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Codifying Flores: A Call to Congress to Protect Migrant Families from Deterrent Border Policies

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Codifying *Flores*: A Call to Congress to Protect Migrant Families from Deterrent Border Policies

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INTRODUCTION

Migrant families, particularly migrant children, have suffered tremendously due to unacceptable mistreatment at the United States-Mexico border. In 2018, the United States reportedly lost track of nearly 1,500 immigrant children in its custody.[1] In 2020, news broke that the government was unable to locate the parents of 545 children whom it had forcibly separated at the border.[2] In the last five years, thousands of immigrant juveniles have come forward with allegations that they suffered sexual abuse while in the custody of U.S. Immigration and Customs Enforcement (ICE).[3] At

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1. *E.g.,* Ron Nixon, *U.S. Loses Track of Another 1,500 Migrant Children, Investigators Find*, N.Y. TIMES, Sept. 8, 2018, LEXIS.

2. Mark Katkov, *Parents Of 545 Children Separated At U.S.-Mexico Border Still Can't Be Found*, NPR (Oct. 21, 2020, 3:34 AM), https://www.npr.org/2020/10/21/926031426/parents-of-545-children-separated-at-u-s-mexico-border-still-cant-be-found [https://perma.cc/96F7-SH4H]. About two-thirds of the parents have been deported back to their country of origin, according to a court filing. *Id.*

3. Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES, Feb. 27, 2019, LEXIS. There were 4,556 allegations in four years, including a rise in complaints during the Trump administration's family separation policy. *Id.* Created in 2003 through the Homeland Security Act of 2002, U.S. Immigration

least seven children have died while in the custody of U.S. Customs and Border Protection (CBP)[4] in the last three years due to poor detention center conditions.[5]

The mistreatment of migrant juveniles detained at the southern border is disturbing and stands in stark opposition to conventional American notions of paternalistic social policy with respect to children. It also conflicts with our jurisprudence, which acknowledges that children are especially vulnerable and thus need special treatment and care.[6] The Department of Homeland Security (DHS) has limited discretion when holding juveniles in detention courtesy of the *Flores* consent decree, effective since 1997.[7] Despite being bound by *Flores*, DHS continues to promulgate policy facilitating the mistreatment of children, creating a situation that necessitates congressional action.

This Comment will address the shortcomings of the *Flores* Settlement Agreement (the Agreement or FSA) in establishing the right for undocumented detainees to compel the United States' conformance to the FSA's standards. While this Comment does not mean to minimize the FSA's accomplishments, it will argue that today, the Agreement no longer serves as an effective check on immigration officials, and that it no longer guarantees constitutional

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and Customs Enforcement is a law enforcement agency operating under the Department of Homeland Security (DHS) with a mission of "[s]ecuring our nation's borders and safeguarding the integrity of our immigration system." *ICE's Mission,* U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/mission [https://perma.cc/4Y6J-UG32] (last visited Feb. 9, 2021).

4. Established in 2003 through the Homeland Security Act, U.S. Customs and Border Protection is the first comprehensive border security agency in the United States. *About CBP*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about [https://perma.cc/M4UE-EUMD] (last visited Feb. 9, 2021).

5. *See* Cynthia Pompa, *Immigrant Kids Keep Dying in CBP Detention Centers, and DHS Won't Take Accountability*, AM. C.L. UNION: IMMIGRANTS' RIGHTS & DETENTION (June 24, 2019, 12:45 PM), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigrant-kids-keep-dying-cbp-detention [https://perma.cc/P482-TPQB].

6. *See* Graham v. Florida, 560 U.S. 48 (2015); Miller v. Alabama, 567 U.S. 460 (2012); Roper v. Simmons, 543 U.S. 551 (2005); *see also* Flores v. Meese, 681 F. Supp. 665, 667 (1988) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

7. *See generally* Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

protections for detained, undocumented children. Thus, to protect detained minors[8] and their accompanying parents from the harmful effects of border policies designed to deter further migration into the United States, Congress should codify the United States District Court for the Central District of California's construction of the Agreement in *Flores v. Lynch*.[9] As the court retaining jurisdiction over the Agreement and tasked with supervising parties' compliance with its terms,[10] the Central District Court of California is aptly positioned to most accurately interpret the meaning of the Agreement, and its interpretation should be given special credence by Congress in codifying it.

