

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 JENNY LISETTE FLORES, *et al.*,) Case No. CV 85-4544-DMG (AGRx)
11 Plaintiffs,)
12
13 v.) **ORDER RE DEFENDANTS' MOTION**
14 MERRICK GARLAND, Attorney General) **TO TERMINATE *FLORES***
15 of the United States, *et al.*,) **SETTLEMENT AGREEMENT AS TO**
16 Defendants.) **DEFENDANT HHS [1414]**
17)
18)
19)
20 _____
21
22
23
24
25
26
27
28

1 On May 10, 2024, Defendants filed a Motion to Terminate the *Flores*
2 Settlement Agreement (“FSA” or “Agreement”) as to the U.S. Department of Health
3 and Human Services (“HHS”) under Federal Rule of Civil Procedure 60(b)(5) and
4 Paragraph 40 of the FSA. [Doc. # 1414.] The Motion is fully briefed. [Doc. ## 1427
5 (“Opp.”), 1435 (“Reply”)]. The Court held a hearing on the Motion on June 21, 2024.
6 Following the hearing, the parties filed supplemental briefing. [Doc. ## 1443
7 (“Motion Supp.”), 1444 (“Opp. Supp.”).] Having carefully considered both sides’
8 written submissions and oral argument, the Court **GRANTS in part and DENIES in**
9 **part** the Motion for the reasons set forth below.

10 **I.**

11 **INTRODUCTION**

12 On January 28, 1997, the District Judge then presiding over this case approved
13 the *Flores* Agreement. *See Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017).
14 Paragraph 40 of the Agreement initially stated: “All terms of this Agreement shall
15 terminate the earlier of five years after the date of final court approval of this
16 Agreement or three years after the court determines that the INS [Immigration and
17 Naturalization Service] is in substantial compliance with this Agreement, except that
18 the INS shall continue to house the general population of minors in INS custody in
19 facilities that are licensed for the care of dependent minors.” FSA ¶ 40 [Doc. # 101
20 at 8].¹ On December 7, 2001, the parties stipulated to modify Paragraph 40 such that
21 it now reads: “All terms of this Agreement shall terminate 45 days following
22 defendants’ publication of final regulations implementing this Agreement[.]
23 Notwithstanding the foregoing, the INS shall continue to house the general population
24 of minors in INS custody in facilities that are state-licensed for the care of dependent
25 minors.” *See* Pl.’s Ex. 2 at 70–73 (Dec. 7, 2001 Stipulation) (alterations omitted)
26 [Doc. # 101].

27
28

¹ Page citations herein refer to the page numbers inserted by the CM/ECF system.

1 The parties originally contemplated that Defendants would initiate action to
2 publish the terms of the FSA as final regulations within 120 days after final district
3 court approval of the Agreement. FSA ¶ 9 [Doc. # 101 at 13]. It has taken much
4 longer than that. Paragraph 9 makes clear, however, that “[t]he final regulations shall
5 not be inconsistent with the terms of [the] Agreement.” [Doc. # 101 at 13.]

6 On October 4, 2023, HHS issued a Notice of Proposed Rulemaking (“NPRM”)
7 which would replace regulations concerning the placement, care, and services
8 provided to unaccompanied children referred to the Office of Refugee Resettlement
9 (“ORR”) and implement the terms of the FSA. *See* Unaccompanied Children
10 Program Foundational Rule, 88 Fed. Reg. 68,908 (Oct. 4, 2023). HHS received over
11 73,000 comments to the proposed rule and published the Final Rule on April 30, 2024.
12 *See* Foundational Rule, 89 Fed. Reg. 34,384. The Foundational Rule is set to become
13 effective on July 1, 2024. *Id.*

14 II.

15 BACKGROUND

16 A. The 2019 Rule

17 This Motion is not the first time that Defendants have sought to terminate the
18 FSA on the basis of proposed regulations. In August 2019, HHS and the U.S.
19 Department of Homeland Security (“DHS”) published a joint rule intended to
20 implement the FSA and moved to terminate the Agreement. *See* Apprehension,
21 Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,
22 84 Fed. Reg. 44,392–535 (Aug. 23, 2019) (“2019 Rule”). Plaintiffs moved to enforce
23 the FSA and to enjoin the 2019 Rule. [Doc. ## 516, 634.] The Court denied
24 Defendants’ Motion, granted Plaintiffs’ Motion, and enjoined Defendants from
25 implementing the regulations. [Doc. # 688.] On appeal, the Ninth Circuit held that
26 although certain regulations consistent with the FSA could take effect, this Court did
27 not abuse its discretion when it denied Defendants’ motion to terminate due to the
28 nature and scope of the inconsistent aspects of the 2019 Rule and the Government’s

1 motion at that time to terminate the *entire* Agreement. *See Flores v. Rosen*, 984 F.3d
2 720, 737 (9th Cir. 2020). The 2019 Rule was never implemented.

