plaintiffs argue that, because the parties included an "influx" provision in the FSA, the recent numbers of border crossings cannot justify relief. A.B.21. Plaintiffs do not dispute that the influx provision (more than 130 minors in custody) has been almost continually met for decades. O.B.58. The parties thought that situation would be an exception. Instead, it has been the norm. Nothing suggests that the parties anticipated the numbers seen in the last five years. *Cf. Hook v. Arizona*, 120 F.3d 921, 924 (9th Cir. 1997) (finding that though the state "anticipated an increase," there was "no evidence" that when entering the decree, "it foresaw the explosion in the number"). Plaintiffs note that encounters have decreased this year. A.B.21. But the unpredictable nature of migration patterns just proves

that the government needs flexibility in administering immigration detention.

Plaintiffs next disagree with Executive officials' determinations that the FSA has contributed to the increase in minors at the border, that more flexibility is necessary to manage unlawful migration, and that family detention is appropriate. A.B.22-23. Those determinations are multi-faceted policy judgments appropriately made by the political branches, not the courts. *See Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (recognizing that decisions about immigration policy involve "changing political and economic circumstances" and are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary"); *San Francisco v. USCIS*, 944 F.3d 773, 809 (9th Cir. 2019) (Bybee, J., concurring) ("We lack the tools of inquiry, investigation, and fact-finding that a responsible policymaker should have at its disposal.").

Regarding legal changes, Plaintiffs argue that the Laken Riley Act does not conflict with the FSA. A.B.34-35. However, Congress's reinforcement of the INA's mandatory-detention provisions is in tension with the FSA's general policy favoring release and the district court's

enforcement of that policy without regard to the mandatory-detention provisions. O.B.20; 4-ER-685-86.

Plaintiffs next assert that the One Big Beautiful Bill Act is not relevant because it is an appropriation passed through budget reconciliation. A.B.35-36. Plaintiffs are incorrect that "significant policy changes are generally disallowed" during that process. A.B.36 (citing 2 U.S.C. §644). Reconciliation provisions must "produce a change in outlays or revenues" that is not "merely incidental to the non-budgetary components of the provision." 2 U.S.C. §644(b)(1). The process does not forbid employment of taxing and spending to promote policy changes. Using Congress's taxing and spending powers to advance significant policy goals is "nothing new." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537, 567 (2012); *see, e.g.*, Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022); Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, 115 Stat. 38 (2001). The One Big Beautiful Bill Act shows that Congress views family detention throughout removal proceedings as appropriate and expects DHS to use the funds accordingly.

The changed circumstances establish that the FSA is outdated and not in the public interest.

D. HHS and DHS implemented durable remedies to comply with federal law.

This Court must consider "whether ongoing enforcement" of the Decree is "supported by an ongoing violation of federal law." *Horne*, 557 U.S. at 454. To start, as the Supreme Court held, there was never a legal violation in the first place and none have existed since. *See Reno v. Flores*, 507 U.S. 292, 305-06 (1993). Even so, if the government has implemented a "durable remedy" to comply with the underlying federal law, judicial oversight must cease. *Horne*, 557 U.S. at 450. The government has implemented durable remedies. O.B.58-60.

In district court, the government argued that DHS and HHS have implemented durable remedies and presented evidence of their operational practices that comply with federal law. FER-209; FER-229-31; FER-240; 2-ER-23-55; 2-ER-66-73; 2-ER-169-200; 2-ER-201-07; 2-ER-208-319; 3-ER-321-616; 4-ER-618-58. In their brief below, Plaintiffs did not specifically dispute that the government has implemented a durable remedy to ensure compliance with federal law, a failure the government noted in its reply brief. FER-25; *see* FER-143-76. The district court did

not address the argument either and instead focused on compliance with the Decree. *See* 1-ER-18; 1-ER-21. That is the same error that the Supreme Court reversed in *Horne*. O.B.46-47.

In this appeal, Plaintiffs do not defend the district court's failure to analyze whether ongoing enforcement of the Decree is justified by an ongoing violation of federal law. Instead, Plaintiffs try to turn their waiver into a justification for remand. A.B.23. Nor do they explain why Defendants' regulations are insufficient to address any current or future violations of federal law. And, notably, Plaintiffs still do not assert that any ongoing violation of federal law warrants continued enforcement of the Decree as to HHS. For that reason, the Court must, at least, release HHS entirely from the district court's oversight. As to DHS, Plaintiffs spend nearly 10 pages alleging, for the first time on appeal, that DHS is violating constitutional rights.[1] A.B.24-33. Plaintiffs' allegations, however, fail to justify affirming the district court's order or remanding for further factfinding.