Part I of this Comment will examine the pre-Agreement landscape of immigration regulations and policies concerning children, emphasizing the standards—or lack thereof—that necessitated judicial intervention. This section will focus on the litigation that gave rise to the Agreement, *Reno v. Flores*, and its ensuing challenges. Part II will propose codifying, as opposed to merely amending, the standards set forth in the Agreement to embody the United States District Court for the Central District of California's holding in *Flores v. Lynch*, in which the Court extended the Agreement's protections to all detained minors—accompanied and unaccompanied alike—and affirmed the right to release accompanied minors' parents to prevent needless separation of family units in violation of the Agreement's terms. Part III will confront counterarguments stemming from the Agreement's plain language, including that it does not facially provide for the affirmative right of release of any adult and was applicable only to juveniles in its original context. This Part will also discuss the way in which the federal government's practice of separating minors from the parents that accompany them across the border may persist if unlawful entry remains

8. "The term 'minor' shall apply to any person under the age of eighteen (18) years who is detained in the legal custody of the [DHS]. This Agreement shall cease to apply to any person who has reached the age of eighteen years. The term 'minor' shall not include an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult. The INS shall treat all persons who are under the age of eighteen but not included within the definition of 'minor' as adults for all purposes, including release on bond or recognizance." *Id.* at 4.

9. Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016).

10. Stipulated Settlement Agreement, *supra* note 7, at 14–15.

a criminal violation, as opposed to a civil offense. Finally, Part IV will argue that, if the terms of the Agreement are codified, parents whom the government separates from their children may seek a writ of habeas corpus to secure their release from detention.

I. *RENO V. FLORES* AND ITS PROGENY

In 1985, then fifteen-year-old Jenny Lisette Flores fled war-torn El Salvador for the United States to meet her mother who, at the time, resided in California unlawfully.[11] Upon entering without inspection (EWI) at a port of entry near San Ysidro, California, Flores was detained and placed in the custody of the Immigration and Naturalization Service (INS).[12] Flores and other identified class members[13] were allegedly subjected to strip and body cavity searches, forced to share sleeping quarters with adults not related to them, not provided with educational instruction, materials, or recreational activities, and detained indefinitely despite no criminal proceedings against them.[14]

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11. Megan Kauffman, *Protecting the Flores and Hutto Settlements: A Look at the History of Migrant Children Detention and Where Immigration Policies are Headed*, 2 IMMIGR. & HUM. RTS. L. REV., no. 2, 2020, at 1, 2; Miriam Jordan, *The History of Migrant Children Protection in America Started with Two Girls in Los Angeles*, N.Y. TIMES, Aug. 20, 2019, LEXIS. While other detained minors were certified in the class, this section focuses only on the experiences of the named plaintiff in the class action, Jenny Lisette Flores.

12. The INS was officially dissolved following the passage of the Homeland Security Act of 2002. In its place and in response to the September 11, 2001, attacks, the Department of Homeland Security opened in March 2003. *Creation of the Department of Homeland Security*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/creation-department-homeland-security [https://perma.cc/JZL3-PPJG] (last visited Nov. 10, 2021). CBP and ICE are components under the unified DHS. *Who Joined DHS*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/creation-department-homeland-security [https://perma.cc/JZL3-PPJG] (last updated Nov. 10, 2021).

13. The names and ages of the remaining Plaintiffs to the class action are as follows: Dominga Hernandez-Hernandez (16); Alma Yanira Cruz-Aldama (13); and Ana Maria Martinez Portillo, (16). Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 5–6, Flores v. Meese, Case No. 85-4544 RJK(Px) (C.D. Cal. July 11, 1985). The class, however, is not limited to these Plaintiffs, but defined broadly as "[a]ll minors who are detained in the legal custody of the INS." Stipulated Settlement Agreement, *supra* note 7, at 7.

