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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 WESTERN DIVISION  
15

16  
17 JENNY LISETTE FLORES, *et al.*,

18 Plaintiffs,

19 v.

20 MERRICK GARLAND, Attorney General  
21 the United States, *et al.*,

22 Defendants.  
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24  
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26  
27  
28

No. CV 85-4544-DMG-AGR<sub>x</sub>

MEMORANDUM IN SUPPORT OF  
MOTION TO ENFORCE SETTLEMENT  
RE OPEN-AIR DETENTION SITES

Hearing: March 29, 2024

Time: 9:30 a.m.

Hon. Dolly M. Gee

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1 **I. INTRODUCTION**

2 U.S. Customs and Border Protection (“CBP”) is holding *Flores* class  
3 members outdoors in open-air detention sites (“OADS”) along the U.S. border in  
4 extraordinarily unsafe and unsanitary conditions. Children have spent anywhere  
5 from several hours to several days at these sites before CBP transports them to  
6 brick-and-mortar facilities for formal processing.

7 Children in OADS are in the legal custody of CBP and are therefore entitled  
8 to the full protections of the *Flores* Settlement Agreement (“FSA”).<sup>1</sup> See FSA ¶ 10.  
9 CBP has decision-making authority over the welfare and legal status of these  
10 children from the moment of first discovery in the United States. See *Flores v.*  
11 *Barr*, No. 85-4544-DMG, 2020 WL 5491445, at \*4 (C.D. Cal. Sept. 4, 2020); 8  
12 U.S.C. § 1232(b)(2). CBP directs noncitizen children to wait at OADS for formal  
13 processing, including regularly physically transporting or escorting children to  
14 specific OADS. While children are at OADS, they cannot leave without CBP  
15 permission and are subject to CBP orders. CBP has at times exercised its authority  
16 to separate families, requiring adult men to move to different OADS than their  
17 children or other family members.

18 Both accompanied and unaccompanied children are regularly detained at  
19 OADS. CBP is plainly failing to meet its obligations to these children as it offers  
20 them no shelter or medical care and little to no sanitation, food, water, or blankets.  
21 Children and their families are forced to take shelter in porta potties, dumpsters, or  
22 tarps filled with trash to escape the cold, wind, and rain. Children and families  
23 must depend on the generosity of volunteers to meet their most basic needs. Some  
24 arrive with or develop serious medical conditions while at OADS and rely on  
25 humanitarian volunteers for medical care. CBP often fails to assist children in

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26  
27 <sup>1</sup> Plaintiffs anticipate Defendants will take the position that children in OADS are  
28 not class members. See Ex. 1, Declaration of Mishan Wroe, Ex. C, February 29,  
2024.

1 desperate need and sometimes exercises its authority over OADS to obstruct access  
2 to critical supplies provided by volunteers and to emergency medical services.

3 Although the numbers of detained children and the length of their detention  
4 at the OADS has varied over the last year, there is no question that the OADS are  
5 unequivocally unsafe and unsanitary. Holding children in these sites flagrantly  
6 violates the requirements of the Settlement. Without court intervention, CBP will  
7 continue to fail to meet its obligations to class members. The Court should grant  
8 Plaintiffs’ motion and order Defendants to comply with the Settlement by  
9 immediately placing all class members in safe and sanitary facilities.

10  
11 **II. STATEMENT OF FACTS**

12 Since at least February 2023, CBP has held children in OADS. *See* Ex. 2,  
13 Declaration of Pedro Rios ¶ 4, February 21, 2024 [“Rios Dec.”]. Both  
14 unaccompanied and accompanied children are held at these sites. *See id.* ¶ 37-38;  
15 Ex. 3, Declaration of Flor De Luna Alvarez-Lopez ¶ 7, February 28, 2024  
16 [“Alvarez-Lopez Dec.”]; Ex. 4, Declaration of Erika Pinheiro ¶¶ 12-14, February  
17 26, 2024 [“Pinheiro Dec.”]; Ex. 5, Declaration of Dr. Theresa Cheng ¶¶ 10-11,  
18 February 23, 2024 [“Cheng Dec.”]. CBP directs class members to remain at OADS  
19 for indefinite periods of time while they await formal processing, holding children  
20 overnight and in some cases for multiple nights. *See* Pinheiro Dec. ¶¶ 7, 12-13, 26-  
21 27 (unaccompanied children have stayed overnight at OADS and families with  
22 young children have sometimes spent multiple nights); Cheng Dec. ¶ 12 (five-year  
23 old and twelve-year-old spent three nights at the OADS); *see also* Ex. 6,  
24 Declaration of Adriana Jasso ¶ 28, February 21, 2024 [“Jasso Dec.”]; Rios Dec.  
25 ¶¶ 19-20, 36.

26 Plaintiffs are currently aware of at least seven OADS within California, in  
27 CBP’s San Diego Sector. Four of the OADS—Whiskey 8, Whiskey 4, Spooner’s  
28 Mesa, and 91X—are located west of the San Ysidro Port of Entry between the

1 primary and secondary U.S. border walls. *See* Rios Dec. ¶ 6. The other three  
2 OADS—Moon Valley, Tower 177, and Willows—are located outside the remote  
3 desert town of Jacumba and are monitored by CBP agents and surveillance towers.  
4 *See* Pinheiro Dec. ¶¶ 28-30, 45; Ex. 7, Declaration of Sarah Kahn ¶ 26, 55,  
5 February 27, 2024 [“Kahn Dec.”]. All of these sites are under CBP control.

### 6 **A. Children Are Held at OADS in Deplorable Conditions**

#### 7 1. CBP fails to provide children shelter at OADS.

8 CBP provides no shelter at OADS and children are left exposed to the  
9 elements. *See* Kahn Dec. ¶¶ 12, 58, 63, 105; Pinheiro Dec. ¶¶ 41-42, 45; Rios Dec.  
10 ¶¶ 27-28. As a result, people sleep in dirt littered with garbage, exposed to  
11 scorpions, snakes, and insects. *See* Pinheiro Dec. ¶ 43; Alvarez-Lopez ¶ 24. Some  
12 children and other noncitizens have resorted to sheltering in porta potties and  
13 dumpsters to escape the wind and rain. *See* Pinheiro Dec. ¶¶ 15, 43; Kahn Dec.  
14 ¶ 105; Cheng Dec. ¶ 32. Volunteers provide tents and tarps, but there are not  
15 enough and conditions are unsanitary. *See* Pinheiro Dec. ¶ 43; Ex. 8, Declaration of  
16 Saulo ¶ 3, February 3, 2024 [“Saulo Dec.”].

