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In the matter of:

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Respondent, [REDACTED] through counsel, hereby moves to terminate proceedings with prejudice pursuant to Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980) due to the Department of Homeland Security's ("DHS") multiple violations of her liberty interest embedded in the U.S. Constitution's 5<sup>th</sup> amendment, the *Flores v. Reno Settlement*<sup>1</sup> ("FSA"), of 8 U.S.C. § 1232(b)(3), which required DHS to transfer her the custody of Health and Human Services within 72 hours of apprehension, by not providing her with sufficient food, water, clothing, shelter, and for committing the federal crime of failing to report child abuse under 18 U.S.C. § 2258.

1. The Department of Homeland Security is obligated to follow various regulations and laws with respect to unaccompanied minors in their custody. The 5<sup>th</sup> amendment to the U.S. constitution as well as the Flores Settlement—both binding law—require DHS to provide sufficient, inter alia, food, water, shelter, and medical treatment, if necessary. These regulations are important to safeguard the interests of the unaccompanied minors because a child can be seriously harmed if not given sufficient food, water, clothing, and shelter, both physically and mentally.
2. In 2008, the United States Congress passed into law the Trafficking and Victims Protection Reauthorization Act. The Act was unequivocal in its requirement that DHS transfer minors to the custody of Health and Human Services (“HHS”) within 72 hours. The Act also further strengthened protections for unaccompanied minors, such as the requirement that the HHS advocate for the best interests of unaccompanied minors in its care.
3. Notwithstanding these important laws that DHS was obligated to follow with respect to Respondent, DHS violated the Flores Settlement, the 5<sup>th</sup> amendment of the U.S.

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Respondent, DHS violated the Flores Settlement, the 5<sup>th</sup> amendment of the U.S. Constitution, and 8 U.S.C. 1232(b)(3) because *Respondent was detained in an overcrowded, unsanitary, holding cells for 96 hours without sufficient food, water, clothing, and shelter. As a result of these violations, Respondent was severely prejudiced mentally and physically: her life was placed in jeopardy and she lost significant weight.*

4. Respondent was also deprived sufficient food and shelter while detained in the custody of Health and Human Services at the Fort Sill Military based located at 5960 Rothwell Street Fort Sill, Oklahoma 73503.
5. In 18 U.S.C. § 2258 of the Victims of Child Abuse Act ("VCAA"), Congress criminalized the failure to report child abuse by certain persons who learns of child abuse in federal facilities. With respect to the Respondent, DHS failed to report egregious child abuse to the designated law enforcement authorities.
6. The BIA held in Matter of Garcia Flores, 17 I & N 325 (BIA 1980) that violation of a regulatory requirement by a service officer can result in evidence being excluded or proceedings invalidated where the regulation in question serves a purpose to benefit the alien which were protected by the regulation.
7. Given that DHS violated numerous regulations and laws that served a purpose of benefit to the Respondent and as a result her interests were prejudiced, her removal proceedings should be invalidated and terminated with prejudice

## **II. STATEMENT OF FACTS**

### **96 HOURS WITHOUT SUFFICIENT FOOD, WATER, CLOTHING, AND SHELTER IN AN OVERCROWDED BORDER PATROL HOLDING CELL**

8. Respondent is 15 years old. She was born on [REDACTED]. On or about [REDACTED], she was arrested by U.S. border patrol agents in Texas. She was then quickly transferred to a small room with more than 100 other individuals, including adult women with their infants and young children.
9. This first holding cell was so overcrowded that there was no room for Respondent to lie down in order to sleep. She had significant difficult sleeping because there was no bed provided to her and she was forced to try to sleep on the concrete floor.
10. Additionally, the lights in this first cell were kept on 24 hours a day for the entirety of her 4 days detained there.
11. The temperature in the first cell was very cold. Respondent states that she was shivering almost the whole time she was in this first jail cell because of the cold. She was only provided with a thin nylon blanket to shield her from the cold temperatures.

12. Respondent was not provided with sufficient food in the first jail cell for 4 days. The tacos provided to her were so bad as to be inedible. Upon tasting the taco given to her, she spit it out in disgust. For 4 days in this first jail cell, she only consumed 3 apples per day and a bottle of juice.
13. Respondent was not provided with sufficient water. The water, which was available from a fountain in the jail cell, had a heavy taste of chemicals. Because of the foul taste of the water, Iris avoided drinking it as much as possible. She only drank from this fountain a total of 4 times in 4 days. She was severely dehydrated as a result of DHS's failure to provide her with potable drinking water.
14. Respondent was not permitted to shower, brush her teeth, or change her clothing for the 4 days that she was held in the first jail cell.
15. Respondent was sick with a fever, cough, and bad headache for the entire 4 days she was in the first jail cell. She was not provided access to medical care or treatment in the same time period.
16. In the first jail cell, Respondent saw other children request that the air condition be turned down. The border patrol officers denied the other children's request and commented that the children were no more than abandoned dogs. When Respondent heard the official say this, she felt like he was telling all of the kids in the jail cell that they were not worth anything and they deserved the treatment they were receiving.