14. Complaint for Injunctive and Declaratory Relief, And Relief in the Nature of Mandamus, *supra* note 13, at 3–4.

The practice of incarcerating children indefinitely in detention facilities without a bail hearing was commonplace at this time, particularly at the Western Region Detention Facility where the government was holding Flores.[15] Releasing detained minors was unreasonably limited on the condition that the minor's legal parent or guardian must come to the facility to secure the release of their child.[16] This policy was enforced primarily to lure undocumented parents or guardians to the facility in order for INS to arrest the parent and initiate removal proceedings against them.[17] Undocumented immigrants such as Flores' mother, aware of this tactic, would attempt to send a relative in lieu of showing up themselves.[18] When the government invariably refused to release Flores to a relative other than a legal parent or guardian, she would remain in detention, not knowing when she would be freed and reunited with her family.[19]

Responding to these practices and policies, activist organizations[20] filed several lawsuits in the United States District Court for the Central District of California on behalf of a class of detained juveniles.[21] In the resulting case, *Flores v. Meese*, the court held that certain INS policies—namely, subjecting minors to strip and cavity searches— absent a reasonable suspicion that such searches will produce contraband or weapons, were impermissible violations of the Fourth Amendment.[22] Relying on cases which struck down similar policies, the court remarked, "[i]n all of these cases, policies authorizing routine strip searches . . . were found constitutionally repugnant. Certainly, application of such policies to children, who

15. *See* Kauffman, *supra* note 11, at 3.
16. *Id.*
17. *Id.*
18. *See id.*
19. *See id.* at 3–4.
20. The activist groups who partook in the legal representation of the plaintiffs include the Center for Human Rights and Constitutional Law, the National Center for Youth Law, the American Civil Liberties Union (ACLU), and the then law offices of Streich Lang, known today as Quarles & Brady, LLC. MATTHEW SUSSIS, CTR. FOR IMMIGR. STUD., THE HISTORY OF THE FLORES SETTLEMENT: HOW A 1997 AGREEMENT CRACKED OPEN OUR DETENTION LAWS 1–2 (2019).
21. *Id.*
22. Flores v. Meese, 681 F. Supp. 665, 669 (E.D. Cal. 1988).

have not been charged with any criminal offense, is even more so."[23] The United States Court of Appeals for the Ninth Circuit also struck down the INS's policy requiring that a minor be released only to a parent, legal guardian, or other related adult.[24] This victory was short-lived, however, as a subsequent ruling reversed the judgment of the *Meese* Court.[25]

In *Reno v. Flores*, the Supreme Court upheld the same INS blanket release policy that the Ninth Circuit deemed unconstitutional in *Meese*, on due process grounds.[26] Finding "no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24," the Court held that the policy was a "reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles" without regard for whether alternative policies may be more appropriate in detaining minors.[27] The distinction is significant: it is the difference between a child being held indefinitely in prison-like conditions due to the absence of a legal guardian or related adult available to claim her, or, on the other hand, allowing a child to be transferred to the "least restrictive setting" as required by the FSA.[28]

The lasting impact of the *Reno* decision was not the holding itself; instead, its lasting legacy was the *Flores* Agreement.[29] At the time of its execution and enforcement, the FSA had already been in litigation for nearly a decade.[30] The Agreement, signed and approved in 1997—and binding on the federal government since then—sets forth certain standards that the federal government must meet in its detention of applicable class members, *i.e.*, "[a]ll minors who are detained in the legal custody of the INS."[31]

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23. *Id.* at 668.

24. Flores v. Meese, 942 F.2d 1352, 1365 (9th Cir. 1991).

25. Reno v. Flores, 507 U.S. 292 (1993).

26. *See id.* at 303 (quoting Santosky v. Kramer, 445 U.S. 745, 766 (1982)), 315.

27. *Id.* at 314–15.

28. Stipulated Settlement Agreement, *supra* note 7, at 7.

29. *See generally* Stipulated Settlement Agreement, *supra* note 7.

30. *Id.* at 3.