3 **B. 2021 Executive Orders in South Carolina, Texas, and Florida**

4 In the time since Defendants’ previous motion to terminate, the Governors of
5 three states—South Carolina, Texas, and Florida—have issued Executive Orders
6 altering the ways that their states license ORR-funded facilities and programs. Motion
7 at 16; Defs.’ Ex. A, Declaration of Toby Biswas ¶ 11 [Doc. # 1414-2 (“Biswas
8 Decl.”)]. In South Carolina, unaccompanied migrant children may no longer be
9 placed “into residential group care facilities or foster care facilities located in, and
10 licensed by, the State of South Carolina.” E.O. No. 2021-19 (Apr. 12, 2021).² This
11 particular change, however, does not affect ORR’s current operations in South
12 Carolina because ORR funds only three transitional foster care programs in the state,
13 all of which are still licensed. Motion at 17; Biswas Decl. ¶ 12.

14 On May 31, 2021, the Governor of Texas directed the state’s Health and Human
15 Service Commission (“HHSC”) to “discontinue state licensing of any child-care
16 facility in [Texas] that shelters or detains [unaccompanied children] under a contract
17 with the Federal government.” Motion at 17; *see* Proclamation by the Governor of
18 the State of Texas (May 31, 2021).³ In response, Texas HHSC “exempted” ORR
19 facilities from Texas’ licensing requirements, meaning that it was no longer possible
20 for ORR to obtain a license to comply with the state’s statutes, rules, and standards
21 even if it wanted to. 26 Tex. Admin. Code §§ 745.111, 745.115. In September 2021,
22 the Governor of Florida followed suit and directed Florida’s Department of Children
23 and Families (“DCF”) to delicense, and cease granting or renewing licenses for, ORR
24 facilities that serve unaccompanied minors. Motion at 17; Fla. Executive Order No.
25 21-223 (Sept. 28, 2021).

26 ² The South Carolina Governor’s Executive Order can be found at:
27 <https://perma.cc/GNK4-T825>.

28 ³ The Texas Governor’s Proclamation can be found at: <https://perma.cc/W3ZG-XZ3J>.

1 As of April of this year, ORR’s total operational standard bed capacity was
2 13,093 beds, 7,317 and 480 of which were in Texas and Florida, respectively. Texas
3 and Florida thus hold approximately 60% of ORR’s operational standard bed
4 capacity. Motion at 17; Defs.’ Ex. C, Declaration of Joel Nelson ¶ [Doc. # 1414-3
5 (“Nelson Decl.”)]. The above-described Executive Orders have had a substantial
6 impact upon ORR’s operations in these states, as state licensure is explicitly required
7 by the terms of the FSA. *See Flores v. Barr*, 407 F. Supp. 3d 909, 919 (C.D. Cal.
8 2019) (rejecting Defendants’ attempt to avoid the state licensure requirement because
9 “the purpose of the [Agreement’s] licensing provision is to provide class members the
10 essential protection of regular and comprehensive oversight by an *independent* child
11 welfare agency.”).

12 III. 13 LEGAL STANDARD

14 Federal Rule of Civil Procedure 60(b)(5) “encompasses the traditional power
15 of a court of equity to modify its decree in light of changed circumstances.” *Frew v.*
16 *Hawkins*, 540 U.S. 431, 441 (2004) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502
17 U.S. 367, 380 (1992)). This rule permits a party to be relieved from “a final judgment,
18 order, or proceeding” when “the judgment has been satisfied, released or discharged;
19 it is based on an earlier judgment that has been reversed or vacated; or applying it
20 prospectively is no longer equitable.” *See* Fed. R. Civ. P. 60(b)(5). The Supreme
21 Court has interpreted Rule 60(b)(5)’s use of the disjunctive word “or” to signal that
22 “each of the provision’s three grounds for relief is independently sufficient.” *Horne*
23 *v. Flores*, 557 U.S. 433, 454 (2009).

24 A party seeking modification or termination of a consent decree bears the
25 burden of showing that “a significant change in circumstances warrants revision of
26 the decree.” *Rufo*, 502 U.S. at 383 (1992); *see Flores v. Rosen*, 984 F.3d at 741. This
27 “significant change” may be either in factual conditions or in law, and courts take a
28 “flexible approach” to modifying consent decrees in institutional reform litigation to

1 “ensure that responsibility for discharging the State’s obligations is returned promptly
2 to the State and its officials when the circumstances warrant.” *Rufo*, 502 U.S. at 383;
3 *Horne*, 557 U.S. at 448. If the moving party satisfies its burden, the Court must then
4 determine whether the party’s proposed modification is “suitably tailored” to the
5 changed circumstance. *Id.* A modification is suitably tailored when it “would return
6 both parties as nearly as possible to where they would have been absent the changed
7 circumstances.” *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016) (internal
8 citations omitted).

9 IV.

10 DISCUSSION

11 A. Modification Due to Changed Circumstances

12 Defendants first seek to modify the FSA based on “changed circumstances”—
13 namely, South Carolina, Texas, and Florida’s decisions to no longer license ORR-
14 funded facilities. Defendants further move to terminate the FSA as to HHS in light
15 of HHS’ publication of the Unaccompanied Children Program Foundational Rule. 89
16 Fed. Reg. 34,384 (Apr. 30, 2024) (to be codified at 45 C.F.R. pt. 410) (“Foundational
17 Rule” or “Rule”).