17 The temperature variations are extreme at OADS; it can be very hot and dry  
18 during the day and it can drop below freezing at night. *See* Pinheiro Dec. ¶¶ 41-42;  
19 Rios Dec. ¶ 11; Kahn Dec. ¶ 75, 81, 96, 101; *see also* Cheng Dec. ¶¶ 26-29 (“I  
20 alternated between worrying that children and other vulnerable groups would get  
21 heat stroke or hypothermia.”). CBP occasionally provides mylar blankets to  
22 detainees, but no other protection from the elements. Alvarez-Lopez Dec. ¶ 23;  
23 Rios Dec. ¶ 26; Kahn ¶ 49. Recently there has been heavy rainfall, leaving people  
24 cold and soaking wet. *See* Alvarez-Lopez Dec. ¶ 23; Kahn Dec. ¶¶ 7, 15, 75, 81;  
25 Ex. 9, Declaration of G. ¶¶ 8-11, February 21, 2024.

26 Children are at particular danger from exposure to the cold temperatures. *See*  
27 Pinheiro Dec. ¶ 15 (two children were hospitalized for hypothermia in February  
28 2024); Saulo Dec. ¶¶ 13, 16 (“My daughter was so cold that she was shaking . . . I

1 was panicking, I was afraid she would die from the cold.”); Kahn Dec. ¶¶ 67-69  
2 (“One father crouched so close to the fire, attempting to provide warmth to his  
3 baby, that smoke engulfed his baby. . . . Border Patrol agents could easily see the  
4 parents desperately trying to warm up their babies.”).

5 People held at these sites have no choice but to burn brush and garbage to try  
6 to stay warm. *See* Pinheiro Dec. ¶ 46; Kahn Dec. ¶¶ 91, 114; Cheng Dec. ¶ 25. The  
7 brush that is available in Jacumba is often creosote, which can be toxic when  
8 burned. *See* Pinheiro Dec. ¶ 46. Noncitizens and volunteers at OADS experience  
9 watery eyes, a burning sensation in their throats, black mucous coming from their  
10 noses and throats, and other respiratory problems. *See* Pinheiro Dec. ¶ 46; Cheng  
11 Dec. ¶ 25.

12 2. Conditions at OADS are grossly unsanitary.

13 There are no permanent toilets or showers at the OADS and CBP fails to  
14 provide people with basic hygiene items. *See* Alvarez-Lopez Dec. ¶¶ 26-27; Kahn  
15 Dec. ¶ 29; *see also* Ex. 10, Declaration of E.G. ¶ 11, February 3, 2024 [“E.G.  
16 Dec.”] (“There is no soap, no water, and no way to keep warm.”). CBP very  
17 recently set up handwashing stations at certain OADS, but some were filled with  
18 trash. *See* Kahn Dec. ¶¶ 46, 119; *see also* Pinheiro Dec. ¶ 47. Although CBP has  
19 set up some portable toilets, they are not regularly serviced and the few porta  
20 potties provided are insufficient for the number of people who need them, making  
21 them quickly unusable. *See* Kahn Dec. ¶ 29; Rios Dec. ¶ 30; E.G. Dec. ¶ 8;  
22 Pinheiro Dec. ¶ 47; Alvarez-Lopez Dec. ¶ 26. Sometimes the porta potties are so  
23 unsanitary, people cannot use them and must relieve themselves outdoors. *See*  
24 Pinheiro Dec. ¶ 47; Cheng Dec. ¶ 32. Even if porta potties are usable, they are  
25 often unavailable because the weather conditions are so severe that children and  
26 others crowd into the filthy porta potties to escape the wind and cold. *See* Kahn  
27 Dec. ¶ 105; Pinheiro Dec. ¶¶ 15, 43; Cheng Dec. ¶ 32.

28

1 Some OADS have dumpsters, but these dumpsters are not regularly serviced  
2 and the sites are filled with garbage. *See* Alvarez-Lopez Dec. ¶ 25; Cheng Dec.  
3 ¶¶ 25, 31; Saulo Dec. ¶ 3; Kahn Dec. ¶¶ 27, 29, 106; *see also id.* ¶ 31 (“The camp  
4 had a distinct, putrid smell, even in the windy post-storm air.”). Children and  
5 others nevertheless attempt to shelter in dumpsters to escape the cold. *See* Pinheiro  
6 Dec. ¶¶ 15, 43.

7 3. CBP fails to provide children held at OADS with minimally adequate  
8 food or water.

9 Despite holding children at OADS for long periods of time, CBP provides  
10 inadequate and inconsistent food and clean water. *See* Rios Dec. ¶¶ 25, 27; Jasso  
11 Dec. ¶¶ 22-25; Pinheiro Dec. ¶¶ 7, 36, 44, 47, 63; Kahn Dec. ¶¶ 12, 30, 54, 57, 66,  
12 72, 80, 107, 111, 119; Saulo Dec. ¶ 9. CBP agents sometimes provide just a single  
13 bottle of water and granola bar or a couple crackers per person. *See* Jasso Dec.  
14 ¶ 23; Pinheiro Dec. ¶ 44; Kahn Dec. ¶ 111; Ex. 11, Declaration of Lillian Serrano  
15 ¶ 19, February 26, 2024 [“Serrano Dec.”]. At other times they provide no food or  
16 water at all. *See* E.G. Dec. ¶ 10; Kahn Dec. ¶¶ 12, 30; *see also* Cheng Dec. ¶ 28 (at  
17 least six formula-fed infants were held at OADS without formula).

