IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

WESLEYANN EMPTAGE, by and through her next friend and mother, Raouitee Pamela Puran, Plaintiff, -vs- MICHAEL CHERTOFF, Secretary of U S Department of Homeland Security; JULIE L MYERS, Assistant Secretary, U S Immigration and Customs Enforcement (ICE); JOHN P TORRES, Director, Office of Detention and Removal Operations, ICE; MARC MOORE, ICE Field Office Director; GARY MEAD, Assistant Director of Detention and Removal Operations at ICE; SIMONA COLON, ICE Officer in Charge; and JOHN POGASH, ICE National Juvenile Coordinator, Defendants	)	Case No A-07-CA-158-SS
SAULE BUNIKYTE, by and through her next friend and mother, Rasa Bunikiene, Plaintiff, -vs- MICHAEL CHERTOFF, Secretary of U S Department of Homeland Security; et al , Defendants	)	Case No A-07-CA-164-SS
EGLE BAUBONYTE, by and through her next friend and mother, Rasa Bunikiene, Plaintiff, -vs-	)	Case No A-07-CA-165-SS

MICHAEL CHERTOFF, Secretary of U.S. Department of Homeland Security; et al., Defendants.	)	
SHERONA VERDIEU, by and through her next friend and mother, Delourdes Verdieu, Plaintiff,	)	
-vs-	)	Case No. A-07-CA-166-SS
MICHAEL CHERTOFF, Secretary of U.S. Department of Homeland Security; et al., Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTIONS FOR PRELIMINARY INJUNCTIONS

Introduction

On March 22, 2007, this Court issued an Order requesting declarations and supplemental briefing on several points that emerged during the March 20, 2007 hearing on plaintiffs' motions for preliminary injunctions seeking relief based on the *Flores* Stipulated Settlement, ("Settlement"), Pl. Ex. A, March 6, 2007 Appendix of Exhibits (hereinafter "March 6 App.").[1] Attached to this Brief are the following declarations, pursuant to the Court's Order: (a) Declaration of Vanita Gupta, attached hereto as Pl. Ex. DD, Attach. 1, describing plaintiffs' counsel's multiple attempts to comply with the exhaustion requirements of Paragraph 24 of the Settlement; (b) Declaration of Griselda

[1] Plaintiffs filed this same supplemental brief in each of their respective cases to ensure that their respective docket reflects this latest filing. However, to minimize paper, plaintiffs have only filed one set of new exhibits, Exhibits DD - FF, in Wesleyann Emptage's case, Case No. A-07-CA-158-SS. The supplemental briefs of Sherona Verdieu, Egle Baubonyte, and Saule Bunikyte hereby incorporate and attach by reference that set of exhibits. Plaintiffs also hereby incorporate and attach by reference: Exhibits A-P that were filed on March 6, 2007 with each plaintiff's Motion for Temporary Restraining Order, and Exhibits P-CC that were filed on March 20, 2007 with each plaintiff's Reply Brief.

Ponce, attached hereto as Pl. Ex. DD, Attach. 2, detailing what proceedings regarding bond and parole have been held with regard to her clients Sherona Verdieu and her mother, Delourdes Verdieu, and Wesleyann Emptage and her mother, Pamela Puran; (c) Declaration of Rasa Bunikiene, attached hereto as Pl. Ex. DD, Attach. 3, detailing what proceedings regarding bond and parole have been held with regard to her and her children Egle Baubonyte and Saule Bunikyte.

Pursuant to this Court's Order, plaintiffs now offer briefing on three issues that emerged during the March 20 hearing.

I. The *Flores* Settlement Applies To All Minors in Federal Immigration Custody, Whether Accompanied or Unaccompanied.

The 2001 Stipulation and Order clearly extends the terms of the Settlement until defendants have published final regulations implementing those terms. *See* 2001 Stipulation and Order, Pl. Ex. B, March 6 App. Defendants cannot claim to have done so and have admitted as much. *See, e.g.*, Victor Lawrence, Tr. of March 20 Hrg. at 42 ("There's no escaping the fact that the regulations have not been written yet."). Thus, there is no dispute that the Settlement remains binding on defendants

Defendants now claim that the Settlement applies only to unaccompanied minors. This claim is belied by the plain meaning of the text of the Settlement, the intent of its drafters, the Supreme Court's interpretation of the case, the historical context in which *Flores* was litigated, and defendants' own actions and admissions.