18 1. Standard Programs

19 Defendants argue that the changed circumstances in Texas and Florida, when
20 considered alongside the FSA’s requirement that class members be placed in state-
21 licensed programs, warrant modification of the Agreement. Through the
22 Foundational Rule, Defendants propose that ORR will continue to require all
23 “standard programs”⁴ to be state-licensed. If state licensing is not an option, like in
24

25
26 ⁴ The Foundational Rule defines a “standard program” as “any program, agency, or
27 organization that is licensed by an appropriate State agency to provide residential, group, or
28 transitional or long-term home care services for dependent children, including a program operating
family or group homes, or facilities for unaccompanied children with specific individualized needs;
or that meets the requirements of State licensing that would otherwise be applicable if it is in a State

1 Florida and Texas, those programs will still be required to adhere to the state's
2 licensing requirements, as they would be if state licensing were still available. Motion
3 at 30.

4 Plaintiffs contend that the Foundational Rule is not a suitably tailored
5 modification of the state licensing requirement for the following reasons: (1) it does
6 not provide for comparable independent oversight, (2) the new Ombuds Office lacks
7 enforcement authority, (3) it does not provide a mechanism for reporting abuse, (4) it
8 does not provide for mandatory initial vetting and inspections of facilities, and (5)
9 accreditation is neither required by the Foundational Rule nor a sufficient substitute
10 even if it were. The Court will address each of these concerns in turn.⁵

11 **a. Independent Oversight**

12 Plaintiffs are understandably apprehensive that, without state licensure, there
13 will be a lack of oversight of unlicensed facilities. Both this Court and the Ninth
14 Circuit have consistently recognized the importance of independent oversight of these
15 facilities. *See Flores v. Barr*, 407 F. Supp. 3d at 919; *Flores v. Lynch*, 828 F.3d 898,
16 906 (9th Cir. 2016) (stating that the “obvious purpose” of the licensing requirement
17 is “to use the existing apparatus of state licensure to independently review detention
18 conditions”).

19 Defendants assert that the Foundational Rule creates additional safeguards to
20 ensure that unlicensed facilities comply with their state's licensing requirements.
21 First, the Rule requires “enhanced monitoring” by ORR of unlicensed facilities, which
22 includes more frequent on-site visits and regular desk monitoring. Motion at 11; 45
23 C.F.R. § 410.1303(e); Biswas Decl. ¶ 20. Second, unlicensed facilities will also be
24 subject to additional monitoring by “a team of state licensing subject-matter experts

25 _____
26 that does not allow state licensing of programs providing care and services to unaccompanied
27 children.” 45 C.F.R. § 410.1001.

28 ⁵ There are many aspects of the Foundational Rule to which Plaintiffs do not object. This
Order addresses only Plaintiffs' articulated areas of concern.

1 in the HHS Administration for Children and Families.” Reply at 18; Defs.’ Ex. D,
2 Supplemental Declaration of Toby Biswas ¶ 6 [Doc. # 1435-1 (“Biswas Supp.
3 Decl.”)]. This team will monitor and inspect facilities at the same time intervals that
4 state licensure teams would have done, but never less frequently than twice per year.
5 Defs.’ Ex. E, Declaration of Maxine M. Maloney ¶ 5 [Doc. # 1435-2 (“Maloney
6 Decl.”)]. Third, all standard programs—licensed and unlicensed—must be accredited
7 by an independent nationally recognized accrediting organization, or be in the process
8 of obtaining accreditation, to receive funding from ORR. Motion at 11; Biswas Decl.
9 ¶ 23. Lastly, the Rule creates an independent Ombuds Office to receive and respond
10 to any complaints or reports of abuse or violations. Foundational Rule at 34,573,
11 Subpart K. The ombudsperson may review cases, conduct site visits, issue public
12 reports, investigate grievances, and “refer concerns to the HHS Office of the Inspector
13 General and other federal agencies such as the U.S. Department of Justice.” Reply at
14 20; Foundational Rule at 34,574.

15 Plaintiffs assert that each safeguard is not a substitute for state licensing.
16 Defendants have not offered any individual safeguard, however, as a one-stop solution
17 for the changed circumstances in Texas and Florida. Instead, Defendants argue that
18 all the safeguards, *taken together*, provide an equivalent, even if not identical, method
19 of oversight. The FSA did not account for what would happen if state licensure was
20 no longer available, and Defendants have offered a reasonable workaround based on
21 their experience implementing the FSA. Here, unlike when the Court denied
22 Defendants’ proposed substitutes for state licensing in the past, it is now
23 “unworkable” for Defendants to fully comply with the FSA’s state licensing
24 requirement, and Defendants have presented an alternative that is more satisfactory
25 than anything they had proposed in the past. *See Rufo*, 502 U.S. at 384; *Flores v.*
26 *Johnson*, 212 F. Supp. 3d 864, 879 (C.D. Cal. 2015).