18 CBP depends on volunteers to provide basic provisions for people at the  
19 OADS. *See* Rios Dec. ¶ 16; Kahn Dec. ¶ 30; Jasso Dec. ¶¶ 6-7, 23, 25; Alvarez-  
20 Lopez Dec. ¶¶ 15, 21-22; Serrano Dec. ¶¶ 6, 23; *see also id.* ¶ 11 (agents inform  
21 volunteers of number of migrants at open-air sites so volunteers can “prepare and  
22 pack lunches for Border Patrol agents to take to the migrants in those sites”). At  
23 the same time, CBP controls when, where, and whether volunteers are permitted to  
24 provide this essential humanitarian aid, at times restricting people’s access to basic  
25 necessities. *See* Rios Dec. ¶¶ 16, 22-24; Jasso Dec. ¶¶ 24, 26-27; Serrano Dec.  
26 ¶¶ 10-11. CBP has even undermined class members’ access to critical supplies by  
27 threatening volunteers with arrest. *See* Serrano Dec. ¶¶ 20-21; Rios Dec. ¶ 24.  
28 When volunteers are unable to provide humanitarian aid, the situation is dire. *See*

1 Rios Dec. ¶ 32 (“I spoke with a group of men from India who told me they were  
2 starving. They showed me the leaves they were eating. They had been there for 5  
3 days.”).

4 4. Children face medical emergencies in OADS with little to no assistance  
5 from CBP.

6 CBP provides no first aid or medical care at OADS, even though many  
7 children arrive sick or injured or become sick while detained at OADS. *See* Cheng  
8 ¶¶ 33-42; Alvarez-Lopez Dec. ¶¶ 28, 33-34, 37, 39; Jasso Dec. ¶¶ 29-32; Rios Dec.  
9 ¶¶ 34, 39-40; Pinheiro Dec. ¶ 53; *see also* Saulo Dec. ¶¶ 15-16 (“[W]e told [CBP  
10 that our daughter] was freezing and she needed help. They told us to call 911. We  
11 tried to call 911 but we didn’t know what address to tell them.”). Instead, CBP  
12 agents and noncitizens rely on humanitarian volunteers to provide first aid. *See*  
13 Alvarez-Lopez Dec. ¶¶ 33-34, 37; *see also* Cheng Dec. ¶¶ 39-41 (CBP agents did  
14 not assist dying 13-year-old boy until volunteer doctor requested help); Rios Dec.  
15 ¶ 35 (CBP agent asked volunteers to monitor boy with a high fever).

16 When children are too sick or injured to remain at OADS, volunteers plead  
17 with CBP for access to emergency medical services. *See* Pinheiro Dec. ¶ 59;  
18 Serrano Dec. ¶¶ 25-30; *see also* Cheng Dec. ¶ 34 (“[W]e had to advocate with  
19 Border Patrol just to get them to call for an ambulance, taking precious time and  
20 limiting our ability to help other migrants in need.”); Jasso Dec. ¶¶ 30-32  
21 (describing volunteer efforts to get Border Patrol to respond to medical  
22 emergencies, including a child who suffered an epilepsy attack). Even when people  
23 can call for emergency care, ambulances sometimes refuse to come all the way to  
24 the OADS in Jacumba because of the remote location and rugged terrain. *See*  
25 Pinheiro Dec. ¶¶ 57, 60; Cheng Dec. ¶ 37. Some CBP agents refuse to help  
26 transport noncitizens to the ambulances. *See* Cheng Dec. ¶¶ 36-37; Pinheiro Dec.  
27 ¶ 57. At Whiskey 8, CBP agents must open a gate to permit ambulances to access  
28 noncitizens suffering medical emergencies. *See* Jasso Dec. ¶ 34.

1           CBP agents have also actively compromised access to medical care. For  
2 example, CBP agents regulate access by medical volunteers and have at times  
3 barred medical volunteers from the sites. *See* Pinheiro Dec. ¶ 49 (“Volunteer  
4 doctors, nurse practitioners, and medical students told me that they have been  
5 asked to leave the OADS by Border Patrol, even though Border Patrol is not  
6 providing any medical triage or treatment onsite.”); Cheng Dec. ¶¶ 24, 44-46  
7 (volunteer doctor provided care through slats in the border wall because Whiskey 8  
8 is located between two border walls in a restricted area); *see also id.* ¶ 35.

9           CBP further undermines access to medical care by threatening people  
10 seeking medical assistance with a loss of the right to seek asylum. *See* Pinheiro  
11 Dec. ¶ 56; Alvarez-Lopez Dec. ¶¶ 30, 34; *see also* Rios Dec. ¶ 36 (mother declined  
12 recommended medical treatment for herself and one-year-old baby after agents  
13 threatened negative immigration consequences if they went to the hospital). CBP  
14 agents have also accused noncitizens of faking illness to try to leave OADS. *See*  
15 Alvarez-Lopez Dec. ¶¶ 31-32; Pinheiro Dec. ¶¶ 54, 58; Serrano Dec. ¶¶ 25, 29; *see*  
16 *also* Cheng Dec. ¶ 37 (“Border Patrol . . . insisted that migrants fake medical  
17 emergencies in order to leave the camps and questioned my triaging and diagnoses  
18 of migrants’ health conditions.”).

### 19           **B. CBP Directs Children to OADS and Imposes its Authority There**

20           CBP instructs children to remain at OADS to await formal processing. In  
21 some cases, CBP transports individuals to OADS in CBP vehicles. *See* Jasso Dec.  
22 ¶ 8-10; Rios Dec. ¶¶ 16-17; Pinheiro Dec. ¶¶ 24-25; Serrano Dec. ¶¶ 6-7; Cheng  
23 Dec. ¶ 14; Alvarez-Lopez Dec. ¶¶ 14, 37. In other instances, CBP provides  
24 instructions to walk to specific OADS. *See* Jasso Dec. ¶¶ 9-10; Pinheiro Dec. ¶¶  
25 25, 39; Rios Dec. ¶¶ 12, 14-15, 41; Serrano Dec. ¶¶ 9-10. CBP also directs groups  
26 of noncitizens to follow CBP agents or CBP vehicles to OADS. *See* Pinheiro Dec.  
27 ¶ 24; Serrano Dec. ¶ 8; Kahn Dec. ¶¶ 52-53, 98, 115, 117; *see also* E.G. Dec. ¶ 6  
28 (“The agents told us to follow them and they drove here. We walked behind the

1 van from the wall.”); Saulo Dec. ¶ 8 (CBP agents “led us in a group down the  
2 mountain towards the camp, lighting the way with their flashlights”).

