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17 Attorneys for Defendants

18 **UNITED STATES DISTRICT COURT**
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

20 JENNY LISETTE FLORES; *et al.*,) Case No. CV 85-4544
21)
22 Plaintiffs,) **DEFENDANTS' EX PARTE**
23) **APPLICATION FOR A STAY PENDING**
24 v.) **APPEAL AUTHORIZATION**
25)
26 LORETTA E. LYNCH, Attorney)
27 General of the United States; *et al.*,)
28 Defendants.)
_____)

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2
3 Pursuant to Local Rule 7-19, the above-captioned Defendants, by and
4 through undersigned counsel, hereby apply *ex parte* for a stay of enforcement of
5 the Court’s January 20, 2017 Order (“Order”) granting Plaintiffs’ August 12, 2016
6 motion to enforce, pending authorization to appeal, and the resolution of any such
7 appeal filed. *See* Minute Order, ECF No. 318.
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10 As set forth in further detail in the memorandum, Defendants submit that
11 good cause exists to grant the relief requested herein. The Court’s extraordinary
12 ruling, mandating new affirmative actions for the U.S. Department of Health and
13 Human Services (“HHS”) and immigration officials, significantly impacts and
14 infringes upon HHS’s express statutory directive and implementing regulations,
15 and places serious administrative burdens on the Executive Office of Immigration
16 Review (“EOIR”) and its immigration judges, raising serious legal questions
17 warranting a stay of litigation. *See Golden Gate Rest. Ass'n v. City & Cty. of San*
18 *Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). Without the entry of an
19 immediate stay, Defendants will be irreparably harmed if they are required to
20 comply with the Order before the Ninth Circuit has acted on the appeal.
21 Accordingly, Defendants submit this *ex parte* application seeking immediate relief
22 from this Court.
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1 On January 24, 2017, Defendants’ undersigned counsel provided notice of
2 its intent to file this *ex parte* application to Plaintiffs’ counsel by telephone. *See*
3 Declaration of Vinita Andrapalliyal ¶ 4. On January 25, 2017, counsel for
4 Defendants followed up via email; Plaintiffs’ counsel stated that Plaintiffs would
5 oppose Defendants’ application. *Id.* at ¶ 4. Plaintiffs’ counsel asked counsel for
6 Defendants to convey their request for three (3) business days, or until January 30,
7 2017, to respond to Defendants’ *ex parte* application. *Id.*

10 Defendants’ application is based on this Notice of Ex Parte Application, the
11 accompanying Memorandum of Points and Authorities, Declaration of Vinita
12 Andrapalliyal, the pleadings, transcripts, records and papers filed herein, and such
13 other and further oral and documentary evidence and legal memoranda as may be
14 presented at or by hearing on this application. A proposed order is lodged
15 herewith.

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2 //

3 Dated: January 25, 2017

4 Respectfully submitted,

5 JOYCE A. BRANDA
6 Acting Assistant Attorney General
7 Civil Division

8 AUGUST E. FLENTJE
9 Special Counsel to the Assistant Attorney General
10 Civil Division

11 WILLIAM C. PEACHEY
12 Director

13 WILLIAM C. SILVIS
14 Assistant Director

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16 Senior Litigation Counsel

17 By: /s/ Vinita B. Andrapalliyal
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Attorneys for Defendants

CERTIFICATE OF SERVICE

1
2 I certify that on January 24, 2017, I served a copy of the foregoing by filing
3 this document with the Clerk of Court through the CM/ECF system, which will
4 provide electronic notice and an electronic link to this document to all attorneys of
5 record:
6

7
8 /s/ Vinita B. Andrapalliyal
9 Vinita B. Andrapalliyal
10 Trial Attorney
11 United States Department of Justice
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16 Attorneys for Defendants

17
18 **UNITED STATES DISTRICT COURT**
FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 JENNY LISETTE FLORES; *et al.*,) Case No. CV 85-4544

20)
21 Plaintiffs,)

22 v.)

