

Transcription of *The Gesture of Safe and Sanitary: ICE (pillow)*

Farrah Karapetian

1:16:36 length

June 18, 2019, Courtroom 3, 3rd Floor, San Francisco, California, Before: Tashima, W. Fletcher, Berzon

[08:16] All rise.

[08:31] The United States Court of Appeals for the 9th Circuit is now in session.

[08:35] Please be seated.

[08:42] Tashima: Welcome to the 9th circuit. We only have one case on the calendar this afternoon: Flores versus Barr. And I guess it's the government going first. When you're ready.

Fletcher: I'm really uncomfortable with this light coming down, but I'm not sure there's anything we can do about it.

[9:05] Government (Sarah Fabian): Would you like me to wait a moment? Fletcher: Yeah, about an hour when the sun's different. I think there's nothing we can do about it.

Fabian: Ok, your honor. With the court's permission, I'd like to reserve two minutes of my time for rebuttal. Fletcher: Ok, keep your eye on the clock, and we'll try to help.

Fabian: I will do that. Good afternoon. Sarah Fabian with the Office of Immigration Litigation from the Department of Justice, on behalf of the defendants, appellants in this case. There are several issues on appeal before the court today. I am happy to address all of them and of course any of the court's questions with regard to any of the issues, but I want to start by focusing on a few points related to two of the issues. First, with regard to the district court's finding that U.S. Customs and Border Protection was in violation of the Flores Settlement Agreement with regard to conditions in the Rio Grande Valley at Border Patrol Stations.

[10:02] Fletcher: Let me see if I've got the basic structure of this case right as it comes to us. We really don't have any jurisdiction over the case with respect to the appointment of the monitor, unless somehow the terms of the agreement have been changed. So, the fight with respect to the jurisdiction is whether or not all the court's findings as to violation were changes to the agreement. Have I got that right?

[10:29] Fabian: That's correct, your honor. I would note that in the order that's on appeal today, the district court declined to order a special monitor. A later order did impose a special monitor on the government, and that we had a protective notice of appeal that we've recently dismissed, so we're not appealing the later order appointing the monitor, so...

[10:49] Berzon: There was another appeal that you also dismissed, right? There were two. Oh, one that would have appointed a special monitor, but didn't say who the special monitor was, and there was a second one about the particular special monitor or some order from the special monitor. There were two more appeals.

[11:05] Fabian: There may even have been three, your honor. There was another appeal in ex parte order filed by the government that was denied by the district court that had been related to this appeal and we subsequently dismissed it and that's what allowed this argument to go forward. There was another order and it was actually we did appeal two orders and that appeal was an order appointing the special monitor and then we had moved for partial reconsideration of that order and that was denied and so we had a single appeal pending for those two orders.

[11:35] Berzon: Also hanging out there is the question of the regulation that will sort of negate all this and start it all over again. But that hasn't happened. There is no final regulation. Is that correct?

[11:49] Fabian: Right, your honor. The government had issued a proposed regulation. That comment period has closed. I don't have any information about when final regulations will be issued. That of course the government's position is will terminate the Flores Agreement by its terms, but whether that issue reaches this court is of course a question for another day.

[12:06] Berzon: Ok, so, what that means is that in this case, we have limited... we have jurisdiction only to the degree, and I gather you agree with this, that the order somehow amended the agreement, or modified it.

[12:30] Fabian: That's correct, your honor, and that goes to Judge Fletcher's question. To the extent that this court finds that the district court's order does nothing more than order the government to comply with the existing terms of the agreement, then the government acknowledges that this court would not have jurisdiction over the appeal.

[12:50] Berzon: Well, it certainly reads that way. In other words, her order is – Paragraph such and such is enforced, Paragraph such and such is enforced, Paragraph such and such is enforced – that's the order at the end, right?

[13:03] Fabian: Correct, your honor, and I think that is really the structure of the order. There are a few points where the government's position is that in holding the government to what the district court found are the terms of the agreement it's our position that in fact she expanded the terms of the agreement, and I believe at least one or two of the issues that we raise, another source for jurisdiction is that the district court declined to amend the agreement in accordance with statutes and regulations that have been issued after the agreement.

[13:39] Berzon: Did you actually ask her to amend or modify the agreement, or I thought you just argued that it didn't apply to this in light of the statutes, but you never actually asked her to modify it, did you?

[13:50] Fabian: That would be correct, your honor. In the district court, with regard to those issues, what we argued is that the statutes and regulations really required that certain provisions of the agreement not be enforced in the way that the court eventually did enforce them.

[14:08] Fletcher: So do we have jurisdiction over that? Because that argument as you just presented it is not that the agreement has been changed but rather that the agreement is no longer enforceable in light of subsequent law. Correct? Do we have jurisdiction then when your argument is not that the agreement has been changed but to all of a sudden because of intervening statutory change it's no longer compliant with law? Do we have jurisdiction over that if that's the frame of the argument?

[14:35] Fabian: There would be jurisdiction if the district court declined to modify the language of the statute.

[14:42] Fletcher: But did you ask the court to modify?

[14:45] Fabian: I would say that we did not directly ask the court to modify. What we did was ask the court to read the agreement in conjunction with the later issued statute, so to the extent that the district court read the agreement ignoring these later issued statutes, then we would argue that that meets the requirement of declining to modify or declining to read the agreement in conjunction...

[15:13] Fletcher: I kind of smell we may take you over time, but don't worry about that. I think I'm being kind of pedestrian about this, but I want to make sure I'm really understanding the jurisdictional issue, because the jurisdictional issue really smells a lot like... So for example, the agreement says the facilities in which we have the confinement or the detention have to be safe and sanitary. If we were to hold that the requirement of toothbrushes doesn't come within safe and sanitary, then we have jurisdiction, because that's a modification of the agreement. That's the argument?