31. *Id.* at 7. Such standards include, *inter alia*, that the INS "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs," that the INS "hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors," that such facilities "provide access to toilets and sinks,

Since its inception, the Agreement has been subject to varying interpretations and questions. Who exactly does the Agreement protect? Should the government treat minors who enter the United States alone under the same standards as minors who are accompanied by parents or guardians? What happens in the case of an unprecedented emergency (such as the COVID-19 pandemic); do the government's obligations under the Agreement remain? What constitutes the least restrictive setting possible in each individualized case? To answer such questions, the FSA empowers the United States District Court for the Central District of California to construe the Agreement's terms and to ensure the federal government's compliance.[32]

In 2015, the class members moved to enforce the Agreement to every minor in federal immigration custody regardless of whether they entered the country accompanied or unaccompanied.[33] The plaintiffs filed a class action suit in response to the government opening two new family detention centers in order to accommodate the recent wave of Central American migrants who had predominantly emigrated from the Northern Triangle due to sociopolitical unrest.[34] The new facilities in Texas and New Mexico, erected in 2014 to detain family units, did not adhere to the Agreement's standards.[35] The detention and release policies implemented at

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drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others," that unaccompanied minors be housed separately from unrelated adults, and that INS transfer the child from their custody to the least restrictive setting deemed appropriate for the child within three days and up to five days if no space is available in a licensed program. *Id.* Throughout its entirety, the document reinforces a general policy of the INS releasing a minor from its custody "without unnecessary delay." *Id.* at 10. Importantly, the Agreement provides that INS shall "make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor . . . . Such efforts at family reunification shall continue so long as the minor is in INS custody." *Id.* at 12.

32. *See id.* at 6.

33. Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).

34. *Id.*; *see* Ben Fox & Elliott Spagat, *Child Border Crossings Surging, Straining U.S. Facilities*, AP NEWS (Mar. 16, 2021), https://apnews.com/article/alejandro-mayorkas-defends-us-border-surge-handling-22d6c52cf738be791572474ee63843f4 [https://perma.cc/WH8L-NCC5].

35. *Lynch*, 828 F.3d at 901.

these centers also violated the FSA's terms.[36] The government defended its actions by arguing that the Agreement does not and was never intended to apply to minors accompanied by their parents or guardians, thus the new detention centers fell outside the scope of the FSA.[37] The government moved in the alternative that the court should modify the Agreement to reflect its contention.[38]

The District Court for the Central District of California summarily rejected the government's claim that the Agreement was intended to be applied only to unaccompanied minors and denied its motion to modify the Agreement.[39] Ruling in favor of the plaintiff class, the District Court reiterated the Agreement's general policies and presumptions and ordered the government to "make 'prompt and continuous efforts toward family reunification' . . . detain class members in appropriate facilities . . . [and] release an accompanying parent when releasing a child unless the parent is subject to mandatory detention[.]"[40] The government appealed the District Court's holding to the Ninth Circuit, challenging the District Court's conclusion that the Agreement applies to all juveniles in immigration custody, the District Court's order to release the child's parent along with the child unless certain exceptions are met, and the denial of the request to modify the Agreement.[41]

On appeal, the Ninth Circuit articulated its task in a simple manner: "[W]e must interpret the Settlement."[42] In doing so, the Ninth Circuit held that the Agreement unequivocally applied to all minors, accompanied and unaccompanied alike, affirming that component of the District Court's ruling.[43] The Ninth Circuit, finding no textual support for the government's argument, noted that "minors who arrive with their parents are as desirous of education and recreation, and as averse to strip searches, as those who come alone."[44]

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 905.
44. *Id.* at 907.

In Part II of its discussion, however, the Ninth Circuit reversed the District Court's order that the government must release the parents that accompanied their children across the border when it releases the minor child, [45] holding that "[t]he District Court erred in interpreting the Settlement to provide release rights to adults."[46] The Ninth Circuit reasoned that "the Settlement does not explicitly provide any rights to adults," and that its review was constrained to the four corners of the document because of its clear language.[47]

II. CODIFYING THE POLICIES OF THE AGREEMENT

> [A]nd that's not a law. It's a court settlement, *but it has the force of law*. And it has been expanded by another court judgment just a few years ago to apply both to children and to families with children. So it is valid to say that it has the force of law. It is not actually a law. It would have—*to change it would require legislation*, which is what the Congress is talking about.[48]

Congress should codify the general policies and standards of the *Flores* Agreement as a means of safeguarding vulnerable minors and families in federal immigration custody from state violence. Neither piecemeal modifications to the Agreement, which are laborious and subject to appellate scrutiny, nor DHS rulemaking, which is at the mercy of the executive branch, sufficiently protect the rights of migrant detainees and preserve enforceable rights against government mistreatment. Thus, Congress must codify the Central District Court of California's interpretation of the Agreement, as it is best situated to offer an equitable and accurate interpretation.