23 LORETTA E. LYNCH, Attorney)
24 General of the United States; *et al.*,)

25 Defendants.)
26)
27)
28)

)
) **DEFENDANTS' MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF DEFENDANTS' EX**
) **PARTE APPLICATION FOR A STAY**
) **PENDING APPEAL AUTHORIZATION**

1 **I. INTRODUCTION**

2 Defendants, in their official capacities, by and through their attorneys, hereby
3 request a stay of enforcement of the Court’s January 20, 2017 Order granting
4 Plaintiffs’ August 12, 2016 motion to enforce, pending authorization to appeal,¹ any
5 appeal that follows, and the resolution of the appeal. See Minute Order, ECF No.
6 318.
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9 On January 20, 2017, this Court granted Plaintiffs’ August 12, 2016 motion
10 to enforce Paragraph 24A of the *Flores* Agreement by requiring immigration judges
11 to hold bond hearings for unaccompanied alien children (“UACs,” or
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16 ¹ For Defendants, any determination whether to appeal must be made by the Solicitor
17 General. See 28 C.F.R. § 0.20(b); See also United States Attorney’s Manual § 2-
18 2.121 (“All appeals to the lower appellate courts in cases handled by divisions of the
19 Department and United States Attorneys, and all petitions for certiorari and direct
20 appeals to the Supreme Court must be authorized by the Solicitor General.”). In
21 deciding whether to authorize appeal in a case such as this one, the Solicitor General
22 seeks input from and consults with multiple components of the Department of Justice
23 (DOJ), and with the interested components of other federal departments. Thus,
24 determining whether to appeal the Court’s Order will require coordination among
25 and consultation with multiple federal offices and agencies. That process will
26 necessarily require careful consideration and will take time, because this Court’s
27 ruling is a case of first impression that interprets the *Flores* Agreement and federal
28 statutes in a manner that significantly impacts the nationwide operations of the
immigration courts, the care and custody of all minors in the country designated as
unaccompanied alien children, and, potentially, the responsibilities of nation’s
principal immigration law enforcement agency.

The Ninth Circuit has authorized such applications for stays pending the
Solicitor General’s determination regarding appeal. *E.g.*, *Elec. Frontier Found. v.*
Office of the Dir. of Nat. Intelligence, 639 F.3d 876, 882 (9th Cir. 2010).

1 “unaccompanied minors”) in the care and custody of the Department of Health and
2 Human Services (“HHS”). Minute Order, ECF No. 318. The Court found that
3 Paragraph 24A was not superseded by operation of law because: (1) both the
4 Trafficking Victims Protection Reauthorization Act (“TVPRA”) and the Homeland
5 Security Act (“HSA”), in relevant part, are silent on the subject of bond hearings;
6 (2) the *Flores* Agreement remains consistent with federal immigration laws
7 requiring bond hearings for immigrant detainees and poses no irreconcilable conflict
8 with the TVPRA’s safety and placement provisions; and (3) Defendants’
9 construction of the TVPRA so as to preclude UACs in ORR custody from bond
10 hearings should be rejected under the canon of constitutional avoidance, because it
11 could result in the indefinite detention of UACs without the due process protection
12 offered to adult detainees through a bond hearing. ECF No. 318, at 4–8.
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18 A stay is warranted under the circumstances. The Court’s extraordinary
19 ruling, mandating new affirmative actions for HHS and immigration officials,
20 significantly impacts and infringes upon HHS’s express statutory directive and
21 implementing regulations, and places serious administrative burdens on the
22 Executive Office of Immigration Review (“EOIR”) and its immigration judges.
23 Unless an immediate stay is entered, Defendants will be irreparably harmed if they
24 are required to comply with the Order before the Ninth Circuit has acted on any
25 appeal filed. Accordingly, for these reasons and the reasons that follow, a stay of
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1 the Court’s January 20, 2017 Order is justified pending appeal and resolution of the
2 appeal.