First, the text of the Settlement makes clear that the *Flores* class includes "*All* minors who are detained in the legal custody of the INS." Settlement, Pl. Ex. A, March 6 App., at ¶ 10 (emphasis added). The class definition makes no distinction between accompanied and unaccompanied minors. The phrase "[a]ll minors" necessarily includes

both. In fact, multiple provisions of the Settlement account for the heightened vulnerability of unaccompanied minors, as opposed to accompanied minors, in immigration custody. *See, e.g. id.* at ¶ 10 ("The INS will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours."); *id.* at ¶ 25 ("Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults . . . ."). The extra protections afforded to unaccompanied minors and the class definition of "[a]ll minors" would be nonsensical if the Settlement applied to only unaccompanied minors.

A fundamental principle in "the canon of contractual interpretation . . . requires words and phrases in a contract to be given their plain meanings . . . ." *Cleere Drilling Co. v. Dominion Exploration & Production, Inc.*, 351 F.3d 642, 650-51 (5th Cir. 2003). Another core principle of contract interpretation requires that a contract "be interpreted as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous." *Transnat'l Learning Cmty. at Galveston, Inc. v. United States Office of Pers. Mgmt.*, 220 F.3d 427, 431 (5th Cir. 2000). The Settlement at issue in this case is a court-approved contract, and plaintiffs raise contract claims. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975) (holding that consent decrees and orders should be construed in the same manner as contracts); *Guidry v. Halliburton Geophysical Services, Inc.*, 976 F.2d 938, 940 (5th Cir. 1992). Federal common law principles govern the interpretation of contracts to which the United States is a party, as in this case. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). In light of these principles, the

Settlement must be interpreted to give meaning to its straightforward provisions, which afford protections to all – not just some – minors in federal immigration custody.

The *Flores* Settlement reflects no intention by its drafters to diverge from the plain meaning of its provisions. As Carlos Holguín, lead counsel for plaintiffs' in *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal.), explains, the drafters of the Settlement sought to protect both accompanied and unaccompanied minors:

> Whether or not the minors were accompanied by a parent was immaterial to claims raised in *Flores* regarding substandard conditions and treatment minors experienced during INS detention, or to the need for specific standards to protect minors and ensure that the facilities in which they were detained were appropriate to their age and special needs. The *Flores* Settlement was intended to protect *all* minors in ICE custody, whether accompanied or not.

Decl. of Carlos Holguín, attached Pl. Ex. DD, Attach. 4, at ¶ 3. When interpreting a contract, courts are compelled to give effect to the parties' intentions. *Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981). Courts may interpret contract provisions to diverge from their "plain meanings" only where "the document demonstrates that the parties intended for the terms to be employed in some special or technical sense." *Cleere Drilling Co.*, 351 F.3d at 651. These principles require the *Flores* Settlement to be interpreted in light of its plain meaning and the drafters' intent to protect all minors.

Indeed, the Supreme Court itself recognized that the litigation giving rise to the Settlement sought to protect both accompanied and unaccompanied minors. In the opening paragraph of its opinion in *Reno v. Flores*, the Court writes:

> In the case of arrested alien juveniles . . . the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings.

> That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, *i e.*, unaccompanied by a parent, guardian, or other related adult

507 U S. 292, 295 (1993) (internal citations omitted). The Supreme Court's language is meaningful only in the context of litigation intended to protect all minors in federal immigration custody.

Furthermore, the historical context in which this case was litigated makes clear that the parties to the Settlement understood that it would protect all children in immigration custody, regardless of whether those children were detained with their parents Although defendants claim that family detention facilities did not exist prior to the late 1990s, and thus, plaintiffs are not entitled to the protections afforded by the Settlement, Victor Lawrence, Tr. of March 20 Hrg. at 24-27, such claims are misleading at best In fact, the federal government had detained immigrant children with their parents long before *Flores v Meese* was filed in 1985. Mr Holguín explains:

> From before the *Flores* case was filed, through the signing of the *Flores* Settlement in 1997, families with children were commonly detained in INS custody, although there were no designated "family detention facilities." Before the *Flores* case was filed, unaccompanied minors *and* families that included minors were typically detained by the INS in makeshift detention facilities, such as rented hotels with razor wire thrown up around them.

Decl of Carlos Holguín, Pl. Ex DD, Attach. 4, at ¶ 3 This historical context made the parties to the Settlement acutely aware of the needs of both accompanied and unaccompanied children.