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45. *See id.* at 908.

46. *Id.*

47. *See id.* (citing Nehmer v. U.S. Dep't of Veterans Affairs, 494 F.3d 846, 861 (9th Cir. 2007)).

48. Interview by Michel Martin with Doris Meissner, Former INS Comm'r, Annaluisa Padilla, President, Am. Immigr. L. Ass'n, and Julian Aguilar, Rep., Tex. Trib., on All Things Considered (June 16, 2018) (emphasis added).

A. *Remedying the Effects of the Border Crisis on Children Necessitates Legislative Reform*

The FSA's termination provision specifies that the terms of the Agreement were to terminate either five years following final court approval of the Agreement or three years after the Central District Court of California determines that the government is in "substantial compliance" with the Agreement, whichever event occurs first.[49] This termination provision was drafted in 1987 and, ten years later, after a protracted litigation, was finally approved by the District Court and became binding.[50] The Agreement maintains its status as the primary legal framework for courts to ensure the government is acting in accordance with, and in consideration for, the particular vulnerability of children.

In 2001, the plaintiff class and the government stipulated that, rather than the Agreement terminating no later than 2002, the Agreement would instead terminate "45 days following defendants' publication of final regulations implementing this Agreement."[51] However, as the Ninth Circuit noted in *Lynch,* "[t]he government has not yet promulgated those regulations."[52] Even today, the government has not published a final rule implementing the Agreement.

Even if the executive were to promulgate a DHS regulation said to mitigate harmful effects of the border crisis on minors, such regulations might contravene the Agreement's terms. For example, in September 2018, the Trump Administration issued a notice of proposed rulemaking that sought to override the requirement to release accompanied children from detention within the time frame specified by the District Court.[53] This regulation conflicts directly with the general policies underlying the Agreement, as well as its specifications as interpreted by the District Court and the Ninth Circuit.

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49. Stipulated Settlement Agreement, *supra* note 7, at 22.

50. *See id.*

51. *Lynch*, 828 F.3d at 903.

52. *Id.*

53. Tal Kopan, *Trump Admin Seeks to Keep Undocumented Immigrant Families in Detention for Far Longer*, CNN (Sept. 6, 2018, 7:45 PM), https://www.cnn.com/2018/09/06/politics/trump-administration-immigrant-families-children-detention/index.html [https://perma.cc/FC2G-9TCA].

While the Agreement was intended to be only a temporary solution, a regulation which is subject to change with each incoming administration is hardly an improvement from the existing framework. The rights of minors in federal immigration detention are currently at the hands of varying judicial interpretations of the FSA, changing administrations, and the furtherance of political agendas. As the INS commissioner who signed the Agreement into effect explained, "[I]t is a judgment on the part of the administration how to implement that court decision."[54]

The most potent form of governmental action to secure the rights of detained juveniles and families would be for Congress to enact legislation reflecting the Agreement's provisions. Families who choose to immigrate into the United States deserve accurate notice of the rights owed to them upon arrival, and those whose agency is limited in fleeing their countries of origin deserve not to be punished for the circumstances under which they exist.

Certain provisions of the Agreement have already been codified into existing law.[55] In 2008, Congress passed H.R. 7311, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which provides, in part, that "an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child."[56] While TVPRA is undoubtedly a victory, it aims specifically to "combat the trafficking of children."[57] Other protections afforded by the Agreement—including the timely release of minors without unnecessary delay, maintaining juveniles in safe and sanitary conditions, and providing them with adequate educational and recreational resources—must be codified.[58]

Codification is of paramount importance because, as it stands, in an action for enforcement brought under the Agreement against the government any legal ruling is limited only to the "individual

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54. Interview with Doris Meissner, Annaluisa Padilla, President, and Julian Aguilar, *supra* note 48.

55. *See generally* 8 U.S.C. § 1232.

56. § 1232(c)(2)(A).

57. § 1232; *see also* § 1232(a)(1).

58. *See* Stipulated Settlement Agreement Exhibit 1 at 1–2, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

claim of the minor bringing the action."[59] Alternatively, holdings stemming from controversies over codified legislation can have a broad, expansive impact on all juveniles in federal immigration custody.

