This workshop was held at the 2017 Equal Justice Conference in Pittsburgh, Pennsylvania

Title:
Serving the Legal Needs of Immigrant Children

Presenters:
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In this session attendees will hear an update on new developments in the law and legal procedures regarding serving the legal needs of immigrant children. Presenters will discuss LSC regulations allowing those programs to provide representation in these cases, alternative strategies for providing representation, court procedures and the status of right to counsel and related issues.
February 20, 2017

MEMORANDUM FOR: Kevin McAleenan
Acting Commissioner
U.S. Customs and Border Protection

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FROM: John Kelly
Secretary

SUBJECT: Enforcement of the Immigration Laws to Serve the National Interest

This memorandum implements the Executive Order entitled “Enhancing Public Safety in the Interior of the United States,” issued by the President on January 25, 2017. It constitutes guidance for all Department personnel regarding the enforcement of the immigration laws of the United States, and is applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). As such, it should inform enforcement and removal activities, detention decisions, administrative litigation, budget requests and execution, and strategic planning.
With the exception of the June 15, 2012, memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” and the November 20, 2014 memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict—including, but not limited to, the November 20, 2014, memorandum entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” and “Secure Communities.”

A. The Department’s Enforcement Priorities

Congress has defined the Department’s role and responsibilities regarding the enforcement of the immigration laws of the United States. Effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens.

Except as specifically noted above, the Department no longer will exempt classes or categories of removable aliens from potential enforcement. In faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law. In order to achieve this goal, as noted below, I have directed ICE to hire 10,000 officers and agents expeditiously, subject to available resources, and to take enforcement actions consistent with available resources. However, in order to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation, Department personnel should prioritize for removal those aliens described by Congress in Sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (4) of the Immigration and Nationality Act (INA).

Additionally, regardless of the basis of removability, Department personnel should prioritize removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Director of ICE, the Commissioner of CBP, and the Director of USCIS may, as they determine is appropriate, issue further guidance to allocate appropriate resources to prioritize enforcement activities within these categories—for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.

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1 The November 20, 2014, memorandum will be addressed in future guidance.
B. Strengthening Programs to Facilitate the Efficient and Faithful Execution of the Immigration Laws of the United States

Facilitating the efficient and faithful execution of the immigration laws of the United States—and prioritizing the Department’s resources—requires the use of all available systems and enforcement tools by Department personnel.

Through passage of the immigration laws, Congress established a comprehensive statutory regime to remove aliens expeditiously from the United States in accordance with all applicable due process of law. I determine that the faithful execution of our immigration laws is best achieved by using all these statutory authorities to the greatest extent practicable. Accordingly, Department personnel shall make full use of these authorities.

Criminal aliens have demonstrated their disregard for the rule of law and pose a threat to persons residing in the United States. As such, criminal aliens are a priority for removal. The Priority Enforcement Program failed to achieve its stated objectives, added an unnecessary layer of uncertainty for the Department’s personnel, and hampered the Department’s enforcement of the immigration laws in the interior of the United States. Effective immediately, the Priority Enforcement Program is terminated and the Secure Communities Program shall be restored. To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Department shall eliminate the existing Forms I-247D, I-247N, and I-247X, and replace them with a new form to more effectively communicate with recipient law enforcement agencies. However, until such forms are updated they may be used as an interim measure to ensure that detainers may still be issued, as appropriate.

ICE’s Criminal Alien Program is an effective tool to facilitate the removal of criminal aliens from the United States, while also protecting our communities and conserving the Department’s detention resources. Accordingly, ICE should devote available resources to expanding the use of the Criminal Alien Program in any willing jurisdiction in the United States. To the maximum extent possible, in coordination with the Executive Office for Immigration Review (EOIR), removal proceedings shall be initiated against aliens incarcerated in federal, state, and local correctional facilities under the Institutional Hearing and Removal Program pursuant to section 238(a) of the INA, and administrative removal processes, such as those under section 238(b) of the INA, shall be used in all eligible cases.

The INA § 287(g) Program has been a highly successful force multiplier that allows a qualified state or local law enforcement officer to be designated as an “immigration officer” for purposes of enforcing federal immigration law. Such officers have the authority to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, and conduct searches authorized under the INA, under the direction and supervision of the Department.

There are currently 32 law enforcement agencies in 16 states participating in the 287(g)
Program. In previous years, there were significantly more law enforcement agencies participating in the 287(g) Program. To the greatest extent practicable, the Director of ICE and Commissioner of CBP shall expand the 287(g) Program to include all qualified law enforcement agencies that request to participate and meet all program requirements. In furtherance of this direction and the guidance memorandum, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (Feb. 20, 2017), the Commissioner of CBP is authorized, in addition to the Director of ICE, to accept State services and take other actions as appropriate to carry out immigration enforcement pursuant to section 287(g) of the INA.

C. Exercise of Prosecutorial Discretion

Unless otherwise directed, Department personnel may initiate enforcement actions against removable aliens encountered during the performance of their official duties and should act consistently with the President’s enforcement priorities identified in his Executive Order and any further guidance issued pursuant to this memorandum. Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws. They also have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. The Department shall prioritize aliens described in the Department’s Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers.

The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, or the USCIS Field Office Director, Asylum Office Director or Service Center Director.

Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws. The General Counsel shall issue guidance consistent with these principles to all attorneys involved in immigration proceedings.

D. Establishing the Victims of Immigration Crime Engagement (VOICE) Office

Criminal aliens routinely victimize Americans and other legal residents. Often, these victims are not provided adequate information about the offender, the offender’s immigration status, or any enforcement action taken by ICE against the offender. Efforts by ICE to engage these victims have been hampered by prior Department of Homeland Security (DHS) policy extending certain Privacy Act protections to persons other than U.S. citizens and lawful permanent residents, leaving victims feeling marginalized and without a voice. Accordingly, I am establishing the Victims of Immigration Crime Engagement (VOICE) Office within the Office of
the Director of ICE, which will create a programmatic liaison between ICE and the known victims of crimes committed by removable aliens. The liaison will facilitate engagement with the victims and their families to ensure, to the extent permitted by law, that they are provided information about the offender, including the offender’s immigration status and custody status, and that their questions and concerns regarding immigration enforcement efforts are addressed.

To that end, I direct the Director of ICE to immediately reallocate any and all resources that are currently used to advocate on behalf of illegal aliens (except as necessary to comply with a judicial order) to the new VOICE Office, and to immediately terminate the provision of such outreach or advocacy services to illegal aliens.

Nothing herein may be construed to authorize disclosures that are prohibited by law or may relate to information that is Classified, Sensitive but Unclassified (SBU), Law Enforcement Sensitive (LES), For Official Use Only (FOUO), or similarly designated information that may relate to national security, law enforcement, or intelligence programs or operations, or disclosures that are reasonably likely to cause harm to any person.

E. Hiring Additional ICE Officers and Agents

To enforce the immigration laws effectively in the interior of the United States in accordance with the President’s directives, additional ICE agents and officers are necessary. The Director of ICE shall—while ensuring consistency in training and standards—take all appropriate action to expeditiously hire 10,000 agents and officers, as well as additional operational and mission support and legal staff necessary to hire and support their activities. Human Capital leadership in CBP and ICE, in coordination with the Under Secretary for Management and the Chief Human Capital Officer, shall develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires.

F. Establishment of Programs to Collect Authorized Civil Fines and Penalties

As soon as practicable, the Director of ICE, the Commissioner of CBP, and the Director of USCIS shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties which the Department is authorized under the law to assess and collect from aliens and from those who facilitate their unlawful presence in the United States.

G. Aligning the Department’s Privacy Policies With the Law

The Department will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents. The DHS Privacy Office will rescind the DHS Privacy Policy Guidance memorandum, dated January 7, 2009, which implemented the DHS “mixed systems” policy of administratively treating all personal information contained in DHS record systems as being subject to the Privacy Act regardless of the subject’s immigration status. The DHS Privacy Office, with the assistance of the Office of the General Counsel, will
develop new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems.

H. Collecting and Reporting Data on Alien Apprehensions and Releases

The collection of data regarding aliens apprehended by ICE and the disposition of their cases will assist in the development of agency performance metrics and provide transparency in the immigration enforcement mission. Accordingly, to the extent permitted by law, the Director of ICE shall develop a standardized method of reporting statistical data regarding aliens apprehended by ICE and, at the earliest practicable time, provide monthly reports of such data to the public without charge.

The reporting method shall include uniform terminology and shall utilize a format that is easily understandable by the public and a medium that can be readily accessed. At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following categories of information must be included: country of citizenship, convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and, if released, the reason for release and location of their release, aliens ordered removed, and aliens physically removed or returned.

The ICE Director shall also develop and provide a weekly report to the public, utilizing a medium that can be readily accessed without charge, of non-Federal jurisdictions that release aliens from their custody, notwithstanding that such aliens are subject to a detainer or similar request for custody issued by ICE to that jurisdiction. In addition to other relevant information, to the extent that such information is readily available, the report shall reflect the name of the jurisdiction, the citizenship and immigration status of the alien, the arrest, charge, or conviction for which each alien was in the custody of that jurisdiction, the date on which the ICE detainer or similar request for custody was served on the jurisdiction by ICE, the date of the alien’s release from the custody of that jurisdiction and the reason for the release, an explanation concerning why the detainer or similar request for custody was not honored, and all arrests, charges, or convictions occurring after the alien’s release from the custody of that jurisdiction.

I. No Private Right of Action

This document provides only internal DHS policy guidance, which may be modified, rescinded, or superseded at any time without notice. This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

In implementing these policies, I direct DHS Components to consult with legal counsel to ensure compliance with all applicable laws, including the Administrative Procedure Act.
Executive Order 13768 of January 25, 2017

Enhancing Public Safety in the Interior of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation’s immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. Definitions. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.
Sec. 4. Enforcement of the Immigration Laws in the Interior of the United States. In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense, where such charge has not been resolved;

(c) Have committed acts that constitute a chargeable criminal offense;

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. Civil Fines and Penalties. As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. Additional Enforcement and Removal Officers. The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.
Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. Review of Previous Immigration Actions and Policies. (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as “Secure Communities” referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. Department of Justice Prosecutions of Immigration Violators. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. Recalcitrant Countries. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. Office for Victims of Crimes Committed by Removable Aliens. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.
Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. Reporting. Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. Transparency. To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. Personnel Actions. The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

Sec. 18. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Program Letter 14-3

TO: All Executive Directors

FROM: Ronald S. Flagg, General Counsel and Vice President for Legal Affairs

DATE: October 29, 2014

SUBJ: Assessing Eligibility of Aliens Under 45 C.F.R. § 1626.4(c)(1)

Introduction

LSC is issuing this Program Letter to provide guidance to recipients in light of the recent influx of non-citizens into the United States from Central America. LSC has received multiple inquiries from recipients and stakeholders about whether recipients may represent these non-citizens, particularly unaccompanied alien children. LSC has also learned that there may be some confusion about the use of 45 C.F.R. § 1626.4(c)(1), which became effective on May 19, 2014, to assess the eligibility of non-citizens who may qualify for legal assistance under one of the anti-abuse statutes. This Program Letter responds to the questions and clarifies the application of section 1626.4(c)(1).

May LSC recipients provide legal assistance to unaccompanied alien children?

Yes, if the child meets one of the exceptions to the general prohibition on legal assistance to non-citizens that are described in detail at 45 C.F.R. Part 1626.


An unaccompanied alien child, by definition, is an individual under the age of 18 who has no lawful immigration status in the United States and who has no parent or guardian available to provide care and custody in the United States. See 6 U.S.C. § 279(g); 8 U.S.C. § 1232(g). The statutes governing the care, placement, and provision of legal assistance to unaccompanied alien children do not authorize LSC recipients to provide legal assistance to unaccompanied alien children. Nor do any of the statutes discussed above authorize LSC recipients to assist unaccompanied alien children by virtue of their categorization as such. In
order for a recipient to represent a non-citizen, including an unaccompanied alien child, the non-citizen must fall into one of the exceptions to the general prohibition on legal assistance to non-citizens.

**How do recipients determine whether a non-citizen is eligible for assistance under one of the anti-abuse statutes? Does the non-citizen have to have been victimized in the United States?**

Reports indicate that a number of the non-citizens entering from Central America may have been victims of crimes or subject to abuse that would make them eligible for legal assistance under one of the anti-abuse statutes (e.g., VAWA 2005, the TVPA). Recipients should use 45 C.F.R. § 1626.4 to determine whether a non-citizen qualifies for LSC-funded legal assistance under one of the anti-abuse statutes. A recipient may provide legal assistance to non-citizens who are eligible under one of the anti-abuse statutes if providing the assistance is among the recipient’s priorities, as determined under 45 C.F.R. Part 1620.

Section 1626.4(c) describes the relationship between both (1) the qualifying activity and the United States and (2) the victim and the United States. Under section 1626.4(c)(1), the qualifying activity does not have to have occurred in the United States. For purposes of eligibility for LSC-funded legal assistance, an activity that “violated a law of the United States” means an activity that:

- Is described in the definition of **battered or subjected to extreme cruelty** in 45 C.F.R. § 1626.2(b);
- Is described in the definition of **victim of sexual assault or trafficking** in 45 C.F.R. § 1626.2(k);
- Meets the definition of **severe forms of trafficking in persons** in section 103(9) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7102(9); or

For example, the person may have suffered the requisite battery or sexual assault in his or her home country, on the journey to the United States, or in the United States. As long as the activity giving rise to eligibility meets one of the definitions listed above, the individual may be eligible for legal assistance under one of the anti-abuse statutes. In addition, some non-citizens, such as a parent of a minor victim of severe forms of trafficking, may be eligible under Part 1626 based on their relationship to a child or other relative who is eligible for assistance under one of the anti-abuse statutes. See 45 C.F.R. § 1626.4(a).

Section 1626.4(d) outlines the requirement for evidentiary support of an individual’s claim for eligibility under one of the anti-abuse statutes. Sections 1626(d)(2) and (d)(3) describe the types of documentation that recipients may consider as evidence, if credible, of an individual’s claim for eligibility under one of the anti-abuse statutes.
May a recipient represent a non-citizen if the individual will likely be victimized if returned to his or her country of origin?

Yes, if the non-citizen already meets one of the exceptions to the general prohibition on legal assistance to non-citizens. For example, if an applicant for assistance claims that he or she would be victimized again if returned to the applicant’s country of origin and demonstrates that he or she was subjected to sexual assault within the definition of 45 C.F.R. § 1626.2(k)(1), a recipient may represent that individual. If the individual has not been subjected to an activity that would give rise to eligibility or is not eligible for legal assistance under another exception to the general prohibition on legal assistance to non-citizens, a recipient may not assist that person based solely on a representation that the individual will likely be victimized if returned.

May a recipient represent an unaccompanied alien child in Special Immigrant Juvenile Status ("SIJS") proceedings?

Yes, if the child meets one of the exceptions to the general prohibition on legal assistance to non-citizens. Under section 101(a)(27)(J) of the INA, a non-citizen minor may qualify for SIJS if a court determines that that reunification with the minor’s parent or parents is not viable because of abuse, abandonment, neglect, or similar basis under state law, and that it is not in the minor’s best interests to repatriate the minor to his or her country of origin or last habitual residence. 8 U.S.C. § 1101(a)(27)(J). Although nothing in section 101(a)(27)(J) or the statutes discussed above specifically authorizes LSC recipients to provide legal assistance to minors applying for SIJS, recipients may represent such minors if the minors fall under one of the exceptions to the general prohibition on legal assistance to non-citizens.
OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

AO-2016-002 (revised)

Subject: Permissibility of Providing Legal Services to Noncitizen Parents and Noncitizen Guardians of Children Seeking Special Immigrant Juvenile Status

Date: July 11, 2016 (revised August 26, 2016)

QUESTION PRESENTED

May LSC funding recipients represent noncitizen parents or guardians of noncitizen children seeking Special Immigrant Juvenile Status (SIJS) as a result of battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities?

BRIEF ANSWER

Yes. Recipients may represent noncitizen parents and, in some instances, noncitizen guardians of noncitizen children subjected to battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities, as long as the legal assistance is directly related to obtaining relief from the abuse for the child. Proceedings in which noncitizen parents or guardians petition for SIJS on behalf of their noncitizen children are proceedings directly related to obtaining relief from the abusive situation for the child.

BACKGROUND

LSC’s Office of Legal Affairs (OLA) received an inquiry from a law professor regarding the provision of LSC-funded legal assistance in SIJS proceedings. As a predicate to granting SIJS, a juvenile court must issue an order: 1) finding that the noncitizen child is dependent on a juvenile court or state agency or is legally committed to, or placed in the custody of an agency, individual or entity appointed by the state; 2) declaring that the child cannot be reunified with one or both parents due to abuse, neglect, abandonment, or other similar basis under state law; and 3) finding that return to the child’s home country is not in the child’s best interests (“SIJ predicate order”). We understand that in some jurisdictions, courts require a parent or guardian, not the child, to file a case that would lead to an SIJ predicate
order. We also understand that parents or guardians may seek an SIJ predicate order through a related proceeding, such as a child custody matter, paternity suit, or a child support case.

The professor sought guidance from OLA on whether LSC funding recipients may represent and provide legal assistance to noncitizen parents or guardians petitioning for SIJS on behalf of noncitizen children who have been subjected to battery, cruelty, sexual assault, or trafficking. Although we limit our analysis to legal assistance in proceedings that may lead to the issuance of an SIJ predicate order, we believe the analysis applies generally to instances in which a recipient seeks to provide legal assistance to a noncitizen parent who is eligible for legal assistance under 45 C.F.R. § 1626.4(a)(1)(ii).

In this opinion, we use the term “guardian” to refer to individuals who have custody of and responsibility for the child in question, regardless of whether that individual is the child’s court-appointed guardian or custodian. Such individuals should have the same characteristics as those who, under the applicable state law, are deemed to be acting in loco parentis or have the necessary relationship to become the child's legal guardian. Under the various applicable state laws, these characteristics typically include factors such as (for reasons other than pecuniary gain) the assumption of primary responsibility for the care, health, safety, and control of the child in a manner that provides for the child’s physical needs; providing a primary residence for the child or a residence that makes the child eligible for public education in the jurisdiction of the residence; or providing for and facilitating the child’s development, mental health, and emotional health.¹

Additionally, we adopt the Department of Homeland Security’s description of a “juvenile court” as “a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children.”² Examples of juvenile courts include juvenile, family, orphans, dependency, guardianship, probate, and delinquency courts. Id.