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4 **II. STANDARD OF REVIEW**

5 It is well-established that a district court has broad discretion to stay
6 proceedings in its own court. *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (“The
7 District Court has broad discretion to stay proceedings as an incident to its power to
8 control its own docket.”). In order to obtain a stay of the enforcement of an order
9 pending appeal, courts consider the following factors:
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- 11
12 (1) a strong likelihood of success on the merits, (2) the possibility of
13 irreparable injury to the requesting party if preliminary relief is not
14 granted, (3) a balance of hardships favoring the [requesting party], and
15 (4) advancement of the public interest (in certain cases).

16 *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007) (citing
17 *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007)).² When the Government is
18 a party, the latter two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). 16
19 F.2d 1405.
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21 The Ninth Circuit employs “two interrelated legal tests” that “represent the
22 outer reaches of a single continuum” in evaluating the above mentioned factors.
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26 ² Courts have analyzed applications for a stay seeking authorization to appeal under
27 the same rubric. *E.g.*, *Long v. U.S. I.R.S.*, No. C74-724 MJP, 2006 WL 2222274, at
28 *2 (W.D. Wash. Aug. 2, 2006), *order enforced*, No. C74-724 MJP, 2008 WL
2474591 (W.D. Wash. June 13, 2008), *aff'd in part, rev'd in part and remanded on
other grounds*, 395 F. App'x 472 (9th Cir. 2010). *See also supra* note 1.

1 *Lopez*, 713 F.2d at 1435 (internal quotation marks omitted). “At one end of the
2 continuum, the moving party is required to show both a probability of success on the
3 merits and the possibility of irreparable injury.” *Id.* As an alternative test, a strong
4 likelihood of success on the merits, and the possibility of irreparable injury to
5 [moving party] if preliminary relief is not granted” can suffice. *Golden Gate Rest.*
6 *Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1115–16 (9th Cir. 2008)
7 (quoting *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir.
8 2007)). “At the other end of the continuum, the moving party must demonstrate that
9 serious legal questions are raised and that the balance of hardships tips sharply in its
10 favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). “These two
11 formulations represent two points on a sliding scale in which the required degree of
12 irreparable harm increases as the probability of success decreases.” *Golden Gate*,
13 512 F.3d at 1116 (quoting *Winter*, 502 F.3d at 862).

19 **III. ARGUMENT**

20 As set forth below, a stay of the Court’s January 20, 2017 Order is warranted
21 because Defendants establish a strong likelihood of success on the merits, that a high
22 degree of irreparable injury in the absence of a stay, and that a stay is in the public
23 interest. *Golden Gate*, 512 F.3d at 1115–16.
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1 **B. Defendants Have a Strong Likelihood of Succeeding on Appeal.**