B. *The U.S. District Court for the Central District of California's* Construction of the FSA

Congress should codify the construction of the Agreement the U.S. District Court for the Central District of California used in *Flores v. Lynch*. In *Lynch*, the District Court ordered the federal government to:

> (1) make "prompt and continuous efforts toward family reunification," (2) release class members without unnecessary delay, (3) detain class members in appropriate facilities, (4) release an accompanying parent when releasing a child unless the parent is subject to mandatory detention or poses a safety risk or a significant flight risk, (5) monitor compliance with detention conditions, and (6) provide class counsel with monthly statistical information.[60]

The Court's interpretation of the Agreement most closely aligns with its general policy to "release a minor from [DHS] custody without unnecessary delay, in the following order of preference, to . . . a parent[.]"[61] It also comports with the requirement the government "make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14 . . . Such efforts at family reunification shall continue so long as the minor is in INS custody."[62] This construction ensures the government must treat all minors in federal immigration custody with "dignity, respect and special concern for their particular vulnerability as minors."[63]

As mentioned in Part I, during the government's appeal in *Flores v. Lynch*, the Ninth Circuit disagreed with the lower court's

59. *See* Stipulated Settlement Agreement, *supra* note 7, at 15.
60. Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).
61. Stipulated Settlement Agreement, *supra* note 7, at 10.
62. *Id.* at 12.
63. *Id.* at 7.

decision, striking down crucial protections for juveniles and their families entering the United States without inspection.[64]

C. *The Ninth Circuit's Error in* Flores v. Lynch

When *Flores v. Lynch* reached the Ninth Circuit, a panel of three judges limited the scope of their review only to the FSA document itself.[65] Owing its review to the nature of the Agreement, Judge Andrew D. Hurwitz wrote, "[t]he Settlement is a consent decree, which, 'like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.'"[66] However, there are genuine issues of ambiguity within the document, evidenced in part by the several lawsuits brought under it to interpret its various terms. The Ninth Circuit's limitation was wholly unfounded and the consequences of such a limitation is detrimental to those people the Agreement intends to protect.

In *Lynch*, the Ninth Circuit found it was permitted to review the lower court's decision *de novo*.[67] In deciding this standard, it relied on an earlier case that provided:

> [T]he interpretation of a contract is a mixed question of law and fact. When the District Court's decision is based on an analysis of the contractual language and an application of the principles of contract interpretation, that decision is a matter of law and reviewable de novo. When the inquiry focuses on extrinsic evidence of related facts, however, the trial court's conclusions will not be reversed unless they are clearly erroneous.[68]

As the District Court drew from existing conditions of border facilities in rendering its decision, the Ninth Circuit erred in imposing a *de novo* standard of review. Instead, the District Court's finding should have only been overturned if the Ninth Circuit found it

64. *See supra* pp. 8–9.
65. *Lynch*, 828 F.3d at 905.
66. *Id.* (quoting United Staes v. Asarco Inc., 430 F.3d 972, 980 (9th Cir. 2005)).
67. *Lynch,* 828 F.3d at 905.
68. Miller v. Safeco Tile Ins. Co., 758 F.2d 364, 367 (9th Cir. 1985).

to be "clearly erroneous," a much higher standard that would allow some deference to be given to the lower court's decision.

In affirming the lower court's holding that the Agreement applies to all children, while reversing its judgment that it also applies to parents accompanying minors, the Ninth Circuit failed to consider the pragmatic implications of such an excessively narrow construction.[69] It also ignored the Agreement's policy of preferential release to a parent, despite the district court's order that "[d]efendants shall comply with the Settlement ¶ 14(a) by releasing class members without unnecessary delay in first order of preference to a parent, including a parent subject to release who presented her or himself or was apprehended by Defendants accompanied by a class member."[70]

In its original context, the *Flores* Agreement limited all of its provisions to the members of the class action, those being "[a]ll minors who are detained in the legal custody of the INS."[71] To read the Agreement so narrowly, however, leads to an interpretation contradictory to its purposes.