¹ See, e.g., DEL. CODE ANN. tit. 13, § 1101(10); D.C. CODE §§ 16-831.01(1), 160831.02(a)(1); 53 PA. CONS. STAT. § 5324 (2010).

ANALYSIS


Congress enacted limited exceptions to this general restriction in Pub. L. 104-134, Pub. L. 105-119, and in subsequent legislation not focused solely on LSC. These and other relevant statutes are defined as “anti-abuse statutes” in section 1626.2(a). See, e.g., Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7105(b)(1)(B) (“TVPA”); Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, § 104; 111 Stat. 2440, 2510 (2006) (“VAWA 2005”). LSC issued several guidance documents reflecting the statutory changes made to the anti-abuse statutes and subsequently amended Part 1626 in May 2014 to incorporate these changes into the regulation. In particular, section 1626.4 implements the statutory exceptions to the general prohibition on legal assistance to noncitizens and governs whether noncitizens are eligible for LSC-funded legal assistance under one of the anti-abuse statues (e.g., VAWA 2005 and TVPA).

A. Providing legal assistance under section 1626.4(a)(1) to noncitizen parents of noncitizen children seeking Special Immigrant Juvenile Status (SIJS)

Whether recipients can represent and provide legal assistance to noncitizen parents of noncitizen children seeking SIJS depends on two factors: (1) whether the

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parent qualifies under section 1626.4(a)(1), and (2) whether the legal assistance includes representation in matters that will assist a person eligible under section 1626.4(a)(1) to escape from, ameliorate the current effects of, or protect against the abusive situation. *Id.* at § 1626.4(b)(2).

Section 1626.4(a)(1) identifies two categories of noncitizen individuals eligible for related legal assistance: noncitizens who have been subjected to battery, cruelty, sexual assault, or trafficking, or any U-visa-qualifying activity\(^4\) and noncitizen parents of children subjected to these activities. With respect to noncitizen parents, section 1626.4(a)(1)(ii) states that LSC recipients may provide related legal assistance to “an alien whose child, without the active participation of the alien, has been battered or subjected to extreme cruelty, or has been a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. § 1101(a)(15)(U)).” 45 C.F.R. § 1626.4(a)(1)(ii) (emphasis added). Noncitizen parents of such children may also be eligible for the same “related legal assistance” if the parents have themselves been battered, subjected to extreme cruelty, sexual assault or trafficking, or any U-visa-qualifying activity. *Id.* at § 1626.4(a)(1)(i).

“Related legal assistance” means “legal assistance directly related . . . to the prevention of, or obtaining relief from, the battery, cruelty, sexual assault, or trafficking.” *Id.* at § 1626.4(b)(1)(i). “Such assistance includes representation in matters that will assist a person eligible for assistance under [Part 1626] to escape from the abusive situation, ameliorate the current effects of the abuse, or protect against future abuse . . .” *Id.* at § 1626.4(b)(2).

\(^4\) Qualifying crimes for a U-visa under § 101(a)(15)(U) of the Immigration and Nationality Act are “one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C. § 1101(a)(15)(U)(iii).
"The key factor for recipients to consider in determining whether a requested service is ‘related legal assistance’ is the connection between the assistance and the purposes for which assistance can be given: escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014). Although the SIJS provision in section 101(a)(27)(J) of the INA is not specifically referenced in Part 1626, recipients may nonetheless provide related legal assistance to a noncitizen seeking relief as an SIJ who falls under one of the exceptions to the general prohibition on legal assistance to noncitizens. See Program Letter 14-3 (Oct. 29, 2014).

Special Immigrant Juvenile Status permits noncitizen children who are present in the United States to apply for lawful permanent residency. See 8 U.S.C. § 1101(a)(27)(J); see also 8 U.S.C. § 1255(h) (describing how special immigrants can become eligible to adjust their status). The essential elements for obtaining SIJS are that:

(1) The child has been declared dependent on a juvenile court or has been legally committed to or placed in the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States;

(2) Reunification with one or more of the child’s parents is not viable due to abuse, neglect, abandonment, or similar basis under state law;

(3) The juvenile court determines that it is not in the best interest of the child to be returned to the parent’s previous country of nationality or country of last habitual residence; and

(4) The Secretary of Homeland Security consents to the grant of Special Immigrant Juvenile Status.

See 8 U.S.C. § 1101(a)(27)(J)(i)-(iii). A court order making the findings required in items (1)-(3) is referred to as an “SIJ predicate order.”

Providing legal assistance in the proceedings leading up to the grant of SIJS is “related legal assistance” under section 1626.4(b)(2), because one of the key elements for SIJS is a juvenile court’s finding that reunification with one or more of the child’s parents is not viable because of abuse, abandonment, neglect, or a
similar state law basis. Because the juvenile court may declare the noncitizen child dependent or place the child in custody for the purpose of preventing or obtaining relief from battery, extreme cruelty, sexual assault, or trafficking, there is a strong connection between the legal assistance and the purpose of “escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014); 45 C.F.R. § 1626.4(b)(2). Thus, if local court rules preclude noncitizen children from filing the initial court case in juvenile court and/or being listed as the party of record, recipients may represent the noncitizen parents of such children because the noncitizen parents are eligible under section 1626.4(a)(1)(ii) and such assistance constitutes related legal assistance as defined by section 1626.4(b)(2). This is also true if the noncitizen parent has been abused, because the noncitizen parent would then be eligible under section 1626.4(a)(1)(i), and therefore entitled to the same related legal assistance defined in section 1626.4(b)(2).5

If a noncitizen child has been subjected to the activities listed in section 1626.4(a)(1)(ii), recipients may represent and provide related legal assistance to either the noncitizen child or the noncitizen parent, notwithstanding the fact that the legal assistance provided to the parent, who may not have a legally cognizable claim in his/her own right, could benefit the eligible noncitizen parent. The amended section 1626.4(a)(1)(ii), read together with the definition of related legal assistance in section 1626.4(b)(2), implements the VAWA provisions relating to LSC6 and reflects the congressional intent to allow recipients to provide legal assistance to noncitizen parents when doing so necessarily results or could result in a benefit to a noncitizen child (i.e., escaping from, ameliorating the current effects of, or preventing future abuse through a grant of SIJS).

This conclusion does not conflict with AO-2010-002, which addressed the question whether recipients could represent ineligible noncitizen parents of U.S.

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5 Recipients “may provide legal assistance to non-citizens who are eligible under one of the anti-abuse statutes if providing the assistance is among the recipient’s priorities, as determined under 45 C.F.R. Part 1620.” Program Letter 14-3 (Oct. 29, 2014).

citizen children in cases where the parent had a legally cognizable right and the child did not, but the representation would benefit the child. AO-2010-002 (Apr. 14, 2010). In the circumstances we are addressing here, the child has a legally cognizable right and is eligible for representation himself or herself.

B. Providing legal assistance under section 1626.4(a)(1) to noncitizen nonparent guardians of children seeking SIJS

The exceptions in section 1626.4(a)(1)(i) and (ii) apply to permit recipients to represent noncitizen children subjected to the activities listed therein and the noncitizen parents of such children. See 45 C.F.R. § 1626.4(a)(1)(ii) (“an alien whose child . . .”). If the child is eligible under section 1626.4(a)(1)(i), however, and a noncitizen (nonparent) guardian of the child is also independently eligible under that provision, then a recipient may accept the noncitizen guardian as a client and provide related legal assistance pursuant to section 1626.4(b)(2) in SIJ proceedings that may ultimately benefit the child, because such assistance includes representation in matters that will assist eligible noncitizen children to escape from, ameliorate the current effects of, or protect against future abuse. See id. § 1626.4(b)(2).

We understand that there may be situations in which one or both parents of a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii) are unavailable (or even deceased), and the noncitizen child is in the custody of a noncitizen who is not independently eligible for legal assistance from an LSC-funded organization. In jurisdictions where local court rules preclude noncitizen children from filing a case that will lead to an SIJ predicate order, the phrase in section 1626.4(a)(1)(ii) that limits eligibility to “an alien whose child” has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States could be read to have the unintended consequence of depriving an otherwise eligible noncitizen child of the benefit of legal services provided by LSC recipients if it is interpreted to mean only the parent of such a child. This result is not consistent with Congress’ intent to expand legal assistance to immigrant victims of violence through VAWA 2005. See 151 Cong. Rec. H12124 (Dec. 17, 2005) (“This provision also includes an amendment to ensure that all legal services organizations can assist any victim of domestic violence, sexual assault and trafficking without regard to the victim’s immigration status.”) (Statement of Sen. Sheila Jackson-Lee,
D-TX). There is no indication that Congress intended a child who has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States to be deprived of legal services solely because the child is in the custody of a noncitizen guardian instead of a noncitizen parent. Indeed, such an interpretation would lead to the anomalous result that children subject to violence or trafficking would lose their access to legal services if their parents were deceased or not present in the United States. To implement Congress’ intent in these types of cases, LSC interprets the phrase “an alien whose child” in its own regulation to include noncitizens with custody or responsibility for a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii).

LSC believes this interpretation is consistent with the congressional intent of the VAWA 2005 provisions relating to LSC. Although the recipient’s client may, in these limited circumstances, be a noncitizen who is not otherwise eligible for LSC-funded legal assistance, the sole beneficiary of the representation is the intended beneficiary of the VAWA provisions implemented by section 1626.4(a)(1)(ii): the noncitizen child subjected to battery, extreme cruelty, sexual assault, or trafficking. The recipient’s representation in these cases must be limited to proceedings related to helping the child “escape from the abusive situation, ameliorate the effects of current abuse, or protect against future abuse.” 45 C.F.R. § 1626.4(b)(2). Such assistance may include seeking an SIJ predicate order. LSC believes the unrelated procedural barrier imposed by local court rules that preclude the noncitizen child who has been subjected to battery, extreme cruelty, sexual assault, or trafficking from petitioning for an SIJ predicate order should not prohibit recipients from representing noncitizen guardians of noncitizen children otherwise entitled to the protections afforded by VAWA, as long as the representation is limited to proceedings related to preventing or obtaining relief from the qualifying abuse.

C. Providing legal assistance under sections 1626.4(a)(2) and 1626.5 to noncitizen parents and noncitizen guardians of children seeking SIJS

In addition to VAWA, the Trafficking Victims Protection Act of 2000 and section 504(a)(11) of LSC’s fiscal year 1996 appropriations act authorize LSC recipients to provide legal assistance to certain noncitizens. Individuals who are eligible for legal assistance as victims of severe forms of trafficking, derivative T-visa holders, or through one of the section 504(a)(11) exceptions to the general bar
on legal assistance to noncitizens may receive any permissible legal assistance from an LSC recipient. Such assistance may include filing a case on behalf of a child that would lead to a juvenile court making the findings required to file a petition for SIJS.

CONCLUSION

Pursuant to section 1626.4(a)(i) and (ii), LSC funding recipients may represent and provide legal assistance in SIJS proceedings to noncitizen parents of children who have been subjected to battery, cruelty, sexual assault, or trafficking, provided that such legal assistance is directly related to preventing or obtaining relief from the battery, cruelty, sexual assault or trafficking. 45 C.F.R. § 1626.4(b)(1). Such assistance includes representation in matters that will assist an eligible noncitizen child to escape from, ameliorate the effects of, or protect against future abuse, such as proceedings leading to an SIJ predicate order. Id. § 1626.4(b)(2). If local court rules preclude noncitizen children from initially filing cases in juvenile court that would lead to an SIJ predicate order, recipients may represent noncitizen parents or noncitizen guardians of such children and provide related legal assistance in such proceedings. Recipients may also provide any permissible legal assistance, including assistance with obtaining the orders needed to file an SIJS petition, to a noncitizen parent or noncitizen guardian who is eligible under the TVPA or section 504(a)(11) of LSC’s fiscal year 1996 appropriation act.

RONALD S. FLAGG
Vice President and General Counsel
Office of Legal Affairs
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES,
    Plaintiff-Appellee,

v.

LORETTA LYNCH, Attorney General, Attorney General of the United States; JEH JOHNSON, Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, and its subordinate entities; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION,
    Defendants-Appellants.

No. 15-56434

D.C. No.
2:85-cv-04544-DMG-AGR

OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted June 7, 2016
Pasadena, California

Filed July 6, 2016

Opinion by Judge Hurwitz

SUMMARY**

Immigration

The panel affirmed in part and reversed in part the district court's order granting the motion of a plaintiff class to enforce a 1997 Settlement with the government which set a nationwide policy for the detention, release, and treatment of minors detained in Immigration and Naturalization Service custody, and remanded for further proceedings.

The panel held that the Settlement unambiguously applies both to minors who are accompanied and unaccompanied by their parents. The panel held, however, that the district court erred in interpreting the Settlement to provide release rights to accompanying adults. The panel also held that the district court did not abuse its discretion in denying the government’s motion to amend the Settlement.

* The Honorable Michael J. Melloy, Senior Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
COUNSEL

Leon Fresco (argued), Deputy Assistant Attorney General; Sarah B. Fabian, Senior Litigation Counsel; William C. Peachey, Director, District Court Section; Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division; United States Department of Justice, Office of Immigration Litigation, Washington, D.C.; for Defendants-Appellants.

Peter Anthony Schey (argued) and Carlos R. Holguin, Center for Human Rights and Constitutional Law, Los Angeles, California; T. Wayne Harman and Elena Garcia, Orrick, Herrington & Sutcliffe LLP, Los Angeles, California; for Plaintiff-Appellee.

OPINION

HURWITZ, Circuit Judge:

In 1997, the plaintiff class (“Flores”) and the government entered into a settlement agreement (the “Settlement”) which “sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS.” Settlement ¶ 9. The Settlement creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.

In 2014, in response to a surge of Central Americans attempting to enter the United States without documentation, the government opened family detention centers in Texas and New Mexico. The detention and release policies at these centers do not comply with the Settlement. The government,
however, claims that the Settlement only applies to unaccompanied minors and is not violated when minors accompanied by parents or other adult family members are placed in these centers.

In 2015, Flores moved to enforce the Settlement, arguing that it applied to all minors in the custody of immigration authorities. The district court agreed, granted the motion to enforce, and rejected the government’s alternative motion to modify the Settlement. The court ordered the government to: (1) make “prompt and continuous efforts toward family reunification,” (2) release class members without unnecessary delay, (3) detain class members in appropriate facilities, (4) release an accompanying parent when releasing a child unless the parent is subject to mandatory detention or poses a safety risk or a significant flight risk, (5) monitor compliance with detention conditions, and (6) provide class counsel with monthly statistical information. The government appealed, challenging the district court’s holding that the Settlement applied to all minors in immigration custody, its order to release parents, and its denial of the motion to modify.

Although the issues underlying this appeal touch on matters of national importance, our task is straightforward—we must interpret the Settlement. Applying familiar principles of contract interpretation, we conclude that the Settlement unambiguously applies both to accompanied and unaccompanied minors, but does not create affirmative release rights for parents. We therefore affirm the district court in part, reverse in part, and remand.
BACKGROUND

I. History of the Litigation

In 1984, the Western Region of the Immigration and Naturalization Service ("INS") adopted a policy prohibiting the release of detained minors to anyone other than "a parent or lawful guardian, except in unusual and extraordinary cases." *Reno v. Flores*, 507 U.S. 292, 296 (1993) (quotation marks omitted). The next year, Flores filed this action in the Central District of California, challenging that policy and the conditions under which juveniles were detained pursuant to the policy. *Id.*

In 1986, the district court certified two classes:

1. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.

2. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who have been, are, or will be subjected to any of the following conditions:
   
a. inadequate opportunities for exercise or recreation;
b. inadequate educational instruction;

c. inadequate reading materials;

d. inadequate opportunities for visitation with counsel, family, and friends;

e. regular contact as a result of confinement with adult detainees unrelated to such minors either by blood, marriage, or otherwise;

f. strip or body cavity search after meeting with counsel or at any other time or occasion absent demonstrable adequate cause.

In 1987, the court approved a consent decree settling the detention condition claims. *Id.* That agreement required the government to “house all juveniles detained more than 72 hours following arrest in a facility that meets or exceeds” certain standards, except in “unusual and extraordinary circumstances.”

The district court then granted the Flores class partial summary judgment on the claim that the INS violated the Equal Protection Clause by treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings, the latter of whom were sometimes released to adults other than their parents. *Id.* In response, the INS adopted a rule allowing juveniles to be released to their parents, adult relatives, or custodians designated by their parents; if no adult relative was available, the rule gave the INS discretion to release a detained relative with the child. *Id.* at 296–97; see Detention and Release of Juveniles,
II. The Settlement

In 1997, the district court approved the Settlement. The Settlement defines a “minor” as “any person under the age of eighteen (18) years who is detained in the legal custody of the INS,” except for “an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult.” Settlement ¶ 4. The Settlement defines the contracting class similarly, as “[a]ll minors who are detained in the legal custody of the INS.” Id. ¶ 10.

The Settlement provides that “[w]henever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights.” Id. ¶ 12(A). “Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS’s concern for the particular vulnerability of minors.” Id. Within five days of arrest, the INS must transfer the minor to a non-secure, licensed facility; but “in the event of an emergency or influx of minors into the United States,” the INS need only make the transfer “as expeditiously as possible.” Id.

The Settlement creates a presumption in favor of release and favors family reunification:

Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the
minor’s safety or that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

A. a parent;

B. a legal guardian;

C. an adult relative (brother, sister, aunt, uncle, or grandparent);

D. an adult individual or entity designated by the parent or legal guardian . . .

E. a licensed program willing to accept legal custody; or

F. an adult individual or entity seeking custody . . .

Id. ¶ 14; see also id. ¶ 18 (requiring “prompt and continuous efforts . . . toward family reunification and the release of the minor”). But, if the INS does not release a minor, it must place her in a “licensed program.” Id. ¶ 19. A “licensed program” is one “licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children,” which must be “non-secure as required under state law” and meet the standards set forth in an exhibit attached to the Settlement. Id. ¶ 6. Those standards include food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy. Some minors, such as those who have
committed crimes, may be held in a juvenile detention facility instead of a licensed program. \textit{Id.} ¶ 21.

The Settlement generally provides for the enforcement in the Central District of California, \textit{id.} ¶ 37, but allows individual challenges to placement or detention conditions to be brought in any district court with jurisdiction and venue, \textit{id.} ¶ 24(B). The Settlement originally was to terminate no later than 2002. \textit{Id.} ¶ 40. But, in 2001, the parties stipulated that the Settlement would terminate “45 days following defendants’ publication of final regulations implementing this Agreement.” The government has not yet promulgated those regulations.