- [REDACTED]
18. After 4 days in this first jail cell, Respondent was transferred to Fort Sill, Oklahoma, where she and dozens of other children were forced to reside in a huge tent-like structure.
  19. HHS did not provide Respondent with sufficient food in Fort Sill. She was again given tacos that were inedible due to having a horrible taste. For the 7 days that Respondent resided in Fort Sill, she only consumed cookies, juice, and water.
  20. Respondent was not taken to see a doctor until 3 days after being transferred to Fort Sill.  
[REDACTED]
  21. Respondent was not permitted to go outside during her 7 days at Fort Sill unless it was when she went to take a shower in a mobile truck. She was only allowed to shower once every two days.
  22. Respondent had a bad headache for the entire 7 days she was detained in Fort Sill. She believes the headache was a result of a severe lack of nutrition that she had suffered for

believes the headache was a result of a severe lack of nutrition that she had suffered for the 11 days in the border jail cell and in Fort Sill.

23. The U.S. government did not begin to comply with the law with respect to treating [REDACTED] until she was transferred from Fort Sill to a children's home. In the children's home, she was given edible food, including pancakes in the morning.
24. [REDACTED] noted that she felt like she was being treated like a human for the first time by U.S. government officials in the children's home.
25. Respondent reports that she lost significant weight during the 11 days in the jail cell and in Fort Sill. Before being apprehended by border patrol, Respondent states that she weighed approximately 116 pounds. Toward the end of her time in the children's home, she weighed only 108 pounds.
26. Respondent wants to forget the horrible and painful days she spent for 11 days in detention where she was deprived of basic necessities such as food, water, sleep, shelter, and medical care.

**IN 2013 DHS DID NOT HAVE SUFFICIENT RESOURCES TO COMPLY WITH LAW  
ON TREATING CHILDREN YET EMERGENCY MEASURES WERE NOT  
IMPLEMENTED UNTIL MAY 12, 2014**

27. DHS Secretary Jeh Johnson declared a "level-four condition of readiness" on May 12, 2014, which was an "official recognition that federal agencies overseeing borders, immigration enforcement, and child welfare had been outstripped by a sudden increase in unaccompanied minors in recent weeks. According to the New York Times, the "level four alert is the highest for agencies handling children crossing the border illegally, and allows Homeland Security officials to call on emergency resources from other agencies."
28. DHS did not open the first emergency shelter for unaccompanied minors until after the level four alert announces by Jeh Johnson on May 12, 2014. In other words, prior to the opening of the first emergency shelter at the Lackland Air Force Base in Texas in May of 2014, Customs and Border Protection ("CBP") was forced to house all children in ill-suited holding cells until they could transfer the children to shelters run by the HHS.
29. Secretary Johnson admitted that "A South Texas processing center is no place for a child." Johnson further supports the assertion that he and his agency ignored for months that there was insufficient resources and space for the government to comply with its obligations in caring for unaccompanied children.
30. Johnson stated in the same article that "...the influx of unaccompanied youths had

‘zoomed to the top of my agenda’ after his encounters at the McAllen Border Patrol station with small children, one of whom was 3.” The encounters reference a personal visit that Jeh Johnson made on May 11, 2014. Mr. Johnson should not have required to actually visit a border patrol holding station to realize that an emergency was ongoing for months before he made the visit.

31. Mr. Johnson’s admission that he did not realize the severity of the crisis until actually having to see little children suffering shows how his agency was, at a minimum, grossly negligent in implementing emergency measures.<sup>2</sup>
32. The Department of Homeland Security was already overwhelmed by the number of unaccompanied children as early as *July 2013*, and likely as early as January of 2013.
33. Mayeli Hernandez, an unaccompanied minor client of the undersigned, testified before Congress on July 29, 2014. In her testimony, Mayeli stated that she entered in July of 2013 and that “...when I suffered a lot was after we crossed the river and the police took us into freezing cold police stations. In there, people couldn’t sleep. We had to sleep on the floor. And they only gave us thin nylon blankets. There wasn’t enough food. They only gave us two sandwiches a day. It was very cold in there and my little sister’s lips even turned blue. We were shivering the whole time that we were there. It was also very hard to sleep because the police were always calling our names, and we were there for *four very cold days*.” (Emphasis added)<sup>3</sup>
34. The undersigned, who represents over one hundred unaccompanied minors who entered after January 1, 2013, has heard dozens of other accounts from children who were forced to stay in overcrowded, unsanitary, freezing-cold holding cells without sufficient food, clothing, and blankets in 2013 and 2014 *prior* to the implementation of emergency measures in May of 2014.
35. On June 11, 2014, the National Immigrant Justice Center, Esperanzas Immigrant Rights Project, Americans for Immigrant Justice, Florence Immigrant and Refugee Rights Project, and the ACLU Border Litigations project, filed a complaint on behalf of 116 unaccompanied minors, ages 5 to 17 years old, who experienced remarkably similar cases of abuse and mistreatment to what the Respondent suffered.<sup>4</sup>