III. THE FAILURES OF A PLAIN TEXTUAL READING OF THE FSA

Parents who accompany minors at the southern border were not within the original scope of the *Flores* Agreement.[72] On its face, the FSA does not explicitly provide any protection or guarantees to those over the age of eighteen and not in federal immigration custody.[73] It does, however, *implicitly* grant certain rights to accompanying parents in relation to the required release of minors to an adult, with preferential treatment being given to a parent.[74] Nearly a quarter-century after the Agreement took effect, and in light of the indignities taking place on a daily basis at the border, a reading of the Agreement limited only to its explicit language is counterintuitive to the Agreement's objectives. When such narrow interpretation is applied, the resulting harm to juveniles and their families is inconsistent with goals of the FSA.

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69. *See Lynch*, 828 F.3d at 905, 908.
70. *Id.* at 908.
71. Stipulated Settlement Agreement *supra* note 7, at 7.
72. *See id.*
73. *See id.*
74. *See id.* at 9–10.

A. *A Purely Textual Analysis of the Document Provides a Reading Counterintuitive to its Purposes*

In *Flores v. Lynch*, the District Court conceded that "the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention."[75] Still, it found support for the release of an accompanying parent or some other relative in caselaw, statutes, and in Immigration and Customs Enforcement's (ICE) practice of releasing parents who were not deemed a flight or safety risk.[76] The Ninth Circuit took issue with the lower court's decision despite its acknowledgment of the absence of any textual support within the Agreement itself, writing:

> While acknowledging that "the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention," the district court nonetheless reasoned that "ICE's blanket no-release policy with respect to mothers cannot be reconciled with the Agreement's grant to class members of a right to preferential release to a parent." The court also found that the regulation upheld in Flores . . . supported the release of an accompanying relative . . . ("If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention."). It also found support for that conclusion in ICE's practice, until June 2014, of generally releasing parents who were not flight or safety risks.
>
> The district court therefore concluded that the government "must release an accompanying parent as long as doing so would not create a flight risk or a safety risk." . . . .
>
> The district court erred in interpreting the Settlement to provide release rights to adults. The Settlement does not explicitly provide any rights to adults.[77]

However, the Agreement implicitly suggests that certain rights inure to the benefit to accompanying adults—most significantly, the right to release—because such rights are necessary to ensure

75. *Lynch*, 828 F.3d at 908.
76. *Id.*
77. *Id.*

and protect the best interests of the child. Significantly, paragraph fourteen of the Agreement gives preferential treatment to accompanying parents in releasing the juvenile.[78] Moreover, the Agreement espouses a general policy to favor family reunification.[79] Ignoring the implied rights created by the Agreement's language is to construe it in a manner wholly inconsistent with its purposes. A reading and application of the Agreement should, ideally, further its intended goals, not contravene them.

B. *Codifying the Agreement's Terms May Improve Material Conditions for Detained Families Despite the Criminal Treatment of Unlawful Entry*

Currently, the United States treats unlawful entry without inspection (EWI) as a criminal offense.[80] In such cases, the governing statutory provision allows for imprisonment up to six months and a fine for a first-time offender.[81] Given this criminal treatment of unlawful entry, a legitimate question arises as to whether the Agreement could actually significantly ameliorate and prevent family separation while EWI remains a criminal offense.

In an ideal scenario, the current framework would be revised to remove any criminal imposition on unlawful entry, mitigating it to a civil offense. Even without such reform, however, the codification of the Agreement's provisions might still pave the way for a remedy to family separation. The statute governing improper entry does mandate the application of either a fine or imprisonment to first-time offenders.[82] It does not, though, indicate a minimum detention requirement; it only imposes a maximum of six months.[83] As such, DHS could, assuming an accompanying parent is the only—or most appropriate—adult available to take the juvenile into custody, release the parent when it releases the child in accordance with the Agreement.[84]

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78. Stipulated Settlement Agreement *supra* note 7, at 9–10.

79. *See id.* at 3, 10–11; Stipulated Settlement Agreement Exhibit 2 at 2; Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

80. 8 U.S.C. § 1325(a).

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* Stipulated Settlement Agreement *supra* note 7, at 9–10.

In the event that federal immigration officials refuse to release an accompanying parent when it releases the minor child, that parent may have a form of relief available if Congress codifies the terms of the *Flores* Agreement. Such relief may reunite those families already separated under the law, and prevent further, unnecessary separation of migrant families.