2 Defendants a strong likelihood of success on the merits of an appeal. There
3 is a substantial legal question presented as to whether the Court’s interpretation of
4 the *Flores* Agreement is correct in light of the TVPRA and HSA’s subsequently-
5 enacted and comprehensive statutory framework governing the care and custody of
6 UACs, including clear statutory language preventing HHS from releasing a UAC
7 unless the agency determines that a proposed custodian is capable of caring for the
8 physical and mental well-being of the minor. 8 U.S.C. § 1232(c)(3).
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12 Paragraph 24A of the Agreement has been superseded by Congress’s actions,
13 as expressed in the Homeland Security Act of 2002 (“HSA”) and the TVPRA, which
14 placed all authority for custody and placement decisions for UACs in the hands of
15 HHS, the agency that has developed expertise and experience over the past fourteen
16 years in determining the placement that is in the best possible interest of UACs in
17 federal custody. 6 U.S.C. § 279(a), (b)(1)(A); (b)(1)(C), (b)(1)(D), (b)(2), (g)(2); 8
18 U.S.C. § 1232(b)(1), (b)(3), (c)(2), (c)(3), (c)(4).
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22 Specifically, when Congress created DHS, through the HSA, it also
23 transferred the care of UACs from the legacy Immigration and Naturalization
24 Service (“INS”) to HHS. 6 U.S.C. § 279(a), (b)(1)(A). Then, in 2008, the TVPRA
25 further established that “the care and custody of all unaccompanied alien children,
26 including responsibility for their detention, where appropriate, shall be the
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1 responsibility of the Secretary of Health and Human Services.” 8 U.S.C. §
2 1232(b)(1) (emphasis added). In the TVPRA, Congress expressly authorized the
3 Secretary of HHS to make placement decisions for UACs, and to prescribe review
4 procedures for those placement decisions. 8 U.S.C. § 1232(c)(2)(A). This eliminated
5 any existing authority held by DHS to make custody decisions for UACs, and placed
6 it solely in the hands of HHS. It also placed the responsibility for developing
7 procedures to review those decisions with the Secretary of HHS, and not with the
8 immigration courts of the Department of Justice’s EOIR. This statutory requirement
9 that any review of placement decisions for UACs be conducted by the Secretary of
10 HHS, specifically under “procedures” developed by the Secretary, clearly
11 superseded the bond hearing requirement of Paragraph 24A. Therefore, custody
12 reviews before an immigration judge are no longer possible or even feasible under
13 the existing statutory and regulatory scheme. Because Paragraph 24A has been
14 rendered inconsistent and incompatible with the existing statutory and regulatory
15 scheme, Paragraph 24A has been superseded by the TVPRA.

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22 Importantly, this Court does not have to conclude that it erred, or that the
23 Ninth Circuit will reverse its decision, in order to find that Defendants satisfy this
24 first factor of analysis. *See Murphy v. DirecTV, Inc.*, No. 2:07-06465-FMC, 2008
25 WL 8608808, at *2 (C.D. Cal. July 1, 2008); *see also C.B.S. Employees Fed. Credit*
26 *Union v. Donaldson Lufkin & Jenrette Sec. Corp.*, 716 F. Supp. 307, 309 (W.D.

1 Tenn. 1989) (explaining that the first prong of the test is satisfied when the movant
2 presents a “serious legal question” because “it is unlikely a district court would ever
3 be able to find that defendants will be likely to succeed on the merits of their
4 appeal”). Rather, the Court need only find that the Government “presents a
5 legitimate, substantial question.” *See Britton v. Co-op Banking Group*, 916 F.2d
6 1405, 1412 (9th Cir. 1990); *Golden Gate*, 512 F.3d at 1115–16. Moreover, the
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8 Government does not need to demonstrate that success is more likely than not in
9 order to prevail on this factor. *See Britton*, 916 F.2d at 1412. Here, the Court’s
10 elevation of the *Flores* Agreement’s terms so as to supersede a subsequently-enacted
11 and conflicting federal statute at the very least raise a serious legal question in light
12 of the comprehensive statutory framework for the protection of unaccompanied
13 minors set forth in the TVPRA.
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17 Accordingly, the first factor of the standard supports the grant of a stay.
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19 **C. Failure to grant the stay will cause the Government irreparable**
20 **harm.**