3 CBP agents decide which noncitizens can remain at which OADS. This  
4 sometimes even includes separating families. For example, CBP routinely requires  
5 men to move to a site called Spooner’s Mesa. *See* Jasso Dec. ¶ 10; Alvarez-Lopez  
6 Dec. ¶¶ 10-13; Serrano Dec. ¶ 10; Pinheiro Dec. ¶ 16; Rios Dec. ¶¶ 14-15. CBP  
7 has separated fathers from their children to send them to different areas of the same  
8 OADS, or to a different OADS. *See* Jasso Dec. ¶ 16. CBP has also separated male  
9 children from their parents. *See id.* ¶ 15 (“[A] mother . . . said that Border Patrol  
10 agents had separated [her minor son] from her and sent him to the Spooner’s Mesa  
11 OADS . . . [T]he agent was dismissive of the concerns about separating the mother  
12 from her minor child.”).

13 While at OADS, CBP agents instruct everyone present to stay within the site  
14 and to wait. *See* Pinheiro Dec. ¶¶ 26-27; E.G. Dec. ¶ 12. They make children and  
15 others sit or stand in rows for long periods of time. *See* Rios Dec. ¶¶ 10-11, 37;  
16 Jasso Dec. ¶ 13. CBP agents drive through the OADS with ATVs or cars to check  
17 that people are following their instructions. *See* Rios Dec. ¶ 11. If people are not  
18 seated or standing as instructed, CBP agents yell at everyone, including the  
19 children. *See id.*; Alvarez-Lopez ¶ 17.

20 CBP regularly subjects individuals at OADS, including children, to “counts”  
21 wherein they order individuals to stand in rows and then count everyone present.  
22 *See* Rios Dec. ¶ 21; Jasso Dec. ¶ 13; Alvarez-Lopez ¶¶ 15-16. CBP agents  
23 sometimes conduct counts in the middle of night, forcing people to wake up and  
24 leave their makeshift shelters to stand in the cold and rain. *See* Jasso Dec. ¶ 13.  
25 Agents have required everyone, including children, to wear only one layer of  
26 clothing during the count. *Id.* Parents have pleaded with CBP agents to allow their  
27 children to remain asleep under tarps during the count, but CBP agents deny these  
28

1 requests. *Id.* CBP agents yell at anyone, including children, who attempt to return  
2 to their makeshift shelters without permission to leave. *Id.*

3 Some CBP agents are aggressive and vulgar toward the people they hold at  
4 OADS, including children. *See* Kahn Dec. ¶¶ 92-94 (CBP agent directed family to  
5 separate and responded aggressively in English when girls pleaded with agent to  
6 keep their family together); Rios Dec. ¶ 33 (CBP agent responded to a person  
7 asking a question by saying “I don’t give a fuck how long you’ve been here,” and  
8 another said ‘get the fuck away from me.’”); Jasso Dec. ¶ 18 (CBP agent began to  
9 scream and swear at a woman who did not have her passport when he demanded  
10 it.).

### 11 **C. Children Must Remain at the OADS Until Processed By CBP**

12 CBP instructs people to stay at their designated OADS and determines  
13 whether and when children and adults can leave the site. *See* E.G. Dec. ¶ 12; Saulo  
14 Dec. ¶ 19; Pinheiro Dec. ¶¶ 29-30; *see also* Serrano Dec. ¶ 13 (“I witnessed a  
15 Border Patrol agent tell a group of migrants that if they did not follow instructions,  
16 he would leave them outside to wait to be transported without access to food and  
17 water for as long as the agent wanted.”). To ensure that people stay within  
18 designated OADS, CBP threatens individuals with deportation or other negative  
19 immigration consequences if they attempt to leave. *See* Saulo Dec. ¶ 19; Rios Dec.  
20 ¶ 36; Pinheiro Dec. ¶¶ 26-27 (at Willows OADS, “Border Patrol agents say  
21 [migrants] cannot cross the railroad track, or they will be deported.”).

22 CBP also physically blocks exits to the sites by controlling gates or  
23 patrolling the exits on foot and in vehicles.<sup>2</sup> *See* Jasso Dec. ¶ 20 (“At Whiskey 8,  
24 all the migrants are stuck behind the secondary border wall.”); Kahn Dec. ¶¶ 17,  
25 55, 71, 83-84, 98; *id.* ¶ 26 (“The only way to exit the Willows OADS is by  
26

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27  
28 <sup>2</sup> The remote location of the sites, coupled with the dangers that border the OADS,  
make it virtually impossible to leave. *See* Pinheiro Dec. ¶ 33.

1 traveling down a dirt road. . . Border Patrol trucks were parked and partially  
2 blocking the road.”); Pinheiro Dec ¶ 30 (“[W]hen I drive in and out of  
3 Jacumba to access the camps, I see at least two to five Border Patrol trucks  
4 patrolling the vicinity.”); *id.* ¶ 45 (“Near the Willows OADS, there are Border  
5 Patrol trucks always parked under a shade canopy.”). CBP has also installed  
6 surveillance towers at the OADS in Jacumba. *See id.* ¶ 28.

7 CBP agents have intercepted noncitizens who left an OADS and returned  
8 them to the sites. *See* Pinheiro Dec. ¶ 29 (“[T]wo migrants walked out of the Moon  
9 Valley OADS to a nearby gas station to buy supplies. They were apprehended by  
10 Border Patrol and brought back to the Moon Valley OADS.”). A CBP agent even  
11 stopped a volunteer doctor they assumed was a noncitizen and told her they would  
12 escort her back to the OADS. *See* Cheng Dec. ¶ 23.

13 CBP agents have at various times issued wristbands to noncitizens to track  
14 their arrival and length of stay at OADS. *See* Rios Dec. ¶ 19; Jasso Dec. ¶¶ 11-12;  
15 Pinheiro Dec. ¶ 31; Cheng Dec. ¶ 15. The wristbands vary in color to reflect the  
16 date an individual arrived at the OADS. *See* Jasso Dec. ¶ 11. When CBP does not  
17 use wristbands, processing is chaotic and individuals are often processed based on  
18 how quickly they can get in line, rather than how long they have been at the OADS  
19 or whether they are particularly vulnerable. *See* Pinheiro Dec. ¶ 32; Cheng Dec.  
20 ¶¶ 17-20. As a result, children and other vulnerable individuals remain at the  
21 OADS for longer periods of time. *See* Pinheiro Dec. ¶ 32; Kahn Dec. ¶ 99; Cheng  
22 Dec. ¶¶ 19, 43.