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2 Julia Preston, [U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone](http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?_r=0), The New York Times, May 16, 2014, [http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?\\_r=0](http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?_r=0)

3 Dan Friedman, [Congress hears from the children that fled violence at home for the U.S. border](http://www.nydailynews.com/news/politics/congress-hears-children-fled-u-s-border-article-1.1885043). New York Daily News, July 30, 2014 <http://www.nydailynews.com/news/politics/congress-hears-children-fled-u-s-border-article-1.1885043>

4 ACLU, [Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection](https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during), June 11. 2014 <https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during>

36. The 116 cases were documented from March to May of 2014. 80 percent of the 116 children interviewed reported inadequate food and water by CBP officials. Approximately half of the children described the denial of medical care. Approximately 70 percent of the children were detained by CBP beyond the 72 hour limit as prescribed by law.
37. A 16 year old girl described as D.G. in the complaint “describes the holding cell as ice-cold and filthy, and says that the bright fluorescent lights were left on all day and night. D.G. became ill while in CBP custody but when she asked to see a doctor, officials told her it was ‘not their fault’ that she was sick and ignored her.”
38. C.S., a 17 year old boy from El Salvador, stated that CBP officials only fed him frozen bologna sandwich.
39. E.M., a 15 year old girl, was detained for a total of 8 days by CBP, where she reported having to sleep in a very cold and uncomfortable cell, and could not sleep because the lights were never turned off. She also reported becoming ill after consuming food provided to her by CBP.
40. The reports of abuse and neglect as described in this complaint against CBP support the account of Respondent’s allegations in this instant motion.
41. Furthermore, a report by The Office of Inspector General (“OIG”) of DHS, John Roth, supports many of the allegations of both Respondent and the 116 complainants in the complaint.<sup>5</sup>
42. The Office of Inspector General (“OIG”) of DHS, John Roth, issued a report on July 30, 2014 regarding the treatment of unaccompanied children in the custody of CBP. The report covered a time period of July 1-16, 2014 this report did not cover the treatment of children in the time period in which Respondent was detained by CBP. The report also did not address the specific allegations of the treatment of the 116 children in the complaint described above.
43. The OIG report found, in part, that “DHS is holding UAC longer than 72 hours because no permanent shelter is available.” If DHS had instituted emergency measures when it first became overwhelmed by the volume of unaccompanied children entering the United States in early 2013, DHS would have had sufficient permanent shelters to prevent its violation of the transfer period of 72 hours, which it had been doing for nearly more than a year prior to the visits from the OIG.
44. The OIG report also found that “Temperatures in DHS facilities were inconsistent.” And

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<sup>5</sup> John Roth, Inspector General, Oversight of Unaccompanied Alien Children, July 30, 2014  
[http://www.oig.dhs.gov/assets/Mgmt/2014/Over\\_Un\\_Ali\\_Chil.pdf](http://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf)



that in some facilities “employees cannot adjust thermostats.” This is a reluctant admission by the OIG that many of the reports of the unaccompanied children of freezing temperatures are true.

45. Finally, the OIG report found that in at least one location, there was not “..an adequate amount of food.” Again, the OIG report admits that, even after emergency measures were instituted, at one detention center an unspecified amount of children were not provided sufficient food. The fact that DHS refused to provide sufficient food and water to children is outrageous and criminal because it exposed children to substantial harm.
46. In an article published November 6, 2014, Noe Alvarez, a social worker who worked directly with unaccompanied children in the custody of ORR, described what children looked like after they were released from the “hielera” or freezing cold holding cells in Texas, “The brothers arrived at my shelter on a Monday evening from Immigration and Customs detention in Texas. They were haggard and unfed...His swollen bare toes and blackened feet concealed the blisters that hid between his sandals. In My office, Agustin told me about the detention centers in Texas. Kids were crammed into rooms under bright lights and were forced to wait. Kids like Agustin called the detention center “la hielera” or the “icebox” because of the blasting air condition in the artic-chilled cells. Some children were left there for weeks; they described the smell of their own festering feet and urine that filled the spaces. They were processed into jail with the dank clothes they traveled in, were not always showered, were provided with little food and little nutrition, and not always permitted physical exercise.”<sup>6</sup>
47. The care of minor children is of utmost importance. The consequences of failing to properly care for a minor child in custody may result in permanent physical or mental harm to the child. ■■■ will remember her horrifying time in the custody of DHS for the entirety of her life.
48. Respondent suffered extreme and prolonged physical and mental pain due to DHS’s failure to provide her with sufficient food, water, clothing, shelter, and medical care. Her health was put imminent risk of harm due to the extreme lack of food and water as well forced sleep deprivation, and she was prejudiced as a result of not being transferred to the custody of HHS within 72 hours of her initial apprehension as required by law. She was further prejudiced by the fact that HHS did not comply with the *Flores* settlement during her 7 days of detention at the U.S. military base in Fort Sill, Oklahoma.