Notwithstanding defendants' claim that the Settlement is not applicable to plaintiffs' claims regarding Hutto, defendants acknowledge that they have made nominal

efforts at compliance. Indeed, before the facility opened on May 1, 2006, ICE Contracting Officer Jan K. Wiser wrote to Judge John C. Doerfler of Williamson County,[2] identifying numerous modifications that needed to be made to the Hutto facility and services "in accordance with the Flores v. Reno Settlement Agreement." Decl. of Vanita Gupta, Pl. Ex. Q, Attach. 2 at 1. Many of these modifications were never made, but the letter reflects that from the outset defendants have been aware of their obligations toward plaintiffs under the Settlement. Moreover, at the hearing on March 20, 2007 before this Court, defendant Simona Colon, defense witness William Ault, and defense counsel Victor Lawrence admitted that defendants are aware of their obligations under the Settlement and that they are making efforts to comply with those obligations. *See, e.g.*, Simona Colon, Tr. of March 20 Hrg. at 166 ("We are working on a plan of action to meet every element [of the Settlement]."); William Ault, Tr. of March 20 Hrg. at 201 ("[T]hey do have the documentation . . . we were referencing for the license as far as trying to get compliance with *Flores*."); Victor Lawrence, Tr. of March 20 Hrg. at 24 ("[Hutto] complies with the relevant aspects of *Flores* that are applicable to this population."); *id.* at 235 ("[T]he agency is in good faith making efforts to apply *Flores* to this facility."). It is disingenuous for defendants to claim otherwise.

In sum, the text of the Settlement, the intent of its drafters, language from the Supreme Court, the historical context in which the case was litigated, and defendants' own actions and admissions make it clear that the Settlement protects all minors in ICE custody.

II. Defendants Violated the Plain Language and Intent of the *Flores* Settlement By Failing to Place Plaintiffs in a Licensed Program.

[2] Williamson County owns the Hutto facility, which is operated by Corrections Corporation of America, Inc. (CCA), pursuant to a contractual arrangement with ICE.

When ICE does not expeditiously release a minor in its custody, the Settlement requires that the minor be placed "in a *licensed program* until such time as release can be effected in accordance with Paragraph 14 above or until the minor's immigration proceedings are concluded, whichever occurs earlier." Settlement, Pl. Ex. A, March 6 App., at ¶ 19 (emphasis added). Placement in a licensed program is the most basic protection afforded by the Settlement with respect to detention conditions, providing a foundation that is supplemented by the additional standards set forth in Exhibit 1 to the Settlement. *See id.*, Exhibit 1 to Ex. A ("Licensed programs shall comply with all applicable state child welfare laws and regulations . . . and shall provide or arrange for the following services for each minor in its care . . . ") The *Flores* licensing requirement is thus not merely an administrative hurdle for ICE, but embodies substantive protections for the child.[3]

While family detention on the scale of the Hutto facility is obviously new in Texas, Department of Family and Protective Services (DFPS) regulations pertaining to 24-hour residential child care facilities do not suggest that relevant child protective

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[3] For example, among the many standards applicable to "General Residential Operations" licensed by Texas Department of Family and Protective Services are:

- specific nutrition and hydration standards for school-age children, toddlers and infants (40 Tex. Admin. Code § 748.1691 *et seq.*);
- physical site requirements, including standards for interior space, play equipment and safety requirements (*e.g.*, 40 Tex. Admin. Code § 748.3351 and § 748.3471);
- recreational activities standards (40 Tex. Admin. Code § 748.3701 *et seq.*);
- specific child privacy rights, protecting personal mail and telephone calls (40 Tex. Admin. Code § 748.1111); and
- immunization and medical care requirements (40 Tex. Admin. Code § 748.1531 *et seq.*)

A "General Residential Operation" is defined as *"[a] residential child-care operation that provides child care for 13 or more children or young adults.* The care may include treatment services and/or programmatic services. These operations include formerly titled emergency shelters, *operations providing basic child care*, operations serving children with mental retardation, and halfway houses. A residential treatment center is not a general residential operation." 40 Tex. Admin. Code § 748.43(22) (emphasis added).

standards are inapplicable in the family detention context.[4] And even if that were the case, it would not obviate defendants' obligation to comply with the Settlement and place children in a licensed facility. Both technically and as a matter of the substantive protections afforded to children, placement in a licensed facility is *not* the same thing as placement in a program that operates under an exemption from licensing requirements. Operation of an exemped program may be considered legal under state law (assuming the exemption is properly granted), but the program is still not "licensed" and thus does not comply with *Flores*.

A Hutto Is Clearly Ineligible for the Exemption Granted by DFPS, Which Was Based on Inaccurate Facts.