[15:47] Fabian: That's correct, your honor. I would... To put it simply, that's correct.

[15:55] Fletcher: I'm trying to put it as simply as I can as we work our way into it. Ok.

[16:00] Tashima: Let me ask a further question along the same lines. In examining those questions, now, you raised a number of what I would call factual sub-issues. The jurisdiction to hear your appeal on your contention that somehow some of these orders amended the underlying consent decree: does that carry with it the jurisdiction to examine the factual question that you raise? For instance, you make some hearsay objections, right?

[16:42] Fabian: Correct, your honor.

[16:45] Tashima: Can we look into those?

[16:46] Fabian: I have asked myself that same question and I think that the answer is that if the court finds that there was no amendment to the agreement that there would not be jurisdiction to reach our evidentiary issues. I wish my answer were different because I think those are important and would like the court to reach them, but I believe my understanding of the statute would be that if the court finds no jurisdiction to hear the appeal in general, then I can't see how the court would have jurisdiction.

[17:14] Berzon: It might be most productive at least for me to hear... I mean your statutory argument is TVRA, right? And maybe also the earlier statute. Revised the I couldn't quite understand this. Revised the process for releasing minors, and therefore the agreement doesn't prevail. Is that essentially your argument?

[17:47] Fabian: Sure, your honor. Turning to the statutory question. I'm happy to do that. I would note that what we're appealing is sort of we have two issues that we're appealing with regard to a more singular finding of the district court, which is what is the impact of both the INA and the TVPRA on ICE's detention authority and how that impacts the Flores Agreement.

[18:20] Berzon: This is what I don't understand. I understand the thrust of your argument in that regard, it's that DHS doesn't make these release decisions. ORR and HHS makes them. Is that the thrust? After TVRA?

[18:41] Fabian: That's correct...

[18:42] Berzon: But what difference does that make? Isn't ORR essentially a successor just as DHS is to INA in this regard and therefore the agreement would still apply? Is it because ORR isn't a formal defendant here, or what's the problem?

[19:08] Fabian: I think your honor the position is the district court held that ICE would be required to make suitability assessments and to release children out of ICE family residential centers

[19:19] Berzon: Alright, and if we said, no, ICE doesn't have to do that, ORR does, you'd be happy?

[19:25] Fabian: Yes, your honor. Our position is simply that TVPRA has put that function of assessing suitability for release to HHS and that ICE, as we raised in the district court, ICE is simply not qualified to do that, and I understand the district court's sort of conclusion that ICE shouldn't be allowed out of that simply because they're not qualified, but the fact is that they're not qualified because the TVPRA has put that authority, put that mandate onto HHS and they are the ones with the expertise in that process.

[19:57] Fletcher: But if that's so, I mean, doesn't the agreement run against the government, rather than a particular subcategory of the government? Why is that a change that's relevant to the agreement?

[20:11] Fabian: You honor, the change, the district court held that it was specifically ICE was

required to conduct that conduct the suitability finding. Now suitability was in fact part of the Flores agreement, and that was then codified to some extent in the TVPRA which put that particular portion...

[20:35] Berzon: But you would agree that the agreement still binds the government, writ large, including ORR, to the terms of the agreement?

[20:45] Fabian: Correct, your honor. I think our concern there was really the district court's holding that ICE was obligated to conduct those findings.

[20:53] Tashima: Let me follow up on that now. So, your contention then is that ICE doesn't have that authority, after the TVPRA was enacted. Is that right? That authority is now with ORR?

[21:08] Fabian: Correct, your honor.

[21:09] Tashima: So what is that, an erroneous conclusion of law? To say that ICE had that authority?

[21:19] Fabian: Correct, your honor.

[21:26] Tashima: Now, what can we do with that? Can we say for instance, ORR has the authority, so what send it back to the district court and tell them to look at it from the point of view that it's ORR's obligation?

[21:49] Fabian: I think your honor what I would say is that here the district court has essentially these are the challenges of interpreting a very old agreement that was designed with the INS in mind, which is no longer around, and so I think to the extent that the district court really read the agreement and it having passed on to the new agencies to apply specifically to this agency, this court could remand the district court... I believe this court could find...

[22:25] Fletcher: So is your problem on this particular point only as to what part of the government has been directed to do this rather than what it has been directed to do?

[22:34] Fabian: Correct, your honor.

[22:35] Fletcher: That seems pretty easy, and maybe if we do have jurisdiction because it's a modification of the agreement, we have jurisdiction on that particular and fairly narrow point, we send it back to the district court to say well change it to ORR, end of story, that's easy, but that's all you're asking for with respect to this point?

[22:55] Fabian: Correct, your honor.

[22:56] Fletcher: Well, that's easy.

[22:58] Berzon: Is this even in the district court opinion as such?

[23:05] Fabian: It... I see I've reached my...

[23:07] Fletcher: Keep talking. We're going over.

[23:08] Tashima: And you haven't even started your argument yet. [laughter]

[23:12] Fabian: Yes, your honor, to the extent, what the district court said is that ICE is required to conduct this analysis, and it is in requiring ICE to conduct the analysis...

[23:23] Berzon: No, but did you bring this very technical problem to the district court's attention?

[23:33] Fabian: Do you mean in our briefing to the district court?

[23:34] Berzon: I'm not finding it. I'm looking through her opinion and I'm not finding it.