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6 Noe Alvarez, We’re failing the immigrant kids who show up alone on our border. I know, because I used to work with them, Washington Poist, November 6, 2014.  
<http://www.washingtonpost.com/posteverything/wp/2014/11/06/i-worked-in-a-center-for-children-caught-at-the-border-the-conditions-are-disgraceful/>

### III ARGUMENT

RESPONDENT'S MOTION TO TERMINATE WITH PREJUDICE SHOULD BE GRANTED BECAUSE DHS VIOLATION RESPONDENT'S RIGHTS UNDER THE FLORES SETTLEMENT, THE 5<sup>TH</sup> AMENDMENT, 8 U.S.C. 1232(b)(3), AND 18 U.S.C. 2258, AND PREJUDICED HER INTERESTS THAT WERE PROTECTED BY SAID LAWS.

49. The Board of Immigration Appeals held in Matter of Garcia Flores that violation of a regulatory requirement by a Service officer can result in evidence being excluded or proceedings invalidated where the regulation in question serves a purpose of benefit to the alien which were protected by the regulation.
50. In Garcia Flores, the INS officers arrested the Respondent without a warrant and failed to advise him of warning of a right to counsel as mandated by 8 C.F.R. 287.3. The BIA adopted a two-part test to determine whether deportation proceedings should be invalidated where a service regulation has been violated as laid out by the United States Court of Appeals of the 9<sup>th</sup> Circuit. See United States v. Calderon-Mejia 591 F.2d 529 (9 Cir. 1979). First, the regulation in question must serve a "purpose of benefit to the alien." Second, if it does, the regulatory violation will render the proceeding unlawful "only if the violation prejudiced interests that were protected by the regulation."
51. The BIA went on to cite to the U.S. Supreme Court's past invalidation of agency action, which only occurred if "there has been an expressed or clearly apparent prejudice to the individual as a result of a violation of a rule or regulation promulgated at least in part to bestow a procedural or substantive benefit on the individual in question." If the compliance with the regulation is mandated by the Constitution, "prejudice may be presumed." Similarly, where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial.

**A. RESPONDENT'S REMOVAL PROCEEDINGS SHOULD BE TERMINATED WITH PREJUDICE BECAUSE OF DHS'S VIOLATION OF 8 U.S.C. 1232(b)(3) BY TAKING 96 HOURS TO TRANSFER RESPONDENT TO THE CUSTODY OF HEALTH AND HUMAN SERVICES**

52. DHS is required to transfer an unaccompanied alien child to the Secretary of Health and Human Services within 72 hours of determining that the child is an unaccompanied alien child, except in the case of exceptional circumstances.
53. Notwithstanding this requirement, Respondent was not transferred as mandated by law for 96 hours. As a result of this violation of the law, Respondent's well-being was severely



prejudiced. He was forced to live in severely substandard conditions for 4 days. He had no bed, was deprived of sleep because of the constant light in the room, and insufficient food and water for 4 days. He was further harmed by the extremely cold temperature of the jail cell for the entirety of her stay in the first jail cell. As a result, he was purposely deprived of sleep for a prolonged period of time—96 hours—and was left very weak and hungry.

