No. 20-55951

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.
Plaintiffs-Appellees,

v.

WILLIAM P. BARR,
Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDENTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, amicus curiae Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

DATED: October 23, 2020

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016); *Matter of C—T—L—*, 25 I&N Dec. 341 (BIA 2010); and *Matter of Q—T—M—T—*, 21 I&N Dec. 639 (BIA 1996).

SUMMARY OF THE ARGUMENT

The district court committed legal error by misapplying the burden of proof. Instead of holding the moving party, Plaintiffs-Appellees, to the applicable preponderance of the evidence standard, the district court faulted the non-moving party—the government—for failing to show that its policy of housing class

[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

members in hotels for a temporary period in response to the COVID-19 pandemic and in compliance with the Closure Order of the Centers for Disease Control ("CDC") is safer than immediately transferring class members to licensed facilities. Because of this pervasive legal error, the Court should reverse the judgment of the district court.

ARGUMENT

The District Court Committed Legal Error By Placing The Burden Of Proof On The Government

This Court reviews a district court's grant or denial of a motion to enforce a settlement agreement for abuse of discretion. *Wilcox v. Arpaio*, 753 F.3d 872, 875 (9th Cir. 2014). Under this deferential standard, the Court will affirm the district court absent "an error of law or clearly erroneous findings of fact." *Id.* at 875. Questions of law, including the interpretation of a settlement agreement, are reviewed de novo. *Parsons v. Ryan*, 949 F.3d 443, 453 (9th Cir. 2020). Under California law, the plain meaning of the settlement's terms govern. *See Navarro v. Mukasey*, 518 F.3d 729, 734 (9th Cir. 2008). Where contract language is susceptible to multiple interpretations, however, courts attempt to discern which interpretation the parties intended. *See id.* (citing Cal. Civil Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."); and § 1641 ("The whole of a contract is to be taken together, so as to

give effect to every part, if reasonably practicable, each clause helping to interpret the other.")).

Although the district court purported to apply the preponderance of the evidence standard to Plaintiffs-Appellees' motion to enforce the *Flores* Settlement Agreement ("Agreement"), the district court's findings show that the court placed the burden on the Defendants-Appellants to show that briefly detaining alien minors in hotels was safer than placing them in the congregate settings at Office of Refugee Resettlement licensed facilities in contradiction to the CDC Closure Order. *See* Excerpts of Record ("ER") 4 (citing *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1048-50 (C.D. Cal. 2017) (apply the preponderance of the evidence standard to Plaintiffs' motion to enforce); *Flores v. Johnson*, 212 F. Supp. 3d 864, 869-70 (C.D. Cal. 2015) (same)). Instead of assessing whether Plaintiffs-Appellees met their burden of showing that the Department of Homeland Security had breached its obligations under the Agreement or that the government's practice of temporarily housing class members in hotel rooms in order to quell the spread of COVID-19 is an unacceptable interpretation of the emergency exception to the 3-day rule, the district court focused on the general rule that class members should be transferred to a licensed ORR facility within three days and faulted the government for failing to show how housing class members in hotels *would be safer* than those

transferred to a licensed facility. *See* ER 16-17 (faulting the government for failing to show that hotels are *safer* than licensed facilities).

The district court repeatedly made the error of placing the burden on the government to show that its policy of housing class members in hotels in response to the CDC's Closure Order was more effective at containing the spread of COVID-19 or generally safer for class members and the general public, rather than properly placing the burden on the moving party to show that the practice constitutes a breach of the Agreement (including the emergency exception to the 3-day rule). For instance, the district court faulted the government for "fail[ing] to demonstrate how hotels, which are otherwise open to the public and have unlicensed staff coming in and out [and are] located in areas with high incidence of COVID-19, are any better for protecting public health than licensed facilities would be."[2] ER 10; *see also* ER 12 (faulting the government for failing "to show how diverting children to hotels, rather than immediately sending them to licensed facilities in the same region with ample accommodations, in any way expedites the process"). Tellingly, the district court did *not* conclude that Plaintiffs-Appellees

[2] In any event, of course, the government did explain how its policy of housing class members in hotels is more effective at controlling the spread of COVID-19 and quarantining potential carriers of the disease than housing class members congregate licensed facilities. *See* Appellant's Opening Brief at 14-16, 20, 29-34.

demonstrated that the policy of placement in hotels was more dangerous or less effective at containing the spread of COVID-19 than immediately transferring all class members to congregate licensed facilities.

Indeed, the district court's burden-shifting was doubly erroneous because the Constitution entrusts the political branches, not the courts, with making health and safety judgments, and those judgments are accordingly entitled to deference by the courts. As Chief Justice Roberts recently observed:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C. J., concurring in denial of application for injunctive relief).

In sum, the record reflects that the district court erred by placing the burden on the non-moving government party to show that its policy of housing class

members in hotels pending expulsion under the CDC's Closure Order was safer and more expeditious than transferring class members to congregate licensed facilities in contradiction to the CDC's Closure Order. This error constitutes a legal error and an abuse of discretion. Accordingly, the Court should reverse the district court's orders.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

DATED: October 23, 2020

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. FED. R. APP. P. 29(a)(5) because:

This brief contains 1,318 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

DATED: October 23, 2020

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CERTIFICATE OF SERVICE

I certify that on October 23, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
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