Defendants have conceded that Hutto is not licensed but argue that the facility is exempted from licensing requirements. William Ault, Tr. of March 20 Hrg. at 198-200 (testifying about defendants' efforts to obtain license). As noted above, even if the exemption were legitimate, that would not satisfy *Flores*. Here defendants' non-compliance is all the more egregious because Hutto clearly does not qualify for the exemption granted by DFPS, which was based on inaccurate facts. Defendants' March 23, 2007 "Status Report" to the Court includes copies of correspondence between Mickey Liles, the Corrections Corporation of America (CCA) Facility Administrator at Hutto, and the DFPS Child Care Licensing Division about CCA's application for an Exemption Determination for Hutto. Def. Attach. to Decl. of Marc J. Moore, Def. Status Report, filed March 23, 2007. The correspondence indicates that DFPS granted the facility an exemption under 40 Tex. Admin. Code § 745.117(2), as a "program of limited duration"

[4] Indeed, 40 Tex. Admin. Code Chapter 748 covering "General Residential Operations and Residential Treatment Centers" includes Subchapter K, "Operations That Provide Care for Children and Adults." *See* § 748.1901 *et seq.*

with "parents on the premises" *Id*, June 14, 2006 Letter from Michele Adams to Mickey Liles. However, Hutto is manifestly not a program of limited duration and satisfies none of the criteria for that exemption under the regulations.[5] Moreover, the exemption application submitted by Warden Liles inaccurately describes the services offered at Hutto in several crucial respects, and this information was clearly relied upon by DFPS in making its exemption determination.

In applying for the exemption, Warden Liles failed to identify Hutto as a facility offering 24-hour residential care; failed to identify the number or age range of children detained at the facility; indicated that Hutto provides 5 ½ hours of school each weekday (which plaintiffs dispute even today and which was certainly not true at the time of the application); and failed to indicate the maximum number of continuous days a child may remain at Hutto. *Id.*, Application for Exemption Determination at 1, 2. Warden Liles also specifically represented that Hutto would house family units "for up to 90 days until their expedited removal from the country." *Id*, May 22, 2006 Letter from Mickey Liles to Michele Adams. The assertion of a de facto 90-day limit on detention at Hutto is patently false, as shown by the experience of *nine* out of the ten plaintiffs in the Hutto

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[5] The criteria for exemption for a program of limited duration with parents on the premises include the following:

> (A) The program operates in association with a shopping center, business, or religious organization;
> (B) The parent or person responsible for the child attends or engages in some elective activity nearby, not including employment or education pursued in order to obtain a degree;
> (C) A child may only be in care:
> (i) For up to four and one half hours per day; and
> (ii) For up to 12 hours per week; and
> (D) The parent or person responsible for the child can be contacted at all times.

40 Tex. Admin. Code § 745.117(2)(1). As suggested by these criteria, this exemption was designed for child care programs at churches or workout facilities, when parents are in the building but doing other things during the short time that their children are in child care

related cases filed on March 6, 2007 [6] DFPS clearly relied upon the misinformation supplied by Warden Liles in granting the exemption. *See id.*, June 14, 2006 Adams Letter (noting a 90-day or less average stay at the facility). Viewed as a whole, the Hutto exemption materials advance the fiction that the children at Hutto only need the protection of state licensing regulations when they are in class, because the rest of the time they are with their parents who can, presumably, attend to all of their needs. What is not acknowledged is that Hutto also disempowers the parents, who are not in control of their children's physical environment, daily schedules, food, medical care, recreational activities, or virtually any other aspect of their lives. Texas child protective regulations impose minimum standards in all of these areas, and thus are very much needed by the children and families at Hutto

The fact that DFPS granted the exemption to Hutto in spite of all this does not excuse defendants from their obligations under *Flores*. They were required to place children in a licensed program, but instead they placed them in an unlicensed program under an exemption that should never have been granted. Indeed, the most notable omission in defendants' licensing submissions is that ICE is not copied anywhere on the correspondence. Nor did defendants submit any evidence that they were aware of or approved the application for a license exemption for Hutto. It appears that ICE essentially abdicated its responsibility to ensure compliance with the Settlement and delegated the purely administrative task of navigating state licensing rules to CCA. CCA

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[6] Wesleyann Emptage has been imprisoned at Hutto 91 days; Sherona Verdieu has been imprisoned at Hutto more than 6 5 months; Egle Baubonyte has been imprisoned at Hutto 3 5 months; Saule Bunikyte has been imprisoned at Hutto 3 5 months; Aisha Ibrahim had been imprisoned at Hutto more than 3 5 months when she was released; Bahja Ibrahim had been imprisoned at Hutto over 3.5 months when she was released; Mohammed Ibrahim had been imprisoned at Hutto over 3 5 months when he was released; Angelina Carbajal had been imprisoned at Hutto for 5 months when she was released; and, Richard Carbajal had been imprisoned at Hutto for 5 months when he was released.

in turn submitted a flawed application for a licensing exemption and removed the facility from state scrutiny.