54. Moreover, this regulation is embedded in the U.S. constitution's 5<sup>th</sup> amendment right to substantive due process. The regulation was made with full knowledge that DHS, a law enforcement agency, is woefully ill-prepared to adequately provide for the special needs of children. The holding cells used to warehouse children like the Respondent were designed only for a few hours before they were to be transferred to HHS custody. As a result, when it failed to follow the 72 hour requirement, Respondent's interests was severely prejudiced.
55. DHS cannot claim that this failure was a result of "exceptional circumstances." Prior to the violation of Respondent's rights protected by the regulation, DHS was routinely violating the law with respect to unaccompanied children, as can be seen from the complaint described above of 116 unaccompanied minors who told of similar accounts of abuse suffered in from March to May of 2014, as well as from the testimony of Mayeli Hernandez, who described similar conditions as early as *July of 2013*.
56. Indeed, the information elicited from the Respondent to establish her removability from the United States was taken while she was under duress. The fact that children who had made such a long and arduous journey were already desperate to give up and go home as a result of the horrid conditions is a strong indication of the purpose behind CBP's inadequate care of unaccompanied minors. The horrible conditions appear to be created to coerce children into returning to their native countries, even if they are, for example, a U.S. citizen or if they qualify for asylum or special immigrant juvenile status. The removal proceedings of the children are meant to be conducted in a non-coercive setting where the best interests of the child are required to be taken into account.
57. 8 U.S.C. 1232(c)(2)(A) requires that HHS "promptly place" unaccompanied children "in the least restrictive setting that is in the best interest of the child." In addition to this, the law authorizes HHS to "appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children." If appointed, a child advocate is required to "advocate for the best interests of the child."
58. Because of DHS, HHS, and President Obama's failure to act in implementing emergency measures in early 2013 when capacity to care for unaccompanied children was already over capacity, the Respondent's best interests were completely ignored for 96 hours.
59. Instead, DHS acted *against* the best interests of the Respondent in an astonishingly egregious manner by in effect depriving her of basic requirements to survive: food, water, sleep, shelter, and medical care. As a result of DHS's actions *against* the best interests of Respondent, there was no one to advocate for her for 96 hours.

60. Congress developed the numerous protections within the 2008 TVPRA so that individuals such as the Respondent are not harmed by the United States government. It is clear from Respondent's account that she was harmed because DHS intentionally chose to violate the requirement that it transfer her to the custody of HHS within 72 hours of apprehension.
61. Given that DHS failed to transfer Respondent to the custody of HHS within 72 hours of apprehension, and given the fact that there was no exceptional circumstances because DHS should have already implemented emergency measures, and because Respondent was prejudiced as a result of this violation, Respondent's removal proceedings should be invalidated through termination with prejudice.

**B. RESPONDENT'S REMOVAL PROCEEDINGS SHOULD BE TERMINATED WITH PREJUDICE BECAUSE DHS AND HHS VIOLATED RESPONDENT'S 5<sup>TH</sup> AMENDMENT RIGHT TO SUBSTANTIVE LIBERTY WHEN IT FAILED TO PROVIDE HER WITH SUFFICIENT FOOD, WATER, CLOTHING, AND SHELTER.**

62. DHS's failure to provide sufficient food, water, clothing, shelter, and medical care violated Respondent's substantive liberty rights under the 5<sup>th</sup> amendment of the U.S. Constitution and therefore termination of removal proceedings with prejudice is warranted.
63. The U.S. Supreme Court has ruled that mentally ill patients involuntarily committed to the custody of the State have substantive liberty interests in the 14<sup>th</sup> amendment to be provided sufficient food, shelter, medical care, and living conditions as safe as the inherent nature of the institutional environment allows.
64. Respondent had the same interests as the appellants in Youngberg V. Romero 457 US 307 (1982), the U.S. Supreme Court was tasked with answering the question of whether an individual involuntarily committed to a state institution for the mentally retarded had substantive rights under the Due Process clause of the 14<sup>th</sup> amendment to (i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or "habilitation."
65. The Supreme Court held in this case that the state had a duty to provide adequate food, shelter, clothing, and medical care to the individuals involuntarily committed to state institutions. The holding went further to state that the "State also has the unquestionable duty to provide reasonable safety for all residents and personnel within the institution,"
66. Finally, the Court concluded that "Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety..."

67. Unaccompanied children such as Respondent are involuntarily placed under into the custody DHS and HHS, agencies within the federal government of the United States. DHS and HHS are required to comply with the U.S. constitution. When Respondent was detained in June of 2014, he had the substantive rights under the Due Process clause of the 5<sup>th</sup> amendment to sufficient food, water, shelter, clothing, and medical care. The U.S. federal government had an affirmative duty under the 5<sup>th</sup> amendment of the U.S. Constitution to provide sufficient food, water, shelter, clothing, and medical care to Respondent.
68. Despite the Respondent's entitlement to sufficient food, water, clothing, shelter, and medical care while involuntarily committed to the custody of DHS, her rights were grossly violated on all accounts.
69. Insufficient Food: The Respondent was only given inedible tacos, juice, and apples for 4 consecutive days. Respondent did not eat anything but juice and apples for 4 consecutive days. Given that she did not eat the inedible food supplied by DHS, she suffered from extreme hunger for 4 consecutive days. In the custody of HHS at Fort Sill, Respondent only ate cookies and juice for 7 consecutive days because she the tacos supplied to her were inedible.
70. Insufficient Water: The Respondent was not provided with potable water for the 96 hours he was detained in the custody of CBP. She only drank water on 4 separate occasions because she tried to avoid the heavily chlorinated water as much as possible. As a result, Respondent was severely dehydrated throughout her 4 days in the first jail cell.
71. Lack of Shelter: Respondent was forced to reside in an overcrowded, and unsanitary holding cell for 96 hours. She was barely able to sleep. In the first jail cell, there was no room on the floor to lie down because there were so many children inside the same room. The lights in the first and second cell were turned on for 24 hours a day. The temperatures were freezing and she was not given more than a thin nylon blanket. She barely slept for 4 consecutive days because of DHS's failure to provide here with sufficient shelter. In the custody of HHS at Fort Sill, Respondent was also not provided sufficient shelter. She was again only given a thin nylon blanket and there was not sufficient temperature control at night. The shelter in Fort Sill became just as cold as the first jail cell during the night. Respondent therefore found it very difficult to sleep for 7 consecutive days at Fort Sill, Oklahoma. Additionally, the lights were kept on for 24 hours a day at Fort Sill, as in the first jail cell.
72. Failure to Provide Clothing: Respondent was not given a change of clothing for 96 hours. She was not allowed to shower or bathe, or clean herself in anyway.
73. Failure to provide medical care: Respondent was not evaluated by a medical professional

