

1 CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
2 Peter A. Schey (58232)
3 Carlos R. Holguín (90754)
4 256 South Occidental Boulevard
5 Los Angeles, CA 90057
6 Telephone: (213) 388-8693
7 Email: pschey@centerforhumanrights.org

8 *Attorneys for Plaintiffs*

9 *Additional counsel listed on following pages*

10
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Jenny Lisette Flores., *et al.*,
Plaintiffs,
v.
William Barr, Attorney General of the
United States, *et al.*,
Defendants.

Case No. CV 85-4544-DMG-AGR_x

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION.**

Hearing: None set

[HON. DOLLY M. GEE]

1 USF SCHOOL OF LAW IMMIGRATION CLINIC

2 Bill Ong Hing (Cal. Bar No. 61513)

2130 Fulton Street

3 San Francisco, CA 94117-1080

4 Telephone: (415) 422-4475

5 Email: bhing@usfca.edu

6 LA RAZA CENTRO LEGAL, INC.

7 Stephen Rosenbaum (Cal. Bar No. 98634)

474 Valencia Street, #295

8 San Francisco, CA 94103

9 Telephone: (415) 575-3500

10 UNIVERSITY OF CALIFORNIA DAVIS
11 SCHOOL OF LAW

Immigration Law Clinic

12 Holly S. Cooper (197626)

One Shields Avenue, TB 30

13 Davis, CA 95616

14 Telephone: (530) 754-4833

15 Email: hscoper@ucdavis.edu

16 THE LAW FOUNDATION OF SILICON VALLEY

17 Jennifer Kelleher Cloyd (Cal. Bar No. 197348)

18 Katherine H. Manning (Cal. Bar No. 229233)

19 Annette Kirkham (Cal. Bar No. 217958)

4 North Second Street, Suite 1300

20 San Jose, CA 95113

21 Telephone: (408) 280-2437

22 Email: kate.manning@lawfoundation.org

23 *Of counsel:*

24 ALDEA - THE PEOPLE'S JUSTICE CENTER

Bridget Cambria

532 Walnut Street

25 Reading, PA 19601

26 Phone: (484) 877-8002

27 Fax: (484) 926-2032

28 Email: bridget.cambria@cambriaklinelaw

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1
2 **I. INTRODUCTION**

3 On January 28, 1997, this Court approved the Flores Settlement Agreement
4 (“Agreement”). *See Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017). Plaintiffs
5 now seek a temporary order protecting class members whom the Defendants the
6 Immigration and Customs Enforcement (“ICE”) and Office of Refugee Resettlement
7 (“ORR”) are holding in congregate detention from the clear and present danger the
8 COVID-19 pandemic poses to their safety and well-being.¹

9 Medical experts, including the United States Center for Disease Control and
10 Prevention (“CDC”), unanimously demand that everyone practice physical distancing,
11 avoid groups of ten or more, self-isolate, and take like precautions that are all but
12 impossible for children held in congregate detention primarily because of Defendants
13 non-compliance with plain terms of the Agreement.²

14 The spread of COVID-19 into Defendants’ facilities is not speculative.³ It has
15 already infected ORR’s MercyFirst and Abbott House congregate facilities in New

16 ¹ “[A] motion to enforce [a] settlement agreement essentially is an action to
17 specifically enforce a contract.” *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709
18 (9th Cir. 1989). As described numerous times in this litigation, the Flores
19 Settlement is a consent decree. *See, e.g., Flores v. Sessions*, 862 F.3d 863, 874 (9th
20 Cir. 2017); Order re Pls.’ Mot. to Enforce at 3 [Doc. # 177]; Order re Pls.’ Mot. to
21 Enforce & Appoint a Special Monitor at 2–4 [Doc. # 363]. Because consent decrees
22 have ‘many of the attributes of ordinary contracts [and] . . . should be construed
23 basically as contracts,’ the doctrine of substantial compliance, or substantial
24 performance, may be employed.” *Jeff D. v. Otter*, 643 F.3d 278, 283–84 (9th Cir.
25 2011) (internal citation omitted).

26 ² Just days ago this Court of Appeals stated in brief and stark terms: “In light of the
27 rapidly escalating public health crisis, which public health authorities predict will
28 especially impact immigration detention centers, the court *sua sponte* orders that
Petitioner be immediately released from [immigration] detention and that removal
of Petitioner be stayed pending final disposition by this court.” *Xochiohua-Jaimes*
v. Barr, No.18-71460 (March 23, 2020) (citations omitted).

³ ORR has stopped placing children in detention facilities in California,
Washington, Oregon and Pennsylvania. Declaration of Peter Schey, March 24,
2020, Exhibit at ¶ (“Schey”).

1 York and facilities housing ICE detainees.⁴ At least one child is now in quarantine
2 awaiting test results in the ICE family detention center in Berks, Pennsylvania.
3 Declaration of Bridget Cambria ¶ 36 (“Cambria Decl.”) (Exhibit H).

4 The Agreement “sets out nationwide policy for the detention, release, and
5 treatment of minors in the custody of the [Defendants] ...” Agreement at ¶ 9. The
6 certified class includes “[a]ll minors who are detained in the legal custody of the
7 [Defendants].” *Id.* ¶ 10. It requires that Defendants “treats [] and shall continue to
8 treat, all minors in its custody with dignity, respect and special concern for their
9 particular vulnerability as minors.” *Id.* ¶ 11.⁵ It requires that except for class members
10 who are flight risks or a danger, class members shall be released without unnecessary
11 delay to listed sponsors, *id.* ¶¶ 14 and 18, and if not promptly released, must “as
12 expeditiously as possible,” *id.* ¶ 12.A.3, be transferred to a “non-secure” program
13 licensed by a state for the care of dependent children. *Id.* ¶¶ 6 and 19, and Exhibit 1.

14 The obvious ways to comply with the Agreement and protect class members’
15 safety are to (1) expedite children’s release to sponsors identified in Paragraph 14, and
16 (2) not detain children in congregate unlicensed facilities where their risk of exposure
17 to COVID-19 is high.

18 At the same time, the Agreement’s terms that encourage and ensure compliance
19 with the Agreement’s substantive rights must also be enforced, including for example,
20 providing class members not released with an explanation for the decision to detain
21 them, providing access to legal counsel and notices to legal counsel necessary for

22 ⁴ See Hamed Aleaziz, *A Staff Member at a Facility Housing Unaccompanied*
23 *Immigrant Children Has Tested Positive for the Coronavirus*, BUZZFEED NEWS,
24 March 19, 2020, available at [www.buzzfeednews.com/article/hamedaleaziz/staff-](http://www.buzzfeednews.com/article/hamedaleaziz/staff-member-coronavirus-diagnosis-unaccompanied-immigrant)
25 *member-coronavirus-diagnosis-unaccompanied-immigrant* (last visited March 26,
26 2020). See also Hamed Aleaziz, *An ICE Detainee Has Become the First to Test*
27 *Positive for the Coronavirus*, BUZZFEED NEWS, March 24, 2020, available at
28 [www.buzzfeednews.com/article/hamedaleaziz/immigrant-ice-detention-facility-](http://www.buzzfeednews.com/article/hamedaleaziz/immigrant-ice-detention-facility-coronavirus-test)
29 *coronavirus-test* (last visited Mar. 26, 2020)

⁵ It also requires that “[f]ollowing arrest, the [Defendants] shall hold minors in
facilities that are safe and sanitary and that are consistent with the [Defendants’]
concern for the particular vulnerability of minors.” *Id.* ¶ 12.A.