23 Although CBP sometimes prioritizes families with young children and other  
24 vulnerable people, this does not appear to be a formal policy and at other times  
25 CBP has processed single adults before families with children. *See* Pinheiro Dec.  
26 ¶¶ 31-32; Cheng Dec. ¶¶ 17-18; *see also* Kahn Dec. ¶ 99 (at about 11:45am, a CBP  
27 agent transported out “single adults, most of whom had arrived in the last hour, and  
28 left the families who had been waiting since 1 am behind.”); Saulo Dec. ¶ 20

1 (“They came a couple hours ago and they were lining everyone up but not the  
2 families.”). In some cases, CBP agents have refused to prioritize unaccompanied  
3 children, even after these children were brought to CBP’s attention. *See* Pinheiro  
4 Dec. ¶ 14 (CBP agent stated that he would not prioritize adolescents or children  
5 over five years old, regardless of whether they were unaccompanied).

6 CBP appears to exercise discretion as to how quickly it processes individuals  
7 out of the OADS. For example, OADS have been cleared quickly in advance of  
8 visits from higher-level DHS officials. *See id.* ¶¶ 36-39; *see also id.* ¶ 37 (“In the  
9 two to three days before [DHS headquarters staff] arrival, Border Patrol agents  
10 processed most migrants out of the Jacumba OADS” and “cleaned the camps of  
11 some of the garbage, dismantled some of the makeshift shelters built by migrants,  
12 and threw out tents and other shelters our collective had built”). These periods of  
13 faster processing then subside, and the cycle of detention continues. *Id.* ¶ 38.

### 14 15 **III. ARGUMENT**

#### 16 **A. Children at OADS are in the Legal Custody of CBP and are Therefore** 17 **Entitled to the Protections Guaranteed by the *Flores* Settlement** 18 **Agreement.**

19 The *Flores* Settlement Agreement protects “[a]ll minors who are detained in  
20 the legal custody of the INS.” FSA ¶ 10. “Although the Agreement’s terms refer to  
21 ‘INS,’ the Immigration and Naturalization Service’s obligations under the  
22 Agreement now apply to the Department of Homeland Security and the  
23 Department of Health and Human Services.” *Flores v. Barr*, 934 F.3d 910, 912 n.2  
24 (9th Cir. 2019). CBP is an agency of the Department of Homeland Security  
25 (“DHS”). *See Flores v. Sessions*, 394 F. Supp. 3d 1041, 1047 (C.D. Cal. 2017).

26 A “motion to enforce [a] settlement agreement essentially is an action to  
27 specifically enforce a contract.” *Adams v. Johns-Manville Corp.*, 876 F.2d 702,  
28 709 (9th Cir. 1989). This Court has repeatedly affirmed its jurisdiction to enforce  
the Settlement and set out the principles for doing so. *See, e.g., Flores v. Sessions*,

1 394 F. Supp. 3d at 1048-49.

2 The Settlement “employs the formal meaning of ‘legal custody,’ derived  
3 from family law, signifying the right and responsibility to care for the well-being  
4 of the child and make decisions on the child’s behalf.” *Flores v. Barr*, 2020 WL  
5 5491445, at \*3; *see also Flores v. Garland*, 3 F.4th 1145, 1154-55 (9th Cir. 2021).  
6 Children can be in the legal custody of both DHS and their parents. *See id.* at 1155  
7 (“[T]he parents of children in government custody do retain parental rights, and  
8 more than one person or entity can have legal custody of a child.”).

9 The Court previously held that children detained under Title 42 of the U.S.  
10 Code are *Flores* class members in DHS legal custody because “DHS has the  
11 authority to make decisions relating to the welfare and legal status of the children.”  
12 *Flores v. Barr*, 2020 WL 5491445, at \*4. In that case, legal custody was illustrated  
13 by DHS’s control over “whether, when, and how they apprehend individuals,” how  
14 minors are processed, “where and under what conditions to detain minors,” and  
15 “when and whether minors” leave DHS custody. *Id.* at \*4-5.

16 CBP exercises similar decision-making authority over children held in  
17 OADS. Children enter CBP’s legal custody upon initial discovery and remain in  
18 CBP’s legal custody until they are formally released or transferred to the custody  
19 of another federal agency.

20 1. CBP has custody of noncitizen children from the moment of first  
21 discovery.

22 CBP authority over a noncitizen child’s welfare and legal status begins when  
23 CBP agents first encounter the child. When agents find a noncitizen child in the  
24 United States and direct them to proceed to and/or to remain in any location, the  
25 child is subject to CBP’s control and CBP can choose to transport them for formal  
26 processing at any time. *See Flores v. Barr*, 2020 WL 5491445, at \*4 (“DHS agents  
27 have near complete control over whether, when, and how they apprehend  
28 individuals” and whether to process them under Title 8 or Title 42).

1 CBP’s decision as to where to hold children and when to process them has  
2 profound consequences for children’s safety and well-being, especially in light of  
3 the dangerous and unsanitary conditions at OADS. *See* Section II(A), *supra*.

4 The Trafficking Victims Protection Reauthorization Act confirms that  
5 CBP’s legal powers and responsibilities related to unaccompanied children begin  
6 at the time of discovery of the child. *See* 8 U.S.C. § 1232(b)(2) (requiring every  
7 federal agency to notify HHS “within 48 hours upon--(A) the apprehension or  
8 *discovery* of an unaccompanied alien child”) (emphasis added); *see also* 8 U.S.C.  
9 § 1232(a)(2)(B) (authorizing “[a]n immigration officer who *finds* an  
10 unaccompanied alien child” from a contiguous country “at a land border or port of  
11 entry” to determine the child’s admissibility and return the child to their country)  
12 (emphasis added).

