



Department of Justice

STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

FOR A HEARING ENTITLED

**“THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES
SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL
IMMIGRATION INCENTIVES”**

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Statement of

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Acting Deputy Assistant Attorney General
Office of Legal Policy
Department of Justice**

**Before the
Senate Committee on Homeland Security and
Governmental Affairs**

**Entitled
The Implications of the Reinterpretation of the Flores Settlement Agreement for Border
Security and Illegal Immigration Incentives
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Mr. Chairman, Ranking Member McCaskill, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding the Department of Justice's position on the *Flores* Settlement Agreement (FSA). This is a very timely subject, and I welcome the opportunity to address it from the Department of Justice's perspective.

Prior to a 1985 class action suit, the former Immigration and Naturalization Service (INS) relied on regulations and the Juvenile Justice and Delinquency Prevention Act of 1974 to determine appropriate detention and release standards for alien minors apprehended along the border. In 1988, the INS published a final rule entitled "Processing, Detention, and Release of Juveniles." In 1997, the *Flores* Settlement Agreement capped nearly twelve years of litigation. The agreement was executed to establish procedures and conditions for the care, custody, and release of unaccompanied alien minors, including to whom those minors could be released.

The FSA remained in effect through the dissolution of the INS and the creation of the Department of Homeland Security. The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, enacted Nov. 25, 2002, abolished the INS and transferred most of its functions to the Department of Homeland Security (DHS), with one relevant exception: While DHS assumed the functions of initiating removal proceedings and the detention and removal of aliens, the Homeland Security Act transferred responsibilities for the care and custody of unaccompanied alien children to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS). It defined an "unaccompanied alien child" as an alien under the age of 18 who lacks legal status in the United States and for whom no parent or guardian in the United States or no parent or guardian is available to provide for the care and physical custody of the child. The Homeland Security Act did not transfer the functions of the Executive Office for Immigration Review (EOIR) to DHS. Accordingly, the Board of Immigration Appeals and the immigration judges, which are part of EOIR, remain in the Department of Justice under the authority of the Attorney General.

From 2015 through 2018, class members filed five motions to enforce the FSA alleging a myriad of violations. The U.S. District Court for the Central District of California granted each of these motions, resulting in reinterpretations of the class membership and additional remedies for what the District Court held were material breaches of the FSA. This resulted in several changes to the agreement; most notably, one such order in 2015 found that the FSA was applicable to all alien minors encountered and taken into custody by the DHS, including those encountered with a parent or guardian. Additionally, the Court determined that DHS's family residential centers were secure, unlicensed facilities, and thus, holding accompanied minors in such facilities beyond a certain period of time constituted a material breach of the FSA. Further, the FSA requires that in the event of an emergency or an influx, minors must be transferred to a licensed facility "as expeditiously as possible." In many instances, the Court determined that this translates to an average of 20 days, the typical length of time for DHS to complete reasonable or credible fear processing.

The previous Administration unsuccessfully appealed the Court's determination that the FSA applied to accompanied minors. In its reply brief, the government argued that the plain meaning of the agreement was limited only to cases of unaccompanied minors in custody. The brief noted that a finding to the contrary would require an additional finding that the government intended the agreement to apply to accompanied minors and their parents. No such language or other support for this premise exists in the text.

Subsequent to the initial entry of the FSA, Congress enacted legislation which the government argued largely superseded the FSA. This included the Homeland Security Act of 2002, which provides a statutory definition for unaccompanied alien children and transferred responsibility for the care and custody of unaccompanied alien children to HHS, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat 5044, enacted Dec. 23, 2008, which set requirements for addressing the processing, treatment, care, transfer, and custody of unaccompanied alien children. The latter includes a provision that an unaccompanied alien child must be transferred to HHS within 72 hours of determining the child is an unaccompanied alien child, absent exceptional circumstances. Regardless of efforts by the previous Administrations, the District Court found that these statutes did not supersede the FSA

On June 20, 2018, President Trump issued an Executive Order that, in part, directed the Attorney General to move for a modification of the FSA in a manner that would "permit the Secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings." The Department complied and requested a modification that was ultimately denied by District Court Judge Dolly M. Gee. The Department has not yet decided whether to appeal this ruling.