1 class members to knowingly and intelligently exercise their *Flores* rights, and
2 recording Defendants’ prompt and “continuous” efforts aimed at release that the
3 Agreement requires.

4 Under present circumstances, it is reasonable and necessary to order Defendants
5 to promptly release children to available custodians, or if they are not entitled to
6 release under Paragraph 14, to transfer them to non-congregate settings, or justify why
7 it has done neither. Unless they are a flight risk or a danger, or there is good cause for
8 not doing so,⁶ minors should generally be released within seven days. To insure that
9 Defendants are complying with the Agreement and making prompt efforts aimed at
10 the release of minors, Defendants should provide the Special Master and Class
11 Counsel the information identified by this Court in its Order Appointing Special
12 Master [Doc. # 494] at B.1.c.i(i)-(x), ii(i)-(vi), and iii. These measures will reduce the
13 number of detained class members remaining in congregate detention making more
14 room and more medical resources available to them, and thus providing them a better
15 chance to protect themselves against an onslaught of contagion.

16 **II. STATEMENT OF FACTS**

17 ***A. The COVID-19 Global Pandemic Demands Measures be Taken to*** 18 ***Enforce the Agreement and Protect the Health and Safety of Class*** 19 ***Members.***

20 COVID-19 is a novel, deadly and highly infectious disease that has developed
21 into a global pandemic and spread in all 50 states. Declaration of Dr. Katherine Peeler
22 (“Peeler Decl.”) ¶ 5 (Exhibit A); Declaration of Dr. Craig W. Haney (“Haney Decl.”)
23 ¶ 3 (Exhibit B); Declaration of Dr. Julie DeAun Graves ¶ 6 (“Graves Decl.”) (Exhibit
24 C); Declaration of Jaimie Meyer ¶ 20 (“Meyer Decl.”) (Exhibit D). At present there is
25 no vaccine and no cure for COVID-19. Haney Decl. ¶ 5. No one has immunity. Haney
26 Decl. ¶ 5. The disease spreads through respiratory droplets and can be transmitted

27
28 ⁶ Defendants may possess good cause for any legitimate reason involving the
release of a minor including the unavailability of a sponsor.

1 through person to person contact—including contact with asymptomatic individuals—
2 and through contact with inanimate surfaces. Meyer Decl. ¶ 20; Graves Decl. ¶ 8.

3 In the United States, about 52,215 people have been diagnosed and at least 675
4 people have died as of March 24, 2020. Peeler Decl. ¶ 5.⁷ Given the severe shortage of
5 COVID-19 tests, these numbers underestimate the true spread of the disease. Graves
6 Decl. ¶ 7. This pandemic has unfortunately already reached the ORR and ICE
7 systems, with several staff members at ORR facilities and at least one ICE detainee
8 testing positive for COVID-19.⁸

9 ***B. Class Members Detained in Congregate Settings Are At High Risk of***
10 ***Contracting COVID-19.***

11 Almost all class members not released by Defendants are incarcerated in
12 congregate settings in ICE detention centers and ORR contract facilities in close and
13 constant proximity to other children, adults, and staff members. *See Cambria* ¶¶ 10, 15-
14 19, 27; Declaration of Shalyn Fluharty (“Fluharty Decl.”) ¶¶ 6-18, 21 (Exhibit I);
15 Declaration of Andrea Meza (“Meza Decl.”) ¶ 40 (Exhibit J).⁹ As the CDC has
16

17 ⁷ For updated statistics, see *Coronavirus COVID-19 Global Cases*, Ctr. Systems
18 Science & Engineering, Johns Hopkins Univ., (JHU),
19 <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda759470fd402994423467b48e9ecf6>.

20 ⁸ Camilo Montoya-Galvez, *3 workers at facilities housing migrant kids in U.S.*
21 *custody test positive for coronavirus*, CBS NEWS, March 23, 2020,
22 <https://www.cbsnews.com/news/coronavirus-migrant-children-workers-test-positive>. Priscilla Alvarez and Catherine E. Shoichet, *First ICE Detainee Tests*
23 *Positive for Coronavirus*, CNN, Mar. 24, 2020,
24 <https://www.cnn.com/2020/03/24/us/ice-detainee-coronavirus/index.html>.

25 ⁹ *See* Office of Refugee Resettlement, *Children Entering the United States*
26 *Unaccompanied: Guide to Terms*, [https://www.acf.hhs.gov/orr/resource/children-](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms)
27 [entering-the-united-states-unaccompanied-guide-to-terms](https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms) (defining “shelter,” for
28 example, as “a residential care provider facility in which all of the programmatic
components are administered on-site ...”); *see also* Amra Uzicanin and Joanna
Gaines, *Community Congregate Settings*, CDC FIELD EPIDEMIOLOGY MANUAL,
U.S. Centers for Disease Control and Prevention, <https://www.cdc.gov/eis/field-epi->

1 warned, detained individuals who “live, work, eat, study, and recreate within
2 congregate environments” are at heightened risk of contracting COVID-19.¹⁰

3 **1. Pandemic Risks in Congregate Settings**

4 COVID-19 is a highly contagious disease for which there is no cure or vaccine.
5 Graves Decl. ¶ 8; Haney Decl. ¶ 5. In the United States, about 69,246 people have
6 been diagnosed and at least 1,046 people have died as of 9:08AM Pacific Standard
7 Time on March 26, 2020.¹¹ The only known way to avoid transmission of COVID-19
8 is for individuals to engage in “social distancing” (maintaining a distance of at least
9 six feet from the nearest person) and frequent hand washing. Graves Decl. ¶ 8. For
10 this reason, the CDC deems social distancing a “cornerstone of reducing transmission
11 of respiratory diseases such as COVID-19.”¹²

12 The rapid transmission of COVID-19 in congregate settings is clearly
13 evidenced by the tragic spread of the virus within cruise ships, nursing homes, and
14 prisons worldwide. Over 800 people tested positive for COVID-19 on cruise ships in
15 Japan and off the coast of California.¹³ At a nursing home facility in Kirkland,
16 Washington, two-thirds of the residents and 47 staff tested positive for COVID-19,
17 with 35 people ultimately dying from the virus.¹⁴ On March 21, 2020, Mayor de

18 manual/chapters/community-settings.html (last reviewed Dec. 13, 2018) (defining
19 “congregate settings” to include “detention facilities”).

20 ¹⁰ U.S. Centers for Disease Control, *Interim Guidance on Management of*
21 *Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*,
22 Mar. 23, 2020, [https://www.cdc.gov/coronavirus/2019-ncov/community/correctional-](https://www.cdc.gov/coronavirus/2019-ncov/community/correctional-detention/guidance-correctional-detention.html)
23 [detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correctional-detention/guidance-correctional-detention.html) (last checked March 25, 2020)

24 ¹¹ For updated statistics, see *Coronavirus COVID-19 Global Cases*, Ctr. Systems
25 Science & Engineering, Johns Hopkins Univ.

26 ¹² *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
27 *Correctional and Detention Facilities*.

28 ¹³ Victoria Forster, *What Have Scientists Learned About COVID-19 and*
29 *Coronavirus By Using Cruise Ship Data?*, FORBES, Mar. 22, 2020,
30 [https://www.forbes.com/sites/victoriaforster/2020/03/22/what-have-scientists-](https://www.forbes.com/sites/victoriaforster/2020/03/22/what-have-scientists-learned-from-using-cruise-ship-data-to-learn-about-covid-19/#3591554f406d)
31 [learned-from-using-cruise-ship-data-to-learn-about-covid-19/#3591554f406d](https://www.forbes.com/sites/victoriaforster/2020/03/22/what-have-scientists-learned-from-using-cruise-ship-data-to-learn-about-covid-19/#3591554f406d).