for the first 4 days in the jail cell. She was visibly sick because of her cough and fever. No official from the U.S. government inquired into the status of her health for the entire 4 days she was in the first jail cell. She suffered constant and severe pain as a result of DHS's failure to provide her with any level of medical care despite the fact that she was visibly ill.

74. Under Garcia Flores, there is an important reference to whether prejudice can be presumed from a violation of a regulation by INS: if the regulation is embedded in the U.S. Constitution, violation of that regulation will result in a presumption of prejudice. In the Respondent's case, DHS flagrantly cast off its duty to provide respondent with sufficient food, water, clothing, and shelter. The importance of the requirement for DHS to provide these basic needs to survival cannot be overstated.
75. Grave abuse will continue result without accountability for the U.S. government's egregious violations of rules set forth in the U.S. constitution.
76. Given DHS's failure to provide Respondent with sufficient food, water, clothing, shelter, and medical care as required by the 5<sup>th</sup> amendment of the U.S. constitution, and given that she was prejudiced as a result of the government's violation of the 5<sup>th</sup> amendment, removal proceedings should be terminated with prejudice pursuant to Garcia-Flores.

**C. RESPONDENT'S REMOVAL PROCEEDINGS SHOULD BE  
TERMINATED WITH PREJUDICE BECAUSE OF DHS'S FLAGRANT  
VIOLATION OF THE FLORES SETTLEMENT**

77. The Flores V. Meese Settlement requires that DHS provide certain basic needs to minors in its custody, including "access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation..."
78. DHS failed to provide sufficient water, food, temperature control, and medical assistance as required by the Flores Settlement because most of the food she was given was not edible, the water was not potable, and she was not given any medical attention despite her being visibly ill.
79. The requirements in the Flores Settlement mirror the rights that he has within the 5<sup>th</sup> amendment of the U.S. constitution. However, DHS's requirements are unequivocal in that the agency is bound by its own agreement to meet certain minimal standards when minors are in its care. DHS intentionally and without justification violated the Flores Settlement by, in effect, ignoring it completely. DHS threw her in a room and left her there without food, water, clothing, shelter, and medical assistance. She was a victim of abuse at the hands of the U.S. government and therefore her removal proceedings should be terminated with prejudice to ensure that the government complies with its own regulations to protect the children in its care.

**D. REMOVAL PROCEEDINGS SHOULD BE TERMINATED WITH  
PREJUDICE BECAUSE DHS FAILED TO REPORT CHILD ABUSE TO  
PROPER AUTHORITIES AS REQUIRED BY 18 U.S.C. § 2258**

80. Section 2258 of the VCAA states that: “A person who, while engaged in a professional capacity or activity described in subsection (b) of Section 226 of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be fined under this title or imprisoned not more than 1 year or both.”
81. Persons covered by this reporting requirement include “Law enforcement personnel...or detention facility employees.”<sup>7</sup>
82. The term “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.<sup>8</sup>
83. The term “mental injury” means harm to a child’s psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response or cognition.<sup>9</sup>
84. The term “negligent treatment” means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child.<sup>10</sup>
85. DHS officers who were responsible for the care and custody of Respondent for the 96 hours he was in their care committed child abuse as defined by the VCAA.
86. Specifically, DHS officers failed to provide Respondent with adequate food, water, clothing, shelter, and medical care as described in detail above. The failure to provide these basic necessities seriously endangered the physical health of the child. She lost significant weight and was extremely weakened as a result of the almost total deprivation of food, water, sleep, clothing, and medical assistance during her time in DHS custody. She could have suffered irreparable physical injury from the acute lack of sufficient water and food for a 96 hour period. HHS officials also failed to provide Respondent with sufficient food and shelter for 7 consecutive days given that she was only able to eat

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<sup>7</sup> 42 U.S.C. § 13031 (b)(6)

<sup>8</sup> *Id* (c)(1)

<sup>9</sup> *Id*(c)(3)

<sup>10</sup> *Id*(c)(7)



cookies and juice, the temperatures in the shelter dropped to very cold temperatures at night, and the lights were kept on for 24 hours a day for 7 days straight.