[1] By failing to raise this claim below, Plaintiffs have waived it. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). If Plaintiffs believe such constitutional violations are occurring, they can bring those claims separately rather than as part of enforcing a sweeping consent decree.

1. HHS has implemented a durable remedy, and Plaintiffs do not contend otherwise.

Because HHS has implemented a durable remedy, the Court must completely release HHS from the FSA. Although Plaintiffs contend that HHS is not in substantial compliance with the *Decree*, A.B.54-57, Plaintiffs nowhere dispute that HHS has implemented a durable remedy to ensure compliance with the underlying *federal law*. A.B.23-33. The district court declined to terminate the entire FSA as to HHS because of alleged inconsistencies between the Foundational Rule and the Decree, not federal law. 1-ER-15-16; 4-ER-726-27. Neither the district court nor Plaintiffs have identified any ongoing federal-law violations that warrant maintaining the Decree as to HHS. Thus, the Court must promptly return responsibility to HHS.[2] *Horne*, 557 U.S. at 450.

2. DHS has implemented a durable remedy through its regulations and policies.

Plaintiffs fail to refute that DHS has implemented durable remedies to ensure compliance with federal law.

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[2] Contrary to Plaintiffs' argument, A.B.53 n.23, the government asked for termination as to HHS even if DHS did not receive relief. FER-214; FER-32 n.3. Keeping HHS bound to the district court's oversight based on allegations about another agency would be contrary to the flexible approach that the Supreme Court requires.

a. Most importantly, in the 2019 Rule, DHS set forth requirements to ensure compliance with constitutional standards of care and other federal laws. *See* 8 CFR §236.3. Plaintiffs do not point to any conflict between the 2019 Rule and federal law. Rather, Plaintiffs shift the goalposts by arguing that the 2019 Rule cannot be a durable remedy because this Court previously "held these very regulations as insufficient to sunset the FSA." A.B.25. But this Court held only that the 2019 Rule was inconsistent with the licensing and release provisions of the Decree. *See Flores*, 984 F.3d at 737-40 (holding that the "DHS regulations relating to the care and placement of accompanied minors *differ substantially from the Agreement*" as to release and state-licensing provisions (emphasis added)). The Court said nothing about consistency with any underlying federal law. If the district court's injunction is dissolved, the DHS regulations will be legally enforceable and in place as a durable remedy.

To the extent Plaintiffs allege that U.S. Customs and Border Protection (CBP) facilities are not safe and sanitary or that U.S. Immigration and Customs Enforcement's (ICE) family residential center lacks suitable food or appropriate medical care, Plaintiffs could bring

such claims (and others like them) under the 2019 Rule. *See* 8 C.F.R. §236.3(g)(2)(i); *id.* §236.3(i)(4)(i)-(ii). District courts are "not closing." *Shakman*, 43 F.4th at 732. Any new claims should be resolved under the current facts and law, rather than a Decree from 1997.

b. Plaintiffs fail to establish that violations of federal law justify enforcement of the FSA as to CBP. Plaintiffs first argue about time in custody. A.B.26. CBP strives to transfer or repatriate individuals as quickly as possible under the circumstances of each case. 2-ER-31; 2-ER-46; FER-110; *see* 1-SER-25-26 (discussing the one child highlighted by Plaintiffs). When ruling on the termination motion, the district court knew that times in CBP custody had been decreasing compared to earlier in 2025, a fact Plaintiffs ignore. 1-SER-8; *see* A.B.26-27.

Next, Plaintiffs contend that CBP has constitutionally deficient custodial conditions. A.B.27. In accordance with the 2019 Rule, CBP provides appropriate custodial care for minors. 8 C.F.R. §236.3(g)(2)(i); 2-ER-32-38; 2-ER-42-46; 1-SER-19-20; FER-61-62; FER-92-96; *see* 1-SER-26-28 (discussing the child Plaintiffs specifically mention). Moreover, the "unique purpose" of CBP custody justifies temporary conditions that

would be unacceptable in a long-term detention facility. *Doe v. Kelly*, 878 F.3d 710, 721-22 (9th Cir. 2017).