32 ¹⁴ Jack Healy & Serge F. Kovalski, *The Coronavirus’s Rampage Through a*
33 *Suburban Nursing Home*, THE NEW YORK TIMES, Mar. 21, 2020,

1 Blasio announced that at least 21 inmates and 17 employees at the Rikers Island
2 Correctional Center tested positive for COVID-19, a drastic increase from the first
3 case identified just three days earlier,¹⁵ and even more so a week later.¹⁶ As noted
4 above, three workers at facilities housing class members in ORR custody have
5 reportedly tested positive for coronavirus,¹⁷ and now at least seven children in a
6 different facility await results.¹⁸ In addition, recent reports reveal that at least one ICE
7 detainee and one ICE employee have tested positive,¹⁹ and ten (10) immigrant
8 detainees at ICE's Aurora facility are in isolation for possible exposure to
9 coronavirus.²⁰

10 [https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-](https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html)
11 [care.html](https://www.nytimes.com/2020/03/21/us/coronavirus-nursing-home-kirkland-life-care.html); see also John Balance, *Louisiana identifies new cluster of coronavirus*
12 *cases in Donaldsonville retirement home*, THE ADVOCATE, March 23, 2020,
13 [https://www.theadvocate.com/batonrouge/news/coronavirus/articlea47f606c-6d33-](https://www.theadvocate.com/batonrouge/news/coronavirus/articlea47f606c-6d33-11ea-83ff-139136d51400.html)
14 [11ea-83ff-139136d51400.html](https://www.theadvocate.com/batonrouge/news/coronavirus/articlea47f606c-6d33-11ea-83ff-139136d51400.html) (discussing outbreaks at two Louisiana retirement
15 homes).

16 ¹⁵ *21 Inmates, 17 Employees Test Positive for COVID-19 on Rikers Island*, NBC
17 NEW YORK, Mar. 21, 2020, [https://www.nbcnewyork.com/news/coronavirus/21-](https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/)
18 [inmates-17-employees-test-positive-for-covid-19-on-rikers-island-](https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/)
19 [officials/2338242/](https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/).

20 ¹⁶ In just a few days, the number of confirmed cases has risen to at least 52 inmates
21 with an additional 96 under observation and awaiting test results. Julia Craven,
22 *Rikers Island Has 52 Confirmed COVID-19 Cases*, SLATE, Mar. 25, 2020,
23 [https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-](https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html)
24 [island.html](https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html).

25 ¹⁷ See n.3, supra.

26 ¹⁸ Silvia Foster-Frau, *Seven Migrant Children in Federal Custody Await*
27 *Coronavirus Test Results*, SAN ANTONIO EXPRESS NEWS, updated Mar. 25, 2020,
28 available at [https://www.expressnews.com/news/us-world/border-](https://www.expressnews.com/news/us-world/border-mexico/article/Seven-migrant-children-in-federal-custody-await-15154725.php)
[mexico/article/Seven-migrant-children-in-federal-custody-await-15154725.php](https://www.expressnews.com/news/us-world/border-mexico/article/Seven-migrant-children-in-federal-custody-await-15154725.php)

29 ¹⁹ *Id.* (detainee); Hamed Aleaziz, *Medical Worker at an ICE Detention Facility for*
30 *Immigrants Has Tested Positive for the Coronavirus*, BUZZ FEED NEWS, Mar. 19,
31 2020, available at [https://www.buzzfeednews.com/article/hamedaleaziz/ice-](https://www.buzzfeednews.com/article/hamedaleaziz/ice-medical-worker-coronavirus)
32 [medical-worker-coronavirus](https://www.buzzfeednews.com/article/hamedaleaziz/ice-medical-worker-coronavirus).

33 ²⁰ Sam Tabachnik, *Ten Detainees at Aurora's ICE Detention Facility Isolated for*
34 *Possible Exposure to Coronavirus*, THE DENVER POST, March 17, 2020, available at
35 [https://www.denverpost.com/2020/03/17/coronavirus-ice-detention-geo-group-](https://www.denverpost.com/2020/03/17/coronavirus-ice-detention-geo-group-aurora-colorado/)
36 [aurora-colorado/](https://www.denverpost.com/2020/03/17/coronavirus-ice-detention-geo-group-aurora-colorado/) (last checked March 24, 2020).

1 Correctional public health experts recommend that “to reduce the likelihood
2 of exposure to detainees, facility personnel, and the general public, it is essential to
3 consider releasing all detainees who do not pose an immediate risk to public
4 safety.” Letter to Congress by Professors Scott Allen and Josiah Rich (March 19,
5 2020) (“Letter to Congress”) at 6 (Exhibit G);²¹ Meyer Decl. ¶¶ 7-35.²² Promptly
6 reducing the number of class members in congregate detention environments by
7 expeditiously releasing them to sponsors as required by the Agreement will protect
8 the safety of those minors as well as the communities around them.²³

11
12 ²¹ Professors. Scott Allen and Josiah Rich serve as medical subject matter experts
13 for the Department of Homeland Security’s Office of Civil Rights and Civil
14 Liberties (“CRCL”). *Id.* at 1. Dr. Allen has conducted numerous investigations of
15 immigration detention facilities on CRCL’s behalf over the past five years. *Id.* at 2.

16 ²² Medical expert and instructor of pediatrics at Harvard Medical School Dr. Peeler,
17 similarly declares:

18 *Releasing children into the custody of properly screened family sponsors is the best*
19 *and safest way to prevent the spread of disease and reduce the threat to this*
20 *vulnerable detained people. This includes allowing families detained at family*
21 *detention centers to be released together. It is my professional opinion that this step is*
22 *both necessary and urgent. The window of opportunity is rapidly narrowing for*
23 *mitigation of COVID-19 in these facilities. It is a matter of days, not weeks.*

24 Peeler Decl. ¶ 39 (emphasis supplied). In addition, “[c]hildren in particular are
25 vulnerable to the mental health consequences of detention.” Declaration of Dr. Mira
26 Zein (“Zein Decl.”) at 2 (Exhibit 9). Growing evidence demonstrates that PTSD,
27 anxiety/stress, and depression can lead to decreased immune response and increased
28 risk of infections. *Id.* at 1. People with a weakened immune system have an”
increased risk of developing more severe forms of COVID-19, including
complications like pneumonia, because their immune response is not strong enough
to fight diseases like COVID-19.” *Id.* at 2.

²³ An outbreak of COVID-19 in a congregate environment where class members are
detained could quickly overwhelm local health care services and cause class
members or Defendants’ staff to be transported to more distant hospitals and
clinics, utilizing more resources and potentially exposing health care workers in
communities where the disease has yet to become prevalent. *See Graves* at ¶ 36;
Letter to Congress Profs. Allen and Rich at 4.

1 **2. Conditions at Defendants’ Detention Facilities**

2
3 The congregate detention conditions at Defendants’ ICE and ORR facilities
4 renders it nearly impossible for detained class members to engage in the required
5 infection control policies, such as social distancing and increased hygiene, necessary
6 to mitigate the risk of COVID-19 transmission. Declaration of Dr. Nancy E. Wang
7 (“Wang Decl.”) at ¶ 17 (Exhibit E); Graves Decl. at ¶¶ 11-12; Letter to Congress at 5.

