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Child Migrants at the Border: The *Flores* Settlement Agreement and Other Legal Developments

Reports of child migrants arriving at the southern border have raised interest in the laws governing their custody and treatment by U.S. authorities. The Immigration and Nationality Act (INA) generally authorizes the detention of non-U.S. nationals ("aliens" under governing law) placed in removal proceedings while their removability and any claims for asylum or other relief are considered. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018). But a more specific body of law—comprised of federal statutes, a 1997 settlement agreement, and regulations partially implementing that agreement—governs the care and custody of alien minors. This framework distinguishes arriving minors who are unaccompanied by immediate family—commonly known as *unaccompanied alien children* (UACs)—from those arriving with a family unit.

The *Flores* Settlement Agreement

In 1985, a class action lawsuit filed in the U.S. District Court for the Central District of California challenged procedures for the detention and release of alien minors by immigration authorities. After more than a decade of litigation, the parties negotiated a settlement agreement commonly known as the *Flores* Settlement Agreement. *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997). The Agreement was entered as a consent decree in 1997, and the district court continues to monitor compliance with its terms. Under a 2001 stipulation, the Agreement is binding until the government promulgates final implementing regulations. *See* Stipulation Extending Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 2001).

The Agreement sets forth a "nationwide policy for the detention, release, and treatment of minors" in immigration custody—applying to UACs and accompanied minors alike. *See* Agreement ¶ 9; *Flores v. Lynch* (*Flores I*), 828 F.3d 898, 908 (9th Cir. 2016). It also announces a general policy favoring release of apprehended minors and requiring the government to place them in "the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests" in protecting the minor's well-being and ensuring his or her presence at removal proceedings. Agreement ¶ 11. Minors are to be detained in "safe and sanitary" facilities and cannot be housed with an unrelated adult for more than 24 hours. *Id.* ¶ 12.

Within three to five days of a minor's apprehension and detention, the government generally must either (1) release the minor to a parent, legal guardian, adult relative, or other "capable and willing" designated adult or entity; or (2) place the minor in a nonsecure facility "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *See id.* ¶ 14; *id.* at Ex. 2(h). Minors may be placed in secure juvenile facilities in limited cases, such as when charged with a crime. *See id.* at Ex. 2(i). This detention period of three to five days may be relaxed in the event of an emergency or an influx of minors into the United States, as long as immigration authorities place all minors in a nonsecure, licensed facility "as expeditiously as possible." *See id.* at Ex. 2(h). An alien minor not released from detention is entitled to a bond hearing before an immigration judge. *See id.* ¶ 24A.

Implications for UAC Arrivals

The treatment and processing of UACs is largely controlled by the interplay of the *Flores* Agreement, federal laws enacted following the entry of the consent decree, and federal regulations issued in 2019.

The Homeland Security Act and the Trafficking Victims Protection Reauthorization Act

Two federal laws establish the main framework for the treatment of UACs. The Homeland Security Act of 2002, Pub. L. No. 107-296, defines an *unaccompanied alien child* as one who (1) lacks lawful immigration status in the United States; (2) is under 18 years old; and (3) is either without a parent or legal guardian in the country or without a parent or legal guardian in the country who is available to provide care and physical custody. *See* 6 U.S.C. § 279(g)(2). The Act also transferred most immigration functions from the former Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS). Functions related to the care of UACs, though, were transferred from INS to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS). *Id.* § 279(a)-(b).

Congress enacted legislation to address the treatment of UACs comprehensively with the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457. The TVPRA generally requires that a child in government custody be transferred to ORR within 72 hours after determining that the minor is a UAC. 8 U.S.C. § 1232(b)(3). ORR must promptly place the minor "in the least restrictive setting that is in the best interest of the child." *Id.* § 1232(c)(2)(A). A UAC "shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." *Id.* Besides establishing a framework for the detention, treatment, and release of UACs, the TVPRA sets forth special rules for their removal. While most aliens encountered at the border without valid entry documents undergo a streamlined expedited removal process, UACs are placed in standard

removal proceedings that offer greater procedural protections. *See* 8 U.S.C. § 1232(a)(5)(D). UACs from Canada or Mexico may also be given the option to return voluntarily to their home country rather than being placed in removal proceedings. *Id.* § 1232(a)(2). Furthermore, UACs are subject to special asylum processing rules. *Id.* §§ 1158(a)(2)(E), (b)(3)(C).

Federal Regulations

DHS and HHS issued a joint final rule in 2019 to implement the *Flores* Agreement "in a manner that is workable in light of subsequent statutory, factual, and operational changes." *See* 84 Fed. Reg. 44,392 (2019). The HHS component of the regulations—which generally tracks the *Flores* Agreement—addresses the care and custody of UACs. The DHS component—which diverges more substantially from the Agreement—addresses the apprehension and processing of all minors, including the care and custody of accompanied minors not covered by HHS regulations. *See* 8 C.F.R. §§ 212.5, 236.3.