In 2001, the parties added a stipulation to the FSA that it would terminate following the promulgation of regulations implementing the agreement. In order to terminate the agreement, DHS and HHS published a notice of proposed rulemaking on September 7, 2018, to address the FSA. While the Department of Justice does not have a role in the rule, the Department supports the regulatory effort, and stands ready to defend any challenges that may arise from its promulgation.

Apart from its role as litigator, the Department of Justice plays no current operational role in detaining or releasing aliens under the FSA and, thus, cannot comment on detention or release decisions made by DHS or ORR. I would observe, however, that as adults entering the United States with children between ports of entry are not currently being referred for prosecution by DHS, the FSA provides DHS little recourse in its decision to hold or release this family unit. Pursuant to the FSA, the time a child can be held in a family residential center generally is limited.

The Department, through EOIR, is diligently working to facilitate immigration court proceedings at many of these DHS facilities. That said, many of these aliens claim a credible fear of persecution and, pursuant to statute and regulation, must be provided with a credible fear interview by an asylum officer with DHS's U.S. Citizenship and Immigration Services. Upon request by the alien, a negative credible fear finding by an asylum officer is to be reviewed by an immigration judge within 7 days. If either the asylum officer or the immigration judge finds that the alien has a credible fear of persecution, the alien be issued a Notice to Appear (NTA) and given an opportunity to file and present an asylum claim on the merits before an immigration judge. By statute, unless the alien requests an earlier date, the government cannot schedule the alien's first immigration court hearing until 10 days after the service of the NTA. Further, pursuant to a policy codified in a judicial settlement agreement, an immigration judge must give a detained alien at least 14 days between his initial immigration court hearing and a merits hearing on his asylum application. Thus, for aliens seeking asylum, it is generally legally impossible to complete their immigration proceedings within the time a child generally can be held in a family residential center. As of the end of June 2018, the median time to adjudicate an asylum application for a detained alien in immigration proceedings was 128 days; for a non-detained alien, the median time was 964 days.

The number of asylum applications in immigration proceedings has increased significantly in recent years, as have the number and length of continuances. Although lengthy case processing times are pronounced for asylum cases, the issue runs throughout the immigration court system. For instance, more than 70 percent of pending unaccompanied alien child cases have been pending for over one year, and the median time to complete an unaccompanied alien child case is 465 days. Only about 9,600 unaccompanied alien child cases have been completed in immigration court through the first three quarters of this fiscal year, compared to over 135,000 non-unaccompanied alien child cases. Of those 9600, roughly 6300 were completed with an order of removal. Although the Attorney General recently clarified the parameters for immigration judges to follow in assessing whether to grant a continuance, other factors—including a lack of preparation or diligence by an alien, processing delays for applications outside of EOIR's purview, and a lack of legal clarity regarding many criminal removal provisions—continue to raise significant obstacles in adjudicating cases expeditiously.

The pending immigration court caseload increased 350% between FY 2008 and FY 2017, in part due to surges in illegal immigration driven by a myriad of factors. Certain judicial decisions, such as the expansion of the FSA to include accompanied children, stymied DHS's efforts to address these surges and contributed to the growth of the backlog. Nevertheless, EOIR has taken steps to address the caseload, including by hiring more immigration judges. EOIR

currently has 395 immigration judges, including 128 who have been hired since January 20, 2017. EOIR has reduced the hiring time for a new judge from an average of 742 days to as little as 195 days, which is a reduction of almost 74 percent. Additionally, EOIR is moving forward with a long sought-after electronic filing and case management modernization effort, commonly referred to as EOIR Courts and Appeals System (ECAS). EOIR began piloting the new electronic case management system in July of this year, and expects to begin expanding it nationwide in early 2019.

The Department of Justice appreciates the opportunity to work with DHS, HHS, and Congress to address these challenges and improve every facet of our immigration system. While we want to ensure that all minors are appropriately cared for while in government custody, the outdated FSA and subsequent reinterpretations constitute a roadblock to solutions for keeping families together once encountered at the border. At this juncture, the Department believes that the proposed regulations provide much needed flexibility to DHS and HHS and will ultimately serve the best interests of all alien minors and their parents.

Thank you for this opportunity to speak before you today, I look forward to further discussions on these issues.