8 Defendants’ facilities share the risk factors of other congregate settings for the
9 spread of COVID-19. Children in Defendants’ facilities live in close quarters, share
10 multiple communal spaces every day, and cannot consistently maintain the
11 recommended six feet distance from others. Graves Decl. at ¶ 11-12.²⁴

12 **a. ICE Detention Centers**

13 Class members in ICE detention facilities cannot maintain any semblance of
14 nationally mandated social distancing, where they are in nearly constant close contact
15 with other detainees, employees, and ICE personnel. Cambria Decl. ¶¶ 15, 16, 25. ICE
16 does not provide widespread access to basic hygiene products, such as soap or hand
17 sanitizer. *Id.* ¶ 28; Declaration of Shalyn Fluarty (“Fluarty Decl.”) ¶ 18. ICE and has
18 not provided even minimally sufficient education to detainees about how to prevent
19 the transmission of COVID-19. Cambria Decl. ¶ 27, Fluarty Decl. ¶ 17.

20 Moreover, ICE detention facilities do not have the medical infrastructure to
21 meet the demands of a pandemic. Meza Decl. ¶ 35. Even one infected person in a
22 facility can infect the majority of people in the facility. Graves ¶ 11. Families

23 ²⁴ Like other detention centers, Defendants’ facilities are accessible to staff and
24 other outside contractors who may transmit the virus. Meyer Decl. ¶ 8; Graves
25 Decl. ¶ 11, 27. The CDC has warned that “[t]here are many opportunities for
26 COVID-19 to be introduced into a correctional or detention facility, including daily
27 staff ingress and egress; transfer of incarcerated/detained persons between facilities
28 and systems, to court appearances, and to outside medical visits; and visits from
family, legal representatives, and other community members.” *Interim Guidance on
Management of Coronavirus Disease 2019 (COVID-19) in Correctional and
Detention Facilities.*

1 consistently express fear that, if forced to remain in ICE detention, they will die from
2 COVID-19.. Fluarty Decl. ¶ 23.

3 **b. ORR Facilities**

4 Class members are similarly at risk in ORR facilities, which often house
5 multiple children in single rooms, with some sleeping in bunk beds placed close
6 together. Declaration Of Peter Schey In Support Of *Ex Parte* Application For
7 Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction
8 (“Schey”) ¶ 5. Children are required to participate in group activities and classes
9 where they share space with others in confined areas. Children share school materials,
10 telephones, televisions, dining tables, and other equipment with other children. *Id.*

11 In Defendants’ facilities, toilets, sinks, and showers are shared and are used
12 regularly by large numbers of children. *Id.* Children in ORR facilities do not always
13 have independent access to soap and water or hand sanitizer. *Id.* In many facilities,
14 access to soap and water is limited to bathrooms. *Id.* Some facilities require children
15 to ask permission to use the bathroom and require staff supervision in bathroom areas.
16 *Id.* Children eat their meals in communal areas, in close proximity to other children
17 and staff. *Id.* Communal dining areas also create dangerous situations for the spread of
18 COVID-19. Graves Decl. ¶ 11.

18 **3. Risks to Detained Children**

19 Children in Defendants’ custody are at risk of serious illness if they contract
20 COVID-19. Severe illness and death from COVID-19 have been reported in people of
21 all ages, including children. Graves at ¶ 7. Even children without identifiable risk
22 factors can become seriously ill from COVID-19.²⁵ The largest study of pediatric
23 COVID-19 patients to date showed that approximately 6% of infected children and

24 _____
25 ²⁵ See Amara Walker, Alta Spells, and Melissa Alonson, *12-year-old girl with*
26 *coronavirus is on a ventilator and fighting for her life*, CNN, March 22, 2020,
27 [https://www.cnn.com/2020/03/22/us/georgia-coronavirus-girl-](https://www.cnn.com/2020/03/22/us/georgia-coronavirus-girl-hospitalized/index.html)
28 [hospitalized/index.html](https://www.cnn.com/2020/03/22/us/georgia-coronavirus-girl-hospitalized/index.html), *Panama: 13-year-old girl with coronavirus dies, officials*
say, AL JAZEERA, Mar. 23, 2020,
[https://www.aljazeera.com/news/2020/03/panama-13-year-girl-coronavirus-dies-](https://www.aljazeera.com/news/2020/03/panama-13-year-girl-coronavirus-dies-officials-200323193144873.html)
[officials-200323193144873.html](https://www.aljazeera.com/news/2020/03/panama-13-year-girl-coronavirus-dies-officials-200323193144873.html).

1 11% of infected infants suffered from respiratory failure, shock, encephalopathy, heart
2 failure, coagulation dysfunction, acute kidney injury, and life-threatening organ
3 dysfunction.²⁶ While children do seem to be less susceptible to COVID-19 compared
4 with adults, “there have still been a significant number of pediatric cases reported,
5 including those becoming critically ill.” Peeler Decl. ¶ 8, citing Yuanyuan Dong, et
6 al., “Epidemiological Characteristics of 2143 Pediatric Patients With 2019
7 Coronavirus Disease in China,” *Pediatrics* (pre-publication release online Mar. 16,
8 2020).

9 Certain children in ORR and ICE custody are at even higher risk of serious
10 illness if they contract COVID-19, including those with chronic illnesses or
11 compromised immune systems.²⁷ Youth who are pregnant or parenting, or who have
12 pre-existing health conditions, may be similarly vulnerable.²⁸

13 **4. Defendants’ Recently Adopted Safety Measures for**
14 **Congregate Care Facilities Fail to Protect Class Members from**
15 **COVID-19.**

17 ²⁶ See Dong Y, Mo X, Hu Y, et al. *Epidemiological characteristics of 2143*
18 *pediatric patients with 2019 coronavirus disease in China*, *Pediatrics*, 2020,
19 <https://pediatrics.aappublications.org/content/pediatrics/early/2020/03/16/peds.2020-0702.full.pdf>.

20 ²⁷ See U.S. Center for Disease Control, *Are you at risk for serious illness?*, Mar. 18,
21 2020, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

22 ²⁸ Many children in ORR and ICE custody have also experienced intense trauma in
23 their home countries and on their journey to the United States that may be
24 exacerbated by the stress and uncertainty of detention.²⁸ Post-traumatic stress
25 disorder and related conditions are associated with weakened immune systems and
26 a heightened susceptibility to infection. Graves Decl. at ¶ 13. The uncertainty and
27 anxiety created by the pandemic creates unique risks for children. Haney Decl. at ¶
28 12-16. Particularly during an emergency of this nature, children need the support of
caring family or caregivers. *Id.* To the extent that Defendants’ programs respond to
this public health risk by further isolating children and limiting opportunities for
recreation or visits, this may further traumatize vulnerable children. Haney Decl. at
¶ 12; Meyer Decl. at ¶¶ 30, 34.

1 **a. ORR Guidance**

2
3 ORR’s COVID-19 Interim Guidance for ORR Programs (“ORR Guidance”),
4 issued its contracted facilities on March 19, 2020 (Exhibit L), is inadequate to protect
5 children in ORR custody from the transmission of COVID-19 and contrary to current
6 CDC guidelines as well as widespread public health practice. *See* Graves Decl. ¶¶ 17-
7 24; Wang Decl. at ¶ 20-26.