Plaintiffs also cite several district court orders. A.B.27-28. The government is separately appealing the three most recent orders. *See Flores v. Bondi*, No. 25-6567, No. 25-820, and No. 24-3656. In any event, those three orders are more limited than Plaintiffs suggest.[3] The district court made narrow findings about only three geographic areas. *See* 1-SER-11-13 (temperature and lighting in Rio Grande Valley (RGV) and El Paso Sectors and three facilities near San Diego); 1-SER-280, 1-SER-288 (monitoring protocols in RGV and El Paso Sectors); 4-ER-737 (outdoor areas near San Diego).

Even if the district court's findings were correct, they would not show systemic violations of federal law. CBP operates 120 stations within 20 U.S. Border Patrol Sectors and 328 ports of entry. *See* 1-SER-18; FER-62; Sectors and Stations, *CBP*, https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors [https://perma.cc/7J6Z-2V62] (last modified Apr. 22, 2025). Plaintiffs' handful of allegations

[3] Plaintiffs also cite orders from 2015 and 2017, which have little probative value in assessing current compliance with federal law. A.B.28.

about a few locations do not justify preserving a nationwide decree. *See Lewis v. Casey*, 518 U.S. 343, 359 (1996).

c. In asserting that ICE is violating class members' constitutional rights, Plaintiffs rely almost entirely on documents filed with the district court *after* the August 15, 2025 order on appeal. A.B.29-30 (citing documents in the Supplemental Excerpts of Record between 1-SER-100 and 1-SER-274). Those documents are not properly part of the record on appeal because they were not before the district court when it ruled. *See* Fed. R. App. P. 10(a); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). Plaintiffs have not moved to supplement the record, as is required. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003). Therefore, the Court should not consider the documents (1-SER-100 to 1-SER-274) that postdate the August 15, 2025 order. *See Henry v. Adventist Health Castle Med. Ctr.*, 970 F.3d 1126, 1128 n.1 (9th Cir. 2020).

Even if considered, those documents would not warrant continuing the FSA. The 2019 Rule requires providing medical care, access to hygiene products, nutritious food, and adequate sleeping conditions for each class member. 8 CFR §236.3(i)(4). So do the Family Residential

Standards.[4] 3-ER-393-423 (§4.1); 3-ER-430-65 (§4.3); 3-ER-471-76 (§4.5). The ICE juvenile coordinator's report shows that ICE fulfills those requirements. 1-SER-238-39; 1-SER-246-49; 1-SER-260; *see also* 1-SER-243-46 (education program); 1-SER-260 (nighttime lighting).

In addition, Plaintiffs mostly rely on inadmissible hearsay from their lawyers. 1-SER-136-39; 1-SER-205-14; *see* Fed. R. Evid. 802. The few non-hearsay examples that Plaintiffs provide would be an "inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis*, 518 U.S. at 359.

Plaintiffs' main objection is to potentially longer periods of detention. A.B.29, 32-33. But the Supreme Court has repeatedly held that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1206 (9th Cir. 2022). The Court held the same in this case. *Reno*, 507 U.S. at 305-06. While an alien sometimes can allege unconstitutionally prolonged detention, this case has never been about run-of-the-mill prolonged-

[4] Contrary to Plaintiffs' claim, A.B.29, the ICE juvenile coordinator did not say that the Family Residential Standards are suitable for "abbreviated" stays only. 1-SER-244.

detention claims. Speculation about such claims would not justify continuing the Decree.

* * *

HHS and DHS have implemented durable remedies; terminating the Decree is required. The Court should reject Plaintiffs' suggestion to remand for additional factfinding because Plaintiffs have not sufficiently supported their allegations as to any agency. A.B.33 n.11. Plaintiffs' various legal theories and scattershot allegations about facilities in Texas and San Diego underscore why a single district court in Los Angeles should not be overseeing a nationwide class action that requires ongoing judicial oversight of core Executive functions. *See Lewis*, 518 U.S. at 349-50, 359; *Horne*, 557 U.S. at 470-72; *Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024).