\section*{III. Developments Subsequent to the Settlement}

Before 2001, “families apprehended for entering the United States illegally were most often released rather than detained because of a limited amount of family bed space; families who were detained had to be housed separately, splitting up parents and children.” \textit{Bunikyte ex rel. Bunikiene v. Chertoff}, No. 1:07-cv-00164-SS, 2007 WL 1074070, at *1 (W.D. Tex. Apr. 9, 2007). “In the wake of September 11, 2001, however, immigration policy fundamentally changed,” with “more restrictive immigration controls, tougher enforcement, and broader expedited removal of illegal aliens,” which “made the automatic release of families problematic.” \textit{Id.}

In 2001, the INS converted a nursing home in Berks County, Pennsylvania (“Berks”) into its first family detention center. \textit{Id.} Because Pennsylvania has no licensing requirements for family residential care facilities, Berks has been monitored and licensed by state authorities under the state standards applicable to child residential and day treatment facilities. \textit{Id.} at *8.

In 2006, DHS converted a medium security prison in Taylor, Texas into its second family detention facility, the Don T. Hutto Family Residential Center (“Hutto”). Bunikyte, 2007 WL 1074070, at *1. In 2007, three children at Hutto, who were not represented by Flores’ class counsel, filed suit in the Western District of Texas, contending that the conditions at Hutto violated the Settlement. Id. at *1–2. In response, the government argued that the Settlement applied only to unaccompanied minors. The district court rejected that argument, holding that “by its terms, [the Settlement] applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.” Id. at *2–3 (quoting Settlement ¶ 9). The court then concluded that the minors’ confinement at Hutto violated the Settlement’s detention standards, id. at *6–15, but rejected the claim that the Settlement entitled the plaintiffs to have their parents released with them, id. at *16. The suit settled before trial. In re Hutto Family Det. Ctr., No. 1:07-cv-00164-SS, Dkt. 94, (W.D. Tex. Aug. 26, 2007).

TVPR A partially codified the Settlement by creating statutory standards for the treatment of unaccompanied minors. See, e.g., 8 U.S.C. § 1232(c)(2)(A) (an unaccompanied alien child “shall be promptly placed in the least restrictive setting that is in the best interest of the child,” subject to considerations of flight and danger).

IV. The Enforcement Action and R.I.L.-R v. Johnson

In 2014, a surge of undocumented Central Americans arrived at the U.S.-Mexico border. In response, ICE opened family detention centers in Karnes City and Dilley, Texas, and Artesia, New Mexico. It closed the Artesia center later that year. The detention centers operate under ICE’s Family Residential Detention Standards, which do not comply with the Settlement.

In January 2015, a group of Central American migrants, who were not represented by Flores class counsel, filed a putative class action, claiming that the government had adopted a no-release policy as to Central American families, and challenging that alleged policy under the Due Process Clause. R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 170 (D.D.C. 2015). On February 20, 2015, the U.S. District Court for the District of Columbia granted the plaintiffs’ motion for a preliminary injunction. Id. at 171. The court found that ICE had not adopted a blanket no-release policy, but found ample support for the plaintiffs’ alternative contention that “DHS policy directs ICE officers to consider deterrence of mass migration as a factor in their custody determinations, and that this policy has played a significant role in the recent increased detention of Central American mothers and children.” Id. at 174. The court preliminarily enjoined the government from using deterrence as a factor in detaining class members. R.I.L.-R v. Johnson, No. 1:15-cv-00011-JEB, Dkt. 32 (D.D.C. Feb. 20, 2015).
In May 2015, the government notified the court that it had decided “to discontinue, at this time, invoking deterrence as a factor in custody determinations in all cases involving families, irrespective of the outcome of this litigation,” while maintaining that it could lawfully reinstate the policy. *Id.* Dkt. 40. In June 2015, by the agreement of the parties, the district court in *R.I.L-R* dissolved the preliminary injunction and closed the case, allowing plaintiffs to move to reinstate the preliminary injunction if the government again invoked deterrence in custody determinations. *Id.* Dkt. 43.

Meanwhile, on February 2, 2015, Flores filed a motion in the U.S. District Court for the Central District of California to enforce the Settlement, arguing that ICE had breached it by (1) adopting a no-release policy, and (2) confining children in the secure, unlicensed facilities at Dilley and Karnes.\footnote{Flores also argued that the government breached Paragraph 12(A) by exposing children in temporary Border Patrol custody to “harsh, substandard” conditions. That issue is not implicated in this appeal.} The government argued in response that the Settlement does not apply to accompanied minors, and filed an alternative motion to amend the Settlement to so provide. On July 24, 2015, the district court granted Flores’ motion, denied the government’s motion to amend, and also held that the Settlement requires release of a minor’s accompanying parent, “as long as doing so would not create a flight risk or a safety risk.”\footnote{The case was reassigned to Judge Dolly M. Gee, because the original judge, Robert J. Kelleher, had died.} On August 21, 2015, the district court filed a remedial order. The government timely appealed. We have jurisdiction under 28 U.S.C. § 1292.
STANDARD OF REVIEW

The Settlement is a consent decree, which, "like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree." United States v. Asarco Inc., 430 F.3d 972, 980 (9th Cir. 2005). We review the district court's interpretation of the contract de novo. Miller v. Safeco Title Ins. Co., 758 F.2d 364, 367 (9th Cir. 1985). "Motions for relief from judgment under Rule 60(b) are reviewed for abuse of discretion." Asarco, 430 F.3d at 978.

DISCUSSION

I. The Settlement Applies to Accompanied Minors

We agree with the district court that "[t]he plain language of the Agreement clearly encompasses accompanied minors." First, the Settlement defines minor as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS"; describes its scope as setting "nationwide policy for the detention, release, and treatment of minors in the custody of the INS"; and defines the class as "[a]ll minors who are detained in the legal custody of the INS." Settlement ¶¶ 4, 9, 10. Second, as the district court explained, "the Agreement provides special guidelines with respect to unaccompanied minors in some situations," and "[i]t would make little sense to write rules making special reference to unaccompanied minors if the parties intended the Agreement as a whole to be applicable only to unaccompanied minors." See id. ¶ 12(A) ("The INS will segregate unaccompanied minors from unrelated adults."); id. ¶ 25 ("Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except . . . "). Third, as the district court reasoned, "the Agreement expressly identifies
those minors to whom the class definition would not apply”—emancipated minors and those who have been incarcerated for a criminal offense as an adult; “[h]ad the parties to the Agreement intended to exclude accompanied minors from the Agreement, they could have done so explicitly when they set forth the definition of minors who are excluded from the Agreement.” *See id. ¶ 4.*

The government nevertheless argues that certain terms of the Settlement show that it was never meant to cover accompanied minors. The Settlement defines “licensed program” as “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.” *Id. ¶ 6.* The government contends that this makes only “dependent minors” eligible for licensed programs; that Black’s Law Dictionary defines dependent minors to exclude accompanied minors, *see Child, Black’s Law Dictionary* (10th ed. 2014); and that it would make little sense for the Settlement to apply to accompanied minors but exclude them from licensed programs. We reject this argument. That a program is “licensed . . . to provide . . . services for dependent children” does not mean that only dependent children can be placed in that program. And, the definition of “licensed program” does not indicate any intent to exclude accompanied minors; rather, its obvious purpose is to use the existing apparatus of state licensure to independently review detention conditions.

At oral argument, the government cited a provision of the Settlement requiring that, “[b]efore a minor is released from INS custody pursuant to Paragraph 14 above, the custodian must execute an Affidavit of Support (Form I-134)
and an agreement to,” among other things, provide for the minor’s well-being and ensure the minor’s presence at immigration proceedings. Settlement ¶ 15. The government claims that the reference to the “custodian” demonstrates that the Settlement did not contemplate releasing a child to an accompanying parent. The government is right in one sense—the Settlement does not contemplate releasing a child to a parent who remains in custody, because that would not be a “release.” But, it makes perfect sense to require an aunt who takes custody of a child to sign an affidavit of support, whether or not the child was arrested with his mother.

The government correctly notes that the Settlement does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children. For example, Exhibit 1, which sets forth requirements for licensed programs, does not contain standards related to the detention of adults or family units. But, the fact that the parties gave inadequate attention to some potential problems of accompanied minors does not mean that the Settlement does not apply to them. See Bunikyte, 2007 WL 1074070, at *3 (“Though it is no defense that the Flores Settlement is outdated, it is apparent that this agreement did not anticipate the current emphasis on family detention. . . . Nonetheless, the Flores Settlement, by its terms, applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.”) (quoting Settlement ¶ 9); id. (“Paragraph 19 sets out the foundation of the detention standards applicable to any minor in United States immigration custody, and there is no reason why its requirements should be any less applicable in a family detention context than in the context of unaccompanied minors.”).
The government next argues that the Complaint and certified classes were limited to unaccompanied minors, and that the parties therefore could not have entered into a Settlement granting rights to accompanied minors. To be sure, this litigation initially focused on the problems facing unaccompanied minors, who then constituted 70% of immigrant children arrested by the INS. See Flores, 507 U.S. at 295. But, the Complaint was not limited to unaccompanied minors. The conduct Flores challenged—INS detention conditions and the Western Region release policy—applied to accompanied and unaccompanied minors alike. See Complaint ¶ 50 (challenging the INS’ “policy to indefinitely jail juveniles, particularly those whose parents INS agents suspect may be aliens unlawfully in the United States, unless and until their parent or legal guardian personally appears before an INS agent for interrogation and to accept physical custody of the minor.”); id. ¶¶ 65, 70–79 (challenging juveniles’ condition of confinement in INS facilities, including the lack of education, recreation, and visitation, and the imposition of strip searches). So did the remedies sought and the classes the district court certified. See id. at 29 ¶ 4 (requesting an order that the INS admit juveniles to bail without requiring that their parents or legal guardians appear before INS agents); Order re Class Certification (certifying a class for the release claims and a class for the detention conditions claims).

The government has not explained why the detention claims class would exclude accompanied minors; minors who arrive with their parents are as desirous of education and recreation, and as averse to strip searches, as those who come alone. As for release, the government focuses narrowly on the release class definition. See Order re Class Certification at 2 (defining the release class to include all minors arrested in the INS’ Western Region “who have been, are, or will be
denied release from INS custody because a parent or legal
guardian fails to personally appear to take custody of them").
But, the release class was certified expressly to challenge the
Western Region’s policy of not releasing detained minors to
anyone other than a parent or guardian. Complaint ¶ 50; see
also Flores, 507 U.S. at 296. That policy applied equally to
accompanied minors, such as a boy detained with his mother
who wanted to be released to his aunt but was refused
because his father “fail[ed] to personally appear to take
custody of [him].” See Order re Class Certification at 2.3

The government also contends that, because the four
named plaintiffs in the Complaint were unaccompanied, a
class including accompanied minors would run afoul of the
requirements of typicality and representativeness. See Fed.
R. Civ. P. 23. The government’s factual premise is
questionable: one of the named plaintiffs was accompanied
at the time of arrest by her adult brother, although he was
released without her. Complaint ¶ 34. But, more
importantly, the government waived its ability to challenge
the class certification when it settled the case and did not
timely appeal the final judgment. And, to the extent this and
other arguments are aimed at providing extrinsic evidence of
the meaning of the Settlement, they fail because the

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3 Even if the Complaint only sought to assert the detention and release
rights of unaccompanied immigrant children, it is far from clear that a
settlement governing detention and release for all immigration children
would be invalid. A consent decree may “provide[ ] broader relief than
the court could have awarded after a trial”; the law only requires that the
agreement “come within the general scope of the case made by the
pleadings.” Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland,
478 U.S. 501, 525 (1986) (alterations, citations, and quotation marks
omitted).
Settlement unambiguously applies to accompanied minors. See *Asarco*, 430 F.3d at 980.

II. The Settlement Does Not Require the Government to Release Parents

Flores’ motion to enforce argued that ICE’s purported no-release policy, which allegedly denied accompanying parents “any chance for release,” frustrated the minor class members’ right to preferential release to a parent, and that to safeguard that right, ICE was required to give parents individualized custody determinations. After the district court tentatively agreed, Flores went further, proposing an order providing that “Defendants shall comply with the Settlement ¶ 14(a) by releasing class members without unnecessary delay in first order of preference to a parent, including a parent subject to release who presented her or himself or was apprehended by Defendants accompanied by a class member.”

While acknowledging that “the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention,” the district court nonetheless reasoned that “ICE’s blanket no-release policy with respect to mothers cannot be reconciled with the Agreement’s grant to class members of a right to preferential release to a parent.” The court also found that the regulation upheld in *Flores*, 507 U.S. at 315, supported the release of an accompanying relative. See 8 C.F.R. § 212.5(b)(3)(ii) (“If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.”). It also found support for that conclusion in ICE’s practice, until June 2014, of generally releasing parents who were not flight or safety risks.
The district court therefore concluded that the government “must release an accompanying parent as long as doing so would not create a flight risk or a safety risk,” and it ordered:

To comply with Paragraph 14A of the Agreement and as contemplated in Paragraph 15, a class member’s accompanying parent shall be released with the class member in accordance with applicable laws and regulations unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.

The district court erred in interpreting the Settlement to provide release rights to adults. The Settlement does not explicitly provide any rights to adults. *Bunikyte*, 2007 WL 1074070 at *16. The fact that the Settlement grants class members a right to preferential release to a parent over others does not mean that the government must also make a parent available; it simply means that, if available, a parent is the first choice. Because “the plain language of [the] consent decree is clear, we need not evaluate any extrinsic evidence to ascertain the true intent of the parties.” *See Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007). In any case, the extrinsic evidence does not show that the parties intended to grant release rights to parents. “In fact, the context of the *Flores* Settlement argues against this result: the Settlement was the product of litigation in which unaccompanied minors argued that release to adults other
than their parents was preferable to remaining in custody until their parents could come get them.” Bunikyte, 2007 WL 1074070 at *16. The regulation the district court relied upon at most shows that the parties might have thought about releasing adults when executing the Settlement, not that they agreed to do so in that document. And, there is no evidence that ICE once released most children and parents because of the Settlement, rather than for other reasons.

Flores suggests that we construe the district court’s order narrowly, arguing that it only requires, as she initially requested, that the government grant accompanying parents individualized custody determinations “in accordance with applicable laws and regulations,” just as it would single adults. But, the district court plainly went further. A non-criminal alien detained during removal proceedings generally bears the burden of establishing “that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” In re Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006). But, the district court placed the burden on the government, requiring it to release an accompanying parent “unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security.” In addition, the order requires a “significant flight risk” to justify detention, while the usual standard is merely “a risk of flight.” Id.

More importantly, parents were not plaintiffs in the Flores action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights
for parents, and the district court erred in creating such rights in the context of a motion to enforce that agreement. 4

III. The District Court Correctly Denied the Government’s Motion to Amend the Settlement

Even if the Settlement applies to accompanied minors, the government argues that it is “no longer equitable” to apply it as written. See Fed. R. Civ. P. 60(b)(5) (allowing relief from judgment if “applying it prospectively is no longer equitable”); Horne v. Flores, 557 U.S. 433, 447 (2009) (”Rule 60(b)(5) serves a particularly important function in what we have termed ‘institutional reform litigation.’”). The district court denied this motion. We review that decision for abuse of discretion. Asarco, 430 F.3d at 978.

“[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.” Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992). When the basis for modification is a change in law, the moving party must establish that the provision it seeks to modify has become “impermissible.” Id. at 388.

4 In so holding, we express no opinion whether the parents of accompanied minors have a right to release, or if so, the nature of that right. Nor do we express an opinion whether the alleged no-release policy would violate the Settlement. We hold only that the Settlement is not the source of any affirmative right to release.
The government first argues that the Settlement should be modified because of the surge in family units crossing the Southwest border. "Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." _Id._ at 385. The Settlement expressly anticipated an influx, and provided that, if one occurred, the government would be given more time to release minors or place them in licensed programs. Settlement ¶ 12. And, even if the parties did not anticipate an influx of this size, we cannot fathom how a "suitably tailored" response to the change in circumstances would be to exempt an entire category of migrants from the Settlement, as opposed to, say, relaxing certain requirements applicable to all migrants. _See_ _Rufo_, 502 U.S. at 383.

The government also argues that the law has changed substantially since the Settlement was approved. It cites Congress' authorization of expedited removal—but that occurred in 1996, before the Settlement was approved. _See_ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 302, 110 Stat. 3009-546, 579–85 (1996). The government also notes that the Homeland Security Act of 2002 reassigned the immigration functions of the former INS to DHS; but there is no reason why that bureaucratic reorganization should prohibit the government from adhering to the Settlement. _See_ Settlement ¶ 1 ("As the term [party] applies to Defendants, it shall include their . . . successors in office.").

The government also argues that some provisions of the TVPRA regarding the detention and release of unaccompanied minors are inconsistent with the Settlement. At most, that might support modification of the conflicting provisions so that they no longer apply to the unaccompanied minors covered by the TVPRA. But, the
creation of statutory rights for unaccompanied minors does not make application of the Settlement to accompanied minors "impermissible." The district court did not abuse its discretion in denying the motion to amend on the record before it.

CONCLUSION

We hold that the Settlement applies to accompanied minors but does not require the release of accompanying parents. We therefore affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.\(^5\) Each party shall bear its own costs.

\(^5\) We note that a second motion to enforce is pending in the district court.
No. 15-35738, 15-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. E. F.M., a minor, by and through his Next Friend, Bob Ekblad, et al.,

Plaintiffs-Appellees,

v.

LORETTA E. LYNCH, Attorney General, et al.,

Defendants-Appellants.