8 The CDC has stated that “[t]he best way to prevent illness is to avoid being
9 exposed to this virus.”²⁹ To minimize exposure, current CDC guidance stresses the
10 importance of practicing “social distancing” and frequently washing hands.³⁰ The
11 CDC defines social distancing as “remaining out of congregate settings, avoiding
12 mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from
13 others when possible.”³¹ On March 16, 2020, the White House introduced “The
14 President’s Coronavirus Guidelines for America,” which urged people to “avoid social
15 gatherings in groups of more than 10 people,” and “[d]isinfect frequently used items
16 and surfaces as much as possible,” and urged states to “close schools in affected and
17 surrounding areas,” and close indoor and outdoor venues where groups of people
18 generally congregate, such as restaurants, food courts, and gyms.”³²

19 The ORR Guidance makes no mention of requiring or encouraging social or
20 physical distancing between children or staff, nor of limiting the gathering of groups

21 ²⁹ U.S. Centers for Disease Control & Prevention, *How to Protect Yourself*, Mar.
22 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

23 ³⁰ *Id.*

24 ³¹ U.S. Centers for Disease Control & Prevention, *Interim US Guidance for Risk*
25 *Assessment and Public Health Management of Persons with Potential Coronavirus*
26 *Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of*
27 *Laboratory-confirmed Cases*, Updated Mar. 22, 2020,
<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>.

28 ³² The White House & U.S. Centers for Disease Control & Prevention, *The*
President’s Coronavirus Guidelines for America: 15 Days to Slow the Spread, Mar.
16, 2020, [https://www.whitehouse.gov/wp-](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20coronavirus-guidance8.5x11315PM.pdf)
[content/uploads/2020/03/03.16.20coronavirus-guidance8.5x11315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20coronavirus-guidance8.5x11315PM.pdf).

1 of children or staff within facilities. *See* Graves Decl. at ¶18; Wang Decl. at ¶ 21;
2 Exhibit L (ORR Interim Guidance).³³ This is not surprising, as it is nearly impossible
3 for children detained in ORR facilities to engage in appropriate social distancing to
4 prevent the transmission of COVID-19. Flamm Decl. ¶ 12. Unless the number of
5 children at these facilities is drastically reduced, the majority of these facilities have
6 insufficient space to allow children to maintain the required six-foot distance between
7 themselves and the nearest child or staff member. Graves Decl. ¶¶ 28-32; Wang Decl.
8 ¶ 28. Partial implementation of social distancing will not adequately protect
9 individuals from the spread of disease. *See* Graves at ¶ 28.

10 ORR may issue updated guidance in the coming days or weeks that adheres
11 more closely to the new CDC Detention Facility Guidance. However, unless the
12 updated guidance also provides for the expedited release of children such that strict
13 adherence to social distancing within ORR facilities is possible, it will not adequately
14 protect against the transmission of COVID-19 and the risk of serious illness and death
15 for detained children. *See* Graves Decl. ¶¶ 28-33; Wang Decl. ¶ 20.

16 **b. ICE's Guidance**

17 _____
18 ³³ The ORR Guidance also neglects to:

- 19 • Provide information on managing the spread of disease among particularly
20 vulnerable children, such as those with heart disease, diabetes, asthma or other chronic
21 respiratory disease, those with compromised immune systems, and infants. *See* Graves
22 ¶ 22; Wang ¶ 22.
- 23 • Anticipate a situation in which more children need to be quarantined than an ORR
24 facility's isolation rooms can accommodate. *See* Graves at ¶ 21; Wang at ¶ 24.
- 25 • Ensure that children have independent access to hand washing and sanitizing
26 supplies. *See* Graves ¶ 20. In many facilities, the only access to soap and water is
27 located in the bathrooms and children are required to ask permission and obtain a staff
28 escort before going to the bathrooms.
- Provide a screening or testing protocol for children not deemed to be "at risk" but
still exhibiting COVID-19 symptoms, which could allow the spread of disease. *See*
Graves ¶ 23; Wang at ¶¶ 22, 25.
- Provide that symptomatic children are provided with appropriate personal protective
equipment to prevent the potential spread of disease. *See* Graves ¶ 24.

1 ICE’s COVID-19 guidance is similarly inadequate. It makes no mention of
2 requiring or encouraging social or physical distancing between detainees or staff, nor
3 of limiting the gathering of groups of detainees or staff within facilities.³⁴ ICE
4 guidance also insufficient with respect to protective equipment such as masks and
5 gloves, quarantine measures and transportation of ill and potentially infected
6 detainees. Graves Decl. ¶¶ 14-16.

7 Legal counsel who routinely serve children in ICE custody report ICE is not
8 following CDC guidelines to prevent the spread of COVID-19. Cambria Decl. ¶¶ 16-
9 19. “It is impossible for detained parents and children at the BCRC to practice social
10 distancing.” *Id.* ¶ 25. There is no education provided on how to prevent the spread, nor
11 is there adequate soap and hand sanitizers or other daily essentials needed to reduce
12 the risk of exposure. *Id.* ¶ 27-29. Unless the number of children and families at these
13 facilities is drastically reduced, the majority of these facilities have insufficient space
14 to allow detainees to maintain the required six-foot distance between themselves and
15 the nearest child or staff member. Cambria Decl. ¶ 25, 41.

16 ICE states that it continues to incorporate CDC’s COVID-19 guidance, which is
17 built upon the already established infectious disease monitoring and management
18 protocols currently in use by the agency.³⁵ In addition, ICE states that it is actively
19 working with state and local health partners “to determine if any detainee requires
20 additional testing or monitoring to combat the spread of the virus.” *Id.* However, legal
21 counsel who routinely serve children in ICE custody report that class members sleep
22 in overcrowded group settings (Cambria ¶ 16), share common bathrooms (Cambria ¶
23 17), throughout the day are required to congregate together (Cambria ¶ 18), eat in a
24 common area (Cambria ¶ 20), parents and children have not been educated about the
25 COVID-19 outbreak (Cambria ¶ 29), parents and children have inadequate access to
26 soap and hand sanitizer (Cambria ¶ 30), they are not provided gloves or masks

27 ³⁴ See U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19*,
28 <https://www.ice.gov/covid19> (Updated March 25, 2020).

³⁵ *Id.*

1 (Cambria ¶ 31), are overseen by facility staff showing signs of illness (Cambria 33),
2 and children showing symptoms like coughing, fever, sore throats, lethargy,
3 congestion, and difficulty breathing, go untreated. (Cambria ¶ 34). *See also* Meza and
4 Fluharty (same issues at Texas family detention facilities).

5 **c. ORR’s and ICE’s Guidelines Fall Far Below Federal, State**
6 **and Local Mandates**

7 Many states have issued extraordinary and unprecedented measures to ensure
8 “social distancing” and over 160 million Americans have been ordered to “shelter in
9 place.”³⁶ For example, on March 19, 2020, Governor Gavin Newsom ordered 40
10 million Californians to stay in their homes, with limited exceptions, and maintain a
11 minimum distance of 6 feet from others.³⁷ The following day, New York issued
12 similar orders, requiring a distance of “at least six feet” between people in public,
13 cancelling all “non-essential gatherings of individuals of *any* size for *any* reasons,”
14 closing *all* non-essential business, and requiring those essential business that remain
15 open to “implement rules that help facilitate social distancing of at least six feet.”³⁸
16 Within the past two weeks, Washington D.C. and forty-six states have mandated
17 statewide school closures.³⁹

18 States have also adopted measures to limit exposure in congregate settings like
19 homeless shelters. On February 24, 2020, New York issued guidance for homeless
20 shelters.⁴⁰ Even so, weeks later, individuals in New York homeless shelters have still

21 ³⁶ Sarah Mervosh and Denise Lu, *See Which States and Cities Have Told Residents*
22 *to Stay Home*, THE NEW YORK TIMES, Mar. 24, 2020, available at
23 <https://nytimes.com/interactive/2020/us/cornoavirus-stay-at-home-order.html>.