21 Denying a stay will cause the Government irreparable harm. Complying with
22 the Order requires the Government and Plaintiffs’ counsel to “forthwith comply with
23 Paragraph 24A of the *Flores* Agreement.” ECF No. 318, at 8. The Order changes
24 the status quo and irreparably harms the Government by: (1) interfering with the
25 comprehensive statutory framework and corresponding policies and procedures
26 governing HHS’s care and custody of UACs; (2) creating uncertainty over the
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1 contours of these newly-mandated bond hearings that will be burden-intensive for
2 the government to resolve, such as how to transport UACs to immigration court,
3 who represents the Government in such bond hearings, and what the appropriate
4 standard of review would be; and (3) improperly burdening immigration judges with
5 responsibilities that are not authorized under statute or regulation, raising
6 fundamental questions about the authority of EOIR over UACs in HHS custody.
7
8 *E.g.*, *Matter of A-W-*, 25 I. & N. Dec. 45, 46 (BIA 2009) (“Immigration judges only
9 have the authority to consider matters that are delegated to them by the Attorney
10 General and the Immigration and Nationality Act.”) (citing 8 C.F.R. § 1003.10(b)
11 (2009)). *Cf. Heckler v. Lopez*, 463 U.S. 1328, 1336–37 (Rehnquist, Circuit Justice
12 1983) (granting a stay of a class-wide preliminary injunction where implementation
13 of the district court’s order would “significantly interfere with the distribution
14 between administrative and judicial responsibility for enforcement of the Social
15 Security Act which Congress has established.”); *Golden Gate Rest. Ass’n*, 512 F.3d
16 at 1115 (granting a stay pending appeal to prevent injury to a party and preserve the
17 status quo).

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22 **D. A stay will not injure the named plaintiffs or class members.**

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25 While it is manifest that the Government will suffer irreparable harm if it is
26 required to comply with the Order before the Ninth Circuit has acted on the appeal,
27 Plaintiffs would suffer no comparable harm if the Court stays proceedings pending
28

1 resolution of the appeal. Given the clear statutory language prohibiting HHS from
2 releasing a UAC on his or her own recognizance, 6 U.S.C. § 279(b)(2)(B), and from
3 releasing a UAC to a potential custodian unless HHS determines that the custodian
4 is capable of caring for the UAC’s physical and mental well-being, 8 U.S.C. §
5 1232(c)(3)(A), a bond hearing cannot materially alter the terms of a UAC’s custody,
6 as an immigration judge has no authority to override HHS’s express statutory
7 obligations and order HHS to release a UAC under conditions that do not comply
8 with 8 U.S.C. § 1232(c)(3)(A).³ *E.g.*, *Matter of A-W-*, 25 I. & N. Dec. 45, 46 (BIA
9 2009) (citing 8 C.F.R. § 1003.10(b) (2009)).

13 **E. A stay is in the public interest.**

14 Finally, the public interest also supports a stay here. Whether the *Flores*
15 Agreement requires Defendants to provide bond hearings to UACs despite the
16 language in the TVPRA indicating otherwise is a serious legal question affecting the
17 Executive’s “sovereign prerogative” of setting immigration policy. *See Landon v.*
18 *Plasencia*, 459 U.S. 21, 32 (1982); *accord Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
19 The issue also implicates the government’s *parens patriae* interest in ensuring the
20 appropriate agency expertise is utilized in making decisions regarding the care and
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27 ³ Further, any UACs desiring to challenge either their placement or the length of
28 their custody may have alternative remedies under the Administrative Procedure Act
 (“APA”), 5 U.S.C. § 701 *et seq.*, or under habeas, 28 U.S.C. § 2241, respectively.

1 custody of unaccompanied minors, recognized by the TVPRA as among the most
2 vulnerable groups. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (“[T]he State
3 has an urgent interest in the welfare of the child”). A stay would further be in
4 the public interest because it would save significant governmental resources, in the
5 event the Ninth Circuit grants Defendants’ appeal.
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8 Accordingly, the Government respectfully requests this Court stay the effect
9 or enforcement of the Order pending any appeal by the Government, and the
10 resolution of any such appeal. *See Minute Order*, ECF No. 318.
11

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court should grant Defendants’ application for
14 a stay of enforcement of the Court’s January 20, 2017, Order granting Plaintiffs’
15 August 12, 2016 motion to enforce, pending Defendants’ authorization to appeal,
16 any appeal, and the resolution of that appeal. *See Minute Order*, ECF No. 318.
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1 Dated: January 25, 2017 Respectfully submitted

2 JOYCE A. BRANDA
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14 By: /s/ Vinita B. Andrapalliyal
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25 Email: Vinita.b.andrapalliyal@usdoj.gov

26 *Attorneys for Defendants*
27
28

CERTIFICATE OF SERVICE

CASE NO. CV 85-cv-4544

I certify that on January 25, 2017, I served a copy of the foregoing pleading on all counsel of record by means of the District Court’s CM/ECF electronic filing system.