13 Notably, CBP’s own national standards recognize its responsibility to make  
14 decisions affecting both accompanied and unaccompanied children’s welfare from  
15 the moment of initial encounter, stating that “Officers/Agents will consider the best  
16 interest of the juvenile *at all decision points beginning at the first encounter* and  
17 continuing through processing, detention, transfer, or repatriation.” U.S. Customs  
18 and Border Protection, *National Standards on Transport, Escort, Detention, and*  
19 *Search*, 4 (Oct. 2015) [“TEDS Manual”] (emphasis added),  
20 [https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-](https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf)  
21 [policy-october2015.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf); *see also Flores v. Barr*, 934 F.3d at 916 (approving use of  
22 TEDS Manual as evidence of government’s own standards).

23 DHS acknowledges that CBP exercises custodial control over *all* noncitizens  
24 it encounters in the United States and instructs to await processing. DHS recently  
25 represented to the U.S. Supreme Court that noncitizens encountered by CBP and  
26 directed to staging areas for processing have been apprehended and are not free to  
27 leave. *See Reply in Support of Application to Vacate the Injunction Pending*  
28 *Appeal at 19, DHS v. Texas*, No. 23A607, 2024 WL 145108 (U.S. Jan. 10, 2024)

1 (“Texas is wrong in asserting that Border Patrol has not apprehended noncitizens at  
2 the time they cross through the wire and are directed to staging areas for further  
3 processing.”). The Solicitor General explained:

4 Apprehension includes “temporary detainment,” and detention  
5 includes “[r]estraint from freedom of movement.” *Neither requires*  
6 *the kind of physical custody that the district court appeared to*  
7 *demand. Under a correct application of those definitions, the*  
8 *noncitizens were apprehended as they exited the river: They were not*  
9 *free to proceed further into the United States on their own, but were*  
10 *directed to a staging area for further evaluation and processing, along*  
11 *a narrow direct road bounded by the concertina wire on one side and*  
12 *fencing on the other, in an area with law-enforcement officers present.*

13 *Id.* at 7-8 (internal citations omitted) (emphasis added); *see also* TEDS Manual at  
14 28 (“Physical restraint is not an essential element of detention.”). Like individuals  
15 apprehended while crossing the Rio Grande River, noncitizens that CBP  
16 encounters along the border and directs to wait in OADS have been apprehended  
17 and detained.

18 CBP cannot evade its responsibilities as the legal custodian of the noncitizen  
19 children it encounters by holding them in OADS and delaying formal processing.  
20 The Settlement explicitly contemplates that children will enter legal custody prior  
21 to formal processing and imposes an affirmative duty on CBP to expeditiously  
22 process children. *See* FSA ¶ 12.A (“Whenever the INS takes a minor into custody,  
23 it shall expeditiously process the minor”); *see also* Section III(D), *infra*.

24 2. CBP has authority to determine where children are detained.

25 When CBP encounters noncitizen children, CBP “decides where and for  
26 how long to hold them,” and the child is legally in CBP custody. *Flores v.*  
27 *Garland*, 3 F.4th at 1155. CBP agents take a variety of actions after encountering  
28 noncitizens along the border in the San Diego sector to control where they are held.  
This includes transporting individuals to OADS in CBP vehicles, using CBP  
vehicles to escort noncitizens to OADS, directing noncitizens to walk to a specific  
OADS, telling people at OADS to remain there, and separating families into

1 different OADS. *See* Section II(B), *supra*; *see also* E.G. Dec. ¶¶ 5-6; Saulo Dec.  
2 ¶ 8; Pinheiro Dec. ¶¶ 24-25; Serrano Dec. ¶¶ 6-10; Jasso Dec. ¶¶ 8-9, 15-17; Rios  
3 Dec. ¶¶ 12, 14-15, 41.

4 Although physical restraint via transport is not required to show custody, *see*  
5 TEDS Manual at 28, it is especially obvious that children are in CBP custody when  
6 they are transported to OADS in CBP vehicles. *See* Jasso Dec. ¶ 8-10; Rios Dec.  
7 ¶ 16; Pinheiro Dec. ¶¶ 24-25; Serrano Dec. ¶¶ 6-7; Cheng Dec. ¶ 14; Alvarez-  
8 Lopez Dec. ¶¶ 14, 37. CBP’s transport standards refer to the transport of  
9 “detainees” and make clear that noncitizens transported in CBP vehicles are  
10 confined. *See* TEDS Manual at 5. These standards do not contemplate the  
11 possibility that CBP agents would transport noncitizens who are not detained. *Id.* at  
12 5-8; *see also* Pinheiro Dec. ¶ 24 (“I have been in numerous meetings with DHS  
13 leadership where they unequivocally stated that they could not transport migrants  
14 unless they were in their custody.”).

15 The Settlement similarly assumes that when CBP transports noncitizen  
16 children, the children are in CBP custody. The Settlement restricts the transport of  
17 unaccompanied minors with detained adults except in specified circumstances and  
18 requires CBP to “take necessary precautions for the protection of the well-being of  
19 such minors when transported with adults.” FSA ¶ 25. This provision would have  
20 little meaning if the children CBP transports are not in its custody.

21 CBP’s authority to decide *where* to hold noncitizens is also plainly  
22 illustrated by its practice of family separations. For example, CBP designates  
23 certain OADS such as Spooner’s Mesa for adult men. *See* Section II(B), *supra*.  
24 This results in fathers being separated from their children and at least one instance  
25 where a 17-year-old boy was separated from his mother. *See* Jasso Dec. ¶¶ 15-16.  
26 That CBP has the power to separate families by sending some family members to  
27 different OADS who would otherwise choose to remain together demonstrates its  
28 custodial control. *See id.* ¶¶ 15-17, 25; Rios Dec. ¶ 41; Alvarez-Lopez Dec. ¶ 13

1 (“I have witnessed mothers clinging to their sons who are barely adults and  
2 begging [CBP] not to separate them.”).

3           3. CBP controls conditions at OADS.

4           CBP’s unilateral control over the conditions at OADS further underscores  
5 that children held at these sites are in CBP custody. *See Flores v. Barr*, 2020 WL  
6 5491445, at \*5 (“DHS also has complete control over where and under what  
7 conditions to detain minors under Title 42”).