24 ³⁷ <https://covid19.ca.gov/>.

25 ³⁸ <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>

26 ³⁹ David Nagel, *Updated List on Statewide School Closures with Closure Dates*,
27 THE JOURNAL, Mar. 24, 2020, available at
28 <https://thejournal.com/articles/2020/03/17/list-of-states-shutting-down-all-their-schools-grows-to-36.aspx?m=1>

⁴⁰ *Interim COVID-19 Guidance for Homeless Shelters*, NYC DEPT. OF HEALTH,
<https://on.nyc.gov/39g0slr> (last visited Mar. 25, 2020).

1 tested positive for COVID-19.⁴¹ Recognizing that large shelters are particularly
2 susceptible to the spread of COVID-19, California is setting up shelters in trailers,
3 hotels and motels to facilitate social distancing.⁴²

4 **III. ARGUMENT**

5 **A. *Standard for Injunctive Relief Under Fed. R. Civ. P. 65.***

6 A plaintiff seeking preliminary relief under Federal Rule of Civil Procedure 65
7 must establish “that he is likely to succeed on the merits, that he is likely to suffer
8 irreparable harm in the absence of preliminary relief, that the balance of equities tips
9 in his favor, and that an injunction is in the public interest.” *Winter v. Nat’l Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 20 (2008); *Washington v. Trump*, 847 F.3d 1151, 1159 n.3
11 (9th Cir. 2017) (noting standards for issuing temporary restraining orders and
12 preliminary injunctions are “substantially identical”). In balancing these elements, “a
13 stronger showing of one element may offset a weaker showing of another.” *All For*
14 *The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, when the
15 likelihood of grave irreparable injury is palpable and the balance of equities tips
16 sharply in plaintiffs’ favor, the plaintiff need only “demonstrate a fair chance of
17 success on the merits or questions serious enough to require litigation.” *Arc of Cal. v.*
18 *Douglas*, 757 F.3d 975, 993-94 (9th Cir. 2014) (internal quotations and citation
19 omitted).

20 **B. *Class Members Are Likely to Succeed on the Merits of Their Claims.***

21 The foregoing has demonstrated that class members in Defendants’ congregate
22 detention are sitting ducks waiting to contract COVID-19. The threat of irreparable
23 injury to their health and safety is palpable. Class Members therefore need only

24 ⁴¹ *Coronavirus ‘Attack Rate’ in N.Y. Concerns White House*, NYC TIMES (Mar. 24,
25 2020), available at <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-new-york-update.html>.

26 ⁴² *Governor Newsom Takes Emergency Action & Authorizes \$150 Million in*
27 *Funding to Protect Homeless Californians from COVID-19*, Office of Gov. Gavin
28 Newsom (Mar. 18, 2020), available at <https://gov.cal.gov/2020/03/18/governor-newsom-takes-emergency-action-authorizes-150-million-in-funding-to-protect-homeless-californians-from-covid-19/>.

1 demonstrate “a fair chance of success on the merits or questions serious enough to
2 require litigation” to secure preliminary relief. *Arc of Cal.*, 757 F.3d at 993-94
3 (internal quotations and citation omitted); *All. for the Wild Rockies*, 632 F.3d at 1132
4 (“[S]erious questions going to the merits’ and a hardship balance that tips sharply
5 toward the plaintiff can support issuance of an injunction, assuming the other two
6 elements of the *Winter* test are also met.”).⁴³ Class Members’ prospects here far
7 exceed a “fair chance” of succeeding on the merits.

8 The *Flores* Settlements vests children who have custodians available to receive
9 them with substantive rights against ORR’s keeping them in congregate care, and
10 protects children detained with their families in ICE facilities. This is especially true
11 during a global pandemic, which will only worsen in the coming days.

12 1. Right to Prompt Release

13 The Agreement protects all minors in immigration-related detention, whether
14 they are taken into custody alone or in the company of parents or other relatives.

15 *Flores v. Lynch*, 828 F.3d 898, 905-07 (9th Cir. 2016) (“*Flores P*”).⁴⁴

16 The Agreement obliges the Government to “release a minor from its custody
17 without unnecessary delay. . . .” Agreement ¶ 14. The Agreement further requires the
18 Government to “make and record the prompt and continuous efforts on its part toward
19 family reunification and the release of the minor pursuant to Paragraph 14.” *Id.* ¶ 18.

20 ⁴³ Plaintiff’s evidence meets and exceeds even the higher “likelihood of success of
21 the merits” standard that applies when the equities are not as starkly balanced as
22 they are here. Preliminary relief is therefore appropriate under either standard.

23 ⁴⁴ “The Settlement is a consent decree, which, ‘like a contract, must be discerned
24 within its *four* corners, extrinsic evidence being relevant only to resolve ambiguity
25 in the decree.” *Flores I*, 828 F.3d at 904 (quoting *United States v. Asarco Inc.*, 430
26 F.3d 972, 980 (9th Cir. 2005)). The district court was therefore called upon to
27 interpret the Agreement according to its “plain language,” *Nodine v. Shiley Inc.*,
28 240 F.3d 1149, 1154 (9th Cir. 2001), construe it “as a whole and every part
interpreted with reference to the whole,” *Kennewick Irrigation Dist. v. United
States*, 880 F.2d 1018, 1032 (9th Cir. 1989) (citation omitted), and prefer
“reasonable interpretations as opposed to those that are unreasonable, or that would
make the contract illusory.” *Id.*

1 If more than one potential custodian is available, the Government must generally
2 release a child first to a parent, then to a legal guardian, adult relative (sibling, aunt,
3 uncle, or grandparent), an unrelated adult or entity designated by the minor’s parent, a
4 licensed program, and finally, if there is no likely alternative to long-term detention, a
5 reputable unrelated adult. *Id.* ¶ 14A-F.

6 Additionally, the *Flores* Settlement provides: “Where the INS determines that
7 the detention of the minor is not required either to secure his or her timely appearance
8 before the INS or the immigration court, or to ensure the minor’s safety or that of
9 others, [Defendants] *shall release a minor from [their] custody without unnecessary*
10 *delay” to a parent, guardian, adult relative (brother, sister, aunt, uncle, or*
11 *grandparent), or a licensed group home. Agreement (emphasis added). Further*
12 *grounding Defendants’ obligation to minimize children’s detention, ¶ 18 of the*
13 *Agreement provides, “Upon taking a minor into custody, the INS . . . shall make and*
14 *record the prompt and continuous efforts on its part toward . . . the release of the*
15 *minor . . .” According to the most recent ORR data at Plaintiffs’ disposal, as of March*
16 *13, 2020, ORR had 3,622 children in custody, 1,193 of whom—nearly a third—the*
17 *agency had placed in congregate settings after having detained them for 30 days or*
18 *more. Schey ¶ 3. ORR’s data do not indicate why the agency failed to release these*
19 *children, nor how many of these 1,193 have custodians available to care for them, yet*
20 *the vast majority undoubtedly do.*⁴⁵

21 ⁴⁵ ORR categorizes detained children pursuant to the affinity of potential custodians
22 appears in § 2.2.1 of its online Policy Guide, *available at*
23 [www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7)
24 [section-2#2.7](http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7) (last visited March 23, 2020). Roughly 42 percent of children in ORR
25 custody are “Category 1”: that is, they have parents or guardians in the United
26 States. Schey at ¶ 9 (authenticating ORR materials produced during meeting at
27 Shiloh RTC with class Counsel Carlos Holguin and Special Master Andrea
28 Sheridan Ordin). Another 47 percent are “Category 2”: that is, they have another
“immediate” relative—a brother, sister, grandparent, aunt, uncle, or first cousin—to
whom they could be released. *Id.* Another 11 percent are “Category 3”: that is,
children with “other sponsors,” such as “more distant relatives and unrelated adult

1 In 2019, children remained in ORR custody for an average of 66 days, and
2 many children are detained for substantially longer periods of time. See Office of
3 Refugee Resettlement, *Facts and Data: Length of Care*,
4 <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (last visited March 23, 2020).