II. *Aleman Gonzalez* shows that the FSA violates the jurisdiction-stripping provision in 8 U.S.C. §1252(f)(1).

Aleman Gonzalez resolved any doubt that 8 U.S.C. §1252(f)(1) divests the district court of jurisdiction to enforce the FSA because the FSA's provisions restrain the operation of covered immigration-detention statutes. O.B.64-69. Plaintiffs do not show otherwise.

A. Section 1252(f)(1) cannot be waived because it is jurisdictional.

Plaintiffs again lean heavily on unpersuasive arguments about waiver and forfeiture because their merits arguments are so weak. A.B.44-50. Section 1252(f)(1) limits the "jurisdiction or authority" of the lower courts. Because jurisdictional limitations speak to "a court's *power*," a jurisdictional defect "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis added). Thus, "if the record discloses that the lower court was without jurisdiction," federal courts must "notice the defect, although the parties make no contention concerning it." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation omitted). For that reason, the government did not, and could not, waive §1252(f)(1) when it agreed to the FSA in 1997 or at any other point in this litigation.

That §1252(f)(1) strips courts of jurisdiction to grant a particular form of relief, rather than adjudicate a particular type of case, does not alter that analysis. Although limits on relief ordinarily are not jurisdictional, Congress "is free to attach the conditions that go with the jurisdictional label"—including exemption from forfeiture—to whatever requirements it chooses. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

Congress unambiguously did so in §1252(f)(1), which expressly states that no court "shall have *jurisdiction or authority*" to grant the specified relief (emphasis added). Accordingly, that limitation "is jurisdictional … because explicit statutory language makes it so." *Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 177 (2017); *see, e.g.*, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007).

Despite §1252(f)(1)'s express jurisdictional language, Plaintiffs argue that the provision "can be waived" because it does not limit "subject-matter jurisdiction." A.B.46-47 (citing *Biden v. Texas*, 597 U.S. 785, 798 (2022)). That §1252(f)(1) does not speak to a federal court's *subject-matter* jurisdiction does not mean it is not "jurisdictional" in the relevant sense of limiting the district court's remedial authority: *Biden* unequivocally stated that "Section 1252(f)(1) no doubt deprives the lower courts of '*jurisdiction*' to grant classwide injunctive relief." 597 U.S. at 801 (emphasis added). Moreover, the fact that §1252(f)(1) does not address *subject-matter* jurisdiction cannot determine whether it may be forfeited, because the *Biden* Court reserved whether §1252(f)(1) "is subject to forfeiture." *Id.* at 801 n.4.

The cases that Plaintiffs cite are unpersuasive or inapposite. A.B.47-48. Plaintiffs cite a Seventh Circuit motions panel decision, which preliminarily reasoned that §1252(f)(1)'s restriction is waivable like personal jurisdiction, venue, and sovereign immunity. *See Castañon-Nava v. DHS*, 161 F.4th 1048, 1056 (7th Cir. 2025). But personal jurisdiction and venue are "*personal privileges* of the defendant." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (emphasis added); *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). Because they represent "individual right[s]," they "can, like other such rights be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Likewise, the doctrine of sovereign immunity confers "a personal privilege which a State may waive at pleasure." *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 506 (2021) (citation modified).

Section 1252(f)(1) does not confer any "personal privilege[]" on a party. *Leroy*, 443 U.S. at 180. Rather, it "delimits federal-court power," *Marathon Oil*, 526 U.S. at 583, by expressly restricting the "jurisdiction or authority" of lower courts to order certain relief, 8 U.S.C. §1252(f)(1). Such restrictions on federal court power are not waivable because they

"serve institutional interests" and "keep the federal courts within the bounds the Constitution and Congress have prescribed." *Marathon Oil*, 526 U.S. at 583.

The other cases cited by Plaintiffs are inapposite because they discuss waiving objections to a court's equity jurisdiction—its authority to issue equitable relief under "the body of doctrine" passed down from English courts. *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939); *see also Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1160 (D.C. Cir. 2007) (citing *Atlas Life*). Conversely, §1252(f)(1) is an explicit, jurisdictional limit from Congress and, thus, cannot be waived.

Even if §1252(f)(1) could be waived, applying waiver here based on previous officials' agreement to the FSA and failure to appeal past orders would be inappropriate for the reasons discussed below in Section IV.