On Appeal from the United States Court District Court
for the Western District of Washington
No. 2:14-cv-01026 (Hon. Thomas S. Zilly)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF A PETITION FOR REHEARING AND
REHEARING EN BANC

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December 15, 2016
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*Sheviakov v. INS,*
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*Tall v. Mukasey,*
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8 C.F.R. § 1003.2(g)(1).................................13

8 C.F.R. § 1003.3(a).................................5

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OTHER AUTHORITIES

ABA House of Delegates Recommendation 106A (adopted Feb. 2001),

ABA House of Delegates Recommendation 114D (adopted Feb. 2010),
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ABA House of Delegates Recommendation 120A (adopted Feb. 1983).......2

ABA House of Delegates Resolution 103D (adopted Aug. 2011),
available at http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_103d.authcheckdam.pdf.............................................3

ABA House of Delegates Resolution 107A (adopted Feb. 2006),

ABA House of Delegates Resolution 113 (adopted Feb. 2015),
available at http://www.americanbar.org/content/dam/aba/directories/policy/2015_hod_midyear_meeting_113.authcheckdam.docx.............3, 7

Br. of Former Federal Immigr. Judges in Supp. of Pls.-Appellees and In Support of Partial Affirm. (Feb 14, 2016), ECF 31-1 .........................9, 10, 12, 13

COMM’N ON IMMIGRATION, AM. BAR ASS’N, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS (June 3, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf...........6
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Denise Noonan Slavin & Dana Leigh Marks, Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a “Government Attorney” or by a “Judge”?,
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EXECUTIVE OFFICE FOR IMMIGRATION REVIEW & NAT’L ASS’N OF
IMMIGRATION JUDGES, ETHICS & PROFESSIONALISM GUIDE FOR
sites/default/files/eoir/legacy/2013/05/23/Ethicsand
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Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum
Adjudication, 60 STAN. L. REV. 295 (2007) ............................................................. 6

Memorandum from Brian M. O’Leary, Chief Immigration Judge, Executive
Office for Immigration Review, U.S. Dep’t of Justice, to All
Immigration Judges, The Friend of the Court Model for Unaccompanied
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http://www.americanbar.org/content/dam/aba/administrative/
immigration/UACFriendCtOct2014.authcheckdam.pdf ........................................ 11, 12
Amicus Curiae the American Bar Association ("ABA") respectfully submits this brief in support of the petition for rehearing and rehearing en banc.¹

IDENTITY AND INTEREST OF AMICUS CURIAE

The ABA is a voluntary, national membership organization of legal professionals. With over 400,000 members from every U.S. state and territory, including prosecutors, public defenders, private lawyers, legislators, judges, law professors, law students, and others, it is the largest voluntary professional membership organization in the United States.² ABA entities holding particular interests in the issues raised by this case include (a) the Commission on Immigration, which has directed the ABA’s efforts to ensure fair treatment and full due process rights for immigrants and refugees since 2002, and (b) the Working Group on Unaccompanied Minor Immigrants, which was created in 2014 to mobilize pro bono lawyers to represent and secure due process for the influx of

¹ The ABA files this brief pursuant to Circuit Rule 29-2 as all parties have consented to its filing. The ABA certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

² Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the ABA’s Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.
Central American youth who otherwise would appear alone in immigration hearings.³

For over 35 years, the ABA has advocated for the right to counsel for immigrants and refugees. For example, in the early 1980s, the ABA first began opposing legislative initiatives to limit the right to counsel in asylum and removal proceedings, ABA House of Delegates Recommendation 120A (adopted Feb. 1983), and adopting specific policies⁴ and standards calling for effective legal representation for immigrant children. In 2001, the ABA adopted a policy that “supports the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings.” ABA House of Delegates Recommendation 106A (adopted Feb. 2001).⁵ In 2004, it adopted standards providing that an unaccompanied child “has the right to have an Attorney represent him in any formal proceedings or other matter in which a decision will be made which will affect his immigration status” and that “an

³ Other ABA entities, including the Standing Committee on Pro Bono and Public Service, the Center on Children and the Law, the Commission on Youth at Risk, and the Commission on Hispanic Legal Rights and Responsibilities, also have long-standing interests in standards and policies concerning immigrant children.

⁴ ABA Recommendations become policy only after approval by vote of the ABA House of Delegates, which is composed of representatives from states, territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others.

⁵ Available at http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_106a.authcheckdam.pdf.
Attorney shall be appointed for the Child, at public expense if necessary.” COMM’N ON IMMIGRATION, AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES, Ch. III-H (2004).^6

Recent ABA policy urges prompt screening of unaccompanied children, noting their “‘particular vulnerability’ . . . as an abused and otherwise victimized population.” ABA House of Delegates Resolution 103D, Report at 4 (adopted Aug. 2011).^7 And, last year, the ABA adopted a resolution supporting the appointment of counsel for unaccompanied children and urging immigration courts not to conduct any hearings before children have had the opportunity to consult with counsel. ABA House of Delegates Resolution 113 (adopted Feb. 2015).^8

In addition to decades of policy work, the ABA offers a valuable perspective because many of its members and staff have extensive, direct experience as counsel in immigration court and administrative appeals. Drawing on the substantial research and debate underlying its policies and the extensive experience of its members, the ABA believes that, in arriving at its jurisdictional decision, the

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^6 Available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

^7 Available at http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_103d.authcheckdam.pdf.

^8 Available at http://www.americanbar.org/content/dam/aba/directories/policy/2015_hod_midyear_meeting_113.authcheckdam.docx.
panel mistakenly viewed certain removal hearing “protections” as adequate substitutes for counsel for immigrant children. The ABA believes that these safeguards do not and cannot displace the critical role of counsel nor guarantee consistent, meaningful judicial review of immigrant children’s various claims.

**SUMMARY OF ARGUMENT**

Plaintiffs here are particularly vulnerable litigants. They are children who seek appointed counsel to represent them in adversarial immigration removal proceedings that may have life or death consequences. With agency immigration judges powerless to guarantee their representation, the children sought relief in federal district court. While the district court held that the law permitted it to adjudicate the appointed counsel claims, the panel held that a claim-channeling provision jurisdictionally forecloses any district court involvement and that each child can raise his or her claim only on an individual appeal to a circuit court of appeals and only after entry of a final order of removal.

The ABA believes that the ultimate question presented by this case – i.e., whether immigrant children have a right to appointed counsel – is inextricably intertwined with the panel’s jurisdictional ruling. Without representation, immigrant children face proceedings that “largely mirror criminal trials,” where they must assume duties traditionally expected of attorneys:

[They] must identify, corroborate, and argue complex claims before a presiding judge. They must master a complex area of the law. They
must develop and argue factually and legally complex claims for relief. They must contest the government’s charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their [ ] banishment and, in some cases, significant peril.

ABA House of Delegates Resolution 107A, Report at 5 (adopted Feb. 13, 2006). As discussed in Section II below, the procedural safeguards cited by the panel do not adequately mitigate the harm faced by immigrant children – including those allowed to bring pillows and toys into the courtroom in light of their immaturity and related limitations — who shoulder these immense responsibilities in immigration court. Moreover, as explained in Section III below, the panel opinion does not account at all for the next phase of the process before the Board of Immigration Appeals ("BIA"), where there are no such protections. As a result, the likelihood that an unrepresented child could successfully navigate (a) an appeal to the BIA and (b) filing a Petition for Review ("PFR") is remote at best. Thus, the result of the panel’s decision is the impermissible “practical equivalent of a

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11 An unrepresented child who prevails before the immigration court may nevertheless have to navigate the procedural complexities of the next phase, since the government has the right to appeal the immigration judge’s decision. See 8 C.F.R. § 1003.3(a); see also ICPM Ch. 4.16(h).

**ARGUMENT**

I. **LEGAL REPRESENTATION BENEFITS IMMIGRANT CHILDREN, THE GOVERNMENT, AND THE ADMINISTRATION OF JUSTICE**

The ABA has long recognized that effective legal representation is vital to ensuring due process for children in immigration proceedings. ABA studies and reports\(^\text{12}\) incorporate research demonstrating conclusively that the single most important factor affecting the outcome of an immigration case is the appearance of counsel for the immigrant.

It is easy to recognize that virtually all unrepresented immigrants are disadvantaged in removal proceedings due to their ignorance of legal procedure and general lack of fluency in English. For unrepresented children in particular, who lack the intellectual faculties, experience, and resources of adults, the deck is

stacked even further against them in identifying avenues of relief, marshalling evidence, adhering to mandatory deadlines and procedures, presenting their cases in chief, refuting any government arguments, and ultimately prevailing. Without a lawyer, immigrant children with legitimate claims for relief do not have a fair chance of obtaining a favorable outcome.

Beyond the above, legal representation benefits the system overall by: (a) increasing efficiency, thereby reducing the costs of immigration proceedings (by, i.e., improving appearance rates in court, reducing the number of requests for continuances, and reducing the length of time in custody for certain children) and (b) ensuring that viable claims for relief are advanced and others are not, that the proper legal standards are applied, and that decisions turn on the full merits of the claims, all of which reinforce the legitimacy of immigration proceedings. See ABA House of Delegates Resolution 113, Report at 3-5; ABA House of Delegates Resolution 107A, Report at 8.

II. IMMIGRATION COURT PROTECTIONS DO NOT ADEQUATELY SAFEGUARD THE RIGHTS OF CHILDREN

Given the obstacles that pro se immigrants face, even the Executive Office for Immigration Review ("EOIR") itself recommends that everyone in removal proceedings obtain legal representation. ICPM Ch. 2.2(a). These obstacles, while substantial for nearly all immigrants, often can be insurmountable for children. To begin with, the manual containing the procedural rules is in English and available
online only, and the rules themselves are highly technical. Documents not filed or served properly or within specified deadlines may be rejected, and such technical errors can be the basis for denial of relief. See ICPM Ch. 3.1(a)-(d), 3.2, App’x D, App’x J.\(^{13}\) Even if an unrepresented child managed to file the necessary papers in a timely manner, he would remain severely disadvantaged at trial because unfamiliarity with courtroom procedures would prejudice his ability to identify and present fact and expert witnesses, cross-examine witnesses, and object to other government evidence. Id. Ch. 4.16(f).

In answer to these and similar concerns, the panel apparently relied on certain “special protections” — such as the responsibilities of immigration judges (“IJs”) and the possibility of third-party non-lawyers acting in the interest of unrepresented children — in formulating its interpretation of the claim-channeling provision. J. E. F.M. v. Lynch, 837 F.3d 1026, 1033, 1037 (9th Cir. 2016) (“Panel Decision”). In the ABA’s experience, the protections outlined by the panel do not ensure meaningful judicial review.

First, the panel focused only on the appointed counsel issue and reasoned that a constitutional claim can be considered on a PFR even if the child never

\(^{13}\) For example, the failure to (a) properly hole punch a document or to paginate multiple exhibits consecutively could lead to the exclusion of evidence and (b) separately notify DHS counsel, the Immigration Court, and the BIA (if applicable) of a change of address could result in the inability to receive vital correspondence including hearing notices and decisions triggering appeal deadlines. ICPM Ch. 2.2(c), 3.3.
raised or preserved the claim in the administrative proceeding. *Id.* at 1038. The focus on this avenue for preserving constitutional claims ignores the reality that other claims of immigrant children would escape meaningful judicial review under the claim-channeling statute. *See, e.g., Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (finding failure to exhaust where petitioner “did not give the BIA an opportunity to consider and remedy . . . procedural errors”).

Second, the panel’s view of the safeguards places much of the burden of protecting children’s rights on the IJs, who are duty-bound to act as impartial adjudicators.¹⁴ Beyond that neutrality obligation, it is unrealistic to expect or assume that IJs can step in to act on each child’s behalf, given heavy dockets that sometimes require them to “address 50 to 70 cases on a three- to four-hour time

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¹⁴ Executive Office for Immigration Review & Nat’l Ass’n of Immigration Judges, Ethics & Professionalism Guide for Immigration Judges 2 (2011), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf (citing 5 C.F.R. § 2635.101(b)(8)); see also Br. of Former Federal Immigr. Judges in Supp. of Pls.-Appellees and In Support of Partial Affirm. at 8 (Feb 14, 2016), ECF 31-1 (“IJ Amici Br.”). There is concern that IJs already have conflicting roles, given their appointment by the Attorney General. Reform Report at 2-9, 6-5 (“DOJ has taken the view that immigration judges are merely staff attorneys of the Department . . . required to comply with the rules of conduct applicable to DOJ attorneys, rather than the rules of judicial conduct.”); see also Denise Noonan Slavin & Dana Leigh Marks, Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a “Government Attorney” or by a “Judge”?*, 16 Bender’s Immigr. Bull. 1785, 1786 (2011).
frame.” See IJ Amici Br. at 4, 7-8.\textsuperscript{15} Those statistics demonstrate that, as a practical matter, IJs lack time to “probe the record” (Panel Decision at 1036) to identify possible bases for relief. By way of comparison, in the ABA’s experience, attorneys spend on average 50 hours per case representing unaccompanied minors. Reform Report at 5-16. Given these numbers, it is unsurprising that represented children are nearly \textit{five times} more likely to obtain a favorable outcome in their proceedings than are unrepresented children. IJ Amici Br. at 22.

Third, the possibility of representation by a “reputable individual,” a parent, or legal guardian is not an adequate substitute for counsel in removal proceedings.\textsuperscript{16} Even when a child can find a non-family “reputable individual” willing to assist him, the court might not allow the person to proceed.\textsuperscript{17} And, similarly, a willing parent or guardian, if one exists, may represent the child only if the adult “clearly informs the Immigration Court of their relationship” and receives

\textsuperscript{15} The time pressures are so intense that the President of the National Association of Immigration Judges repeatedly has compared adjudicating asylum cases to hearing death penalty cases in traffic court. See, e.g., \textit{Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary}, 111th Cong. 55 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges).

\textsuperscript{16} The panel held that parents of accompanied children are capable of making a right-to-counsel claim for the child. Panel Decision at 1038.

\textsuperscript{17} A reputable non-family individual may appear on behalf of an immigrant child only if she correctly files both a declaration stating that she has received “no direct or indirect remuneration” and a notice of appearance, and then is “officially recognized by the Immigration Court.” ICPM Ch. 2.9(a).
authorization to proceed. ICPM Ch. 2.8. Acquiring these authorizations and communicating with the court can be challenging, especially for non-English speakers, and it is inconceivable that most of these lay individuals would be able to adequately understand, process, or assist with “[t]he proliferation of immigration laws and regulations [that] has aptly been called a labyrinth that only a lawyer could navigate.” Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005).18

Fourth, the Friend-of-the-Court (“FOTC”) models relied on by the panel (Panel Decision at 1037) are of limited utility. Although authorized by EOIR, these programs are not universal. Moreover, even in jurisdictions that have them, the FOTC’s role is, as the panel acknowledged, limited to non-representational assistance (Panel Decision at 1037), and the extent of the FOTC’s participation is “entirely within the court’s discretion” (EOIR Friend Memo at 1 (citing In re Estate of Ohlhauser, 101 N.W.2d 827, 829 (S.D. 1960))). An FOTC may try to protect the rights of a child if the IJ allows it, but, unlike counsel, an FOTC cannot

18 Further, the third party could have a conflict of interest. For example, a parent might not want to assist a child in making a status claim based on abuse or neglect by a parent or domestic violence at the hands of another family member.

file pleadings or motions, reserve an exception to any ruling of the court, exercise or waive rights, or prosecute an appeal. *Id.*

The ABA submits that this patchwork of “special protections” does little to ensure that immigrant children have adequate means to identify and pursue legitimate claims for relief from removal, and, as such, these protections are inadequate substitutes for individual legal counsel.

**III. THE PANEL DECISION DOES NOT ACCOUNT FOR THE OBSTACLES TO OBTAINING MEANINGFUL JUDICIAL REVIEW PRESENTED BY BIA AND PFR REQUIREMENTS**

The panel’s opinion did not address the separate, additional barriers to review presented in the BIA administrative appeal process, which, pursuant to 8 U.S.C. § 1252(d)(1), must occur before a claim is ripe for judicial review through a PFR. *See Brown v. Holder*, 763 F.3d 1141, 1146 (9th Cir. 2014). Moreover, with few exceptions (such as the constitutional question allowance noted by the panel (Panel Decision at 1031)), the failure to exhaust administrative remedies includes the failure to present claims in the administrative forum below. *Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014).

Prior briefing in this case described many of the hurdles an unrepresented child would face in pursuing her case before the BIA. *IJ Amici Br.* at 13. It bears emphasis that – to avoid rejection or dismissal of the appeal – all of the documents must be completed in English, timely filed, and properly served on government
counsel. 8 C.F.R. §§ 1003.2(g)(1), 1003.33; see also IJ Amici Br. at 14; Executive Office for Immigration Review, U.S. Dep’t of Justice, Board of Immigration Appeals Practice Manual ("BIAPM") Ch. 3.1(c), 3.3. Even if an unrepresented child somehow managed to meet all of the BIA filing requirements, she still would face daunting challenges. Most significantly, she would have only 21 days after receiving the hearing transcript to file a brief. BIAPM Ch. 4.7(a)(i) and App’x F.20 The brief, which must be in English with citations to law and the record, is so critical that the BIA informs parties that "[a] well-written brief is in any party's best interest and is therefore of great importance to the [BIA]." Id. at Ch. 4.6(b). Long-standing ABA policy recognizes these difficulties by urging appointed counsel for children, and, notably, the BIA Practice Manual itself urges all appellants to obtain representation. Id. at Ch. 2.2(a).

The hurdles to meaningful judicial review do not end once the BIA issues its decision. The immigrant child, still unrepresented, must figure out how to file a PFR. BIA decisions denying immigrants relief provide no information about the right to appeal, the time limit for filing a PFR, or the relevant circuit court in which any PFR must be filed. Reform Report at 4-17.21

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20 A single extension of 21 days is available, but only if a number of procedural requirements are met. Id. at Ch. 4.7(c).

21 Out of the 13 different courts of appeal, the court with jurisdiction over the PFR is the one with jurisdiction over the immigration court where the IJ completed proceedings. Id. at 4-17 and n.138 (citing 8 U.S.C. § 1252(b)(2)). This can prove
Complicating matters further, a child has only 30 days from the date of the BIA’s administrative order to file a PFR. 8 U.S.C. § 1252(b)(1); Fed. R. App. P. 26(a); see also Reform Report at 4-16. The deadline is mandatory and jurisdictional, with equitable tolling rarely available. Reform Report at 4-16. The deadline does not account for any delays in the issuance or mailing of the decision by the BIA, for any actual delays delivering the decision to the child (id. at 4-17), or for the time necessary for the child to mail or deliver the PFR to the court of appeals. See Sheviakov v. INS, 237 F.3d 1144, 1146-47 (9th Cir. 2001). As the ABA has noted,

the 30-day deadline for filing a [PFR] can have harsh consequences. It also frustrates review because of the exigencies of removal. . . . 30 days is simply insufficient for petitioners who may be in detention or are without counsel. . . . Difficulties with language and in obtaining representation to file the appeal render a 30-day period far too short.

Reform Report at 4-17; see also ABA House of Delegates Recommendation 114D (adopted Feb. 2010).22

difficult to determine because some immigration courts conduct hearings by televideo, where the child and IJ are in different locations. Memorandum from the Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep’t of Justice, to All Assistant Chief Immigration Judges, Hearings Conducted through Telephone and Video Conference (Aug. 18, 2004), available at https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf.

22 Available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/114D.authcheckdam.pdf.
Any pro se child, even one with adult assistance, could be defeated by the complex requirements for exhausting an administrative appeal and filing a PFR. This reality, combined with the difficulties in developing an adequate record without counsel, prevents consistent, meaningful judicial review of immigrant children’s claims.