[23:40] Fabian: Sure... Let me...

[23:45] Berzon: It's not very important. I just think this is sort of the tail wagging the dog, so let's go to the dog. Ok?

[23:52] Fletcher: Now, with all of your time expired, would you like to begin your argument? [laughter]

[23:56] Fabian: Sure, your honor. Well, I want to make sure that I've addressed the court's pre-argument questions first. In asking about the statute... There are sort of two pieces to our statutory argument. The TVPRA piece is one of them, and then another issue that we had raised was with regard to the parole regulations and really how...

[24:15] Berzon: Ok, so you discuss parole regulations, but there's another parole regulation, which applies as I understand it generally to people in mandatory detention and includes release of juveniles. 215 point something or other.

[24:31] Fabian: Sure, 212.5 I think is the one that the court...

[24:35] Berzon: And you never discuss it and you just make believe it isn't there.

[24:42] Fabian: Your honor, I don't think that we would contend that it isn't there. I think that the government's position is that 212.5 applies and applies by its terms after someone is found to have credible fear. The statute and that is 235.3c, sorry the regulation 235.3c then points back to 212.5b as controlling release. 212.5b can apply in conjunction with 235.3b42 which is what we argue also must apply in looking at parole for individuals who have not yet been found to have credible fear and that is our position here is that to the extent that the district court read out the 235.3 piece for individuals who have not yet been found to have credible fear that the court erred in applying only 212.5b and I would note I think that in their opposition plaintiffs did say of course as I read it they said that 235.3b could still be applied with 212, and we agree with that. And so if that is plaintiff's position, then I think we agree. But our understanding of what the court was ordering was that ICE could not apply the 235.3 standard and was required only to apply the 212.5b standard.

[26:26] Berzon: I'm fairly confused, but I guess I'll have to read the standards more specifically.

[26:35] Fabian: I... I...

[26:35] Berzon: For all the aliens within the following groups, who have been or are detained in accordance with 235.3b or c, and that doesn't include the people who are in expedited removal?

[26:49] Fabian: Well, 235.3b refers to individuals who have not yet been found, though they are in expedited removal, they have not yet been found to have a credible fear.

[26:58] Berzon: Ok, and 212.5 says the parole of aliens within the following groups who have been or are detained in accordance with 235.3b or c would generally be justified only in a case by case basis and then it gives a list of people and one of them is aliens who are defined as juveniles under 236.3a, so why doesn't that directly apply to the group under 235.3b. It says it does!

[27:24] Fabian: It does. We would agree. It does directly apply, but it doesn't read out of the picture 235.3b.

[27:35] Berzon: But you read 235.3 limitations as exclusive, in saying that unless they have an emergency medical or they're involved with law enforcement, then they can't get parole, but this provision says that if they're detained in accordance with 235.3b and they're juveniles they can get parole.

[27:52] Fabian: I would dispute that position, your honor. I think our position is that the reference to 235.3b incorporates the limitations in that section, and then it notes that those individuals, if not deemed to be a flight risk, can get parole, but for individuals who fall under the requirements of 235.3, those individuals must first meet the standards of that regulatory section...

[28:25] Berzon: I don't understand how that can be, when this section here says 212.5b says that this section applies to 235.3b individuals and then gives criteria one of which is juveniles. I'm mystified. It specifically says so.

[28:25] Fabian: But it doesn't say that it overrules or overcomes the standard that initially must be found in 235.3, and I would note that what this says is simply how, in determining under what conditions a juvenile should be paroled in accordance with the standards of 235.3b, then this 212.5 would dictate the conditions on how that parole...

[29:17] Berzon: For example, 2, women who've been medically certified as pregnant, is not an addition to the list in the other section, so those people really can't be paroled after all...

[29:32] Fabian: I think our position would be that for all of the categories listed in 212.5

[29:45] Berzon: You first have to meet the other criteria, which are exceedingly narrow, and

don't include women who have been medically certified as pregnant.

[29:53] Fabian: Well, yes, I think all of those categories...

[30:00] Fletcher: Yes, well, how do you get women who've been certified as pregnant back up under the other one, so that the other one is a meaningful sort of restriction but a pregnant woman is able to qualify. How do you do that?

[30:14] Fabian: I'm not sure I understand your question, your honor.

[30:15] Fletcher: You've got two sections. You say in order to get the later criteria, which for our purposes really means juveniles, you need to qualify under the earlier section of criteria for parole. So I'm asking you how do you get pregnant women to fit under that under any circumstances? I'm basically asking Judge Berzon's question.

[30:36] Fabian: I think all of the categories in section 212.5, and that would include category 2 that your honors are referencing, all of those individuals, to the extent that they have not yet been found to have credible fear, also apply under 235.3b.

[30:58] Berzon: Meaning they can't be paroled. They cannot be paroled even though it says they can be paroled.

[31:04] Fabian: No, meaning they can be paroled, but under the more narrow standard in the 235...

[31:09] Berzon: What's the standard?

[31:13] Fabian: Parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

[31:19] Berzon: Being pregnant isn't good enough; you have to have a medical emergency.

[31:23] Fabian: Well, I think that part would be first. 235.3... The first analysis is that they have to meet the requirements for parole there.

[31:34] Fletcher: But here's the problem, and I think you'll recognize it: it's really hard to say that simply being pregnant is a medical emergency, and it's really hard to say that being pregnant is a law enforcement purpose, so it's possible in fact even likely that there're gonna be some pregnant women who look as though they're going to be eligible for parole on the later section can't qualify because they can't fit through the gate that you say they have to get through first. I mean that's the question. So how do you get those two criteria satisfied when the only thing you got is that the woman is certified as pregnant?