27 At the hearing, Plaintiffs raised the issue that Defendants’ safeguards, such as
28 HHS’s specialized “ACF Licensing Team” and accreditation, are not actually

1 required by the Foundational Rule and are therefore unenforceable. Although it is
2 true that not every safeguard is explicitly written into the Rule, the FSA is equally
3 silent regarding some of the oversight and monitoring provisions that are now
4 considered fundamental aspects of the FSA. For example, the FSA does not spell out
5 how states will enforce their licensing requirements. In like manner, the Rule requires
6 unlicensed facilities still to adhere to their state's licensing requirements, and
7 Defendants' proffered safeguards are designed to mimic the oversight presumably
8 provided by state licensing. Therefore, if Defendants fail to provide adequate
9 safeguards—whether it is the ones they have already created, or new mechanisms
10 tailored to future circumstances—then they would also fail to adhere to the state's
11 licensing requirements. That failure would be an enforceable violation of the Rule.
12 The only difference between the oversight provided by the Rule and state oversight is
13 that ORR, a separate specialized team within HHS, an accreditation agency, and the
14 Ombuds Office are overseeing the facilities' compliance with state requirements,
15 rather than the state itself. The Court therefore concludes that Defendants' proposed
16 oversight modification is "suitably tailored" because it returns the parties "as nearly
17 as possible" to where they would have been prior to Texas' and Florida's Executive
18 Orders. *Cf. Kelly*, 822 F.3d at 1098.

19 **b. Ombuds Office**

20 Defendants offer the Ombuds Office for the Unaccompanied Children Program
21 as an additional form of oversight, similar to that of the *Flores* Monitor. *See*
22 Foundational Rule at 34,573 ("HHS believes that an Office of the Ombudsman is a
23 sound solution to serve a similar function as the oversight currently provided by the
24 *Flores* monitor."). The Ombuds is to be situated within the Administration for
25 Children and Families ("ACF"), not within ORR, and will be "an independent,
26 impartial, and confidential public official with authority and responsibility to receive,
27 investigate and informally address complaints about Government actions, make
28

1 findings and recommendations and publicize them when appropriate, and publish
2 reports on its activities.” 45 C.F.R. § 410.2000.

3 Plaintiffs are concerned that the Ombuds lacks “any” enforcement authority,
4 but like the *Flores* monitor and Juvenile Coordinator, the ombudsperson is primarily
5 meant to be a source of oversight and monitoring rather than an independent enforcing
6 authority. Opp. at 14 (emphasis omitted). Nonetheless, the ombudsperson may refer
7 concerns to the HHS Office of the Inspector General (“OIG”) and other federal
8 agencies such as the U.S. Department of Justice. Reply at 20. Outside of state
9 enforcement, which is no longer possible in Texas and Florida, and enforcement by
10 this Court, which was never intended to last indefinitely, it is unclear what alternative
11 enforcement mechanisms would be both viable and satisfactory to Plaintiffs.

12 **c. Initial Vetting**

13 Plaintiffs take further issue with the Rule’s alleged lack of mandatory vetting
14 and inspection of new facilities before they begin accepting children. Opp. at 12–13.
15 Defendants assert, however, that the ACF Licensing Advisory Team will be
16 responsible for “rigorous initial vetting of prospective grantees with respect to
17 adherence to state licensing standards” in non-licensing states. Maloney Decl. ¶ 7.
18 The Foundational Rule requires that unlicensed facilities be monitored on the same
19 timeline, and meet the same standards, that would be required if the state had not
20 ceased licensing, and this requirement applies equally to new and already existing
21 facilities. *Id.* ¶ 5. The Court therefore will not deny Defendants’ request for
22 modification based on inadequate vetting.

23 **d. Reporting Abuse**

24 Plaintiffs assert that the Foundational Rule fails to provide a “clear mechanism
25 for children or [others] to report abuse, neglect, or standards violations at unlicensed
26 facilities,” Opp. at 8–10, but this is incorrect. Beginning on July 1, 2024, in states
27 that are no longer investigating reports of abuse—currently only Texas—a “Division
28 on Child Protection Investigations” within ORR will be responsible for investigating

1 any reports of abuse, neglect, or other violations. Reply at 19; Maloney Decl. ¶¶ 14,
2 18; Biswas Supp. Decl. ¶ 14. Further, ORR is in the process of drafting an interim
3 final rule (“IFR”) that will provide additional mechanisms for reporting and
4 investigating abuses. Biswas Supp. Decl. ¶ 20. The IFR is intended to “replicate” the
5 investigative infrastructure in place in states that no longer license ORR facilities. *Id.*
6 The Court thus conditionally finds that this modification is suitably tailored to the
7 changed circumstances. If the IFR is not enacted or is contrary to what Defendants
8 have represented it to be, Plaintiffs may seek reconsideration on this basis.

9 **e. Accreditation**

10 The parties do not dispute that accreditation alone is not a substitute for state
11 licensure. There are important differences between state licensure and accreditation,
12 such as public versus private standards, broad versus specific areas of focus, and
13 responsibilities to investigate complaints. Opp. at 14–15; Pls.’ Ex. 1, Declaration of
14 Jill Mason ¶¶ 28, 31, 33, 34 [Doc. # 1427-3 (“Mason Decl.”)]; Pls.’ Ex. 6, Southwest
15 Key Programs Comment at 7 [Doc. # 1427-8 (“Southwest Comment”)]. Defendants
16 offer accreditation, however, not as a substitute for state licensing, but as an *additional*
17 safeguard to ensure that facilities meet the requisite standards. This is illustrated by
18 the fact that the ORR requires *all* facilities—regardless of licensure status—to be
19 accredited before they are eligible to receive funding.