8           CBP monitors noncitizens at OADS and requires them to comply with CBP  
9 orders. *See* Section II(B), *supra*. For example, CBP agents conduct regular  
10 “counts” of noncitizens at these sites. *See id.*; *see also* Jasso Dec. ¶ 13; Rios ¶ 21;  
11 Alvarez-Lopez ¶¶ 15-16. Even outside of formal counts, CBP agents sometimes  
12 subject noncitizens to full-body searches, Jasso Dec. ¶ 19, and instruct noncitizens  
13 at the OADS to remain seated and yell at them if they try to move, Rios Dec. ¶ 11;  
14 Alvarez-Lopez Dec. ¶ 17. At various times CBP has issued wristbands to monitor  
15 when noncitizens entered the OADS. *See* Pinheiro Dec. ¶¶ 31-32; Alvarez-Lopez  
16 Dec. ¶ 18; Jasso Dec. ¶¶ 11-12.

17           CBP also controls children’s access to basic needs. CBP provides extremely  
18 minimal services such as porta potties, small snacks, minimal water, and mylar  
19 blankets. *See* Section II(A), *supra*; *see also* Jasso Dec. ¶¶ 23-24; Rios Dec. ¶¶ 25-  
20 27, 30, 32; Serrano Dec. ¶ 19; Alvarez-Lopez ¶¶ 21-22; Kahn Dec. ¶¶ 29, 111. Yet  
21 CBP also implicitly recognizes that it is not meeting the basic needs of migrants  
22 and depends on the generosity of volunteers to prevent an even greater  
23 humanitarian crisis. *See* Serrano Dec. ¶¶ 6, 10, 23; Jasso Dec. ¶¶ 23-25; Rios Dec.  
24 ¶ 16; Alvarez-Lopez ¶ 22. CBP nevertheless maintains control over volunteer  
25 access, preventing volunteers from entering sites like Spooner’s Mesa and at times  
26 threatening to arrest volunteers attempting to provide humanitarian assistance at  
27 other sites. *See* Serrano Dec. ¶¶ 10, 20-21; Jasso Dec. ¶¶ 24-27; Rios Dec. ¶¶ 7, 23-  
28 24; Alvarez-Lopez Dec. ¶¶ 8-9. CBP similarly blocks detainees from leaving

1 OADS to access basic necessities such as food and water. *See* Jasso Dec. ¶¶ 25-26;  
2 *see also* Pinheiro Dec. ¶ 29 (noncitizens were re-apprehended by CBP and returned  
3 to OADS after they attempted to leave to buy supplies).

4 Further, CBP controls noncitizen’s access to medical care, including by  
5 limiting access to emergency services and threatening families with negative  
6 immigration consequences for seeking emergency services. *See* Section II(A)(4),  
7 *supra*; Cheng Dec. ¶¶ 34-37, 44-46; Rios Dec. ¶ 36; Pinheiro Dec. ¶¶ 49-52, 54,  
8 56.

9  
10 4. CBP unilaterally determines when noncitizens can leave OADS.

11 Finally, CBP controls how long children remain in OADS before they are  
12 transported for formal processing. As in the Title 42 context, there appear to be no  
13 formal limits on children’s length of stay in OADS. *See* Pinheiro Dec. ¶ 13; *see*  
14 *also Flores v. Barr*, 2020 WL 5491445, at \*5 (“DHS has wide discretion to  
15 determine when and whether minors held under Title 42 leave their custody.”).  
16 Children have been held at OADS overnight and sometimes for multiple days  
17 before CBP transports them for formal processing. *See* Pinheiro Dec. ¶¶ 12-14;  
18 Rios Dec. ¶¶ 19-20; Cheng Dec. ¶ 12; Serrano Dec. ¶ 18. At other times, CBP has  
19 rapidly processed all noncitizens out of OADS, seemingly in response to upcoming  
20 high-level visits or formal complaints. *See* Pinheiro Dec. ¶¶ 36-39.

21 CBP instructs people to remain in OADS and regularly threatens noncitizens  
22 with immigration consequences if they try to leave. *See* Section II(A)(4), (C),  
23 *supra*; *see also* Pinheiro Dec. ¶¶ 26-27; Serrano Dec. ¶¶ 9, 12; Saulo Dec. ¶ 19.  
24 CBP agents have even told volunteers that they believe individuals may fake  
25 medical emergencies to leave the OADS. *See* Alvarez-Lopez Dec. ¶¶ 32-33;  
26 Serrano Dec. ¶ 29; Cheng Dec. ¶ 37. That CBP agents express this concern  
27 demonstrates that neither CBP nor those they hold at OADS believe that  
28 noncitizens are free to leave on their own.

1           Indeed, at the San Ysidro OADS, noncitizens are physically fenced in and  
2 monitored by CBP agents, making it unfeasible to leave without CBP permission.  
3 *See* Jasso Dec. ¶ 20; Rios Dec. ¶ 6. At the Jacumba OADS, CBP has installed  
4 surveillance towers and CBP agents patrol the area on trucks and are regularly  
5 present onsite. *See* Pinheiro Dec. ¶¶ 14, 25, 28, 30-31, 45; Kahn Dec. ¶¶ 26, 33,  
6 51-55, 62, 69, 71, 83-85, 98; Cheng Dec. ¶ 17. CBP has returned noncitizens who  
7 attempted to leave the OADS. *See* Pinheiro Dec. ¶ 29; *cf.* Cheng Dec. ¶ 23. CBP  
8 controls when noncitizen children are able to leave, and these children rightly  
9 believe that they must remain at the OADS until CBP decides to process them.<sup>3</sup>

10           CBP’s control over where and under what conditions children are held and  
11 when children are allowed to leave OADS plainly demonstrates that CBP has “the  
12 authority to make decisions relating to the welfare and legal status of the children,”  
13 *Flores v. Barr*, 2020 WL 5491445, at \*4, from the moment of first encounter until  
14 the children’s release or transfer to another agency.