[32:10] Fabian: Well, and I think what I would note is that 235.3b is a later enacted regulation and it was intended to implement 1225b and to create a more restrictive standard for individuals who are still pending their credible fear finding.

[32:28] Berzon: Well, but it didn't say the other... I'm losing my numbers here... but the other reg... 212.5 notwithstanding... It doesn't say that. Anyway, so there's that. What else would you like to argue about?

[32:47] Fletcher: Yeah, you wanna talk about toothbrushes and so on? Safe and secure? Certified? Confined? I mean, whaddaya wanna talk about?

[32:55] Fabian: Your honor, I'd be happy. There are so many things, your honor. I was planning to address the CBP issues?

[32:59] Berzon: Which issues? I'm sorry.

[33:00] Fabian: The Customs and Border Protection, which is CBP, that's the conditions in the CBP facilities.

[33:06] Berzon: Ok, but you're really gonna stand up and tell us that being able to sleep isn't a question of safe and sanitary conditions?

[33:12] Fabian: Your honor, what I think I'd like to stand up and say...

[33:15] Berzon: You're not really gonna say that...

[33:16] Fabian: ...is to focus the court on what the question is here in this appeal, and that is this

is a consent decree, and it is focused on the four corners of the language in the consent decree, and what I do want to note is what the district court looked at was not asking the question is there a violation of the language of the consent decree, and is this an overall violation of what the parties intended to prohibit in the consent decree. The district court instead looked at it from a different angle. The district court looked first was there a violation of CBP's own ted standard.

[34:03] Fletcher: Well, I'm not sure she did that first, and I'm not sure that the TED standard is really all that different from the more general statement or category or requirement of the agreement. Yes, the Ted's standard is more detailed, but that sounds to me as if it could quite easily come under the more general category of safe and secure.

[34:24] Fabian: Well, your honor...

[34:27] Fletcher: Safe and sanitary, sorry.

[34:29] Fabian: And that's... any number of things might fall under those categories, and I think.

[34:34] Berzon: Yes, but sleep surely does. You can't be safe and sanitary or safe as a human being if you can't sleep,

[34:42] Fabian: Well...

[34:43] Berzon: ...and you said in your brief that it doesn't say anything about sleeping, and therefore there's nothing in here about being able to sleep.

[34:50] Fabian: I think the concern there is your honor the court finding that sleep for example is relevant to a finding of no safe and sanitary conditions is one thing, but the ultimate conclusion is safe and sanitary is a singular category in the agreement and one has to assume that it was left that way and not enumerated by the parties because either the parties couldn't reach agreement on how to enumerate that or that it was left to the agencies to determine...

[35:22] Fletcher: Or it was relatively obvious, or at least obvious enough so that if you're putting people into a crowded room to sleep on a concrete floor with an aluminum foil blanket on top of them, that doesn't comply with the agreement. It may be that they don't get super thread count Egyptian linens. I get that. But the testimony that the district judge believed was it's really cold, in fact it gets colder when we complain about it being cold, we're forced to sleep crowded with the lights on all night long and all you put us on is the concrete floor with an aluminum blanket. I mean, I understand at some outer boundary there may be some definitional difficult, but no one argue that this is safe and sanitary. Or at least I don't think you're arguing that. Are you?

[36:15] Fabian: Your honor I think what I'm arguing is that the way that the district court reached the conclusion was to say these specific items, and I think I would acknowledge I think sleep is the more difficult end of what I'm arguing

[36:31] Berzon: We actually have an opinion that says that it's unconstitutional to make homeless people not sleep.

[36:42] Fabian: Correct, your honor, and I think that's part of our point though is that we're not talking about the constitutional standard here and we're not talking about what CBP has implemented more broadly as its own TED policy.

[36:57] Fletcher: Are you arguing seriously that you do not read the agreement as requiring you to do something other than what I've just described? Cold all night long, lights all night long, sleep on the concrete, and you've got an aluminum foil blanket?

[37:12] Berzon: And too crowded to lie down, which they also said.

[37:15] Fletcher: I find that inconceivable that the government would say that that is safe and sanitary.

[37:20] Fabian: I think what I'm arguing your honor is I don't believe that the district court made the finding in the way that your honor just detailed it.

[37:28] Fletcher: Everything I just said comes right out of the district court order.

[37:33] Fabian: Our concern is that the district court really looked at a condition, and again as I

said, I think sleep is clearly at the one end of her findings, I think we also...

[37:49] Berzon: Which is your strongest argument?

[37:53] Fabian: Well, I think what I would go to is when you start enumerating for example specific hygiene items, and the way that was done was that the court sort of enumerated these and said these fall under the rubric these fall under the category of what could be required...

[38:08] Fletcher: Again, it wasn't perfumed soap. It was soap. It wasn't high class milled soap. It was soap. And that sounds as though it was part of safe and sanitary. Are you disagreeing with that?

[38:22] Fabian: What I'm disagreeing with is that the court ultimately concluded that these things would fall under here and then simply by not providing them, you have violated that tenant of the agreement. I also would note that in that particular...

[38:38] Tashima: What do you... Granted that the decree doesn't have a list of items that have to be supplied in order to be sanitary... What's a reasonable in your eyes definition of sanitary that the court could enforce?

[38:59] Fabian: Well, I think what I would ask, what I would say is, the court, I would ask that the court find that the conditions were not safe and sanitary. What the court found is that these things fall within the category and by not providing them that's an automatic breach of the agreement. And...