87. DHS's top officer, Jeh Johnson, was aware of the conditions in which Respondent and other children were held. Mr. Johnson and other DHS officers, therefore, had a duty to report the child abuse suffered by Respondent in its custody. HHS officials also had a duty to report child abuse suffered by Respondent in its custody and in DHS's custody.
88. No officer in DHS or HHS reported the child abuse suffered by the Respondent. Therefore, all DHS and HHS officers that were aware of the child abuse suffered by Respondent, including Jeh Johnson, committed the crime of failure to report child abuse under 18 U.S.C. § 2258.
89. Respondent's removal proceedings should be terminated with prejudice because DHS and HHS officials violated a federal criminal law of reporting suspected child abuse. The failure to report child abuse is a serious enough matter that spurred congress to make it a crime. Nevertheless, DHS did not report child abuse of the Respondent to any authority.
90. 18 U.S.C. § 2258 was created to provide a benefit to the Respondent, namely to prevent her from becoming a victim of child abuse. The violation of this criminal statute warrants termination of removal proceedings with prejudice under Garcia-Flores. e

#### **IV. CONCLUSION**

91. Given the multiple and egregious violations of laws and regulations—including the criminal act of failing to report child abuse under 18 U.S.C. § 2258—designed to provide a benefit to the Respondent, and given that Respondent was prejudiced as a result of these violations, her removal proceedings should be terminated with prejudice pursuant to Matter of Garcia Flores.

WHEREFORE, Respondent requests this Court grant Respondent's Motion to Terminate with Prejudice.

Respectfully Submitted,

Dated: November 25, 2014  
Bay Shore, New York

Bryan Johnson, Esq.



## TABLE OF CONTENTS

TAB		PAGE
A	<b>Evidence of DHS Abuse of Respondent and Other Children</b>	
	-Respondent's affidavit	1-3
	-Medical document demonstrating Respondent was detained at Fort Sill, Oklahoma as late as [REDACTED]	4
	-ACLU, <u>Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection</u> , June 11, 2014 <a href="https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during">https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during</a>	5-29
	-John Roth, Inspector General, <u>Oversight of Unaccompanied Alien Children</u> , July 30, 2014 <a href="http://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf">http://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf</a>	30-38
B.	<b>Evidence of DHS Reckless Failure To Address Increase in Unaccompanied Immigrant Children In 2013</b>	
	-Dan Friedman, <u>Congress hears from the children that fled violence at home for the U.S. border</u> . New York Daily News, July 30, 2014 <a href="http://www.nydailynews.com/news/politics/congress-hears-children-fled-u-s-border-article-1.1885043">http://www.nydailynews.com/news/politics/congress-hears-children-fled-u-s-border-article-1.1885043</a>	39-41
	-Jenny Jiang, <u>Transcript: Mayelis testimony at the Congressional Progressive Caucus's Hearing on unaccompanied children on the southwest border-July 29, 2014</u> , <a href="http://www.whatthefolly.com/2014/08/13/transcript-mayelis-testimony-at-the-congressional-progressive-caucuss-hearing-on-unaccompanied-children-on-the-southwest-border-july-29-2014/">http://www.whatthefolly.com/2014/08/13/transcript-mayelis-testimony-at-the-congressional-progressive-caucuss-hearing-on-unaccompanied-children-on-the-southwest-border-july-29-2014/</a>	42-45
	-Julia Preston, <u>U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone</u> , The New York Times, May 16, 2014, <a href="http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?_r=0">http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?_r=0</a>	46-48

-Noe Alvarez, We're failing the immigrant kids who show up alone on our border. I know, because I used to work with them 49-56  
<http://www.washingtonpost.com/posteverything/wp/2014/11/06/i-worked-in-a-center-for-children-caught-at-the-border-the-conditions-are-disgraceful/>

### **C. Law In Support of Motion To Terminate With Prejudice**

-Flores V. Reno Settlement, January 13, 1997 57-79  
[https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf)

-8 U.S. Code § 1232 - Enhancing efforts to combat the trafficking of children, December 23, 2008, 80-91  
<http://www.law.cornell.edu/uscode/text/8/1232#FN-1>

- Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980) 92-96  
<http://www.justice.gov/eoir/vll/intdec/vol17/2780.pdf>

-18 U.S. Code § 2258, Failure to Report Child Abuse 97  
<http://www.law.cornell.edu/uscode/text/18/2258>