B Defendants Cannot Unilaterally Decide That the Licensing Requirement Is Impossible to Meet and Therefore Optional

Even if it were genuinely impossible for defendants to comply with the *Flores* licensing requirement, they were not entitled to ignore the Settlement, which has the force of a court order. *Jim Walter Resources, Inc. v. Int'l Union, U. Mine Workers of Am.*, 609 F.2d 165, 168 (5th Cir. 1980). "All orders and judgments of courts must be complied with promptly." *Id.* (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975)). The appropriate remedy would have been to ask the *Flores* Court for clarification of the licensing requirement or permission for an exemption. *Id.* (strict compliance with court orders is required regardless of circumstances, and the only remedy was to return to the district court for permission to not comply or to modify obligations).

The Fifth Circuit has made clear that the government cannot exercise its discretion in a manner that would effectively subvert its obligations under a binding consent decree. In *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1162 (5th Cir. 1996), the City of New Orleans entered into a consent decree that settled an action brought by a class of African-American police officers, who had contended that the promotion and hiring practices of the New Orleans Police Department ("NOPD") were discriminatory. The decree expressly provided that police recruits could be considered for promotion so long as they *resided* in the Parish of New Orleans. *Id.* at 1164. After the entry of the decree, the City passed an ordinance which provided that no city employee could be considered for promotion unless the employee was *domiciled* in Orleans Parish. *Id.* at 1167. The district court found that the ordinance conflicted with

the decree and its use to deny promotions was improper. *Id.* The Fifth Circuit affirmed, stating that "[t]he City cannot unilaterally amend the bargain struck in the Decree through the passage of a municipal ordinance." *Id.* Similarly, here ICE cannot unilaterally alter the terms of the consent decree—*i.e.*, it cannot choose to detain minor children in a facility that cannot be properly licensed in an effort to circumvent its obligations under the *Flores* Settlement.

Finally, ICE's own experience with family detention demonstrates that impossibility is no defense to failure to comply with the *Flores* licensing requirements. Although Hutto is not a licensed program, ICE's only other family detention facility *is* licensed, thanks to the efforts of local officials in Berks County, Pennsylvania. The Berks Family Shelter Care Facility houses families detained by ICE in a converted nursing home owned by the county—a vastly more home-like setting than a privately-run medium-security prison. According to the Women's Commission Report on family detention, the relevant state agency in Pennsylvania initially found that the Berks facility did not fit into any of the usual child-care licensing categories. *See* Women's Commission Report, *Locking Up Family Values: The Detention of Immigrant Families*, Pl. Ex. C, Attach. 1, March 6 App., at 36. Berks County officials asked the licensing board to create a category or "box to check" even though none officially existed "because they refused to open without some form of license." *Id.* Apparently, the facility did receive a license and is now subject to appropriate state regulations.[7]

Here, defendants have submitted no evidence that ICE could not have complied with the licensing requirement in *Flores*, either by applying for a license rather than

[7] The ACLU affiliate in Pennsylvania recently filed a state open records request to obtain copies of the licensing papers for the Berks facility.

applying for an exemption, or by insisting that a special license be granted subjecting Hutto to meaningful regulation by the state. Instead, defendants choose to operate outside of any licensing requirements, just as they have operated outside of the requirements of the *Flores* Settlement.

III. A Preliminary Injunction Is the Only Way to Ensure That Plaintiffs Will Not Continue to Suffer Irreparable Injury From Their Confinement at Hutto.

In its Order, the Court also asked Plaintiffs to address "the effect of legal proceedings for release, including bond, parole, and habeas corpus proceedings, on Plaintiffs' request for equitable release." As set forth below, and in the accompanying Declarations of Griselda Ponce and Rasa Bunikiene, the plaintiffs and their mothers have availed themselves of the administrative mechanisms available to them to seek release from detention – to date with no success. While plaintiffs and their mothers can continue to pursue release through these administrative avenues, or challenge the denial of administrative release in petitions for habeas corpus, the availability of such proceedings in no way deprives this Court of its authority to grant equitable relief. "[I]t is a fundamental rule that a court of equity will exercise jurisdiction even when a plaintiff has another remedy, if that remedy is not as practicable and efficacious to the ends of justice and its proper administration as the remedy in equity." *Vicksburg, S & P Ry Co. v. Schaff*, 5 F.2d 610, 611 (5th Cir. 1925); *see also Justin Industries, Inc. v. Choctaw Securities, L.P.*, 920 F.2d 262, 269 (5th Cir. 1990) ("where a self-help remedy is not as complete, practical and efficient as that which equity could afford, courts will grant a preliminary injunction") (internal citations and quotations omitted). Moreover, in the instant case, none of the proceedings available to Plaintiffs can assure them the relief they

seek – namely *immediate* release from Hutto with their parents, either under reasonable conditions of supervision or to a detention facility that is *Flores* compliant. A preliminary injunction is the only way to ensure that plaintiffs will not continue to suffer irreparable injury from their confinement at Hutto.