[39:16] Tashima: I don't know about automatic, but to me it's what Judge Fletcher says, it's within everybody's common understanding: if you don't have a toothbrush, if you don't have soap, if you don't have a blanket, it's not safe and sanitary. Wouldn't everybody agree to that? Do you agree to that?

[39:34] Fabian: Well, I think there's fair reason to find that those things may be part of safe and sanitary...

[39:44] Tashima: Not maybe. Are. A part. Why do you say maybe? You mean there are circumstances when a person doesn't need to have a toothbrush, toothpaste, and soap for days?

[39:55] Fabian: Well, I think in CBP custody it's frequently intended to be much shorter term, so it may be that for a shorter term stay in CBP custody that some of those things may not be required.

[40:09] Fletcher: Yeah, but I don't think that was the situation that the court was confronting. It wasn't as if those people were there for twelve hours and then moved onto the Hilton Hotel. No, they were there for a fairly sustained period, and at least according to the evidence that the judge believed, they weren't getting these things for a fairly sustained period.

[40:25] Fabian: Well, I do want to clarify that the judge did find that in Ursula in one of the CBP facilities that many of those things were present, and that the evidence did show that minors spent a much shorter period of time, that there was only a small percentage of minors that weren't moved to Ursula...

[40:44] Berzon: So just to clarify. At some point in your brief, you appear to be saying that safe and sanitary has no independent meaning, and that the following there's another sentence that follows it that has some details and that's the only thing you're required to do. I don't understand you to be arguing that now. Is that correct? That's what your brief said. Your brief seemed to say that safe and sanitary has no independent meaning.

[41:08] Fabian: I don't think it has no independent meaning and if that's the impression our argument gave, I apologize. I think that the position is more generally that to impose specific enumerated meanings that were not contained in the agreement without in fact reaching the ultimate question of were the conditions overall in general as a general matter safe and sanitary is not a correct finding of breach.

[41:40] Tashima: No, but you see under that approach, if the district court were to conclude no

they were not sanitary, and all it could do was say fix it, they couldn't tell you what to do, right? They couldn't say, you have to provide soap. All they can do is issue an order saying make it sanitary, right? That's what the details are there for. Isn't that the purpose: to give concrete meaning to the term? I mean, if CBP got an order saying we want your facilities to be sanitary, you can say, ok fine, we'll make it sanitary, but you know, who knows what sanitary is?

[42:27] Fabian: And I think that then goes to what level the agreement could be enforceable.

[42:34] Tashima: So, that's part of what I'm getting... You're saying that the agreement is so vague that it's unenforceable. That's almost your argument, isn't it?

[42:43] Fabian: To some extent, yes, your honor. I think that if the term in the agreement requires an after agreement interpretation by the district court, then yes, that does constitute a vague term that the parties didn't sufficiently clarify in reaching agreement.

[43:05] Fletcher: You know, let's hear from the other side, and we've taken you eighteen minutes and fifty two seconds over time, but we will give you a chance to respond.

[43:14] Fabian: Thank you, your honor.

[43:16] Fletcher: You lost a piece of paper. There's a piece of paper that fell down. Thank you.

[Fabian leaves stage left; new white elderly man enters stage right]

[43:30] Shea: May it please the court. Peter Shea for the plaintiffs. I see you were grappling with about ICE releasing children to non-parents and the argument in the appellate brief by the government that somehow if it was going to release to a non parent that would convert that trial to an unaccompanied minor and therefore only under the TVPRA of 2008...

[44:10] Berzon: Well, even if it did, it seems to me there would be something in that. If they're not going to be able to be taken care of by their parents, because their parents are in detention, and after the last iteration of the case, you're not going to get that parent freed because of this agreement, but still, maybe I'm missing the stakes here, but whoever it is, whether it's ICE or ORR, if they're bound by the agreement what difference does it make?

[44:44] Shea: Well, I guess the first point I would make is that that's not an argument they ever made to the district court.

[44:54] Berzon: That may be true. That may be true.

[44:58] Shea: And if you look at page record excerpts page 26 and 27, Judge E deals with their argument about why ICE will not even though the settlement says that from the time of apprehension the defendants will make and perform prompt and continuous efforts aimed at the release of children under Paragraph 14, and the settlement doesn't say oh if the child is with a parent locked up by ICE, somebody else has to make that evaluation.

[45:39] Berzon: But it would help me to know why you care. If the agreement is still binding on ORR, then why do you care?

[45:46] Shea: Well, it is binding on ORR. There's no question about that.

[45:50] Berzon: Ok, so therefore why do you care?

[45:52] Shea: But as a practical matter, if a child is in ICE custody, then under the terms of the agreement, it is ICE that has that kid in its physical custody.

[46:09] Berzon: Ok, but their position well ICE has to hand it over to ORR, well if they don't hand it over the ORR, then they have a problem under Tevron, and if they do, then ORR is still bound by the agreement, so what's your problem?

[46:21] Shea: Of the tens of thousands of children who've been detained by ICE, the government cannot point to a single case – and we're monitoring this all the time – we're not aware of a single case in which a child has been transferred from ICE to ORR just so that...

[46:41] Berzon: Then they've got a major, if they're coming here and telling us that that's what they're supposed to be doing, then they've got a major problem. That's what they're telling us. They're telling us that they're supposed to be handing them over to ORR; now you're telling me

they never do. That's a big problem.

[46:57] Shea: They never do, and...

[46:58] Berzon: It may not be this problem, but it's a big problem.

[47:00] Shea: Today, we have a situation where once a month a kid is dying in CBP custody.

[47:08] Berzon: Well, maybe you're much better off with an order that says they have to hand them over to ORR right away, because that's what they're saying.