20 **2. Secure, Medium-Secure, and Out-of-Network Placements**

21 Plaintiffs raise several issues with the Rule’s regulations concerning secure and
22 medium-secure (“heightened supervision”) facilities, namely that the Rule allegedly
23 permits: potential “indefinite delay” in standard placement if the child poses a threat
24 to self or others, placement in medium-secure facilities for isolated or petty offenses,
25 and heightened supervision for no reason other than that the child is “step[ping]-down
26 from a secure facility.” Opp. at 16–17.

27 First, Plaintiffs compare section 410.1101 to Paragraph 21 of the FSA, but the
28 appropriate analogue to Paragraph 21 is section 410.1105. Plaintiffs are correct that

1 section 410.1101(d) does not specify a timeline for placing children who may need a
2 non-standard placement, but neither does Paragraph 21 of the FSA. To the extent that
3 Plaintiffs are concerned that children will be placed in a secure facility solely because
4 they pose a danger to self or others, section 410.1105(a) explicitly prohibits that
5 scenario. 45 C.F.R. § 410.1105(a) (“A finding that a child poses a danger to self shall
6 not be the sole basis for a child’s placement in a secure facility”).

7 Regarding Plaintiffs’ second concern, the Court agrees that the Rule appears to
8 impermissibly allow isolated or petty offenses to be considered in the decision to place
9 an unaccompanied child in a heightened supervision facility. This plainly contradicts
10 Paragraph 21 of the FSA, which clearly states that “this provision [defining when
11 minors may be placed in more restrictive facilities] shall not apply to [isolated or
12 petty] offense(s).” FSA ¶ 21(A)(i)–(ii). Defendants address this inconsistency in their
13 supplemental briefing by asserting that the Rule does not allow isolated or petty
14 offenses *alone* to justify placement in a heightened supervision facility. Motion Supp.
15 at 4. The Court is not concerned, however, that the Rule authorizes heightened
16 placement based *solely* on isolated or petty offenses. The Court reads Paragraph 21.A
17 of the FSA to disallow isolated or petty offenses to have *any* effect upon ORR’s
18 decision to place a child in a heightened supervision or secure facility. Accordingly,
19 the Court concludes that the Rule’s treatment of isolated and petty offenses
20 contravenes the FSA.

21 Similarly, the Court agrees with Plaintiffs that the Rule appears, impermissibly,
22 to allow placement in a heightened supervision facility solely because a child is ready
23 to “step-down” from a secure facility. § 410.1105(b)(2)(v). As Plaintiffs point out,
24 the Rule does not contemplate the possibility that a child could be ready to move
25 immediately from a secure facility to a standard program. Opp. 17. In their
26 supplemental briefing, Defendants attempt to explain this inconsistency by relying on
27 the Rule’s requirement that children are placed “in the least restrictive setting
28 appropriate[.]” Motion Supp. at 6 (citing 45 C.F.R. § 410.1103(a)). This coexisting

1 catchall, however, does not eliminate the fact that the Rule explicitly lists being “ready
2 for step-down from a secure facility,” without more, as an acceptable reason for a
3 child’s placement in a heightened supervision facility. The Court therefore declines
4 to accept the regulations to the extent that they are inconsistent with the FSA in this
5 respect. *See* FSA ¶¶ 21, 23.

6 Plaintiffs further assert that the Rule exempts out-of-network (“OON”) facilities both from Exhibit 1’s minimum standards and the Rule’s monitoring
7 provisions. Opp. at 17–19; Pls.’ Ex. A (describing failure by an OON placement to
8 provide a class member with the services required by Exhibit 1 of the FSA) [Doc. #
9 1427-1]. Defendants respond that the FSA does not address OON placements, and
10 regardless, the Rule includes sufficient safeguards and protections for children in
11 OON facilities. Reply at 19; Biswas Supp. Decl. ¶ 29. Defendants are undeniably
12 correct that the FSA never uses the term “out-of-network,” but it is nonetheless true
13 that OON facilities have typically been considered another form of “secure”
14 placement. *See Lucas R. v. Becerra*, No. CV-18-5741-DMG (PLAx), 2022 WL
15 4177454 at *22 (C.D. Cal. Mar. 11, 2022) (describing minors at OON facilities as
16 having interests “under the Constitution, TVPRA, and FSA”); *see also Flores v.*
17 *Lynch*, 828 F.3d at 905, 906. The primary issue regarding the Rule’s treatment of
18 OON facilities is that the Rule fails to provide *substantive* protections for the children
19 placed at these facilities. Supp. Opp. at 7. Section 410.1105(c) addresses *when*
20 children may be placed in an OON facility, but it does not provide any guarantees
21 about the *conditions* at those placements. Minors in these placements are *Flores* class
22 members and therefore entitled to protections under either the FSA or the Rule. As a
23 result, the Court concludes that OON facilities should be included in the provisions
24 of the Rule governing in-network facilities. To the extent they are not, the Rule is
25 inconsistent with the FSA.