CONCLUSION

Due to the complexities of proceeding pro se before an IJ and exhausting administrative remedies at the BIA before filing a PFR, the panel’s decision creates a grave risk that most immigrant children will be unable to obtain meaningful access to judicial review of their various legal claims. For this reason and because of the ABA’s long-standing advocacy for recognition of the right to counsel for immigrant children, the ABA urges this Court to grant the petition for rehearing and rehearing en banc.

December 15, 2016

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 32(a), 29(c), AND 29(d)

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a) and 29(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d), and Circuit Rule 29-2(c)(2) because it contains 4,615 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Linda A. Klein
Linda A. Klein
CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that I will cause an original and seven copies of this brief to be filed with the Court at the directive of the Clerk of the Court.

The participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Linda A. Klein
Linda A. Klein
Volunteers Needed!

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ABA Immigrant Child Advocacy Network
February 20, 2017

MEMORANDUM FOR: Kevin McAleenan  
Acting Commissioner  
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FROM: John Kelly  
Secretary  

SUBJECT: Enforcement of the Immigration Laws to Serve the National Interest  

This memorandum implements the Executive Order entitled “Enhancing Public Safety in the Interior of the United States,” issued by the President on January 25, 2017. It constitutes guidance for all Department personnel regarding the enforcement of the immigration laws of the United States, and is applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). As such, it should inform enforcement and removal activities, detention decisions, administrative litigation, budget requests and execution, and strategic planning.
With the exception of the June 15, 2012, memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” and the November 20, 2014 memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,” all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict—including, but not limited to, the November 20, 2014, memorandum entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” and “Secure Communities.”

A. The Department’s Enforcement Priorities

Congress has defined the Department’s role and responsibilities regarding the enforcement of the immigration laws of the United States. Effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens.

Except as specifically noted above, the Department no longer will exempt classes or categories of removable aliens from potential enforcement. In faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law. In order to achieve this goal, as noted below, I have directed ICE to hire 10,000 officers and agents expeditiously, subject to available resources, and to take enforcement actions consistent with available resources. However, in order to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation, Department personnel should prioritize for removal those aliens described by Congress in Sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (4) of the Immigration and Nationality Act (INA).

Additionally, regardless of the basis of removability, Department personnel should prioritize removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Director of ICE, the Commissioner of CBP, and the Director of USCIS may, as they determine is appropriate, issue further guidance to allocate appropriate resources to prioritize enforcement activities within these categories—for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.

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1 The November 20, 2014, memorandum will be addressed in future guidance.
B. Strengthening Programs to Facilitate the Efficient and Faithful Execution of the Immigration Laws of the United States

Facilitating the efficient and faithful execution of the immigration laws of the United States—and prioritizing the Department’s resources—requires the use of all available systems and enforcement tools by Department personnel.

Through passage of the immigration laws, Congress established a comprehensive statutory regime to remove aliens expeditiously from the United States in accordance with all applicable due process of law. I determine that the faithful execution of our immigration laws is best achieved by using all these statutory authorities to the greatest extent practicable. Accordingly, Department personnel shall make full use of these authorities.

Criminal aliens have demonstrated their disregard for the rule of law and pose a threat to persons residing in the United States. As such, criminal aliens are a priority for removal. The Priority Enforcement Program failed to achieve its stated objectives, added an unnecessary layer of uncertainty for the Department’s personnel, and hampered the Department’s enforcement of the immigration laws in the interior of the United States. Effective immediately, the Priority Enforcement Program is terminated and the Secure Communities Program shall be restored. To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Department shall eliminate the existing Forms I-247D, I-247N, and I-247X, and replace them with a new form to more effectively communicate with recipient law enforcement agencies. However, until such forms are updated they may be used as an interim measure to ensure that detainers may still be issued, as appropriate.

ICE’s Criminal Alien Program is an effective tool to facilitate the removal of criminal aliens from the United States, while also protecting our communities and conserving the Department’s detention resources. Accordingly, ICE should devote available resources to expanding the use of the Criminal Alien Program in any willing jurisdiction in the United States. To the maximum extent possible, in coordination with the Executive Office for Immigration Review (EOIR), removal proceedings shall be initiated against aliens incarcerated in federal, state, and local correctional facilities under the Institutional Hearing and Removal Program pursuant to section 238(a) of the INA, and administrative removal processes, such as those under section 238(b) of the INA, shall be used in all eligible cases.

The INA § 287(g) Program has been a highly successful force multiplier that allows a qualified state or local law enforcement officer to be designated as an “immigration officer” for purposes of enforcing federal immigration law. Such officers have the authority to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, and conduct searches authorized under the INA, under the direction and supervision of the Department.

There are currently 32 law enforcement agencies in 16 states participating in the 287(g)
Program. In previous years, there were significantly more law enforcement agencies participating in the 287(g) Program. To the greatest extent practicable, the Director of ICE and Commissioner of CBP shall expand the 287(g) Program to include all qualified law enforcement agencies that request to participate and meet all program requirements. In furtherance of this direction and the guidance memorandum, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (Feb. 20, 2017), the Commissioner of CBP is authorized, in addition to the Director of ICE, to accept State services and take other actions as appropriate to carry out immigration enforcement pursuant to section 287(g) of the INA.

C. Exercise of Prosecutorial Discretion

Unless otherwise directed, Department personnel may initiate enforcement actions against removable aliens encountered during the performance of their official duties and should act consistently with the President’s enforcement priorities identified in his Executive Order and any further guidance issued pursuant to this memorandum. Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws. They also have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. The Department shall prioritize aliens described in the Department’s Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers.

The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, or the USCIS Field Office Director, Asylum Office Director or Service Center Director.

Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws. The General Counsel shall issue guidance consistent with these principles to all attorneys involved in immigration proceedings.

D. Establishing the Victims of Immigration Crime Engagement (VOICE) Office

Criminal aliens routinely victimize Americans and other legal residents. Often, these victims are not provided adequate information about the offender, the offender’s immigration status, or any enforcement action taken by ICE against the offender. Efforts by ICE to engage these victims have been hampered by prior Department of Homeland Security (DHS) policy extending certain Privacy Act protections to persons other than U.S. citizens and lawful permanent residents, leaving victims feeling marginalized and without a voice. Accordingly, I am establishing the Victims of Immigration Crime Engagement (VOICE) Office within the Office of
the Director of ICE, which will create a programmatic liaison between ICE and the known victims of crimes committed by removable aliens. The liaison will facilitate engagement with the victims and their families to ensure, to the extent permitted by law, that they are provided information about the offender, including the offender's immigration status and custody status, and that their questions and concerns regarding immigration enforcement efforts are addressed.

To that end, I direct the Director of ICE to immediately reallocate any and all resources that are currently used to advocate on behalf of illegal aliens (except as necessary to comply with a judicial order) to the new VOICE Office, and to immediately terminate the provision of such outreach or advocacy services to illegal aliens.

Nothing herein may be construed to authorize disclosures that are prohibited by law or may relate to information that is Classified, Sensitive but Unclassified (SBU), Law Enforcement Sensitive (LES), For Official Use Only (FOUO), or similarly designated information that may relate to national security, law enforcement, or intelligence programs or operations, or disclosures that are reasonably likely to cause harm to any person.

E. Hiring Additional ICE Officers and Agents

To enforce the immigration laws effectively in the interior of the United States in accordance with the President's directives, additional ICE agents and officers are necessary. The Director of ICE shall—while ensuring consistency in training and standards—take all appropriate action to expeditiously hire 10,000 agents and officers, as well as additional operational and mission support and legal staff necessary to hire and support their activities. Human Capital leadership in CBP and ICE, in coordination with the Under Secretary for Management and the Chief Human Capital Officer, shall develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires.

F. Establishment of Programs to Collect Authorized Civil Fines and Penalties

As soon as practicable, the Director of ICE, the Commissioner of CBP, and the Director of USCIS shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties which the Department is authorized under the law to assess and collect from aliens and from those who facilitate their unlawful presence in the United States.

G. Aligning the Department's Privacy Policies With the Law

The Department will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents. The DHS Privacy Office will rescind the DHS Privacy Policy Guidance memorandum, dated January 7, 2009, which implemented the DHS "mixed systems" policy of administratively treating all personal information contained in DHS record systems as being subject to the Privacy Act regardless of the subject's immigration status. The DHS Privacy Office, with the assistance of the Office of the General Counsel, will
develop new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems.

H. Collecting and Reporting Data on Alien Apprehensions and Releases

The collection of data regarding aliens apprehended by ICE and the disposition of their cases will assist in the development of agency performance metrics and provide transparency in the immigration enforcement mission. Accordingly, to the extent permitted by law, the Director of ICE shall develop a standardized method of reporting statistical data regarding aliens apprehended by ICE and, at the earliest practicable time, provide monthly reports of such data to the public without charge.

The reporting method shall include uniform terminology and shall utilize a format that is easily understandable by the public and a medium that can be readily accessed. At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following categories of information must be included: country of citizenship, convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and, if released, the reason for release and location of their release, aliens ordered removed, and aliens physically removed or returned.

The ICE Director shall also develop and provide a weekly report to the public, utilizing a medium that can be readily accessed without charge, of non-Federal jurisdictions that release aliens from their custody, notwithstanding that such aliens are subject to a detainer or similar request for custody issued by ICE to that jurisdiction. In addition to other relevant information, to the extent that such information is readily available, the report shall reflect the name of the jurisdiction, the citizenship and immigration status of the alien, the arrest, charge, or conviction for which each alien was in the custody of that jurisdiction, the date on which the ICE detainer or similar request for custody was served on the jurisdiction by ICE, the date of the alien’s release from the custody of that jurisdiction and the reason for the release, an explanation concerning why the detainer or similar request for custody was not honored, and all arrests, charges, or convictions occurring after the alien’s release from the custody of that jurisdiction.

I. No Private Right of Action

This document provides only internal DHS policy guidance, which may be modified, rescinded, or superseded at any time without notice. This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

In implementing these policies, I direct DHS Components to consult with legal counsel to ensure compliance with all applicable laws, including the Administrative Procedure Act.
Executive Order 13768 of January 25, 2017

Enhancing Public Safety in the Interior of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation’s immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. Policy. It is the policy of the executive branch to:

(a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. Definitions. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.
Sec. 4. Enforcement of the Immigration Laws in the Interior of the United States. In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

(a) Have been convicted of any criminal offense;
(b) Have been charged with any criminal offense, where such charge has not been resolved;
(c) Have committed acts that constitute a chargeable criminal offense;
(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
(e) Have abused any program related to receipt of public benefits;
(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. Civil Fines and Penalties. As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. Additional Enforcement and Removal Officers. The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.
Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. Review of Previous Immigration Actions and Policies. (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as “Secure Communities” referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. Department of Justice Prosecutions of Immigration Violators. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. Recalcitrant Countries. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. Office for Victims of Crimes Committed by Removable Aliens. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.
Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. Reporting. Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. Transparency. To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. Personnel Actions. The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

Sec. 18. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Program Letter 14-3

TO: All Executive Directors

FROM: Ronald S. Flagg General Counsel and Vice President for Legal Affairs

DATE: October 29, 2014

SUBJ: Assessing Eligibility of Aliens Under 45 C.F.R. § 1626.4(c)(1)

Introduction

LSC is issuing this Program Letter to provide guidance to recipients in light of the recent influx of non-citizens into the United States from Central America. LSC has received multiple inquiries from recipients and stakeholders about whether recipients may represent these non-citizens, particularly unaccompanied alien children. LSC has also learned that there may be some confusion about the use of 45 C.F.R. § 1626.4(c)(1), which became effective on May 19, 2014, to assess the eligibility of non-citizens who may qualify for legal assistance under one of the anti-abuse statutes. This Program Letter responds to the questions and clarifies the application of section 1626.4(c)(1).

May LSC recipients provide legal assistance to unaccompanied alien children?

Yes, if the child meets one of the exceptions to the general prohibition on legal assistance to non-citizens that are described in detail at 45 C.F.R. Part 1626.


An unaccompanied alien child, by definition, is an individual under the age of 18 who has no lawful immigration status in the United States and who has no parent or guardian available to provide care and custody in the United States. See 6 U.S.C. § 279(g); 8 U.S.C. § 1232(g). The statutes governing the care, placement, and provision of legal assistance to unaccompanied alien children do not authorize LSC recipients to provide legal assistance to unaccompanied alien children. Nor do any of the statutes discussed above authorize LSC recipients to assist unaccompanied alien children by virtue of their categorization as such. In
order for a recipient to represent a non-citizen, including an unaccompanied alien child, the non-citizen must fall into one of the exceptions to the general prohibition on legal assistance to non-citizens.

*How do recipients determine whether a non-citizen is eligible for assistance under one of the anti-abuse statutes? Does the non-citizen have to have been victimized in the United States?*

Reports indicate that a number of the non-citizens entering from Central America may have been victims of crimes or subject to abuse that would make them eligible for legal assistance under one of the anti-abuse statutes (e.g., VAWA 2005, the TVPA). Recipients should use 45 C.F.R. § 1626.4 to determine whether a non-citizen qualifies for LSC-funded legal assistance under one of the anti-abuse statutes. A recipient may provide legal assistance to non-citizens who are eligible under one of the anti-abuse statutes if providing the assistance is among the recipient’s priorities, as determined under 45 C.F.R. Part 1620.

Section 1626.4(c) describes the relationship between both (1) the qualifying activity and the United States and (2) the victim and the United States. Under section 1626.4(c)(1), the qualifying activity *does not have to have occurred in the United States*. For purposes of eligibility for LSC-funded legal assistance, an activity that “violated a law of the United States” means an activity that:

- Is described in the definition of *battered or subjected to extreme cruelty* in 45 C.F.R. § 1626.2(b);
- Is described in the definition of *victim of sexual assault or trafficking* in 45 C.F.R. § 1626.2(k);
- Meets the definition of *severe forms of trafficking in persons* in section 103(9) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7102(9); or

For example, the person may have suffered the requisite battery or sexual assault in his or her home country, on the journey to the United States, or in the United States. As long as the activity giving rise to eligibility meets one of the definitions listed above, the individual may be eligible for legal assistance under one of the anti-abuse statutes. In addition, some non-citizens, such as a parent of a minor victim of severe forms of trafficking, may be eligible under Part 1626 based on their relationship to a child or other relative who is eligible for assistance under one of the anti-abuse statutes. *See* 45 C.F.R. § 1626.4(a).

Section 1626.4(d) outlines the requirement for evidentiary support of an individual’s claim for eligibility under one of the anti-abuse statutes. Sections 1626(d)(2) and (d)(3) describe the types of documentation that recipients may consider as evidence, if credible, of an individual’s claim for eligibility under one of the anti-abuse statutes.
May a recipient represent a non-citizen if the individual will likely be victimized if returned to his or her country of origin?

Yes, if the non-citizen already meets one of the exceptions to the general prohibition on legal assistance to non-citizens. For example, if an applicant for assistance claims that he or she would be victimized again if returned to the applicant’s country of origin and demonstrates that he or she was subjected to sexual assault within the definition of 45 C.F.R. § 1626.2(k)(1), a recipient may represent that individual. If the individual has not been subjected to an activity that would give rise to eligibility or is not eligible for legal assistance under another exception to the general prohibition on legal assistance to non-citizens, a recipient may not assist that person based solely on a representation that the individual will likely be victimized if returned.

May a recipient represent an unaccompanied alien child in Special Immigrant Juvenile Status (“SIJS”) proceedings?

Yes, if the child meets one of the exceptions to the general prohibition on legal assistance to non-citizens. Under section 101(a)(27)(J) of the INA, a non-citizen minor may qualify for SIJS if a court determines that that reunification with the minor’s parent or parents is not viable because of abuse, abandonment, neglect, or similar basis under state law, and that it is not in the minor’s best interests to repatriate the minor to his or her country of origin or last habitual residence. 8 U.S.C. § 1101(a)(27)(J). Although nothing in section 101(a)(27)(J) or the statutes discussed above specifically authorizes LSC recipients to provide legal assistance to minors applying for SIJS, recipients may represent such minors if the minors fall under one of the exceptions to the general prohibition on legal assistance to non-citizens.
ADVISORY OPINION

AO-2016-002 (revised)

Subject: Permissibility of Providing Legal Services to Noncitizen Parents and Noncitizen Guardians of Children Seeking Special Immigrant Juvenile Status

Date: July 11, 2016 (revised August 26, 2016)

QUESTION PRESENTED

May LSC funding recipients represent noncitizen parents or guardians of noncitizen children seeking Special Immigrant Juvenile Status (SIJS) as a result of battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities?

BRIEF ANSWER

Yes. Recipients may represent noncitizen parents and, in some instances, noncitizen guardians of noncitizen children subjected to battery, extreme cruelty, sexual assault, human trafficking, stalking or other U-visa-listed activities, as long as the legal assistance is directly related to obtaining relief from the abuse for the child. Proceedings in which noncitizen parents or guardians petition for SIJS on behalf of their noncitizen children are proceedings directly related to obtaining relief from the abusive situation for the child.

BACKGROUND

LSC’s Office of Legal Affairs (OLA) received an inquiry from a law professor regarding the provision of LSC-funded legal assistance in SIJS proceedings. As a predicate to granting SIJS, a juvenile court must issue an order: 1) finding that the noncitizen child is dependent on a juvenile court or state agency or is legally committed to, or placed in the custody of an agency, individual or entity appointed by the state; 2) declaring that the child cannot be reunified with one or both parents due to abuse, neglect, abandonment, or other similar basis under state law; and 3) finding that return to the child’s home country is not in the child’s best interests (“SIJ predicate order”). We understand that in some jurisdictions, courts require a parent or guardian, not the child, to file a case that would lead to an SIJ predicate
order. We also understand that parents or guardians may seek an SIJ predicate order through a related proceeding, such as a child custody matter, paternity suit, or a child support case.

The professor sought guidance from OLA on whether LSC funding recipients may represent and provide legal assistance to noncitizen parents or guardians petitioning for SIJS on behalf of noncitizen children who have been subjected to battery, cruelty, sexual assault, or trafficking. Although we limit our analysis to legal assistance in proceedings that may lead to the issuance of an SIJ predicate order, we believe the analysis applies generally to instances in which a recipient seeks to provide legal assistance to a noncitizen parent who is eligible for legal assistance under 45 C.F.R. § 1626.4(a)(1)(ii).