[47:14] Shea: They're not turning them over because ORR has no bed space.

[47:18] Fletcher: It sounds to me as though this is something that is better addressed by the district court in the first instance. It doesn't sound as if the district court were even made aware of this issue.

[47:27] Shea: It wasn't and if you look at the argument they made in the district court, which the court addresses in some detail on page 26 and 27, they don't argue anything close to the notion that these kids are unaccompanied because they're not. I mean, the statute, you can't just take any child and transfer that child to ORR. Under the terms of the settlement paragraph 14,18,19, whoever has custody of that kid, Border Patrol, ORR, or ICE, is supposed to make and record continuous efforts aimed at the release of that child to a list of relatives listed in paragraph 14, and the only thing that ICE argued in a district court and the court discusses this in detail at pages 26 and 27 – they didn't say anything about the TVPRA. They just said oh ICE doesn't have the capacity or the expertise to do this. You cannot take under the federal statute, and they never have taken a child who was detained with the parent, and suddenly defined that child as an unaccompanied minor simply because the mother says, "I would like my child released to my mother, the child's grandmother in San Francisco." That is supposed to trigger, and historically has triggered, a brief investigation, certainly they can assess the household and they should assess the household, but that triggers a brief investigation into can the grandmother, is the grandmother willing, capable, and able to take care of that child. That's taking place while the child is with the mother in the family detention center. Under federal law, you cannot suddenly define that child as an unaccompanied minor just because the mother said I would like the child released to my sister. Now, once if the ICE determines as it historically has for 33 years that the grandmother is a good placement, and they place that child with that grandmother, even then, I don't think you can define that child as an unaccompanied minor, nor has the government ever done that, so it would simply create an administrative nightmare with no written procedures...

[50:06] Fletcher: Let me just interject again. Is this issue properly before us, given that it has not been presented to the district court?

[50:12] Shea: I don't think it is, because we would then have responded to this argument sort of the way I'm responding to it here had we had the opportunity, but that was never the argument. Their argument was a much vaguer. They submitted a declaration, and it's cited in fourth paragraph of page 26 of the exert records, and if you look at the fourth paragraph, the judge says, according to the ICE declaration, "ICE lacks the institutional capacity or resources to assess whether an adult other than a parent or guardian seeking custody is a suitable custodian." That's all they ever argued there. They didn't argue anything about the TVPRA, and really under the TVPRA...

[51:11] Fletcher: I'll say it again. You've convinced me that that issue is not properly in front of us. I don't know about my colleague.

[51:19] Shea: Ok, well perhaps.

[51:24] Tashima: Let me ask you to address this question, which government counsel addressed, which is that the district court's approach to citing what was and what was not sanitary went way beyond the words of the agreement itself, and that the word "sanitary", or "safe and sanitary" doesn't necessarily encompass a toothbrush and toothpaste. What's your response to that argument?

[52:02] Shea: You know, my response to that question, and of course the underlying question is did she substantially – accordingly to the case law – it's not just did she change it, it's did she substantially change it...

[52:18] Tashima: And I think that part of the argument must be by giving this construction to the “safe and sanitary” the court amended the consent decree and increased the burden on the government.

[52:40] Shea: And that's their argument, that it substantially changed...

[52:43] Tashima: Making it an appealable question.

[52:45] Shea: Exactly, and let me respond. That's a good question. As we understand it, in addressing issues of compliance, a court turns to California law, contract law, and I'm not an expert in that contract, but I think generally terms in an agreement need to be reasonably interpreted, like what was the reasonable intention of the parties. I think that's fair to say. When one looks at these terms, and there's really three terms: there's “safe”, there's “sanitary”, and there's paragraph 11, which says, “defendants shall treat all minors with dignity, respect, and special concern for the particular vulnerability.” So you have those three constellation of ideas. So when you look, when you're doing this kind of... it's not statutory construction, but construction of the terms of a consent decree, I think the first thing you do, your honor, is you turn to just the plain meaning. Just what's the plain meaning? And I think sanitary is an adjective. It generally means to be free from dangers to one's health. If you look up the Webster's dictionary and I'm not positive we had the Webster's dictionary with us when we were negotiating this settlement, but it's as good as guide as any to what does this mean. Webster's dictionary defines sanitary as “of or relating to health.”

[54:45] Fletcher: What about clean? Is “clean” in there anywhere? “Sanitary” has some relationship to cleanliness.

[54:53] Shea: I think you would then have to keep looking to further definitions to get to clean, but I think what the court was looking at was a reasonable interpretation of “safe and sanitary.” “Safe”, if you look up that word in the dictionary, it means “free from harm or risk,” so we...

[55:17] Tashima: It also means “secure” doesn't it?

[55:24] Shea: It does also mean “secure”, and certainly the border patrol facilities are secure, but they're not safe, and they're not sanitary...

[55:36] Berzon: So let me just back up. First of all, your position ultimately that we have no jurisdiction because all of these interpretations are simply an enforcement of the written words of the agreement and nothing more.

[55:50] Shea: Yes, absolutely.

[55:55] Berzon: I'm a little mystified by this notion that we don't... In this instance, she wrote the agreement to say, “paragraph such and such is enforced,” paragraph such and such is enforced.” In the 2015 agreement, she wrote the order to say, “The defendant shall do x.” Nobody thought that that was not an appealable order, even though it was an instance in order that she comply with the agreement as she interpreted it. So how is this different?