In the cases of plaintiffs Sherona Verdieu and Wesleyan Emptage, their mothers' requests for release on parole have been pending before defendant Marc Moore since March 16, 2007. Decl. of Griselda Ponce, Pl. Ex. DD, Attach. 2, at ¶¶ 8, 22; Parole Applications of Delourdes and Sherona Verdieu, Pl. Ex. Q, Attach. 3, March 19, 2007 Appendix of Exhibits (hereinafter "March 19 App."); Parole Applications of Raouitee Pamela Puran and Wesleyann Emptage, Pl. Ex. Q, Attach. 4, March 19 App. There is no determinate time frame in which defendants must adjudicate such requests. Indeed, Sherona Verdieu's mother submitted a parole request on October 3, 2006 which was denied over one month later without explanation despite submission of ample documentation showing that a U.S. citizen sister in Miami has the means to support her and her daughter, and is committed to ensuring their timely appearance at all immigration hearings. Decl. of Griselda Ponce, Pl. Ex. DD, Attach. 2, at ¶ 8; Parole Applications of Delourdes and Sherona Verdieu, Pl. Ex. Q, Attach. 3, March 19 App. Furthermore, there is no reason to believe that the pending requests will ultimately be decided in plaintiffs' favor. Although ICE has a stated policy favoring parole for asylum seekers such as the mothers of Sherona and Wesleyann who have been found to have a "credible fear" of persecution and are therefore no longer subject to "expedited removal," *see, e.g.* INS Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of

Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in 75 *Interpreter Releases* 270 (Feb. 23, 1998); *see also* INS Memorandum, *Detention Guidelines Effective October 9, 1998* from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, it appears that the ICE Field Office in San Antonio, Texas has a blanket policy of denying parole requests from asylum seekers at Hutto. Decl. of Griselda Ponce, Pl. Ex. DD, Attach. 2, at ¶¶ 12, 24. Moreover, because plaintiffs Sherona and Wesleyann have been classified as "arriving aliens," they are not entitled to have their custody status reviewed by an immigration judge, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B), and thus have no way to challenge a denial of parole administratively [8]

The only remaining avenue open to plaintiffs Sherona and Wesleyann is to file habeas corpus petitions with this Court, challenging the *de facto* denial of parole. While this is an option that plaintiffs' counsel have considered, the standard for obtaining release under habeas corpus would be different, and arguably more demanding, than the standard plaintiffs must meet to obtain release pursuant to their *Flores* enforcement actions. Habeas courts traditionally give great deference to the government's parole decisions, upholding such decisions as long as the government can present "a facially legitimate and bona fide reason" for the denial of parole. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *Petrescu v. INS*, 68 F.3d 481, 481 (9th Cir. 1995);

[8] During oral argument on March 20, Defendants represented that, "in two-thirds of cases where the individuals [at Hutto] do request parole, they are paroled." Victor Lawrence, Tr. of March 20 Hrg. at 36. To the extent that such statistics are accurate -- which is highly doubtful -- it is likely that they refer to detainees who, unlike plaintiffs Sherona and Wesleyann, were not classified as "arriving aliens" and were therefore entitled to have their parole denials reviewed in a custody hearing before an immigration judge. *See Matter of X-K*, 23 I&N Dec. 731 (BIA 2005) (holding that aliens who were placed in expedited removal who were not "arriving aliens" were entitled to immigration judge custody hearings).

Sidney v. Howerton, 777 F 2d 1490, 1491 (11th Cir 1985). Moreover, the filing of habeas corpus petitions would cause unnecessary delay.

The situation of plaintiffs Saule and Egle, and their mother Rasa Bunikiene, is different in that because they are not classified as "arriving aliens," they are entitled to seek review of their detention in a bond hearing before an immigration judge. 8 C.F.R. § 1003.19(h)(2)(i)(B). Unfortunately, the immigration lawyer hired to represent these plaintiffs and their mother in their immigration proceedings, and to seek their release on bond, failed to file necessary papers with the result that all the requests were denied. *See* Decl. of Rasa Bunikiene, Pl. Ex. DD, Attach. 3, at ¶ 5. Plaintiffs' mother has been trying to reach her immigration lawyer since March 26, 2007 in order to fire her, and she is currently seeking new counsel to file new bond requests. *Id.* at ¶ 4. While these requests may ultimately be successful, there is no way to know how long the process will take. Until such time, Egle and Saule remain at Hutto where they continue to suffer irreparable harm.