15           **B. CBP Maintains OADS in Unsafe and Unsanitary Conditions**  
16           **Inconsistent with a Concern for the Particular Vulnerability of Minors.**

17           The Settlement requires CBP to “hold minors in facilities that are safe and  
18 sanitary and that are consistent with [CBP’s] concern for the particular  
19 vulnerability of minors.” FSA ¶ 12.A; *see also Flores v. Barr*, 2020 WL 5491445,  
20 at \*8 n.9 (noting that Settlement requires a “setting appropriate to the minor’s age  
21 and special needs” and “special concern for their particular vulnerability as  
22 minors”) (citing FSA ¶¶ 11-12.A)). Specifically, Paragraph 12.A requires  
23 Defendants to “provide access to toilets and sinks, drinking water and food as  
24 appropriate, medical assistance if the minor is in need of emergency services,

---

25  
26 <sup>3</sup> Even if it were theoretically possible for a child to leave an OADS, secure  
27 detention has never been a requirement for legal custody under the Settlement.  
28 Rather, the Settlement explicitly provides for non-secure custody. *See* FSA ¶ 6.

1 adequate temperature control and ventilation, [and] adequate supervision to protect  
2 minors from others . . . .”

3 In its June 2017 order, the Court found that the conditions in CBP stations in  
4 the Rio Grande Valley Sector (“RGV Sector”) were unsafe and unsanitary. *See*  
5 *Flores v. Sessions*, 394 F.Supp.3d at 1053-61. The Ninth Circuit agreed, explaining  
6 that “[a]ssuring that children eat enough edible food, drink clean water, are housed  
7 in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and are  
8 not sleep-deprived are without doubt essential to the children’s safety.” *Flores v.*  
9 *Barr*, 934 F.3d at 916 .

10 CBP’s abdication of its duties at OADS is far worse than CBP’s “egregious”  
11 failure to adequately feed children in the RGV Sector. *See id.* At OADS, CBP  
12 provides *no* meals. *See* Section II(A)(3), *supra*; *see also* E.G. Dec. ¶ 10; Alvarez-  
13 Lopez Dec. ¶¶ 21-22. When CBP provides drinking water, it provides insufficient  
14 amounts at best. *See* Alvarez-Lopez Dec. ¶¶ 21-22; Pinheiro Dec. ¶ 44; Rios Dec.  
15 ¶¶ 25-27, 32.

16 This Court previously found that safe and sanitary conditions require basic  
17 hygiene products like soap, towels, showers, dry clothing, and toothbrushes, and  
18 sleeping space. *See Flores v. Sessions*, 394 F.Supp.3d at 1053-61. Yet CBP does  
19 not even provide *shelter* at OADS, let alone hygiene products, showers, or dry  
20 clothing. *See* Section II(A), *supra*; *see also* E.G. Dec. ¶¶ 9, 11; Alvarez-Lopez  
21 Dec. ¶¶ 23-27; Kahn Dec. ¶¶ 12, 58, 63, 79, 105. The only toilets available are  
22 unsanitary porta potties. *See* Section II(A)(2), *supra*. If the conditions in the RGV  
23 Sector did not comply with the Settlement, conditions in the OADS are plainly  
24 noncompliant.

25 Moreover, OADS are affirmatively dangerous places to detain children. It is  
26 impossible to comply with the Settlement’s requirement of “adequate temperature  
27 control,” FSA ¶ 12.A, when children are left to sleep outdoors. Children have had  
28 to seek emergency medical care due to the extreme cold temperatures. *See* Pinheiro

1 Dec. ¶ 15; Saulo Dec. ¶¶ 13-17. CBP fails to provide any medical care and  
2 sometimes *impedes* emergency medical care. *See* Section II(A)(4), *supra*; *see also*  
3 Pinheiro Dec. ¶¶ 49, 51, 54. CBP does not supervise minors—including  
4 unaccompanied children—even if they become ill or have other urgent needs. *See*,  
5 *e.g.*, Pinheiro Dec. ¶ 13; Rios Dec. ¶ 35; Alvarez-Lopez Dec. ¶ 34.

6 Being held in OADS is also terrifying, particularly for children. *See* Kahn  
7 Dec. ¶ 42 (“Some of the children were clinging to their mothers and crying.  
8 Everyone I spoke to expressed fear, especially about being separated.”); Rios Dec.  
9 ¶ 42 (“[I]n the night, the children cry. . . . [T]he adults have a way to cope, but the  
10 children are scared.”); Pinheiro Dec. ¶ 53 (migrants appeared to experience panic  
11 attacks because “they did not know how long they would have to remain at the  
12 OADS.”). The dangerous environment CBP has created at OADS is fundamentally  
13 inappropriate for any child and in no way complies with the Settlement’s  
14 requirements for safe and sanitary conditions.

### 15 **C. CBP Separates Children from their Families and Fails to Ensure** 16 **Contact with Family Members**

17 Paragraph 12.A of the Settlement requires Defendants to ensure that children  
18 have “contact with family members who were arrested with the minor.” At OADS,  
19 CBP separates children from family members and does not ensure continuing  
20 contact. *See* Section II(B), *supra*. Children separated from their families are not  
21 informed of their right to communicate with their families, nor are they told what is  
22 happening, where their families have been sent, or if they will ever see them again.  
23 *See* Pinheiro Dec. ¶ 23; Jasso Dec. ¶¶ 15-17; Kahn Dec. ¶¶ 42, 92-94.

### 24 **D. CBP Fails to Expeditiously Process Class Members**

25 Paragraph 12.A of the Settlement provides that “[w]hensoever [CBP] takes a  
26 minor into custody, it shall expeditiously process the minor.” In violation of the  
27 Settlement, CBP fails to expeditiously process children and instead holds them in  
28 OADS for indefinite periods of time. The time children have been held can range

1 from several hours to several days. *See* Section II, *supra*; Pinheiro Dec. ¶¶ 12-14;  
2 Cheng Dec. ¶ 12. CBP appears to have no set time limit on children’s detention in  
3 OADS prior to formal processing and no clear policy to ensure children are  
4 expeditiously processed. *See* Pinheiro Dec. ¶¶ 13-14; Saulo Dec. ¶ 20; Cheng Dec.  
5 ¶¶ 17-19; Kahn Dec. ¶ 99; Alvarez-Lopez Dec. ¶ 39.

6  
7 **IV. CONCLUSION**

8 Plaintiffs respectfully request that the Court grant this motion and order  
9 Defendants to comply with the Settlement with respect to all class members held at  
10 OADS.

11  
12  
13 Dated: February 29, 2024

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