[56:28] Shea: It is different in this way. In 2015, we were dealing with these issues for the first time, and so we saw orders actually enforcing different parts of the settlement. We were somewhat frustrated, when I was before this court in '16, and at the same time we conducting monitoring in 2016 as we are permitted to do and came to believe based on declarations that we gathered from people in custody during that monitoring that they were still not complying with the settlement or with the 2015 order, which at the same time we were in front of the 9 circuit dealing with, and so we were perhaps overly cautious..

[57:38] Berzon: It isn't about what you thought; we're a court, and these questions are jurisdictional; and the question is what is the difference between those two orders?

[57:48] Shea: I'm getting to that, and so if you look at page 1 of her order, which is exerts of record page 1, she makes very clear, and I'll quote her, "Plaintiffs only requested that the court appoint an independent special monitor to ensure defendant's compliance with the agreement." So it was very different from 2015, when we brought our first major motion to enforce, and we wanted her to order enforcement: paragraph this and paragraph that, whatever we thought they were violating. We seriously thought in 2016, what do we do? Do we bring a motion for contempt? Do we do this? Do we tell her for the second time to order them for the second time to do this? And we made the decision as clause counsel to seek the appointment of an independent monitor. And that is the only thing we sought, and in fact she denied that. Now she's more recently, I don't know if your clerks have been following the case, but more recently she did appoint a special...

[59:03] Berzon: We were told that and we were told that the appeal from that...

[59:05] Shea: Exactly, then they appealed that, which sort of makes this whole exercise here seem kind of fruitless...

[59:15] Tashima: By the way, before I forget, this is off the record, but...

[59:17] Shea: but did that answer your question? I'm sorry.

[59:19] Berzon: Well, it doesn't exactly answer my question. I understand what you asked for, but I still don't know why the order in the form that issued, which before it got to the question of the monitor denying the special master, but saying you should have this internal monitor, has these four or five paragraphs that say, "paragraph such and such is enforced," and "paragraph such and such is enforced."

[59:45] Tashima: Is the monitor proceeding with some work now?

[59:49] Shea: Monitor's doing great work now.

[59:53] Tashima: Does the monitor have a task like to make a report to the court by such and such a date?

[59:59] Shea: The monitor has a report due any day, and according to an order and I don't have a docket number but an order that the court issued just a week ago on June the 10th pursuant to a stipulation that we reached with the government because we filed another motion to enforce about a military style camp that they're running with 2000 children in Florida, unlicensed facility, so we filed an important motion to enforce, and the government and us agreed that that is being submitted to the special monitor for mediation and really a preliminary adjudication.

[1:00:41] Berzon: But that's not this monitor; that's an external independent monitor.

[1:00:44] Shea: That's an independent motion.

[1:00:48] Tashima: And that's going forward now.

[1:00:49] Shea: That's going forward, and we're meeting with a special monitor this week Thursday and Friday in Washington D.C., and the judge ordered on June 10 has in essence deputized the special master to hear that motion, deal with that motion; we have filed a non-confidential brief, government just yesterday or the day before filed a brief. We're all meeting on Thursday or Friday, and then the judge said in her order of June 10, that if anyone is dissatisfied with the resolution that the monitor orders, that we have the right to appeal. It's kind of like functioning as a magistrate.

[1:01:33] Berzon: To us or to her?

[1:01:34] Shea: To her.

[1:01:35] Berzon: And then will there be an appeal here?

[1:01:36] Shea: Yes, well, I hope not, but if necessary, we'll be back. I'm hoping it will get resolved by Friday 5 pm EST, but...

[1:01:50] Fletcher: We'll see you on Monday.

[1:01:55] Shea: But just to wrap up...

[1:01:57] Berzon: One other piece of the issue that I'd like you to get to not necessarily this second is about the licensed and secure question. Now, question A is is that essentially concluded by the earlier opinion, i.e. it's already been resolved? Their position is that the licensed and secured requirement or not secure can't be applied to family facilities because there's no licensing for it.

[1:02:32] Shea: Correct.

[1:02:34] Berzon: Was that litigated in the 2015 proceedings?

[1:02:41] Shea: That was also part of the 2015 and that was part of her order in 2015 that this court affirmed.

[1:02:49] Berzon: So, it's your position that that's over with, that essentially, they're relitigating the same thing.

[1:02:53] Shea: Yeah, I think so. Her position, there might be a couple ways to look at her position. I think one way to look at it is to say, "Well, fine, then hold these children with their mothers in a licensed facility." States do issue – California and other states - do issue licenses for sort of group homes where a mother might be with a minor child.

[1:03:22] Berzon: Her representation is that they don't, or that at least in the states in which they have these facilities, there is no available license. So, what about that?

[1:03:36] Shea: The other point I recall her once making was well if Texas doesn't provide that, maybe you need to find a state that does. For example, at least they seemed to think that Pennsylvania does, because they have a small family detention facility in Pennsylvania, and there's some sort of ongoing administrative litigation there about whether Pennsylvania permits it or doesn't permit it. They've taken the position, oh it does; I guess somebody else has taken the position no it doesn't. I think Judge G's position was well then maybe you need to do your family detention somewhere else. If Texas doesn't permit it, then do it somewhere else. But at the same time – and I confess I'm not totally up on this – but at the same time, there is ongoing litigation in Texas about whether they can get this type of license. The folks that they give the money to to run those facilities have lobbied very hard in Texas to get the Texas whatever it's called Department of Children or Family Services to provide them with a license, and that is an ongoing matter there. I think my time is way up.

[1:05:04] Fletcher: Oh yes.

[1:05:06] Shea: So, I mean, I'm happy to answer any further question, but I'm also happy to sit down.

[1:05:11] Fletcher: Any further questions?