26 //

27 //

1 **3. Plaintiffs’ Proposed Solutions**

2 In their Opposition, Plaintiffs contend that neither modification nor termination
3 of the FSA is appropriate because it is not “impossible” for Defendants to comply
4 with the FSA’s licensing requirement. Plaintiffs offer two alternatives that they argue
5 would allow Defendants to comply with the FSA, notwithstanding the changed
6 circumstances in Texas and Florida. First, Plaintiffs suggest that the FSA does not
7 require placement in either Texas or Florida, so Defendants “could comply with the
8 Settlement by moving children out of unlicensed facilities ‘as expeditiously as
9 possible.’” Opp. at 11, n.3. Second, Plaintiffs suggest that Defendants could sue
10 Texas and Florida “to enjoin their blatant discrimination against the federal
11 government.” *Id.* As for Plaintiffs’ first suggestion, Defendants counter that it would
12 be impractical to either stop placements in Texas and Florida or to transfer all children
13 out of those states and into licensing states. The Court agrees. As discussed *supra*,
14 over half of ORR’s bed capacity is in Texas and Florida, and “a majority” of
15 unaccompanied children are encountered along the Texas-Mexico border. Motion at
16 18–20; Biswas Decl. ¶ 16. Establishing an equivalent number of housing options in
17 other states would likely take years to accomplish. It would be not only impractical,
18 but also potentially harmful to unaccompanied migrant children, to no longer operate
19 facilities in these border states. Further, the Court agrees with Defendants that suing
20 Texas and Florida is neither the most efficient nor the most effective response to their
21 decisions to stop licensing ORR-funded facilities. Even if Defendants were ultimately
22 successful in their lawsuit and the litigation was exceptionally quick (a highly unlikely
23 prospect where litigation of this sort is concerned), there would still be an unknown
24 period of time in which Defendants would be unable to comply with the FSA’s
25 licensing requirement, therefore failing to remedy the very issue that Defendants face
26 now.

27 In sum, the Court concludes that modification with regard to state licensure is
28 appropriate because the Foundational Rule is suitably tailored to the changed

1 circumstances in Florida and Texas. The Rule “return[s] both parties as nearly as
2 possible to where they would have been absent the changed circumstances” because
3 it still requires unlicensed facilities to meet their state’s licensing requirements. *Kelly*,
4 822 F.3d at 1098. Although the form of oversight is necessarily different, the Rule
5 creates multiple safeguards to account for this change.

6 The Court does not find, however, the modifications concerning secure,
7 heightened supervision facilities and out-of-network placements to be suitably
8 tailored to the change in circumstances, because Texas’ and Florida’s Executive
9 Orders do not impact HHS’s ability to comply with the relevant FSA provisions in
10 that regard.

11 **B. Termination of the FSA as to HHS**

12 Defendants argue that the Court should terminate the Agreement as to HHS
13 because the Foundational Rule “faithfully implements the FSA requirements
14 applicable to HHS . . . and in some instances, necessarily takes a modified approach
15 in light of substantially changed circumstances[.]” They assert that it is no longer
16 equitable for HHS to be bound by the FSA. Motion at 24. Plaintiffs assert that
17 termination is inappropriate because partial termination is both inconsistent with the
18 FSA’s termination clause and not justified on equitable grounds.

19 **1. Partial Termination**

20 Paragraph 40 of the FSA, as amended, provides that “All terms of this
21 Agreement shall terminate 45 days following [D]efendants’ publication of final
22 regulations implementing this Agreement. Notwithstanding the foregoing, the INS
23 shall continue to house the general population of minors in INS custody in facilities
24 that are state-licensed for the care of dependent minors.” FSA ¶ 40. Plaintiffs contend
25 that the use of the phrase “all terms” prohibits partial termination based on partial
26 implementation. Opp. at 20. The Court disagrees.

27 Last time Defendants moved to terminate the Agreement, the Ninth Circuit
28 explicitly clarified that:

1 “Although we hold that the majority of the HHS regulations may take
2 effect, we also hold that the district court did not abuse its discretion in
3 declining to terminate those portions of the Agreement covered by the
4 HHS regulations. *The government moved the district court to terminate*
5 *the Agreement in full, not to modify it or terminate it in part.* The
6 Agreement therefore remains in effect, notwithstanding the overlapping
7 HHS regulations. *If the government wishes to move to terminate those*
8 *portions of the Agreement covered by the valid portions of the HHS*
9 *regulations, it may do so.”*

10 *Flores v. Rosen*, 984 F.3d at 737 (emphasis added). This language approves of partial
11 termination of the FSA so long as the requisite legal standards for termination are met.
12 The Court has no principled reason to find that partial termination of the FSA as to
13 HHS is impermissible under the law, provided that Defendants bear their burden of
14 demonstrating that they have satisfied the legal standards for such termination.