The U.S. Court of Appeals for the Ninth Circuit recently reviewed a challenge to aspects of the new regulations. As for the HHS regulations, the court ruled that they could largely take effect, but for two exceptions. *See Flores v. Rosen* (*Flores III*), 984 F.3d 720, 736 (9th Cir. 2020). First, the court ruled that a "catch all" provision in the HHS regulations, allowing the placement of a minor in a secure facility upon an agency determination that the minor is "otherwise a danger to self or others," impermissibly deviated from the *Flores* Agreement. *See id.* at 732–33; 8 C.F.R. §§ 410.203(a)(5). Second, the court struck down an HHS regulation providing that a minor can "opt-in" to receive a bond redetermination hearing concerning a custody placement decision, as opposed to the *Flores* Agreement's "opt-out" right to a hearing. *Flores III*, 984 F.3d at 735. The court did conclude, however, that a hearing before an HHS adjudicator, rather than before an immigration judge as provided by the Agreement, was not a material departure because the minor retains a right to independent adjudicatory review of a custody decision. *Id.* at 734–35.

As for the DHS regulations, the Ninth Circuit upheld aspects concerning the initial care and processing of UACs and accompanied minors. But it found two components—generally relevant to accompanied minors rather than UACs—impermissibly differ substantially from the Agreement in that they (1) limit the circumstances in which accompanied minors may be released; and (2) provide for the detention of families in facilities licensed by federal authorities—not state-licensed facilities as mandated in the Agreement. *Flores III*, 984 F.3d at 737–40.

Further, the court held that the district court did not abuse its discretion in denying the government's motion to terminate the *Flores* Agreement in full, leaving it still in effect. *Id.* at 737, 744. But the government may still move to terminate those portions of the Agreement covered by the regulations not struck down by the court. *Id.* at 737 n.12.

In sum, the apprehension, processing, custody, and care of UACs is generally controlled by the TVPRA, the *Flores* Agreement, and those portions of the 2019 regulations largely consistent with the Agreement.

Implications for Accompanied Minors and Their Family Units

While federal statutes and regulations address the treatment of UACs, the *Flores* Agreement is the main source governing accompanied minors (i.e., those who came with a family unit). Of note, some provisions in the 2019 DHS regulations relating to the initial apprehension and processing of minors—accompanied or otherwise—overlap with the *Flores* Agreement. *See Flores III*, 984 F.3d at 737.

Rules for the custody and care of accompanied minors may also implicate their family units. The *Flores* Agreement does not establish any affirmative release rights for the parents of the minor. *See Flores I*, 828 F.3d at 908–09. But it requires the placement of minors in nonsecure, state-licensed facilities within days of apprehension, potentially leading to those minors' separation from family units that remain housed by immigration authorities. In certain extenuating circumstances, an extension of the transfer period for up to 20 days may be permissible. *See* Order Re Response to Order to Show Cause, *Flores v. Lynch*, No. 85-CV-04544 (C.D. Cal. 2015).

Although DHS maintains some family detention facilities, it is unclear how many (1) are nonsecure, state-licensed facilities as required by the *Flores* Agreement; and also (2) permit the housing of adults. With the Agreement in place, the executive branch has, in effect, three options for the detention of families pending the outcome of removal proceedings: (1) release family units as a group; (2) detain family units in a family detention center, *provided* those facilities comply with the *Flores* Agreement; or (3) detain the parents and release the children only.

Congressional Considerations

The *Flores* Agreement terminates upon the promulgation of final regulations consistent with its terms. But options exist to change the Agreement's effect. For example, the executive branch could reach an agreement with the plaintiffs to modify the Agreement's terms. Or, the government could file a motion before the court overseeing the consent decree to modify the Agreement if changed circumstances so warrant. *See* Fed. R. Civ. P. 60(b). To date, however, such requests by the government have been denied. *See, e.g.*, *Flores III*, 984 F.3d at 741–44.

Congress may consider legislation to codify, alter, or end the application of the *Flores* Agreement. If legislation conflicts with the Agreement, it may warrant a modification of the consent decree by the presiding court. *See Flores v. Sessions*, 862 F.3d 863, 874 (9th Cir. 2017). More broadly, Congress may consider legislation to address the treatment of child migrants comprehensively, including on matters not governed by the *Flores* Agreement. In recent Congresses, legislation has been introduced to modify the TVPRA provisions governing the custody and removal of UACs specifically.

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