/s/ Vinita B. Andrapalliyal

VINITA B. ANDRAPALLIYAL
Trial Attorney
United States Department of Justice

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16 Attorneys for Defendants

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18 **UNITED STATES DISTRICT COURT**
FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 JENNY LISETTE FLORES; *et al.*,) Case No. CV 85-4544
20)
21 Plaintiffs,) **DECLARATION IN SUPPORT OF**
22) **DEFENDANTS' EX PARTE**
23 v.) **APPLICATION FOR A STAY PENDING**
24) **APPEAL AUTHORIZATION**
25 LORETTA E. LYNCH, Attorney)
26 General of the United States; *et al.*,)
27 Defendants.)
28)

DECLARATION OF VINITA B. ANDRAPALLIYAL

I, VINITA ANDRAPALLIYAL, declare:

1. I am co-counsel for the Defendants.

2. On January 20, 2017, the Court entered a preliminary injunction that orders Defendants to “forthwith comply with Paragraph 24A of the *Flores* Agreement” by providing unaccompanied minors in the care and custody of the U.S. Department of Health and Human Services (“HHS”) with bond hearings in front of an immigration judge.

3. Defendants seek the entry of a stay of the Court’s January 20, 2017 Order. Because this matter requires immediate action that cannot be accommodated through a regularly noticed motion, Defendants have filed the accompanying ex parte application seeking entry of a stay of the Court’s Order pending authorization to appeal, and pending resolution of any such appeal filed.

4. On January 24, 2017, Defendants’ counsel notified Plaintiffs’ counsel by telephone during a meet and confer conference call of the intention to file the accompanying ex parte application and the relief sought. On January 25, 2017, counsel for Defendants again informed counsel for Plaintiffs of their intent to file the ex parte application, and inquired about Plaintiffs’ position on the application. Plaintiffs’ counsel advised Defendants’ counsel that Plaintiffs oppose the application, and asked counsel for Defendants to indicate their request for three (3)

1 business days of Defendants' ex parte filing, or until January 30, 2017, to file a
2 response to the application.

3 I declare under penalty of perjury that the foregoing is true and correct.
4

5 Executed on January 25, 2017, at Washington, D.C.
6

7 /s/ Vinita Andrapalliyal
8 VINITA ANDRAPALLIYAL
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17 Attorneys for Defendants

18 **UNITED STATES DISTRICT COURT**
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

20 JENNY LISETTE FLORES; *et al.*,) Case No. CV 85-4544
21)
22 Plaintiffs,) **[PROPOSED] ORDER GRANTING**
23) **APPLICATION FOR A STAY PENDING**
24 v.) **APPEAL AUTHORIZATION**
25)
26 LORETTA E. LYNCH, Attorney)
27 General of the United States; *et al.*,)
28 Defendants.)
_____)

1 The Court, having considered Defendants' Ex Parte Application for the
2 Entry of a Stay, and all materials and arguments submitted in relation thereto,
3 hereby orders as follows:
4

5 IT IS HEREBY ORDERED that Defendants' Ex Parte Application for a stay
6 of all proceedings in the present litigation pending authorization to appeal, and
7 resolution of any such appeal, is GRANTED. The Court's January 20, 2017, Order
8 requiring Defendants to "forthwith comply with Paragraph 24A of the *Flores*
9 Agreement" by providing unaccompanied alien children in the care and custody of
10 the U.S. Department of Health and Human Services with a bond hearing in front of
11 an immigration judge is hereby stayed until further order of this Court.
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16 SO ORDERED.
17

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19 DATED: _____, 2017
20

21 _____
22 HON. DOLLY M. GEE
23 UNITED STATES DISTRICT JUDGE
24
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