In this opinion, we use the term “guardian” to refer to individuals who have custody of and responsibility for the child in question, regardless of whether that individual is the child’s court-appointed guardian or custodian. Such individuals should have the same characteristics as those who, under the applicable state law, are deemed to be acting in loco parentis or have the necessary relationship to become the child's legal guardian. Under the various applicable state laws, these characteristics typically include factors such as (for reasons other than pecuniary gain) the assumption of primary responsibility for the care, health, safety, and control of the child in a manner that provides for the child’s physical needs; providing a primary residence for the child or a residence that makes the child eligible for public education in the jurisdiction of the residence; or providing for and facilitating the child’s development, mental health, and emotional health.¹

Additionally, we adopt the Department of Homeland Security’s description of a “juvenile court” as “a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children.”² Examples of juvenile courts include juvenile, family, orphans, dependency, guardianship, probate, and delinquency courts. Id.

¹ See, e.g., DEL. CODE ANN. tit. 13, § 1101(10); D.C. CODE §§ 16-831.01(1), 160831.02(a)(1); 53 PA. CONS. STAT. § 5324 (2010).

ANALYSIS


Congress enacted limited exceptions to this general restriction in Pub. L. 104-134, Pub. L. 105-119, and in subsequent legislation not focused solely on LSC. These and other relevant statutes are defined as “anti-abuse statutes” in section 1626.2(a). See, e.g., Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7105(b)(1)(B) (“TVPA”); Violence Against Women and Department of Justice Reauthorization Act, Pub. L. 109-162, § 104; 111 Stat. 2440, 2510 (2006) (“VAWA 2005”). LSC issued several guidance documents reflecting the statutory changes made to the anti-abuse statutes and subsequently amended Part 1626 in May 2014 to incorporate these changes into the regulation. In particular, section 1626.4 implements the statutory exceptions to the general prohibition on legal assistance to noncitizens and governs whether noncitizens are eligible for LSC-funded legal assistance under one of the anti-abuse statues (e.g., VAWA 2005 and TVPA).

A. Providing legal assistance under section 1626.4(a)(1) to noncitizen parents of noncitizen children seeking Special Immigrant Juvenile Status (SIJS)

Whether recipients can represent and provide legal assistance to noncitizen parents of noncitizen children seeking SIJS depends on two factors: (1) whether the

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parent qualifies under section 1626.4(a)(1), and (2) whether the legal assistance includes representation in matters that will assist a person eligible under section 1626.4(a)(1) to escape from, ameliorate the current effects of, or protect against the abusive situation. *Id.* at § 1626.4(b)(2).

Section 1626.4(a)(1) identifies two categories of noncitizen individuals eligible for related legal assistance: noncitizens who have been subjected to battery, cruelty, sexual assault, or trafficking, or any U-visa-qualifying activity\(^4\) and noncitizen parents of children subjected to these activities. With respect to noncitizen parents, section 1626.4(a)(1)(ii) states that LSC recipients may provide *related legal assistance* to “an alien whose child, without the active participation of the alien, has been battered or subjected to extreme cruelty, or has been a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. § 1101(a)(15)(U)).” 45 C.F.R. § 1626.4(a)(1)(ii) (emphasis added). Noncitizen parents of such children may also be eligible for the same “related legal assistance” if the parents have themselves been battered, subjected to extreme cruelty, sexual assault or trafficking, or any U-visa-qualifying activity. *Id.* at § 1626.4(a)(1)(i).

“Related legal assistance” means “legal assistance directly related . . . to the prevention of, or obtaining relief from, the battery, cruelty, sexual assault, or trafficking.” *Id.* at § 1626.4(b)(1)(i). “Such assistance includes representation in matters that will assist a person eligible for assistance under [Part 1626] to escape from the abusive situation, ameliorate the current effects of the abuse, or protect against future abuse . . .” *Id.* at § 1626.4(b)(2).

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\(^4\) Qualifying crimes for a U-visa under § 101(a)(15)(U) of the Immigration and Nationality Act are “one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C. § 1101(a)(15)(U)(iii).
“The key factor for recipients to consider in determining whether a requested service is ‘related legal assistance’ is the connection between the assistance and the purposes for which assistance can be given: escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014). Although the SIJS provision in section 101(a)(27)(J) of the INA is not specifically referenced in Part 1626, recipients may nonetheless provide related legal assistance to a noncitizen seeking relief as an SIJ who falls under one of the exceptions to the general prohibition on legal assistance to noncitizens. See Program Letter 14-3 (Oct. 29, 2014).

Special Immigrant Juvenile Status permits noncitizen children who are present in the United States to apply for lawful permanent residency. See 8 U.S.C. § 1101(a)(27)(J); see also 8 U.S.C. § 1255(h) (describing how special immigrants can become eligible to adjust their status). The essential elements for obtaining SIJS are that:

(1) The child has been declared dependent on a juvenile court or has been legally committed to or placed in the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States;

(2) Reunification with one or more of the child’s parents is not viable due to abuse, neglect, abandonment, or similar basis under state law;

(3) The juvenile court determines that it is not in the best interest of the child to be returned to the parent’s previous country of nationality or country of last habitual residence; and

(4) The Secretary of Homeland Security consents to the grant of Special Immigrant Juvenile Status.

See 8 U.S.C. § 1101(a)(27)(J)(i)-(iii). A court order making the findings required in items (1)-(3) is referred to as an “SIJ predicate order.”

Providing legal assistance in the proceedings leading up to the grant of SIJS is “related legal assistance” under section 1626.4(b)(2), because one of the key elements for SIJS is a juvenile court’s finding that reunification with one or more of the child’s parents is not viable because of abuse, abandonment, neglect, or a
similar state law basis. Because the juvenile court may declare the noncitizen child dependent or place the child in custody for the purpose of preventing or obtaining relief from battery, extreme cruelty, sexual assault, or trafficking, there is a strong connection between the legal assistance and the purpose of “escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.” 79 Fed. Reg. 21868 (Apr. 18, 2014); 45 C.F.R. § 1626.4(b)(2). Thus, if local court rules preclude noncitizen children from filing the initial court case in juvenile court and/or being listed as the party of record, recipients may represent the noncitizen parents of such children because the noncitizen parents are eligible under section 1626.4(a)(1)(ii) and such assistance constitutes related legal assistance as defined by section 1626.4(b)(2). This is also true if the noncitizen parent has been abused, because the noncitizen parent would then be eligible under section 1626.4(a)(1)(i), and therefore entitled to the same related legal assistance defined in section 1626.4(b)(2).5

If a noncitizen child has been subjected to the activities listed in section 1626.4(a)(1)(ii), recipients may represent and provide related legal assistance to either the noncitizen child or the noncitizen parent, notwithstanding the fact that the legal assistance provided to the parent, who may not have a legally cognizable claim in his/her own right, could benefit the eligible noncitizen parent. The amended section 1626.4(a)(1)(ii), read together with the definition of related legal assistance in section 1626.4(b)(2), implements the VAWA provisions relating to LSC6 and reflects the congressional intent to allow recipients to provide legal assistance to noncitizen parents when doing so necessarily results or could result in a benefit to a noncitizen child (i.e., escaping from, ameliorating the current effects of, or preventing future abuse through a grant of SIJS).

This conclusion does not conflict with AO-2010-002, which addressed the question whether recipients could represent ineligible noncitizen parents of U.S.

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5 Recipients “may provide legal assistance to non-citizens who are eligible under one of the anti-abuse statutes if providing the assistance is among the recipient’s priorities, as determined under 45 C.F.R. Part 1620.” Program Letter 14-3 (Oct. 29, 2014).

citizen children in cases where the parent had a legally cognizable right and the child did not, but the representation would benefit the child. AO-2010-002 (Apr. 14, 2010). In the circumstances we are addressing here, the child has a legally cognizable right and is eligible for representation himself or herself.

B. Providing legal assistance under section 1626.4(a)(1) to noncitizen nonparent guardians of children seeking SIJS

The exceptions in section 1626.4(a)(1)(i) and (ii) apply to permit recipients to represent noncitizen children subjected to the activities listed therein and the noncitizen parents of such children. See 45 C.F.R. § 1626.4(a)(1)(ii) (“an alien whose child . . .’’). If the child is eligible under section 1626.4(a)(1)(i), however, and a noncitizen (nonparent) guardian of the child is also independently eligible under that provision, then a recipient may accept the noncitizen guardian as a client and provide related legal assistance pursuant to section 1626.4(b)(2) in SIJ proceedings that may ultimately benefit the child, because such assistance includes representation in matters that will assist eligible noncitizen children to escape from, ameliorate the current effects of, or protect against future abuse. See id. § 1626.4(b)(2).

We understand that there may be situations in which one or both parents of a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii) are unavailable (or even deceased), and the noncitizen child is in the custody of a noncitizen who is not independently eligible for legal assistance from an LSC-funded organization. In jurisdictions where local court rules preclude noncitizen children from filing a case that will lead to an SIJ predicate order, the phrase in section 1626.4(a)(1)(ii) that limits eligibility to “an alien whose child” has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States could be read to have the unintended consequence of depriving an otherwise eligible noncitizen child of the benefit of legal services provided by LSC recipients if it is interpreted to mean only the parent of such a child. This result is not consistent with Congress’ intent to expand legal assistance to immigrant victims of violence through VAWA 2005. See 151 Cong. Rec. H12124 (Dec. 17, 2005) (“This provision also includes an amendment to ensure that all legal services organizations can assist any victim of domestic violence, sexual assault and trafficking without regard to the victim's immigration status.”) (Statement of Sen. Sheila Jackson-Lee,
D-TX). There is no indication that Congress intended a child who has been subject to extreme cruelty, battery, sexual assault, or trafficking in the United States to be deprived of legal services solely because the child is in the custody of a noncitizen guardian instead of a noncitizen parent. Indeed, such an interpretation would lead to the anomalous result that children subject to violence or trafficking would lose their access to legal services if their parents were deceased or not present in the United States. To implement Congress' intent in these types of cases, LSC interprets the phrase “an alien whose child” in its own regulation to include noncitizens with custody or responsibility for a noncitizen child subjected to the activities listed in section 1626.4(a)(1)(ii).

LSC believes this interpretation is consistent with the congressional intent of the VAWA 2005 provisions relating to LSC. Although the recipient's client may, in these limited circumstances, be a noncitizen who is not otherwise eligible for LSC-funded legal assistance, the sole beneficiary of the representation is the intended beneficiary of the VAWA provisions implemented by section 1626.4(a)(1)(ii): the noncitizen child subjected to battery, extreme cruelty, sexual assault, or trafficking. The recipient's representation in these cases must be limited to proceedings related to helping the child "escape from the abusive situation, ameliorate the effects of current abuse, or protect against future abuse." 45 C.F.R. § 1626.4(b)(2). Such assistance may include seeking an SIJ predicate order. LSC believes the unrelated procedural barrier imposed by local court rules that preclude the noncitizen child who has been subjected to battery, extremely cruelty, sexual assault, or trafficking from petitioning for an SIJ predicate order should not prohibit recipients from representing noncitizen guardians of noncitizen children otherwise entitled to the protections afforded by VAWA, as long as the representation is limited to proceedings related to preventing or obtaining relief from the qualifying abuse.

C. Providing legal assistance under sections 1626.4(a)(2) and 1626.5 to noncitizen parents and noncitizen guardians of children seeking SIJS

In addition to VAWA, the Trafficking Victims Protection Act of 2000 and section 504(a)(11) of LSC's fiscal year 1996 appropriations act authorize LSC recipients to provide legal assistance to certain noncitizens. Individuals who are eligible for legal assistance as victims of severe forms of trafficking, derivative T-visa holders, or through one of the section 504(a)(11) exceptions to the general bar
on legal assistance to noncitizens may receive any permissible legal assistance from an LSC recipient. Such assistance may include filing a case on behalf of a child that would lead to a juvenile court making the findings required to file a petition for SIJS.

CONCLUSION

Pursuant to section 1626.4(a)(i) and (ii), LSC funding recipients may represent and provide legal assistance in SIJS proceedings to noncitizen parents of children who have been subjected to battery, cruelty, sexual assault, or trafficking, provided that such legal assistance is directly related to preventing or obtaining relief from the battery, cruelty, sexual assault or trafficking. 45 C.F.R. § 1626.4(b)(1). Such assistance includes representation in matters that will assist an eligible noncitizen child to escape from, ameliorate the effects of, or protect against future abuse, such as proceedings leading to an SIJ predicate order. Id. § 1626.4(b)(2). If local court rules preclude noncitizen children from initially filing cases in juvenile court that would lead to an SIJ predicate order, recipients may represent noncitizen parents or noncitizen guardians of such children and provide related legal assistance in such proceedings. Recipients may also provide any permissible legal assistance, including assistance with obtaining the orders needed to file an SIJS petition, to a noncitizen parent or noncitizen guardian who is eligible under the TVPA or section 504(a)(11) of LSC’s fiscal year 1996 appropriation act.

RONALD S. FLAGG
Vice President and General Counsel
Office of Legal Affairs
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISSETTE FLORES,
      Plaintiff-Appellee,

    v.

LORETTA E. LYNCH, Attorney General, Attorney General of the United States; JEH JOHNSON, Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, and its subordinate entities; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION,
      Defendants-Appellants.

No. 15-56434
D.C. No.
2:85-cv-04544-
DMG-AGR

OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted June 7, 2016
Pasadena, California

Filed July 6, 2016

Opinion by Judge Hurwitz

SUMMARY**

Immigration

The panel affirmed in part and reversed in part the district court’s order granting the motion of a plaintiff class to enforce a 1997 Settlement with the government which set a nationwide policy for the detention, release, and treatment of minors detained in Immigration and Naturalization Service custody, and remanded for further proceedings.

The panel held that the Settlement unambiguously applies both to minors who are accompanied and unaccompanied by their parents. The panel held, however, that the district court erred in interpreting the Settlement to provide release rights to accompanying adults. The panel also held that the district court did not abuse its discretion in denying the government’s motion to amend the Settlement.

* The Honorable Michael J. Melloy, Senior Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
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OPINION

HURWITZ, Circuit Judge:

In 1997, the plaintiff class ("Flores") and the government entered into a settlement agreement (the "Settlement") which "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS." Settlement ¶ 9. The Settlement creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.

In 2014, in response to a surge of Central Americans attempting to enter the United States without documentation, the government opened family detention centers in Texas and New Mexico. The detention and release policies at these centers do not comply with the Settlement. The government,
however, claims that the Settlement only applies to unaccompanied minors and is not violated when minors accompanied by parents or other adult family members are placed in these centers.

In 2015, Flores moved to enforce the Settlement, arguing that it applied to all minors in the custody of immigration authorities. The district court agreed, granted the motion to enforce, and rejected the government’s alternative motion to modify the Settlement. The court ordered the government to: (1) make “prompt and continuous efforts toward family reunification,” (2) release class members without unnecessary delay, (3) detain class members in appropriate facilities, (4) release an accompanying parent when releasing a child unless the parent is subject to mandatory detention or poses a safety risk or a significant flight risk, (5) monitor compliance with detention conditions, and (6) provide class counsel with monthly statistical information. The government appealed, challenging the district court’s holding that the Settlement applied to all minors in immigration custody, its order to release parents, and its denial of the motion to modify.

Although the issues underlying this appeal touch on matters of national importance, our task is straightforward—we must interpret the Settlement. Applying familiar principles of contract interpretation, we conclude that the Settlement unambiguously applies both to accompanied and unaccompanied minors, but does not create affirmative release rights for parents. We therefore affirm the district court in part, reverse in part, and remand.
BACKGROUND

I. History of the Litigation

In 1984, the Western Region of the Immigration and Naturalization Service ("INS") adopted a policy prohibiting the release of detained minors to anyone other than "a parent or lawful guardian, except in unusual and extraordinary cases." Reno v. Flores, 507 U.S. 292, 296 (1993) (quotation marks omitted). The next year, Flores filed this action in the Central District of California, challenging that policy and the conditions under which juveniles were detained pursuant to the policy. Id.

In 1986, the district court certified two classes:

1. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS’ Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.

2. All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 by the Immigration and Naturalization Service ("INS") within the INS’ Western Region and who have been, are, or will be subjected to any of the following conditions:
   a. inadequate opportunities for exercise or recreation;
b. inadequate educational instruction;

c. inadequate reading materials;

d. inadequate opportunities for visitation with counsel, family, and friends;

e. regular contact as a result of confinement with adult detainees unrelated to such minors either by blood, marriage, or otherwise;

f. strip or body cavity search after meeting with counsel or at any other time or occasion absent demonstrable adequate cause.

In 1987, the court approved a consent decree settling the detention condition claims. *Id.* That agreement required the government to “house all juveniles detained more than 72 hours following arrest in a facility that meets or exceeds” certain standards, except in “unusual and extraordinary circumstances.”

The district court then granted the Flores class partial summary judgment on the claim that the INS violated the Equal Protection Clause by treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings, the latter of whom were sometimes released to adults other than their parents. *Id.* In response, the INS adopted a rule allowing juveniles to be released to their parents, adult relatives, or custodians designated by their parents; if no adult relative was available, the rule gave the INS discretion to release a detained relative with the child. *Id.* at 296–97; *see* Detention and Release of Juveniles,
II. The Settlement

In 1997, the district court approved the Settlement. The Settlement defines a “minor” as “any person under the age of eighteen (18) years who is detained in the legal custody of the INS,” except for “an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult.” Settlement ¶ 4. The Settlement defines the contracting class similarly, as “[a]ll minors who are detained in the legal custody of the INS.” Id. ¶ 10.

The Settlement provides that “[w]henever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights.” Id. ¶ 12(A). “Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS’s concern for the particular vulnerability of minors.” Id. Within five days of arrest, the INS must transfer the minor to a non-secure, licensed facility; but “in the event of an emergency or influx of minors into the United States,” the INS need only make the transfer “as expeditiously as possible.” Id.

The Settlement creates a presumption in favor of release and favors family reunification:

Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the
minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

A. a parent;

B. a legal guardian;

C. an adult relative (brother, sister, aunt, uncle, or grandparent);

D. an adult individual or entity designated by the parent or legal guardian . . .

E. a licensed program willing to accept legal custody; or

F. an adult individual or entity seeking custody . . .

Id. ¶ 14; see also id. ¶ 18 (requiring "prompt and continuous efforts . . . toward family reunification and the release of the minor"). But, if the INS does not release a minor, it must place her in a "licensed program." Id. ¶ 19. A "licensed program" is one "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children," which must be "non-secure as required under state law" and meet the standards set forth in an exhibit attached to the Settlement. Id. ¶ 6. Those standards include food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy. Some minors, such as those who have
committed crimes, may be held in a juvenile detention facility instead of a licensed program. *Id.* ¶ 21.