B. The government's motion was timely.

The government's motion to terminate in light of *Aleman Gonzalez* was made "within a reasonable time." Fed. R. Civ. P. 60(c)(1); *see Bynoe v. Baca*, 966 F.3d 972, 980 (9th Cir. 2020) (listing factors). Plaintiffs assert that the government's motion was not timely because three years passed between the *Aleman Gonzalez* decision in 2022 and the motion.

A.B.46. The special features of institutional-reform injunctions show that the government's timing was reasonable. The current Administration could not move for relief until it took office in January 2025. The Administration moved for relief four months later, which is a reasonable time. FER-180. That the previous administration did not challenge the district court's jurisdiction should not bind this Administration.[5] *See Horne*, 557 U.S. at 449, 453. Moreover, the interest in finality and any prejudice to other parties are substantially lessened here because institutional-reform decrees are always supposed to be "temporary solutions, not permanent interventions." *United States v. Washington*, 573 F.3d 701, 710 (9th Cir. 2009). The government's motion was timely.

C. *Aleman Gonzalez* reveals the FSA's jurisdictional infirmity and makes the Decree's prospective application inequitable.

Plaintiffs argue that the FSA has no fundamental jurisdictional infirmity and that "*Aleman Gonzalez* is not the fundamental change in law the Government imagines." A.B.44-45. That is incorrect.

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[5] Contrary to Plaintiffs' assertion, A.B.46, the government explained below that it moved for relief within a reasonable time, FER-17-18. The government did not discuss timeliness in its Opening Brief because the district court did not base its ruling on that issue. 1-ER-10 n.4.

Many provisions of the FSA run afoul of §1252(f)(1) as clarified in *Aleman Gonzalez*. O.B.65-67. Because the parties in 1997 did not have the benefit of *Aleman Gonzalez*, they did not realize the conflict with §1252(f)(1). 4-ER-694 (¶41). Likewise, before *Aleman Gonzalez*, the district court believed that §1252(f)(1) posed no problem because the FSA requires "*individualized* determinations" rather than the blanket release of all class members. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1062, 1066-67, 1072-73 (C.D. Cal. 2017). But *Aleman Gonzalez* establishes that ordering the government to conduct such "individualized" determinations class-wide also violates §1252(f)(1). *Aleman Gonzalez*, 596 U.S. at 551.

Plaintiffs contend that the FSA has only a collateral effect on the covered statutes and that, "[i]n approving and enforcing the Settlement, the district court neither enjoined nor restrained the operation of any statute." A.B.51. Plaintiffs are incorrect. The FSA indisputably is a class-wide injunction. *See* 4-ER-684 (¶10); 4-ER-794. The FSA contains many provisions that "require officials to take actions that (in the Government's view) are not required by" the covered statutes "and to refrain from actions that (again in the Government's view) are allowed by" the covered statutes. O.B.66. The FSA implicates the fundamental questions of when

and how to release aliens. O.B.67-68. Thus, the FSA exceeds the district court's jurisdiction under §1252(f)(1).

To avoid that conclusion, Plaintiffs assert that DHS may satisfy the Decree's release provisions by considering accompanied minors for parole under 8 U.S.C. §1182(d)(5). A.B.53. The parole statute does not solve the jurisdictional issue. First, Plaintiffs' interpretation does not accord with the Decree's text. While the FSA specifically mentions "bond" hearings, it nowhere mentions parole. 4-ER-689 (¶24.A). The Supreme Court struck down injunctions that similarly required bond hearings in *Aleman Gonzales*. 596 U.S. at 551. Second, requiring an individualized determination for release violates §1252(f)(1) whether done through a bond hearing or a parole determination. That requirement adds a "new procedural step" to the operation of the covered provisions. *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102, 1125 (9th Cir. 2025), *cert. granted on other grounds*, No. 25-5, 2025 WL 3198572 (U.S. Nov. 17, 2025).

Last, Plaintiffs posit that §1252(f)(1) at most would warrant modifying, not terminating, the FSA. A.B.53. The jurisdictional flaw, however, goes to the FSA's core. The FSA sets out one "nationwide policy

for the detention, release, and treatment of minors" in immigration custody. 4-ER-683 (¶9). The FSA provisions that most clearly violate §1252(f)(1) cannot be logically separated from the rest. Even if they could, the remainder would not resemble the parties' bargain in 1997. Now that the jurisdictional error is plain, the Decree should be vacated.