IV. RELIEF IN THE FORM OF FEDERAL HABEAS

Habeas corpus is a common law writ through which a prisoner or detainee may petition a court to review whether the individual's imprisonment or detention is lawful.[85] An individual need not demonstrate that they are in actual physical detention or prison, just that they are in "custody."[86] If, after its review, a court finds that the government is holding the detainee contrary to established law, it must grant the individual's petition and order the government to release the detainee.

Codifying the *Flores* Agreement, particularly the provision of preferential release of a minor child to an accompanying parent upon the release of the child, may establish grounds upon which an accompanying parent detained in federal immigration custody may file a writ of federal habeas corpus. If the reviewing court finds that the detention violates the codified terms of the Agreement, it must grant the detained parent's petition and order federal immigration officials to release the minor's parent.

Currently, an attorney for a child detained in violation of the Agreement may file a writ of habeas corpus to grant the release of the child on the ground that the detention violates the Agreement's terms. Such relief does not exist, however, for accompanying adults. Codifying the *Flores* Agreement's provisions as interpreted by the U.S. District Court for the Central District of California, which expanded the protections of the FSA to adults who accompany minors across the border, may make available for migrant families this avenue of relief.

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85. *Habeus Corpus*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus [https://perma.cc/T4EH-3WA4] (last visited Nov. 11, 2021).

86. *Id.*

CONCLUSION

Recent events at the United States–Mexico border demonstrate a compelling need for Congress to act and to alleviate the effects of the border crisis on children.[87] The Agreement, though consequential in protecting certain rights of minors, is no longer effective. The situation at the border is unquestionably a humanitarian crisis, despite the Biden administration's refusal to appropriately label it as such.[88] Congressional action is not, in this context or any, a panacea; true change of those conditions begetting human suffering at the border would require systemic reform: interdisciplinary efforts, intergovernmental cooperation, and a cultural shift of which populations we deem worthy of protecting. Still, legislative reform is a good start.

The general policies of the *Flores* Agreement are to ensure that the government treats minors in federal immigration custody with "dignity, respect and special concern for their particular vulnerability" as children.[89] Despite the Agreement's binding legal effect on the U.S. government, infractions on the rights of detained minors persist. The numerous government violations of the Agreement's terms are indicative that the force of the Agreement is insufficient in guaranteeing protectable, enforceable rights for detained migrant children and those who may have crossed the U.S. border with them. Thus, congressional action is imperative—Congress should codify the terms of the Agreement, as interpreted by the U.S. District Court for the Central District of California in *Flores v.*

87. *See* Camilo Montoya Gomez, *"They Never Saw the Sun": Lawyers Describe Overcrowded Conditions for Children in Border Patrol Custody*, CBS NEWS (Mar. 12, 2021), https://www.cbsnews.com/news/migrant-children-detained-in-overcrowded-conditions/?ftag=CNM-0010aab7e&linkId=113345561 [https://perma.cc/32Q7-8M2X]; Nomaan Merchant, *Children Packed Into Border Patrol Tent for Days on End*, AP NEWS (Mar. 12, 2021), https://apnews.com/article/immigration-coronavirus-pandemic-border-patrols-texas9b959d739d59f03dd5873927171f2e29?utm_mdium=AP&utm_campaign=SocialFlow&utm_source=Twitter [https://perma.cc/BSM2-53W7].

88. *See* Michael D. Shear & Zolan Kanno-Youngs, *Biden Faces Challenge From Surge of Migrants at the Border*, N.Y. TIMES (Mar. 8, 2021) https://www.nytimes.com/2021/03/08/us/politics/immigration-mexico-border-biden.html [https://perma.cc/4EK3-6NZ7].

89. Stipulated Settlement Agreement *supra* note 7, at 11.

Lynch, to safeguard for detained minors those protections the Agreement intended to provide.

If Congress acts, it will ensure both adequate treatment for minors while they remain in government custody, and that the government will release the minor child expeditiously and without unnecessary delay. Codifying the Agreement will also aid in reuniting families separated under the current immigration regime, allowing for parents who accompanied minors across the border to seek judicial review of their detention and, where the detention is found to violate the Agreement's terms, reunite children with their families.