The Settlement generally provides for the enforcement in the Central District of California, *id.* ¶ 37, but allows individual challenges to placement or detention conditions to be brought in any district court with jurisdiction and venue, *id.* ¶ 24(B). The Settlement originally was to terminate no later than 2002. *Id.* ¶ 40. But, in 2001, the parties stipulated that the Settlement would terminate “45 days following defendants’ publication of final regulations implementing this Agreement.” The government has not yet promulgated those regulations.

III. **Developments Subsequent to the Settlement**

Before 2001, “families apprehended for entering the United States illegally were most often released rather than detained because of a limited amount of family bed space; families who were detained had to be housed separately, splitting up parents and children.” *Bunikyte ex rel. Bunikiene v. Chertoff*, No. 1:07-cv-00164-SS, 2007 WL 1074070, at *1 (W.D. Tex. Apr. 9, 2007). “In the wake of September 11, 2001, however, immigration policy fundamentally changed,” with “more restrictive immigration controls, tougher enforcement, and broader expedited removal of illegal aliens,” which “made the automatic release of families problematic.” *Id.*

In 2001, the INS converted a nursing home in Berks County, Pennsylvania ("Berks") into its first family detention center. *Id.* Because Pennsylvania has no licensing requirements for family residential care facilities, Berks has been monitored and licensed by state authorities under the state standards applicable to child residential and day treatment facilities. *Id.* at *8.

In 2006, DHS converted a medium security prison in Taylor, Texas into its second family detention facility, the Don T. Hutto Family Residential Center ("Hutto"). *Bunikyte*, 2007 WL 1074070, at *1. In 2007, three children at Hutto, who were not represented by Flores’ class counsel, filed suit in the Western District of Texas, contending that the conditions at Hutto violated the Settlement. *Id.* at *1–2. In response, the government argued that the Settlement applied only to unaccompanied minors. The district court rejected that argument, holding that "by its terms, [the Settlement] applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.” *Id.* at *2–3 (quoting Settlement ¶ 9). The court then concluded that the minors’ confinement at Hutto violated the Settlement’s detention standards, *id.* at *6–15, but rejected the claim that the Settlement entitled the plaintiffs to have their parents released with them, *id.* at *16. The suit settled before trial. *In re Hutto Family Det. Ctr.*, No. 1:07-cv-00164-SS, Dkt. 94, (W.D. Tex. Aug. 26, 2007).

TVPRA partially codified the Settlement by creating statutory standards for the treatment of unaccompanied minors. See, e.g., 8 U.S.C. § 1232(c)(2)(A) (an unaccompanied alien child “shall be promptly placed in the least restrictive setting that is in the best interest of the child,” subject to considerations of flight and danger).

IV. The Enforcement Action and R.I.L-R v. Johnson

In 2014, a surge of undocumented Central Americans arrived at the U.S.-Mexico border. In response, ICE opened family detention centers in Karnes City and Dilley, Texas, and Artesia, New Mexico. It closed the Artesia center later that year. The detention centers operate under ICE’s Family Residential Detention Standards, which do not comply with the Settlement.

In January 2015, a group of Central American migrants, who were not represented by Flores class counsel, filed a putative class action, claiming that the government had adopted a no-release policy as to Central American families, and challenging that alleged policy under the Due Process Clause. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 170 (D.D.C. 2015). On February 20, 2015, the U.S. District Court for the District of Columbia granted the plaintiffs’ motion for a preliminary injunction. Id. at 171. The court found that ICE had not adopted a blanket no-release policy, but found ample support for the plaintiffs’ alternative contention that “DHS policy directs ICE officers to consider deterrence of mass migration as a factor in their custody determinations, and that this policy has played a significant role in the recent increased detention of Central American mothers and children.” Id. at 174. The court preliminarily enjoined the government from using deterrence as a factor in detaining class members. R.I.L-R v. Johnson, No. 1:15-cv-00011-JEB, Dkt. 32 (D.D.C. Feb. 20, 2015).
In May 2015, the government notified the court that it had decided “to discontinue, at this time, invoking deterrence as a factor in custody determinations in all cases involving families, irrespective of the outcome of this litigation,” while maintaining that it could lawfully reinstate the policy. *Id.* Dkt. 40. In June 2015, by the agreement of the parties, the district court in *R.I.L.-R* dissolved the preliminary injunction and closed the case, allowing plaintiffs to move to reinstate the preliminary injunction if the government again invoked deterrence in custody determinations. *Id.* Dkt. 43.

Meanwhile, on February 2, 2015, Flores filed a motion in the U.S. District Court for the Central District of California to enforce the Settlement, arguing that ICE had breached it by (1) adopting a no-release policy, and (2) confining children in the secure, unlicensed facilities at Dilley and Karnes.\(^1\) The government argued in response that the Settlement does not apply to accompanied minors, and filed an alternative motion to amend the Settlement to so provide. On July 24, 2015, the district court granted Flores’ motion, denied the government’s motion to amend, and also held that the Settlement requires release of a minor’s accompanying parent, “as long as doing so would not create a flight risk or a safety risk.”\(^2\) On August 21, 2015, the district court filed a remedial order. The government timely appealed. We have jurisdiction under 28 U.S.C. § 1292.

\(^1\) Flores also argued that the government breached Paragraph 12(A) by exposing children in temporary Border Patrol custody to “harsh, substandard” conditions. That issue is not implicated in this appeal.

\(^2\) The case was reassigned to Judge Dolly M. Gee, because the original judge, Robert J. Kelleher, had died.
STANDARD OF REVIEW

The Settlement is a consent decree, which, "like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree." *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005). We review the district court’s interpretation of the contract de novo. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985). "Motions for relief from judgment under Rule 60(b) are reviewed for abuse of discretion." *Asarco*, 430 F.3d at 978.

DISCUSSION

I. The Settlement Applies to Accompanied Minors

We agree with the district court that “[t]he plain language of the Agreement clearly encompasses accompanied minors.” First, the Settlement defines minor as “any person under the age of eighteen (18) years who is detained in the legal custody of the INS”; describes its scope as setting “nationwide policy for the detention, release, and treatment of minors in the custody of the INS”; and defines the class as “[a]ll minors who are detained in the legal custody of the INS.” Settlement ¶¶ 4, 9, 10. Second, as the district court explained, “the Agreement provides special guidelines with respect to unaccompanied minors in some situations,” and “[i]t would make little sense to write rules making special reference to unaccompanied minors if the parties intended the Agreement as a whole to be applicable only to unaccompanied minors.” *See id.* ¶ 12(A) ("The INS will segregate unaccompanied minors from unrelated adults."); *id.* ¶ 25 ("Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except . . . "). Third, as the district court reasoned, “the Agreement expressly identifies
those minors to whom the class definition would not apply”—emancipated minors and those who have been incarcerated for a criminal offense as an adult; “[h]ad the parties to the Agreement intended to exclude accompanied minors from the Agreement, they could have done so explicitly when they set forth the definition of minors who are excluded from the Agreement.” See id. ¶ 4.

The government nevertheless argues that certain terms of the Settlement show that it was never meant to cover accompanied minors. The Settlement defines “licensed program” as “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.” Id. ¶ 6. The government contends that this makes only “dependent minors” eligible for licensed programs; that Black’s Law Dictionary defines dependent minors to exclude accompanied minors, see Child, Black’s Law Dictionary (10th ed. 2014); and that it would make little sense for the Settlement to apply to accompanied minors but exclude them from licensed programs. We reject this argument. That a program is “licensed ... to provide ... services for dependent children” does not mean that only dependent children can be placed in that program. And, the definition of “licensed program” does not indicate any intent to exclude accompanied minors; rather, its obvious purpose is to use the existing apparatus of state licensure to independently review detention conditions.

At oral argument, the government cited a provision of the Settlement requiring that, “[b]efore a minor is released from INS custody pursuant to Paragraph 14 above, the custodian must execute an Affidavit of Support (Form I-134)
and an agreement to,” among other things, provide for the minor’s well-being and ensure the minor’s presence at immigration proceedings. Settlement ¶15. The government claims that the reference to the “custodian” demonstrates that the Settlement did not contemplate releasing a child to an accompanying parent. The government is right in one sense—the Settlement does not contemplate releasing a child to a parent who remains in custody, because that would not be a “release.” But, it makes perfect sense to require an aunt who takes custody of a child to sign an affidavit of support, whether or not the child was arrested with his mother.

The government correctly notes that the Settlement does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children. For example, Exhibit 1, which sets forth requirements for licensed programs, does not contain standards related to the detention of adults or family units. But, the fact that the parties gave inadequate attention to some potential problems of accompanied minors does not mean that the Settlement does not apply to them. See Bumiikyte, 2007 WL 1074070, at *3 (“Though it is no defense that the Flores Settlement is outdated, it is apparent that this agreement did not anticipate the current emphasis on family detention. . . . Nonetheless, the Flores Settlement, by its terms, applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.”) (quoting Settlement ¶ 9); id. (“Paragraph 19 sets out the foundation of the detention standards applicable to any minor in United States immigration custody, and there is no reason why its requirements should be any less applicable in a family detention context than in the context of unaccompanied minors.”).
The government next argues that the Complaint and certified classes were limited to unaccompanied minors, and that the parties therefore could not have entered into a Settlement granting rights to accompanied minors. To be sure, this litigation initially focused on the problems facing unaccompanied minors, who then constituted 70% of immigrant children arrested by the INS. See Flores, 507 U.S. at 295. But, the Complaint was not limited to unaccompanied minors. The conduct Flores challenged—INS detention conditions and the Western Region release policy—applied to accompanied and unaccompanied minors alike. See Complaint ¶ 50 (challenging the INS’ “policy to indefinitely jail juveniles, particularly those whose parents INS agents suspect may be aliens unlawfully in the United States, unless and until their parent or legal guardian personally appears before an INS agent for interrogation and to accept physical custody of the minor.”); id. ¶¶ 65, 70–79 (challenging juveniles’ condition of confinement in INS facilities, including the lack of education, recreation, and visitation, and the imposition of strip searches). So did the remedies sought and the classes the district court certified. See id. at 29 ¶ 4 (requesting an order that the INS admit juveniles to bail without requiring that their parents or legal guardians appear before INS agents); Order re Class Certification (certifying a class for the release claims and a class for the detention conditions claims).

The government has not explained why the detention claims class would exclude accompanied minors; minors who arrive with their parents are as desirous of education and recreation, and as averse to strip searches, as those who come alone. As for release, the government focuses narrowly on the release class definition. See Order re Class Certification at 2 (defining the release class to include all minors arrested in the INS’ Western Region “who have been, are, or will be
denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them”). But, the release class was certified expressly to challenge the Western Region’s policy of not releasing detained minors to anyone other than a parent or guardian. Complaint ¶ 50; see also Flores, 507 U.S. at 296. That policy applied equally to accompanied minors, such as a boy detained with his mother who wanted to be released to his aunt but was refused because his father “fail[ed] to personally appear to take custody of [him].” See Order re Class Certification at 2.3

The government also contends that, because the four named plaintiffs in the Complaint were unaccompanied, a class including accompanied minors would run afoul of the requirements of typicality and representativeness. See Fed. R. Civ. P. 23. The government’s factual premise is questionable: one of the named plaintiffs was accompanied at the time of arrest by her adult brother, although he was released without her. Complaint ¶ 34. But, more importantly, the government waived its ability to challenge the class certification when it settled the case and did not timely appeal the final judgment. And, to the extent this and other arguments are aimed at providing extrinsic evidence of the meaning of the Settlement, they fail because the

3 Even if the Complaint only sought to assert the detention and release rights of unaccompanied immigrant children, it is far from clear that a settlement governing detention and release for all immigration children would be invalid. A consent decree may “provide[] broader relief than the court could have awarded after a trial”; the law only requires that the agreement “come within the general scope of the case made by the pleadings.” Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (alterations, citations, and quotation marks omitted).
Settlement unambiguously applies to accompanied minors. See *Asarco*, 430 F.3d at 980.

**II. The Settlement Does Not Require the Government to Release Parents**

Flores' motion to enforce argued that ICE's purported no-release policy, which allegedly denied accompanying parents "any chance for release," frustrated the minor class members' right to preferential release to a parent, and that to safeguard that right, ICE was required to give parents individualized custody determinations. After the district court tentatively agreed, Flores went further, proposing an order providing that "Defendants shall comply with the Settlement ¶ 14(a) by releasing class members without unnecessary delay in first order of preference to a parent, including a parent subject to release who presented her or himself or was apprehended by Defendants accompanied by a class member."

While acknowledging that "the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention," the district court nonetheless reasoned that "ICE's blanket no-release policy with respect to mothers cannot be reconciled with the Agreement's grant to class members of a right to preferential release to a parent." The court also found that the regulation upheld in *Flores*, 507 U.S. at 315, supported the release of an accompanying relative. See 8 C.F.R. § 212.5(b)(3)(ii) ("If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention." ). It also found support for that conclusion in ICE's practice, until June 2014, of generally releasing parents who were not flight or safety risks.
The district court therefore concluded that the government “must release an accompanying parent as long as doing so would not create a flight risk or a safety risk,” and it ordered:

To comply with Paragraph 14A of the Agreement and as contemplated in Paragraph 15, a class member’s accompanying parent shall be released with the class member in accordance with applicable laws and regulations unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.

The district court erred in interpreting the Settlement to provide release rights to adults. The Settlement does not explicitly provide any rights to adults. *Bunikyte*, 2007 WL 1074070 at *16. The fact that the Settlement grants class members a right to preferential release to a parent over others does not mean that the government must also make a parent available; it simply means that, if available, a parent is the first choice. Because “the plain language of [the] consent decree is clear, we need not evaluate any extrinsic evidence to ascertain the true intent of the parties.” *See Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007). In any case, the extrinsic evidence does not show that the parties intended to grant release rights to parents. “In fact, the context of the *Flores* Settlement argues against this result: the Settlement was the product of litigation in which unaccompanied minors argued that release to adults other
than their parents was preferable to remaining in custody until their parents could come get them.” *Buunikyte*, 2007 WL 1074070 at *16. The regulation the district court relied upon at most shows that the parties might have thought about releasing adults when executing the Settlement, not that they agreed to do so in that document. And, there is no evidence that ICE once released most children and parents because of the Settlement, rather than for other reasons.

Flores suggests that we construe the district court’s order narrowly, arguing that it only requires, as she initially requested, that the government grant accompanying parents individualized custody determinations “in accordance with applicable laws and regulations,” just as it would single adults. But, the district court plainly went further. A non-criminal alien detained during removal proceedings generally bears the burden of establishing “that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” *In re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006). But, the district court placed the burden on the government, requiring it to release an accompanying parent “unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security.” In addition, the order requires a “significant flight risk” to justify detention, while the usual standard is merely “a risk of flight.” *Id.* More importantly, parents were not plaintiffs in the *Flores* action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights
for parents, and the district court erred in creating such rights in the context of a motion to enforce that agreement.\footnote{In so holding, we express no opinion whether the parents of accompanied minors have a right to release, or if so, the nature of that right. Nor do we express an opinion whether the alleged no-release policy would violate the Settlement. We hold only that the Settlement is not the source of any affirmative right to release.}

III. The District Court Correctly Denied the Government's Motion to Amend the Settlement

Even if the Settlement applies to accompanied minors, the government argues that it is "no longer equitable" to apply it as written. See Fed. R. Civ. P. 60(b)(5) (allowing relief from judgment if "applying it prospectively is no longer equitable"); Horne v. Flores, 557 U.S. 433, 447 (2009) ("Rule 60(b)(5) serves a particularly important function in what we have termed ‘institutional reform litigation.’"). The district court denied this motion. We review that decision for abuse of discretion. Asarco, 430 F.3d at 978.

"[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992). When the basis for modification is a change in law, the moving party must establish that the provision it seeks to modify has become "impermissible." Id. at 388.
The government first argues that the Settlement should be modified because of the surge in family units crossing the Southwest border. "Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Id. at 385. The Settlement expressly anticipated an influx, and provided that, if one occurred, the government would be given more time to release minors or place them in licensed programs. Settlement ¶12. And, even if the parties did not anticipate an influx of this size, we cannot fathom how a "suitably tailored" response to the change in circumstances would be to exempt an entire category of migrants from the Settlement, as opposed to, say, relaxing certain requirements applicable to all migrants. See Rufo, 502 U.S. at 383.

The government also argues that the law has changed substantially since the Settlement was approved. It cites Congress' authorization of expedited removal—but that occurred in 1996, before the Settlement was approved. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 302, 110 Stat. 3009-546, 579–85 (1996). The government also notes that the Homeland Security Act of 2002 reassigned the immigration functions of the former INS to DHS; but there is no reason why that bureaucratic reorganization should prohibit the government from adhering to the Settlement. See Settlement ¶1 ("As the term [party] applies to Defendants, it shall include their . . . successors in office.").

The government also argues that some provisions of the TVPRA regarding the detention and release of unaccompanied minors are inconsistent with the Settlement. At most, that might support modification of the conflicting provisions so that they no longer apply to the unaccompanied minors covered by the TVPRA. But, the
creation of statutory rights for unaccompanied minors does not make application of the Settlement to accompanied minors "impermissible." The district court did not abuse its discretion in denying the motion to amend on the record before it.

CONCLUSION

We hold that the Settlement applies to accompanied minors but does not require the release of accompanying parents. We therefore affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.\(^5\) Each party shall bear its own costs.

\(^5\) We note that a second motion to enforce is pending in the district court.
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. E. F.M., a minor, by and through his Next Friend, Bob Ekblad, et al.,

Plaintiffs-Appellees,

v.

LORETTA E. LYNCH, Attorney General, et al.,

Defendants-Appellants.