[1:05:12] Tashima: Nope.

[1:05:13] Shea: Thank you very much.

[Shea exits stage right.]

[1:05:17] Fletcher: Now we took the government way over time. Would you put three minutes on the clock, please?

[Fabian enters stage left and takes the podium.]

[1:05:24] Fabian: I wanted to see if I could answer a few of the jurisdictional questions and maybe shed a little more light on that. As to Judge Berzon's questions about the last appeal, one thing that I will note is that in our briefing on that 2015 appeal, the government asserted jurisdiction under 1291. The panel then found jurisdiction under 1292, really without comment.

[1:05:59] Fletcher: Remind of those numbers. Was 1292 a preliminary injunction?

[1:06:00] Fabian: Correct, and 1291 was a final order, so we had asserted that in our brief. The court then found jurisdiction under 1292 as a preliminary injunction.

[1:06:11] Berzon: There's a real murkiness and there's interesting about what happens in post consent decree proceedings. The consent decree is a final order, and then you have all these post

decree proceedings, and at what point there's a final order is extraordinarily murky, which I hadn't realized before. And what's an injunction is extraordinarily murky too. In other words, when the court says, do what you already promised to do, that doesn't seem to be an injunction, but maybe some phrasing otherwise, like you must do exactly x, and this order doesn't really... it reads the first way. You seem to be reading it the second way.

[1:07:03] Fabian: And I think that gets to why I wanted to point that out. That hadn't been argued in front of the prior panel, and I think it clarified our understanding of this court's understanding of the jurisdiction to be under 1292, which is why we raised the issue in this brief to acknowledge the limitations of that section. Then, I think to your honor's point, that helps maybe understand the two ways we would read this. If what the district court said, I am now finding that you are obligated per se to comply with your Ted's policies, comply with these enumerated items...

[1:07:45] Berzon: She never said that; she surely never said that.

[1:07:50] Fabian: And if the court finds that in fact that's not what the court said, and if truly these enumerated conditions may be part of an unsanitary finding and if the court is saying they're not new requirements; they're not added requirements; and it's not a direct finding that these are obligations, then in fact if the court is simply ordering compliance with the existing term of the agreement in a way that can be understood then

[1:08:23] Berzon: That's what the order says.

[1:08:25] Fabian: I think in that position we would understand there would be no jurisdiction for this court to hear.

[1:08:30] Berzon: Can I ask a question? The ultimate revival of the internal monitor issue is moot, right, because eventually we went to an outside independent monitor.

[1:08:49] Fabian: No, what the district court did was provide for a year of monitoring by the juvenile coordinators in this particular order that's on appeal. After a year of monitoring by the juvenile coordinators, the district court decided that that was insufficient and ordered... It was titled special master independent monitor.

[1:09:08] Berzon: So therefore... I'm wondering exactly what's the live issue here.

[1:09:17] Fabian: Well, your honor what the monitor is monitoring is compliance with this particular order. So, if this order, if the court were to overturn the conclusions in this order, then we would also then go back to the district court and challenge really with a motion for reconsideration.

[1:09:35] Berzon: I think you might go back and consider whether you really want to continue this appeal. There doesn't seem to be a whole lot left of it, considering that life has so moved on from it now. We're looking at this anciently old record at this point, and you have a special master and there's going to be a report and there's going to be more sets of litigation about what's going on now and there's going to be a regulation hopefully someday. I just feel like we're litigating ancient history at this point.

[1:10:05] Fabian: And your honor, I think that's fair; I think things have moved on. I think the regulations, I understand from a press release yesterday that plaintiffs may file a new motion with regard to Border Patrol very soon, and so I want to say that one of the issues that may still be very live is the evidentiary issue which we didn't discuss here today. I think it's well laid out in our briefing.

[1:10:28] Berzon: Really hard for us to get to jurisdictionally.

[1:10:32] Fabian: Understand, your honor, and as I said, if there's no jurisdiction, then unfortunately the court won't have the opportunity to address those issues, but I do think those are still live.

[1:10:43] Berzon: Also specific to this instance. Once you know what the district court's position is and if she reiterates it again, i.e. if you want to cross-examine person x you have to say that say that you want to cross-examine person x, I mean it's not that hard to do that, and then they have

to bring person x. At best, you have an example of just confusion.

[1:11:10] Fabian: I would agree, except that I'd note that this motion had 106 declarations.

[1:11:15] Fletcher: Name 'em all. You know what, here's my strategy. Name all of them. At that point, the other side's going to say, we don't want a rigamarole, why don't we reduce it to 20.

[1:11:24] Fabian: Well, and we did, in this case, when we understood that that's what we were being asked to do. I would note in the record that the judge specifically said that that would not have been allowed at the hearing and understandably so. So, with the conjunction of the most recent motion there were 80 declarations. There were 400 possible declarations. That would be our approach, your honor, and it seems...

[1:11:52] Berzon: But she never got to the point of saying how many of the 100 she would have allowed because her position was that you had waived all of them. So, you just straighten it out next time. Then if she says you can't cross-examine all 100; you can only cross-examine 20, you can come complain to us.

[1:12:12] Fletcher: Especially if you cross-examine 20, let's imagine you totally destroy any testimony that they did, and then she relies on the testimony of the other 80 that she didn't allow you to name, then you've got a case.

[1:12:26] Fabian: Understood, your honor. If your honors have any more questions, otherwise I'll sit down.

[1:12:32] Fletcher: Thank you very much. Sorry for taking you both over time, but that's what happens when you only have one case. Flores v. Barr submitted for decision. Thank you. OK.