15 Plaintiffs also raise concerns that DHS will not comply with the FSA’s
16 requirement that it expeditiously transfer children to licensed placements if HHS is
17 not required to expeditiously accept custody of those children. Opp. at 25; Supp. Opp.
18 at 11. But DHS is still bound by the FSA and HHS has a “duty to *promptly* place
19 unaccompanied children in the least restrictive setting that is in the best interest of the
20 child” under both the Rule and the William Wilberforce Trafficking Victims
21 Protection Reauthorization Act of 2008 (“TVPRA”). 45 C.F.R. § 410.1209(e); 8
22 U.S.C. 1232(c)(2)(A) (emphasis added). That ongoing duty does not change under
23 the Foundational Rule.

24 In their supplemental briefing, Plaintiffs request, essentially, that the Court
25 specify that every paragraph of the FSA that does not have a direct analogue in the
26 Rule remains intact. To grant this request would require the Court to defy Supreme
27 Court precedent. In *Rufo* and *Frew*, the Supreme Court clearly stated that principles
28 of federalism require district courts to give “significant weight,” “latitude,” and
“substantial discretion” to the government officials responsible for “deciding how

1 best to discharge their governmental responsibilities.” 502 U.S. at 392; 540 U.S. at
2 442. Thus, the Court acknowledges that Defendants have some latitude in crafting a
3 Rule that implements the FSA. Nonetheless, the Court addresses Plaintiffs’ point that
4 the Rule severely limits or eliminates Plaintiffs’ counsel’s access to information by
5 excluding Paragraphs 24, 28–33, 37, and 40 from the Rule. Supp. Opp. at 21. It is
6 not clear from the Rule who will have access to the data being collected under sections
7 1303, 1500, and 1501 of the Rule (Paragraph 28A of the FSA), or how they are meant
8 to access that information. At least while the FSA remains partially in effect as to
9 HHS, Plaintiffs’ counsel’s access to ORR facilities and to information about the
10 children held at those facilities should be no different than it has been for the last 27
11 years under Paragraphs 32 and 33 of the FSA. Because the parties did not specifically
12 address how these particular paragraphs would co-exist with a situation where
13 regulations have been enacted, the Court will defer ruling on whether the regulations
14 supersede Paragraphs 32 and 33.

15 The Court concludes that the Rule implements sections A–D of Paragraph 24,
16 and that Paragraphs 24E, 28B, 29–31, 37, and 40 were relevant under the FSA only
17 absent enactment of pertinent regulations. Regarding Paragraph 24A, Defendants
18 have created an appropriate analogue for the FSA’s “bond redetermination hearing”
19 via the Foundational Rule’s “risk determination hearing.” 45 C.F.R. § 410.1903. The
20 Rule also provides minors with an adequate explanation of their rights and access to
21 legal services. *See* 45 C.F.R. § 410.1109; FSA ¶¶ 24B, 24D. Lastly, section 1901
22 codifies the notice requirements set forth in the *Lucas R* injunction regarding the
23 “step-up” class, therefore guaranteeing that minors are aware of the rationale behind
24 their particular placements. 45 C.F.R. § 410.1901; FSA ¶ 24C.

25 **2. No Longer Equitable**

26 Plaintiffs and Defendants disagree over the appropriate standard for whether
27 termination of a consent decree is “warranted on equitable grounds.” According to
28 Plaintiffs, partial termination requires consideration of: “[1] whether there has been

1 full and satisfactory compliance with the decree in those aspects of the system where
2 supervision is to be withdrawn; [2] whether retention of judicial control is necessary
3 or practicable to achieve compliance with the decree in other facets of the [] system;
4 and [3] whether the [defendant] has demonstrated . . . its good-faith commitment to
5 the whole of the court’s decree.” Opp. at 21; *Freeman v. Pitts*, 503 U.S. 467, 473,
6 491 (1992). Defendants contend, however, that past compliance with the consent
7 decree is irrelevant to whether termination is appropriate on equitable grounds.
8 Instead, Defendants argue that they have met their burden of showing that it is no
9 longer equitable to enforce the FSA as to HHS because “changed factual conditions
10 make compliance with the decree substantially more onerous,” “[the FSA is]
11 unworkable because of unforeseen obstacles,” or “enforcement of [the FSA as to
12 HHS] without modification would be detrimental to the public interest.” Motion at
13 25; *Rufo*, 502 U.S. at 384.

14 Plaintiffs cite *Freeman v. Pitts* extensively in their Opposition, but there are
15 several important differences between *Freeman*, a school desegregation case, and the
16 case at hand. As a preliminary matter, the petitioners in *Freeman* did not seek
17 termination of a consent decree pursuant to any provision of Rule 60(b). This is
18 because the relevant agreement in *Freeman* was a court-ordered desegregation plan,
19 not a consent decree entered into voluntarily by the parties and solely monitored by
20 the court. See *Freeman*, 503 U.S. at 471. Further, as in other school desegregation
21 cases, the petitioners in *Freeman* were required to show that their school district had
22 achieved “unitary status”—as explicitly required by the Supreme Court in *Green v.*
23 *School Board of New Kent County*, 391 U.S. 430 (1968)—in order to be dismissed
24 from the litigation. 503 U.S. at 473. Thus, “achievement of unitary status” was the
25 *Freeman* equivalent of the FSA’s “publication of final regulations implementing this
26 Agreement”—a clear prerequisite to termination required by the agreement itself, not
27 a requirement set forth by a separate provision of law. Although Defendants do not
28 make clear in their Motion which subsection of Rule 60 they purport to satisfy,

1 Defendants' stated standard is the correct one under the circumstances of this case.
2 *See, e.g., Frew v. Hawkins*, 401 F. Supp. 2d 619, 633 (E.D. Tex. 2005), *aff'd sub nom.*
3 *Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006) (rejecting plaintiffs' argument that
4 *Freeman* and the other school desegregation cases set the standard for consent decree
5 termination); *accord N.L.R.B. v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C.
6 Cir. 2000); *Alexander v. Britt*, 89 F.3d 194 (4th Cir. 1996).