On Appeal from the United States Court District Court
for the Western District of Washington
No. 2:14-cv-01026 (Hon. Thomas S. Zilly)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF A PETITION FOR REHEARING AND
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December 15, 2016
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ABA House of Delegates Recommendation 106A (adopted Feb. 2001),

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ABA House of Delegates Recommendation 120A (adopted Feb. 1983)........2

ABA House of Delegates Resolution 103D (adopted Aug. 2011),
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ABA House of Delegates Resolution 107A (adopted Feb. 2006),

ABA House of Delegates Resolution 113 (adopted Feb. 2015),
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Memorandum from Brian M. O’Leary, Chief Immigration Judge, Executive
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Immigration Judges, The Friend of the Court Model for Unaccompanied
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V
Amicus Curiae the American Bar Association ("ABA") respectfully submits this brief in support of the petition for rehearing and rehearing *en banc*.¹

**IDENTITY AND INTEREST OF AMICUS CURIAE**

The ABA is a voluntary, national membership organization of legal professionals. With over 400,000 members from every U.S. state and territory, including prosecutors, public defenders, private lawyers, legislators, judges, law professors, law students, and others, it is the largest voluntary professional membership organization in the United States.² ABA entities holding particular interests in the issues raised by this case include (a) the Commission on Immigration, which has directed the ABA’s efforts to ensure fair treatment and full due process rights for immigrants and refugees since 2002, and (b) the Working Group on Unaccompanied Minor Immigrants, which was created in 2014 to mobilize pro bono lawyers to represent and secure due process for the influx of

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¹ The ABA files this brief pursuant to Circuit Rule 29-2 as all parties have consented to its filing. The ABA certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

² Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the ABA’s Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.
Central American youth who otherwise would appear alone in immigration hearings.\(^3\)

For over 35 years, the ABA has advocated for the right to counsel for immigrants and refugees. For example, in the early 1980s, the ABA first began opposing legislative initiatives to limit the right to counsel in asylum and removal proceedings, ABA House of Delegates Recommendation 120A (adopted Feb. 1983), and adopting specific policies\(^4\) and standards calling for effective legal representation for immigrant children. In 2001, the ABA adopted a policy that “supports the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings.” ABA House of Delegates Recommendation 106A (adopted Feb. 2001).\(^5\) In 2004, it adopted standards providing that an unaccompanied child “has the right to have an Attorney represent him in any formal proceedings or other matter in which a decision will be made which will affect his immigration status” and that “an

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\(^3\) Other ABA entities, including the Standing Committee on Pro Bono and Public Service, the Center on Children and the Law, the Commission on Youth at Risk, and the Commission on Hispanic Legal Rights and Responsibilities, also have long-standing interests in standards and policies concerning immigrant children.

\(^4\) ABA Recommendations become policy only after approval by vote of the ABA House of Delegates, which is composed of representatives from states, territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others.

\(^5\) Available at http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_106a.authcheckdam.pdf.
Attorney shall be appointed for the Child, at public expense if necessary.”

COMM’N ON IMMIGRATION, AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES, Ch. III-H (2004).6

Recent ABA policy urges prompt screening of unaccompanied children, noting their “‘particular vulnerability’ . . . as an abused and otherwise victimized population.” ABA House of Delegates Resolution 103D, Report at 4 (adopted Aug. 2011).7 And, last year, the ABA adopted a resolution supporting the appointment of counsel for unaccompanied children and urging immigration courts not to conduct any hearings before children have had the opportunity to consult with counsel. ABA House of Delegates Resolution 113 (adopted Feb. 2015).8

In addition to decades of policy work, the ABA offers a valuable perspective because many of its members and staff have extensive, direct experience as counsel in immigration court and administrative appeals. Drawing on the substantial research and debate underlying its policies and the extensive experience of its members, the ABA believes that, in arriving at its jurisdictional decision, the

6 Available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

7 Available at http://www.americanbar.org/content/dam/abadirectories/policy/2011_am_103d.authcheckdam.pdf.

8 Available at http://www.americanbar.org/content/dam/abadirectories/policy/2015_hod_midyear_meeting_113.authcheckdam.docx.
panel mistakenly viewed certain removal hearing “protections” as adequate substitutes for counsel for immigrant children. The ABA believes that these safeguards do not and cannot displace the critical role of counsel nor guarantee consistent, meaningful judicial review of immigrant children’s various claims.

**SUMMARY OF ARGUMENT**

Plaintiffs here are particularly vulnerable litigants. They are children who seek appointed counsel to represent them in adversarial immigration removal proceedings that may have life or death consequences. With agency immigration judges powerless to guarantee their representation, the children sought relief in federal district court. While the district court held that the law permitted it to adjudicate the appointed counsel claims, the panel held that a claim-channeling provision jurisdictionally forecloses any district court involvement and that each child can raise his or her claim only on an individual appeal to a circuit court of appeals and only after entry of a final order of removal.

The ABA believes that the ultimate question presented by this case – i.e., whether immigrant children have a right to appointed counsel – is inextricably intertwined with the panel’s jurisdictional ruling. Without representation, immigrant children face proceedings that “largely mirror criminal trials,” where they must assume duties traditionally expected of attorneys:

[They] must identify, corroborate, and argue complex claims before a presiding judge. They must master a complex area of the law. They
must develop and argue factually and legally complex claims for relief. They must contest the government’s charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their [ ] banishment and, in some cases, significant peril.


As discussed in Section II below, the procedural safeguards cited by the panel do not adequately mitigate the harm faced by immigrant children – including those allowed to bring pillows and toys into the courtroom in light of their immaturity and related limitations\textsuperscript{10} – who shoulder these immense responsibilities in immigration court. Moreover, as explained in Section III below, the panel opinion does not account at all for the next phase of the process before the Board of Immigration Appeals ("BIA"), where there are no such protections. As a result, the likelihood that an unrepresented child could successfully navigate (a) an appeal to the BIA and (b) filing a Petition for Review ("PFR") is remote at best.\textsuperscript{11} Thus, the result of the panel’s decision is the impermissible "practical equivalent of a

\textsuperscript{9} \textit{Available at} http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107a.authcheckdam.pdf.


\textsuperscript{11} An unrepresented child who \textit{prevails} before the immigration court may nevertheless have to navigate the procedural complexities of the next phase, since the government has the right to appeal the immigration judge’s decision. \textit{See} 8 C.F.R. § 1003.3(a); \textit{see also} ICPM Ch. 4.16(h).

**ARGUMENT**

I. **LEGAL REPRESENTATION BENEFITS IMMIGRANT CHILDREN, THE GOVERNMENT, AND THE ADMINISTRATION OF JUSTICE**

The ABA has long recognized that effective legal representation is vital to ensuring due process for children in immigration proceedings. ABA studies and reports\(^{12}\) incorporate research demonstrating conclusively that the single most important factor affecting the outcome of an immigration case is the appearance of counsel for the immigrant.

It is easy to recognize that virtually all unrepresented immigrants are disadvantaged in removal proceedings due to their ignorance of legal procedure and general lack of fluency in English. For unrepresented children in particular, who lack the intellectual faculties, experience, and resources of adults, the deck is


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stacked even further against them in identifying avenues of relief, marshalling evidence, adhering to mandatory deadlines and procedures, presenting their cases in chief, refuting any government arguments, and ultimately prevailing. Without a lawyer, immigrant children with legitimate claims for relief do not have a fair chance of obtaining a favorable outcome.

Beyond the above, legal representation benefits the system overall by: (a) increasing efficiency, thereby reducing the costs of immigration proceedings (by, i.e., improving appearance rates in court, reducing the number of requests for continuances, and reducing the length of time in custody for certain children) and (b) ensuring that viable claims for relief are advanced and others are not, that the proper legal standards are applied, and that decisions turn on the full merits of the claims, all of which reinforce the legitimacy of immigration proceedings. See ABA House of Delegates Resolution 113, Report at 3-5; ABA House of Delegates Resolution 107A, Report at 8.

II. IMMIGRATION COURT PROTECTIONS DO NOT ADEQUATELY SAFEGUARD THE RIGHTS OF CHILDREN

Given the obstacles that pro se immigrants face, even the Executive Office for Immigration Review ("EOIR") itself recommends that everyone in removal proceedings obtain legal representation. ICPM Ch. 2.2(a). These obstacles, while substantial for nearly all immigrants, often can be insurmountable for children. To begin with, the manual containing the procedural rules is in English and available
online only, and the rules themselves are highly technical. Documents not filed or served properly or within specified deadlines may be rejected, and such technical errors can be the basis for denial of relief. See ICPM Ch. 3.1(a)-(d), 3.2, App’x D, App’x J.\textsuperscript{13} Even if an unrepresented child managed to file the necessary papers in a timely manner, he would remain severely disadvantaged at trial because unfamiliarity with courtroom procedures would prejudice his ability to identify and present fact and expert witnesses, cross-examine witnesses, and object to other government evidence. \textit{Id.} Ch. 4.16(f).

In answer to these and similar concerns, the panel apparently relied on certain “special protections” – such as the responsibilities of immigration judges ("IJs") and the possibility of third-party non-lawyers acting in the interest of unrepresented children – in formulating its interpretation of the claim-channeling provision. \textit{J. E. F.M. v. Lynch}, 837 F.3d 1026, 1033, 1037 (9th Cir. 2016) ("Panel Decision"). In the ABA’s experience, the protections outlined by the panel do not ensure meaningful judicial review.

First, the panel focused only on the appointed counsel issue and reasoned that a constitutional claim can be considered on a PFR even if the child never

\textsuperscript{13} For example, the failure to (a) properly hole punch a document or to paginate multiple exhibits consecutively could lead to the exclusion of evidence and (b) separately notify DHS counsel, the Immigration Court, and the BIA (if applicable) of a change of address could result in the inability to receive vital correspondence including hearing notices and decisions triggering appeal deadlines. ICPM Ch. 2.2(c), 3.3.
raised or preserved the claim in the administrative proceeding. *Id.* at 1038. The focus on this avenue for preserving constitutional claims ignores the reality that other claims of immigrant children would escape meaningful judicial review under the claim-channeling statute. *See, e.g.*, *Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (finding failure to exhaust where petitioner “did not give the BIA an opportunity to consider and remedy . . . procedural errors”).

Second, the panel’s view of the safeguards places much of the burden of protecting children’s rights on the IJs, who are duty-bound to act as impartial adjudicators.\(^{14}\) Beyond that neutrality obligation, it is unrealistic to expect or assume that IJs can step in to act on each child’s behalf, given heavy dockets that sometimes require them to “address 50 to 70 cases on a three- to four-hour time

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\(^{14}\) **EXECUTIVE OFFICE FOR IMMIGRATION REVIEW & NAT’L ASS’N OF IMMIGRATION JUDGES, ETHICS & PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES** 2 (2011), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf (citing 5 C.F.R. § 2635.101(b)(8)); *see also* Br. of Former Federal Immigr. Judges in Supp. of Pls.-Appellees and In Support of Partial Affirm. at 8 (Feb 14, 2016), ECF 31-1 (“IJ Amici Br.”). There is concern that IJs already have conflicting roles, given their appointment by the Attorney General. Reform Report at 2-9, 6-5 (“DOJ has taken the view that immigration judges are merely staff attorneys of the Department . . . required to comply with the rules of conduct applicable to DOJ attorneys, rather than the rules of judicial conduct.”); *see also* Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a “Government Attorney” or by a “Judge”?,* 16 BENDER’S IMMIGR. BULL. 1785, 1786 (2011).
frame.” See IJ Amici Br. at 4, 7-8. Those statistics demonstrate that, as a practical matter, IJs lack time to “probe the record” (Panel Decision at 1036) to identify possible bases for relief. By way of comparison, in the ABA’s experience, attorneys spend on average 50 hours per case representing unaccompanied minors. Reform Report at 5-16. Given these numbers, it is unsurprising that represented children are nearly five times more likely to obtain a favorable outcome in their proceedings than are unrepresented children. IJ Amici Br. at 22.

Third, the possibility of representation by a “reputable individual,” a parent, or legal guardian is not an adequate substitute for counsel in removal proceedings. Even when a child can find a non-family “reputable individual” willing to assist him, the court might not allow the person to proceed. And, similarly, a willing parent or guardian, if one exists, may represent the child only if the adult “clearly informs the Immigration Court of their relationship” and receives

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15 The time pressures are so intense that the President of the National Association of Immigration Judges repeatedly has compared adjudicating asylum cases to hearing death penalty cases in traffic court. See, e.g., Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 111th Cong. 55 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges).

16 The panel held that parents of accompanied children are capable of making a right-to-counsel claim for the child. Panel Decision at 1038.

17 A reputable non-family individual may appear on behalf of an immigrant child only if she correctly files both a declaration stating that she has received “no direct or indirect remuneration” and a notice of appearance, and then is “officially recognized by the Immigration Court.” ICPM Ch. 2.9(a).
authorization to proceed. ICPM Ch. 2.8. Acquiring these authorizations and communicating with the court can be challenging, especially for non-English speakers, and it is inconceivable that most of these lay individuals would be able to adequately understand, process, or assist with “[t]he proliferation of immigration laws and regulations [that] has aptly been called a labyrinth that only a lawyer could navigate.” *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).\(^\text{18}\)

Fourth, the Friend-of-the-Court (“FOTC”) models relied on by the panel (Panel Decision at 1037) are of limited utility. Although authorized by EOIR,\(^\text{19}\) these programs are not universal. Moreover, even in jurisdictions that have them, the FOTC’s role is, as the panel acknowledged, limited to non-representational assistance (Panel Decision at 1037), and the extent of the FOTC’s participation is “entirely within the court’s discretion” (EOIR Friend Memo at 1 (citing *In re Estate of Ohlhauser*, 101 N.W.2d 827, 829 (S.D. 1960))). An FOTC may try to protect the rights of a child if the IJ allows it, but, unlike counsel, an FOTC cannot

\(^{18}\) Further, the third party could have a conflict of interest. For example, a parent might not want to assist a child in making a status claim based on abuse or neglect by a parent or domestic violence at the hands of another family member.

file pleadings or motions, reserve an exception to any ruling of the court, exercise or waive rights, or prosecute an appeal. *Id.*

The ABA submits that this patchwork of “special protections” does little to ensure that immigrant children have adequate means to identify and pursue legitimate claims for relief from removal, and, as such, these protections are inadequate substitutes for individual legal counsel.

**III. THE PANEL DECISION DOES NOT ACCOUNT FOR THE OBSTACLES TO OBTAINING MEANINGFUL JUDICIAL REVIEW PRESENTED BY BIA AND PFR REQUIREMENTS**

The panel’s opinion did not address the separate, additional barriers to review presented in the BIA administrative appeal process, which, pursuant to 8 U.S.C. § 1252(d)(1), must occur before a claim is ripe for judicial review through a PFR. *See Brown v. Holder*, 763 F.3d 1141, 1146 (9th Cir. 2014). Moreover, with few exceptions (such as the constitutional question allowance noted by the panel (Panel Decision at 1031)), the failure to exhaust administrative remedies includes the failure to present claims in the administrative forum below. *Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014).

Prior briefing in this case described many of the hurdles an unrepresented child would face in pursuing her case before the BIA. IJ Amici Br. at 13. It bears emphasis that – to avoid rejection or dismissal of the appeal – all of the documents must be completed in English, timely filed, and properly served on government
counsel. 8 C.F.R. §§ 1003.2(g)(1), 1003.33; see also IJ Amici Br. at 14; Executive Office for Immigration Review, U.S. Dep’t of Justice, Board of Immigration Appeals Practice Manual ("BIAPM") Ch. 3.1(c), 3.3. Even if an unrepresented child somehow managed to meet all of the BIA filing requirements, she still would face daunting challenges. Most significantly, she would have only 21 days after receiving the hearing transcript to file a brief. BIAPM Ch. 4.7(a)(i) and App’x F.\textsuperscript{20} The brief, which must be in English with citations to law and the record, is so critical that the BIA informs parties that “[a] well-written brief is in any party’s best interest and is therefore of great importance to the [BIA].” \textit{Id.} at Ch. 4.6(b).

Long-standing ABA policy recognizes these difficulties by urging appointed counsel for children, and, notably, the BIA Practice Manual itself urges all appellants to obtain representation. \textit{Id.} at Ch. 2.2(a).

The hurdles to meaningful judicial review do not end once the BIA issues its decision. The immigrant child, still unrepresented, must figure out how to file a PFR. BIA decisions denying immigrants relief provide no information about the right to appeal, the time limit for filing a PFR, or the relevant circuit court in which any PFR must be filed. Reform Report at 4-17.\textsuperscript{21}

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\textsuperscript{20} A single extension of 21 days is available, but only if a number of procedural requirements are met. \textit{Id.} at Ch. 4.7(c).

\textsuperscript{21} Out of the 13 different courts of appeal, the court with jurisdiction over the PFR is the one with jurisdiction over the immigration court where the IJ completed proceedings. \textit{Id.} at 4-17 and n.138 (citing 8 U.S.C. § 1252(b)(2)). This can prove
Complicating matters further, a child has only 30 days from the date of the BIA’s administrative order to file a PFR. 8 U.S.C. § 1252(b)(1); Fed. R. App. P. 26(a); see also Reform Report at 4-16. The deadline is mandatory and jurisdictional, with equitable tolling rarely available. Reform Report at 4-16. The deadline does not account for any delays in the issuance or mailing of the decision by the BIA, for any actual delays delivering the decision to the child (id. at 4-17), or for the time necessary for the child to mail or deliver the PFR to the court of appeals. See Sheviakov v. INS, 237 F.3d 1144, 1146-47 (9th Cir. 2001). As the ABA has noted,

the 30-day deadline for filing a [PFR] can have harsh consequences. It also frustrates review because of the exigencies of removal. . . . 30 days is simply insufficient for petitioners who may be in detention or are without counsel. . . . Difficulties with language and in obtaining representation to file the appeal render a 30-day period far too short.

Reform Report at 4-17; see also ABA House of Delegates Recommendation 114D (adopted Feb. 2010). 22

difficult to determine because some immigration courts conduct hearings by televideo, where the child and IJ are in different locations. Memorandum from the Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep’t of Justice, to All Assistant Chief Immigration Judges, Hearings Conducted through Telephone and Video Conference (Aug. 18, 2004), available at https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf.

22 Available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/114D.authcheckdam.pdf.
Any pro se child, even one with adult assistance, could be defeated by the complex requirements for exhausting an administrative appeal and filing a PFR. This reality, combined with the difficulties in developing an adequate record without counsel, prevents consistent, meaningful judicial review of immigrant children’s claims.

**CONCLUSION**

Due to the complexities of proceeding pro se before an IJ and exhausting administrative remedies at the BIA before filing a PFR, the panel’s decision creates a grave risk that most immigrant children will be unable to obtain meaningful access to judicial review of their various legal claims. For this reason and because of the ABA’s long-standing advocacy for recognition of the right to counsel for immigrant children, the ABA urges this Court to grant the petition for rehearing and rehearing en banc.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 32(a), 29(c), AND 29(d)

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a) and 29(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d), and Circuit Rule 29-2(c)(2) because it contains 4,615 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Linda A. Klein
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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that I will cause an original and seven copies of this brief to be filed with the Court at the directive of the Clerk of the Court.

The participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Linda A. Klein
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HELP UNACCOMPANIED IMMIGRANT CHILDREN

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WHERE ARE YOU NEEDED?

- State family or juvenile court proceedings for findings of abandonment, abuse or dependency in order to qualify for special immigrant juvenile status (S-15) and remain in the US or
- Federal immigration court for asylum or other relief from deportation

HOW CAN YOU HELP?

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- You will be matched with an established legal assistance provider and receive training and mentoring

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