5 Under ORR’s procedures —

- 6 a. ORR does not decide within any time certain whether a detained minor’s
7 parent or other proposed custodian is suitable;
- 8 b. ORR does not provide a detained minor, or his or her parent or other
9 proposed custodian, an opportunity to inspect or rebut evidence derogatory of
10 the proposed custodian’s fitness;
- 11 c. ORR does not afford a detained minor or his or her proposed custodian a
12 hearing before a neutral and detached decisionmaker either before or after ORR
13 declares a potential custodian unfit;
- 14 d. Once ORR decides a proposed custodian is unsuitable, it need not inform
15 a detained minor or the proposed custodian of its decision for up to 30 days;
- 16 e. ORR allows detained minors no appeal or other administrative recourse
17 from its finding a proposed custodian unsuitable, though such a decision nearly
18 always prolongs the minor’s detention;
- 19 f. Except for parents and legal guardians, ORR allows rejected custodians
20 no appeal from a decision declaring them unfit, which nearly always prolongs
21 an affected minor’s detention;
- 22 g. As for parents and legal guardians, ORR’s policy requires them to submit
23 a written request to HHS’s Assistant Secretary for Children and Families to be
24 heard regarding ORR’s declaring them unfit, but a hearing need not be
25 convened within any time certain.

26
27 individuals.” *Id.* The remainder are “Category 4”: children for whom ORR has
28 identified no potential custodian.

1 www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-
2 section-2 (last visited March 24, 2020).

3 In the vast majority of cases,⁴⁶ delay releasing class members is attributable
4 either to (1) entirely elective investigatory measures, or (2) administrative torpor or
5 indifference.⁴⁷

6 Seven days should be more than enough for ORR to manage post-release risk.
7 *See e.g.*, Declaration of James Owens, Feb. 7, 2018, Exhibit K, ¶ 6 (state dependency
8 courts determine cause to detain children within three days); Exhibit M (ORR Manual
9 of Procedures, at § 2.2.2 (care providers generally expected to complete custodian
10 evaluations within 10-21 days), § 2.7.2 (case coordinators expected to make
11 recommendation within 1 business day), and § 2.7.3 (Federal Field Specialists
12 expected to make release decisions within 1-2 business days of receiving case
13 coordinator recommendations)). Class counsel recently secured the release of a class
14 member in ORR custody to his undocumented father in about five days. Schey 3. Any
15 marginal gains to that ORR may claim for child safety from their prolonged
16 investigations of sponsors for more than 30 days cannot outweigh the harm congregate
17 detention will inevitably cause to the health and safety of children in ORR and ICE
18 custody.

19
20 _____
21 ⁴⁶ The TVPRA, 8 U.S.C. § 1232 (c)(3)(B) does require ORR to conduct home
22 studies before releasing trafficking and abuse victims and children with special
23 needs, but relatively few class members—and certainly not a third—fall within
24 these special categories. Nor is there any apparent reason ORR could not generally
25 complete a home study within 30 days. See MAP § (directing that cases be referred
26 for home studies within days and completed within days of referral).

27 ⁴⁷ In devising its own requirements for proposed custodians, ORR has an
28 established track record of arbitrariness and vacillation. *See, e.g.*, Order re
Plaintiffs' Motion to Enforce Class Action Settlement, July 30, 2018 (Doc. #470) at
27-29 (disapproving ORR requirement that its director approve release of any child
placed in a restrictive setting); *id.* at 29-30 (disapproving ORR requirement that
myriad post-release services be in place before any child is released to a sponsor
subjected to a home study).

1 For its part, ICE simply does not undertake or record any efforts aimed at the.
2 release of minors as required by Paragraphs 14 and 18 of the Agreement. Schey ¶ 7.
3 During the mandatory meet and confer conference Defendants made clear this is the
4 case, and it is fully confirmed by all legal services providers who represent detained
5 class members in their individual cases. *Id.* See also Cambria ¶ 39; Fluharty ¶ 44;
6 Meza ¶ 43.

7 Pursuant to the terms of the Agreement and Court Order, Defendants provide
8 monthly data of class members in custody to Plaintiffs' class counsel. The most recent
9 data provided to class counsel is for the month of February 2020. Schey ¶ 2.

10 A preliminary review of data provided by Defendants to class counsel on a
11 monthly basis shows that during February 2020 ICE detained about 3,359 class
12 members in ICE family detention facilities. Schey ¶ 4. Of these class members it
13 appears two (2) were apprehended in 2014. *Id.* Four (4) were apprehended in 2018 and
14 have been detained for over fourteen months. *Id.* About ten (10) have been detained
15 for about one year and another ten (10) have been detained for about eleven months.
16 *Id.* About twenty-six (26) have been detained for about ten months, fifteen (15) for
17 about nine (9) months, eleven (11) for about eight months, fifty-eight (58) for about
18 seven (7) months, ninety six (96) for about six (6) months, two hundred and five (205)
19 five (5) months, one hundred and fifty-one (151) for about four (4) months, two
20 hundred and ninety-three (293) for three (3) months, and nine hundred and eighty
21 (980) have been detained for two months. *Id.* In short, about 1,861 class members
22 appear now in ICE custody have been detained for three months or longer with no
23 efforts made by Defendants to release them under the terms of the Agreement.⁴⁸

24 When the alternative is to leave children on the tracks with the COVID-19 train
25 fast approaching, Defendants' not releasing minors without unnecessary delay and
26 ICE's blatant violation of the Agreement and this Court's Orders, are unconscionable.

27 _____
28 ⁴⁸ During February about 23 class members were released by ICE on "orders of
recognizance," and about 348 were released on parole. *Id.*

1 The temporary procedural relief Plaintiffs seek is a minimal step to protect
2 children’s substantive rights under the Agreement and the Court’s prior Orders
3 requiring the prompt release of minors who are neither a flight risk nor a danger. The
4 children’s right to Defendants’ compliance with the Agreement they reached with
5 Plaintiffs has now become critically important to avoid unnecessarily keeping children
6 in congregate detention endangering their health and well-being during a global
7 pandemic.

8 2. Right to safe and sanitary conditions of detention

9 The Settlement further requires that ICE and ORR understand that children in
10 immigration detention are vulnerable, even when they are detained with their families.
11 The Settlement, therefore, requires that *all* decisions on a minor’s custody *must* be
12 made taking into account the particular vulnerability of children *as well* as to protect
13 *the minor’s well-being and that of others*. *See id.* at ¶ 11. Additionally, Paragraph 12
14 of the *Flores* Settlement requires Defendants detain children “in facilities that are safe
15 and sanitary and that are consistent with [their] concern for the particular
16 vulnerability of minors.”