-42 U.S. Code §13031, Child Abuse Reporting 98-100  
<http://www.law.cornell.edu/uscode/text/42/13031>

**AFFIDAVIT**

STATE OF NEW YORK )

ss.:

COUNTY OF SUFFOLK )

I, [REDACTED], being duly sworn, depose and say:

1. I am [REDACTED]
2. I reside at the following address: [REDACTED]
3. I was arrested by border patrol officers in the State of Texas around the [REDACTED]  
[REDACTED] I was brought by car for about 30 minutes until we arrived at a border patrol station. I was put into a big jail cell with close to 100 other girls who were all minors. Some of the children were as young as 3 years old and were accompanied by their teenage mothers.
4. I was in this first cell for 4 days. In the cell, it was very cold. I was shivering almost the whole time I was there.
5. There was no bed to sleep on. I almost did not sleep for 4 days straight. I was forced to try to sleep on the concrete floor of the cell. It was hard to lay down completely because there were so many other children in the cell with me. I was only given a thin nylon cloth to cover myself with. It was not enough to protect me from the cold.
6. The light in the first cell was turned on for the entire time. The light being on the whole time made it very difficult to sleep.
7. I only ate apples for the 4 days that I was in this cell. The officers gave us tacos to eat. When I tried to eat the taco, I spit it out because the taste was so bad. It was not edible.
8. The water was very ugly in the first cell. It had a lot of chlorine. I only drank from the water fountain about 4 times in my entire time in the cell because it was so bad. The water physically hurt me as it went down my throat because of the amount of chemicals that it had in it.
9. The only thing that kept me going was the one bottle of juice a day and 3 apples per day that were given to us.
10. I felt really bad on the 4<sup>th</sup> day that I was there. I was very hungry and thirsty. I was scared because I was there for so long.

11. There was one toilet for all the children in the cell. The toilet was open to everyone else to see in the cell.
12. I was not permitted to shower or brush my teeth, or change clothing for the 4 days I was in this cell. It smelled really rotten in the cell because none of the other children were allowed to clean themselves either.
13. When I was in this cell, the first day I was already sick with a fever and cough. In those 4 days I was sick with fever the whole time. I had a bad headache as well for these 4 days.
14. Many of the children in the cell with me asked officials from the U.S. government if they could lower the air conditioning and were told no. One of the officials joked that we already had already found out how hell was and that we were just abandoned dogs. When he said this, it was clear that he was telling us that we were not worth anything and that we deserved to be there.
15. Many of the younger children were crying almost the whole time. It was like hell in this cell.
16. After the 4<sup>th</sup> day in detention in the cold cell, I was transferred to a military base that was enclosed with cloth. It was ugly there as well. The food was the same. Inedible Tacos.
17. In the military base, we were given tacos, cookies, and juice to eat. I only ate the cookies and juice because of the really bad taste of the tacos. The water was bottled in this place.
18. In this military base, I was able to sleep on a small cot. The temperature in this military base got just as cold as the cell in Texas at night. I did not have a blanket to cover me, only a thin nylon cloth.
19. I was in this military base for 7 days. As I stated earlier, I only ate cookies and juice for the entire 7 days in this base.
20. There were many sick children in this base. A woman that worked there told another girl that she sounded like an animal because of her loud cough from having the flu.

In the military base, I was brought to the doctor [REDACTED]  
[REDACTED]

22. In the military base and in the cell in Texas I was never allowed to go outside except when we were brought to take showers in a mobile truck. We were only allowed to shower once every two days.

23. I felt so weak on the 7<sup>th</sup> day in the military base and my 11<sup>th</sup> day overall of barely eating anything. My head hurt really badly and I think it was due to the severe lack of nutrition that I was receiving. I slept very poorly in this military base because of the cold and because the lights were on the entire time in this place.
24. After 7 days in the military base, I was transferred to a children's home which was much better than my two last residences provided by the U.S. government.
25. I was given food that I could eat, including pancakes in the morning and many different types of food were edible. In this place, I felt like I was treated as a human being for the first time in 11 days. In the military base and the jail cell, I felt like I was being treated as a dog, or something even less.
26. I lost a lot of weight from those 11 days. I weighed approximately 116 pounds before coming to the United States. Close to the end of my time in the children's home, I was weighed in at 108 pounds.
27. I don't know what to say to the U.S. government that treated me so poorly. I want to forget those horrible and painful days where I was deprived of such basic things as food, water, and sleep.
28. Please do not do allow the U.S. government to continue to abuse children like me. I would not want anyone else to suffer so much as I have.
29. This statement has been read to me in my native language, Spanish, and I affirm the truth of the contents contained in it.

Sworn to before me this  
[REDACTED] 2014

\_\_\_\_\_  
Notary Public