Plaintiffs do not seek release pursuant to the *Flores* Settlement as a way to circumvent other avenues by which they may obtain release. No other potential avenue of relief exists that is as complete, practical, and efficient. *See Justin Industries, Inc.*, 920 F.2d at 269. Plaintiffs filed complaints and seek equitable relief pursuant to the Settlement because their rights under this Settlement are being violated and they are suffering irreparable harm every further day that they are detained in a facility that is not in compliance with existing law.[9] Once a parole request, bond application, or habeas petition is filed, there are no time limits on the decision makers. In contrast, the

[9] Plaintiffs explain why the *Flores* Settlement mandates the release of a parent or at least the transfer of a parent with his or her child into a facility that complies with the settlement in their respective Reply Briefs filed on March 19, 2007, at pages 11-14.

Settlement requires that Plaintiffs be placed in the least restrictive setting appropriate to their age and needs. Thus, in the absence of a compelling reason for denying plaintiffs and their mothers release on parole, the Settlement compels plaintiffs' *immediate* release, with their mothers, under reasonable conditions of supervision. In the event that defendants have a compelling justification for denying such release, plaintiffs must be detained in the next least restrictive setting, namely with their parents in a facility that is *Flores*-compliant.

In light of the irreparable injury that all plaintiffs continue to suffer from each day they are held at Hutto, there is no justification for denying equitable relief merely because release may be obtainable via one of these other avenues at some indefinite point in the future. *See Lewis v SS Baune,* 534 F.2d 1115, 1124 (5th Cir. 1976) (stating that irreparable injury to plaintiffs is "probably the major" basis for showing the inadequacy of any legal remedy). Where, as here, the denial of immediate relief may result in irreparable harm, it is well accepted that exhaustion of administrative remedies is not necessary. *See, e.g., McCarthy v Madigan,* 503 U.S 140, 147 (1992) ("Even where the administrative decisionmaking schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure *immediate* judicial consideration."). Thus, while it remains possible that defendants will decide to release Wesleyann and Sherona and their mothers on parole[10] -- or that a renewed request to an immigration judge in the cases of Saule and Egle and their mother will result in their

[10] Although grants of parole are unlikely, it is notable that since the commencement of this litigation, six of the ten plaintiffs have been released by defendants. In conversation with defendants' counsel, plaintiffs counsel have repeatedly raised the pending parole requests and requested counsel's assistance in interceding with defendants to exercise their parole authority. *See* Letter from Vanita Gupta to Victor Lawrence and Edward Wiggers dated March 23, 2007, a true and correct copy of which is attached hereto as Pl. Ex. EE.

release on bond -- the mere possibility of release in some indeterminate time period is not a basis for denying them the equitable relief to which they are otherwise entitled.

Plaintiffs are children who seek preliminary injunctive relief to prevent further irreparable harm to their well-being caused by detention in a facility that, by defendants' own admissions, is not compliant with existing law.[11] As previously set forth, plaintiffs face a substantial threat of irreparable harm unless they are released from Hutto *with their parents*. *See* Pl. Preliminary Injunction Motions, filed March 6, 2007, at 7-9; Pl. Reply Briefs, filed March 19, 2007, at 18-19. As defendants concede, Hutto "is not a licensed facility," Victor Lawrence, Tr. of March 20 Hrg. at 24; it is not the "least restrictive" setting appropriate for plaintiffs' ages and needs, Simona Colon, Tr. of March 20 Hrg. at 160-165 (admitting that she has not considered ISAP, electronic monitoring bracelets, or refugee homes as release options for plaintiffs, although asylum seekers have an incentive to appear at their immigration proceedings); Gustavo Ivan Cadavid, Tr. of March 20 Hrg. at 127 (admitting that children at Hutto could see themselves as criminals and perceive Hutto as a jail); and it is not in compliance with many of the standards set forth in the Settlement. Simona Colon, Tr. of March 20 Hrg. at 158-84.

Moreover, there can be no question that the longer such confinement continues the greater the threat of significant harm. Indeed, in obtaining an exemption from licensing requirements for the Hutto facility, the Corrections Corporation of America ("CCA") specifically represented that the facility would be used to house families "for up

[11] On March 26, 2007, Defendants filed "Declaration of Marc Moore" ("Declaration") with attached exhibits that include each minor plaintiff's private and confidential medical records. As the Court is aware, Plaintiffs' counsel had requested plaintiffs' medical records in order to establish irreparable harm at the March 20 court hearing, but defendants denied that request, arguing that the records were not relevant to the preliminary injunction hearing. Defendants then supplemented the record by publically filing the medical records after the hearing and without releases from our clients, without taking any steps to assure or protect plaintiff's privacy interests in their own medical information. Plaintiffs have requested that defendants re-file the Declaration under seal but Defendants have thus far declined to do so.