17 Paragraphs 6 and 19 of the Settlement require Defendants to place the general
18 population of detained children in state-licensed facilities that comply with both state
19 health and safety standards and the minimum standards listed in Exhibit 1 to the
20 Settlement. These include “[p]roper physical care and maintenance, including suitable
21 living accommodations.” Settlement Exhibit 1, ¶ A.1. Exhibit 1 requires, *inter alia*,
22 “[a]ppropriate routine medical ... care, ... emergency health care services, ...
23 screening for infectious disease[] within 48 hours of admission ... [and]
24 immunizations in accordance with the U.S. Public Health Service (PHS), Center
25 for Disease Control.” *Id.* The parties to the Agreement clearly agreed that the
26 health of detained class members was of paramount importance.

27 During a public health crisis, Defendants continuing to detain class members in
28 congregate detention for long periods of time while delaying or entirely ignoring their
right to release without unreasonable delay is in *prima facie* violation of their

1 obligation to provide class members with safe conditions of detention. Agreement ¶
2 12. As a result, there is a high likelihood that Class Members have been and will
3 continue to be subjected to the risk of death or serious illness and the traumatic effects
4 of heightened isolation associated with this pandemic. *See* Graves at ¶ 13; Haney at ¶
5 12.⁴⁹

6 This Court should require Defendants to articulate good cause for exposing
7 children to the clear dangers of congregate detention in lieu of release to their families
8 or transfer to non-congregate settings.

9 ***C. Absent a Temporary Restraining Order, Class Members In Congregate***
10 ***Facilities Will Suffer Irreparable Injury.***

11 “Irreparable harm is the single most important prerequisite for the issuance of a
12 preliminary injunction.” *Spark Indus., LLC v. Kretek Int’l, Inc.*, No. CV 14-5726-
13 GW(ASX), 2014 WL 12600262, at *3 (C.D. Cal. July 29, 2014) (citations omitted).
14 Increased risk of exposure to a deadly virus by virtue of placement in congregate
15 detention facility for children who are neither flight risks nor a danger represents a
16 paradigmatic example of imminent irreparable harm.⁵⁰

17 ***D. The Equities Weigh Heavily in Plaintiffs’ Favor and the Issuance of the***
18 ***Temporary Restraining Order and Preliminary Injunction is in the Public***
19 ***Interest.***

20 In this case, the equities and public interest merge into a single balancing test
21 because the Defendants are government officials. *See Nken v. Holder*, 556 U.S. 418,

22 ⁴⁹ Class Members will also be deprived of essential support from family members
23 or other caring adults at this time of extreme stress and anxiety. Haney at ¶ 12-16.

24 ⁵⁰ An imminent threat to health and safety constitutes irreparable harm. In
25 *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at
26 *15 (D. Ariz. No. 18, 2016), *aff’d sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir.
27 2017), the court issued an injunction to curb inhumane treatment of civil
28 immigration detainees where evidence demonstrated “the physiological effects of
sleep deprivation or constant discomfort that comes from an inadequate food
supply, or health risks related to exposure due to contaminated water or unsanitary
cells, or medical risks associated with being unable to continue taking prescription
medications or being exposed to communicable diseases.”

1 435 (2009); *see also California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). In
2 balancing the equities, “[a] court must balance the competing claims of injury and
3 must consider the effect on each party of the granting or withholding of the requested
4 relief.” *Arc of Cal.*, 757 F.3d at 991 (*quoting Amoco Prod. Co. v. Vill. of Gambell*,
5 480 U.S. 531, 542 (1987)).⁵¹

6 The balance here tips decidedly in favor of Plaintiffs’ interest in health and
7 safety. Unless this Court intervenes, class members are likely to suffer serious and
8 severe irreparable harm, including potential exposure to COVID-19 and the effects
9 thereof should they become infected. No purported government interest justifies
10 subjecting children to these conditions. *See Lopez v. Heckler*, 713 F.2d 1432, 1437
11 (9th Cir. 1983) (“Faced with [] a conflict between financial concerns and *preventable*
12 human suffering, [the court has] little difficulty concluding that the balance of
13 hardships tips decidedly in plaintiffs’ favor.”) (emphasis added), *quoted by Hernandez*
14 *v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017).

15 Granting Plaintiffs’ motion would not subject Defendants to any identifiable
16 hardship outweighing the irreparable harm to class members’ health and safety.
17 Moreover, “it is obvious that compliance with the [Agreement] is in the public
18 interest.” *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dep’t of Educ.*,
19 600 F.3d 1104, 1113 (9th Cir. 2010); *see also Small v. Avanti Health Sys., LLC*, 661
20 F.3d 1180, 1197 (9th Cir. 2011) (The “public interest favors applying federal law
21 correctly.”).⁵²

23 ⁵¹ In performing this balancing, “the Ninth Circuit expects lower courts to protect
24 physical harm to an individual over monetary costs to government entities.”
25 *McNearney v. Washington Dep’t of Corr.*, No. 11-cv-5930 RBL/KLS, 2012 WL
3545267, at *15 (W.D. Wash. June 15, 2012).

26 ⁵² Because the requested temporary restraining order and preliminary injunction
27 would simply mandate compliance with the Agreement, which is “enforceable as a
28 judicial decree,” *Labor/Cnty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp.*
Auth., 263 F.3d 1041, 1048 (9th Cir. 2001), the Government could suffer no harm
as a result.

1 Granting Plaintiffs’ request for preliminary relief also serves the public interest
2 because allowing COVID-19 to spread in Defendants’ facilities endangers the general
3 public. As public health experts have explained, reducing the number of individuals in
4 dangerous congregate care settings protects both those individuals and the
5 communities around them. An outbreak of COVID-19 in a congregate environment,
6 such as an ORR or ICE facility, could quickly overtake the capacity of local health
7 care resources, and would likely require transport of infected class members,
8 potentially to areas where COVID-19 has not yet spread. *See* Graves at ¶ 36; Letter
9 to Congress Profs. Allen and Rich at 4.

10 Accordingly, the proposed temporary Order proposed by Plaintiffs will cause
11 no countervailing injury to Defendants, and serves the broader public interest.

12 **VII. CONCLUSION**

13 For the foregoing reasons, the Court should grant this application for a
14 temporary restraining order and order Defendants to show cause why a preliminary
15 injunction should not issue in the form lodged herewith.

16 Dated: March 26, 2020

CENTER FOR HUMAN RIGHTS AND
CONSTITUTIONAL LAW

Peter A. Schey
Carlos R. Holguin

20 USF SCHOOL OF LAW IMMIGRATION CLINIC
21 Bill Ong Hing

22 LA RAZA CENTRO LEGAL, INC.
23 Stephen Rosenbaum

24 UNIVERSITY OF CALIFORNIA DAVIS
25 SCHOOL OF LAW
26 Immigration Law Clinic
27 Holly S. Cooper

28 THE LAW FOUNDATION OF SILICON VALLEY
Jennifer Kelleher Cloyd
Katherine H. Manning

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Annette Kirkham

Of counsel:

ALDEA - THE PEOPLE'S JUSTICE CENTER
Bridget Cambria

 /s/ Peter Schey
Peter A. Schey
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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I, Peter Schey, declare and say as follows:

I am over the age of eighteen years of age and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, CA 90057, in said county and state.

On March 26, 2020, I electronically filed the following document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’ EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION.

with the United States District Court, Central District of California by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*/s/Peter Schey
Attorney for Plaintiffs*