7 If Defendants sought to terminate the FSA under the first prong of Rule
8 60(b)(5), or because "the judgment has been satisfied, released or discharged," then
9 Defendants' record of compliance with the FSA would be relevant. *See, e.g., Jeff D.*
10 *v. Otter*, 643 F.3d 278, 283–84, 290 n.4 (9th Cir. 2011) (analyzing the first prong of
11 Rule 60(b)(5) and acknowledging that the analysis would be different if defendants
12 sought vacatur under the "no longer equitable" prong). Here, however, Defendants
13 appear to seek termination under the third "equitable" prong of Rule 60(b)(5). *See*
14 *Horne*, 557 U.S. at 454 ("[E]ach of [Rule 60(b)(5)'s] three grounds for relief is
15 independently sufficient.").

16 The "changed factual conditions" in Texas and Florida have undoubtedly made
17 compliance with the FSA "substantially more onerous." As discussed above, it is now
18 impossible for Defendants to comply with the licensing requirement of the FSA unless
19 ORR transfers all children out of its facilities in Texas and Florida and ceases placing
20 children in those states. This is not only substantially more onerous, but also,
21 practically infeasible and "detrimental to the public interest," as it would eliminate
22 approximately 60% of ORR's operational bed capacity in one fell swoop.
23 Furthermore, it could not have been reasonably foreseeable that states would change
24 their licensure programs so drastically as to make ORR's compliance with the FSA
25 "unworkable." These events certainly were not anticipated at the time that Defendants
26 entered into the FSA approximately 27 years ago. *See Rufo*, 502 U.S. at 385.
27 Accordingly, Defendants have adequately shown that applying the FSA prospectively
28

is no longer equitable as to HHS so long as they can provide a reasonable alternative framework under the Foundational Rule that is consistent with the spirit of the FSA.

3. Retention of Jurisdiction

On June 17, 2024, Plaintiffs filed a “Notice of Legislative Developments” informing the Court that 46 senators had introduced a joint resolution pursuant to the Congressional Review Act (“CRA”) providing for congressional disapproval of the Foundational Rule. [Doc. # 1436.] If a CRA joint disapproval is approved by both houses of Congress and signed by the President, the rule at issue would be prevented from either going into effect or continuing in effect. *See* 5 U.S.C. § 802. If the Court relinquishes jurisdiction over HHS due to the Foundational Rule and Congress subsequently enacts this joint resolution, *Flores* class members in ORR custody could be left without *any* protections—which would be contrary to the terms of the FSA. The Court’s termination of the FSA as to HHS is therefore conditional on there not being a rescission of those regulations, such as the Foundational Rule, in a manner inconsistent with the FSA. The Court also retains jurisdiction to modify the Agreement or this Order should further changed circumstances necessitate, to ensure that the Rule faithfully implements the FSA as the parties originally contemplated. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (“[A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.”); *Williams v. Edwards*, 87 F.3d 126, 131 (5th Cir. 1996) (“A consent decree may be judicially modified . . . when the court has reserved the power to modify and articulates the long-term objective to be accomplished).

V.

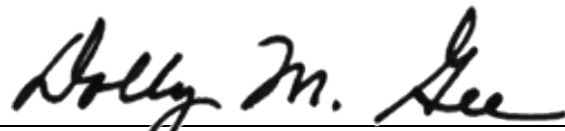
CONCLUSION

In light of the foregoing, the Court **GRANTS in part and DENIES in part** Defendants' motion. The Court **conditionally and partially TERMINATES** the *Flores* Settlement Agreement as to the U.S. Department of Health and Human

1 Services, except Paragraphs 28A, 32, and 33 of the FSA, and those FSA provisions
2 governing secure, heightened supervision, and out-of-network facilities, as described
3 in Part IV(A)(2), *supra*. Termination as to HHS, except as noted, shall take effect on
4 July 1, 2024, the same day that the Foundational Rule takes effect, provided that the
5 Foundational Rule is not subsequently rescinded or modified to be inconsistent with
6 the FSA. The Court retains jurisdiction to modify the Agreement or this Order should
7 further changed circumstances make it appropriate. The *Flores* Settlement
8 Agreement remains in full force and effect as to the DHS, including the U.S. Customs
9 and Border Protection and U.S. Immigration and Customs Enforcement.

10
11 **IT IS SO ORDERED.**

12
13 DATED: June 28, 2024



14
15 DOLLY M. GEE
16 CHIEF U.S. DISTRICT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28