to 90 days," and would "operate in accordance with . . . ICE Juvenile Shelter Care Standards." May 22, 2006 Letter from Mickey Liles to Michele Adams, Def. Attach. to Decl. of Marc J. Moore, Def. Status Report, filed March 23, 2007. *See also Reno v. Flores*, 507 U.S. 292, 310-11, 314 (upholding constitutionality of detention of alien juveniles in light of brief duration of detention, "an average of only 30 days," and fact that children would be held in "a government-supervised and state-licensed shelter-care facility [while the INS] continue[d] searching for a relative or guardian [for release purposes]"). Yet all four Plaintiffs have been detained more than 90 days – and in one case more than six months – in a facility that, despite the most recent improvements, still fails to meet ICE Juvenile Care Standards and is in clear violation of *Flores*.

"The most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Canal Authority v. Callaway,* 489 F.2d 567, 573 (5th Cir. 1974). In this case, absent a preliminary injunction, even if plaintiffs ultimately prevail at trial, there is no relief this Court will be able to grant to repair the damage. Quite apart from any psychological harm that plaintiffs may suffer from continued detention at Hutto, the mere fact of their detention -- under conditions that clearly violate the Settlement -- constitutes "irreparable injury." *See, e.g. Studebaker Corporation v. Gittline,* 360 F.2d 692, 698 (2d Cir. 1966) ("[a]ll that 'irreparable injury' means . . . is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired."); *see also Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975) ("[T]he central purpose of a preliminary injunction . . . is to prevent irreparable harm. It is the threat of harm that cannot be undone which authorizes exercise of this equitable power to enjoin before the merits are

fully determined."). For these reasons, a preliminary injunction is the only way to ensure that plaintiffs will not continue to suffer irreparable injury from continued detention at Hutto.

IV. Plaintiffs' Proposed Scheduling Order for Expedited Disovery and Trial

This Court also ordered that parties provide a proposed scheduling order for expedited discovery and trial. Plaintiffs contacted Victor Lawrence on Thursday, March 22, 2007 to begin the process of devising such a joint proposed scheduling order. Initially, plaintiffs' counsel proposed a May or June trial date, and confirmed this proposal in a letter to defendants on March 23, 2007, Pl. Ex. EE. Mr. Lawrence, with co-counsel Edward Wiggers, requested time to consult with their client. On March 27, the parties conferred again by telephone. Plaintiffs' counsel requested a trial date in June. Defendants' counsel offered mid-November as the earliest date they could go to trial in this matter. When plaintiffs' counsel suggested that we may be able to limit our case in order to try to work out an earlier trial date than November, defendants' counsel stated that they could not accept an earlier trial date. Plaintiffs' counsel asked for time to confer with co-counsel about defendants' proposed trial date. On Wednesday, March 28, plaintiffs' counsel informed opposing counsel that a November trial date was not expeditious enough, and asked defendants' counsel what we could do with regards to the presentation of our case at trial that would permit an earlier trial date. Defendants' counsel responded that there is nothing plaintiffs' counsel can do.

Plaintiffs' counsel do not agree that a trial date set for eight months after the March 20 hearing is expeditious. In light of the fact that both parties are unable to work out a joint proposed scheduling order for expedited discovery and trial, plaintiffs' counsel

are filing our own proposed scheduling order for expedited discovery and trial, attached hereto as Pl. Ex. FF.[12] Plaintiffs' counsel propose July 16, 2007 as an expedited trial date. This is the latest date on which we believe the trial should be held in light of our clients' serious claims of irreparable injury caused by detention in a facility that defendants themselves have admitted is not compliant with the Settlement.

Conclusion

For the reasons set forth above, plaintiff's Motion for a Preliminary Injunction Ordering Her Immediate Release From Hutto With Her Mother should be granted.

Dated: March 29, 2007.

Respectfully submitted,

/s/ Lisa Graybill

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[12] Plaintiffs' counsel submit this proposed scheduling order for expedited discovery and trial with an acknowledgement of the possibility that our four plaintiffs may be released between now and the trial date, and thus the concerns presented in the complaints about Hutto's non-compliance with *Flores* may evade review. Along with the fact that we believe our clients are suffering irreparable harm, this is why plaintiffs' counsel urge as early a trial date as logistically possible. To the extent that our current plaintiffs are released from Hutto, plaintiffs' counsel are prepared to add a limited number of plaintiffs on or before the same day that we submit our papers designating our testifying experts, thereby preventing defendants from suffering prejudice and allowing both parties to retain the set trial date.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2007, I electronically filed the foregoing document with the Clerk of the Court using the ECF system. The ECF system will send notification of this filing to the following person:

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I further certify that on March 29, 2007, a copy of the foregoing document was delivered by electronic mail to the following person:

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