III. HHS has substantially satisfied the FSA's terms.

As discussed above, enforcing the FSA is "no longer equitable" under Rule 60(b)(5) as to HHS because HHS implemented a durable remedy. *See supra* Section I.E.1. Alternatively, terminating the FSA as to HHS is necessary because HHS substantially satisfied the Decree by promulgating the Foundational Rule and issuing interpretive rules to eliminate the perceived inconsistencies between the Foundational Rule and the FSA. O.B.70-73.

Plaintiffs are wrong that the Office of Refugee Resettlement's (ORR) updated policy guides are "[m]utable internal policies that conflict with the Foundational Rule." A.B.56. Plaintiffs fail to compare the text and identify any conflict between the updated policy guide and the Foundational Rule. Even before the district court's 2024 ruling on HHS's motion to terminate, ORR maintained that the best reading of the

Foundational Rule forecloses the court's concerns about the appearance of conflict with the FSA. FER-247-54. ORR's policy updates in 2025 merely clarified and confirmed ORR's interpretation and practice.

Plaintiffs provide no support for their assertion that the updated policy guidance is not an interpretive rule because it does not specifically cite the relevant Foundational Rule provisions. A.B.56. The introduction states that the policy guide explains how ORR runs the unaccompanied alien children program, "consistent with ORR's legal authorities," including the Foundational Rule. ORR UAC Bureau Policy Guide: Introduction, *ORR* (Feb. 27, 2025), https://acf.gov/orr/policy-guidance/unaccompanied-children-bureau-policy-guide-introduction [https://perma.cc/29VL-S54E].

Reading the policy guide updates together with the Foundational Rule shows that HHS has adopted the relevant and substantive terms of the FSA as an agency regulation. The Foundational Rule is the legally enforceable notice-and-comment rule that Plaintiffs argue is required, and the policy guide clarifies that ORR does not implement the Foundational Rule in the way the district court feared.

This Court should decline Plaintiffs' request to remand for additional factfinding. A.B.57 n.26. Unlike with DHS, Plaintiffs do not even attempt to support their allegations of HHS's noncompliance before this Court. In the district court, the government thoroughly refuted Plaintiffs' isolated and out-of-date allegations. FER-38-48. HHS has substantially complied with the FSA. The district court erred in holding otherwise.

IV. Past opinions and litigation decisions do not foreclose the government's motion.

Contrary to Plaintiffs' argument, the government's motion to terminate was not an "improper collateral attack on prior orders of the district court and opinions of this Court." A.B.18. Plaintiffs contend that the government simply disagrees with the decision in *Flores v. Rosen*, 984 F.3d 720, after failing to seek further review. A.B.18-20. Plaintiffs misunderstand the *Horne* standard and the bases for the government's Rule 60(b) motion. Plaintiffs' position is essentially that the government gets one attempt to dissolve a decades-long consent decree constraining immigration enforcement and, if one administration decides not to appeal, the entire government is forever bound. That is not the law.

The Supreme Court has rejected the proposition that courts should entrench institutional-reform decrees through rigidly applying doctrines such as waiver, forfeiture, and law of the case. In *Horne*, the court of appeals held that the state defendants (under a previous administration) forfeited their arguments about changed circumstances because they failed to appeal. *Horne*, 557 U.S. at 452. The Supreme Court rejected that premise, explaining that the appellate court's focus on the defendants' failure to appeal "insulated the policies embedded" in the district court's order, because those policies "were supported by the very officials who could have appealed them … and, as a result, were never subject to true challenge." *Id.* at 453. Therefore, "[i]nstead of focusing on the failure to appeal," courts must conduct "the type of Rule 60(b)(5) inquiry prescribed in [*Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)]," which "makes no reference to the presence or absence of a timely appeal." *Id.* Indeed, the entire point of Rule 60(b)(5) is to review the equities moving forward given the passage of time since a prior order.[6]

[6] Plaintiffs contend that the government waived reliance on Rule 60(b)(6) by arguing that Rule 60(b)(5) applies. A.B.18 n.3. But Plaintiffs themselves argue that relief under Rule 60(b)(5) is unavailable. Although the government disagrees, it preserved the alternative argument that, if

The passage of time here—six years since the government last moved to terminate the entire Decree—has yielded new developments and insights that support termination.

First, the government argued that the Decree's ongoing enforcement violates the separation of powers. FER-220-32. The argument reflects lessons learned from six more years of judicial intrusion. And the government asserted that, in decisions in 2019 and 2024, the district court interpreted the FSA to require promulgating regulations in violation of the APA. FER-232-36.

Second, the government argued for relief based on the unprecedented and exponential increase in border crossings in 2023 and 2024. FER-237-39.

Third, the government identified two statutes passed in 2025 that fund family residential centers and require DHS to hold aliens, including accompanied minors, until the conclusion of their removal proceedings. FER-241; FER-26-27. These statutes confirm Congress's approval of family detention for periods that exceed the limits added to the FSA by

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Rule 60(b)(5) is unavailable, Rule 60(b)(6) applies and warrants relief. O.B.64; FER-236.

the district court. *See* One Big Beautiful Bill Act, Pub. L. No. 119-21, §90003 (2025); Laken Riley Act, Pub. L. 119-1 (2025).

Fourth, the government showed that no ongoing violation of federal law justifies ongoing judicial oversight of this area of Executive policy. FER-230-31. This argument depends on circumstances as they now exist, not as they were in 2019. *Horne*, 557 U.S. at 439, 447-51. In any event, there never were constitutional violations as the Supreme Court held prior to the FSA, underscoring the impropriety of this decades long straight jacket a single district court has bound the entire nation's immigration enforcement in. *See Reno*, 507 U.S. at 300.

Fifth, the government relied on the Supreme Court's 2022 decision in *Aleman Gonzalez*, 596 U.S. 543, which establishes that, under 8 U.S.C. §1252(f)(1), the district court lacks jurisdiction to enforce substantial portions of the FSA against DHS. FER-210-12. That decision was issued after the previous termination appeal.

Sixth, the government asserted that HHS's Foundational Rule, adopted in 2024, and HHS's policy updates in 2025 show that HHS has satisfied the FSA and that prospective application of the FSA as to HHS is inequitable. FER-213-14.

Plainly, in ruling on the government's last motion to terminate the entire Decree, the district court in 2019 and this Court in 2020 did not consider the factual and legal circumstances of the last six years because those events had not yet happened.

For similar reasons, the law-of-the-case doctrine does not control here. The doctrine generally "does not apply to issues or claims that were not actually decided." *Mortimer*, 594 F.3d at 720. Even if the doctrine did apply, it is prudential and has at least three exceptions: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 721 (citation modified).

All three exceptions apply here. First, if this Court's 2020 decision were interpreted to forever foreclose the government's requests for relief, it would be clearly erroneous under *Horne*, and continuing to subject core Executive functions to judicial oversight without an ongoing violation of federal law would work manifest injustice under our constitutional structure. Second, the Supreme Court's 2022 decision in *Aleman Gonzalez* and the new statutes about detention (the One Big Beautiful

Bill Act and the Laken Riley Act) require reconsidering past decisions. Third, the government submitted almost entirely different evidence regarding the government's 2025 motion to terminate, from HHS's regulations and guidance to the newly enacted statutes approving of family detention, compared to the 2019 motion. *See* FER-237-43; FER-26-27; 2-ER-23-73; 2-ER-77-158; 2-ER-201-07.

Plaintiffs specifically argue that the law-of-the-case doctrine bars the government's *Aleman Gonzalez* argument. A.B.48-49. That makes even less sense. In the decision that Plaintiffs cite, the district court did not have the benefit of *Aleman Gonzalez*. *See Flores v. Sessions*, 394 F. Supp. 3d 1041, 1066-67 (C.D. Cal. 2017). Thus, "intervening controlling authority makes reconsideration appropriate." *Mortimer*, 594 F.3d at 721. This Court has not resolved the issue considering *Aleman Gonzalez* either. The law-of-the-case doctrine does not apply.

In short, *Horne* requires addressing the government's arguments on the merits, rather than dismissing them as waived, barred, or "nothing new under the sun." 1-ER-9.

CONCLUSION

The Court should reverse the district court and remand with instructions to terminate the FSA, dissolve the injunction on DHS's 2019 Rule, and dismiss the case.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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