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NON-DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**NEW YORK, NEW YORK**

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In the Matter of

**[CLIENT]** **[A number]**

In removal proceedings.

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Immigration Judge: XX Individual Hearing: XX

**MOTION TO TERMINATE REMOVAL PROCEEDINGS PURSUANT TO INVALID AGENCY ACTION**

**UNITED STATES DEPARTMENT OF JUSTICE**
**Executive Office for Immigration Review**
**United States Immigration Court**
**New York, New York**

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In the Matter of

**[Client]** **[A number]**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TERMINATE REMOVAL PROCEEDIGNS PURSUANT TO INVALID AGENCY ACTION**

## Statement of Facts

[client] is a 19-year-old Honduran who stands just 5'5" tall and weighs 115 lbs. Affidavit of [client] at ¶ 2, *attached as* Exhibit A. He endured an arduous trip to the United States in April 2013, when he was just 17, to escape a terrible life at home, one in which he experienced abuse, deprivation, and indifference rising to the level of severe neglect at the hands of both of his parents. *Id.* at ¶¶ 3-5. Unfortunately, [client]'s life did not improve as he dreamed it would when he arrived at the United States border.

[client] was apprehended by immigration officials on April 24, 2013, near McAllen, TX. He had traveled for twelve days from Honduras. *Id.* at ¶ 8. [Client] had the foresight to bring a copy of his birth certificate with him when he set out on his journey. He had no other form of identification, and he tripped and fell on the banks of the Rio Grande, soaking and ruining his birth certificate. *Id.* at ¶ 9. At the immigration detention center where [client] was taken, he reported to the first Border Patrol agent he spoke with that he was 17 years of age. *Id.* at ¶ 12. Despite instructions to the contrary, *see* Form I-770, *attached as* Exhibit B, the agent did not act upon [client]'s reasonable claim that he was a minor by providing him with the forms, such as a notice of rights, and procedural safeguards, such as a telephone call, that minors detained by immigration officials are required to receive. 8 CFR § 1236.3 (g)-(h). Instead, the agent informed [client] that he did not believe him. [Client] Affidavit at ¶ 13. When [client] suggested to the agent that he call and confirm [client]'s age with his family in Honduras, the agent refused. *Id.*

Although [client] was briefly detained with other children in a cold cell with a cement floor and only four mattresses, he spent the next eight days alone in cells filled with adult men. [Client] Affidavit at ¶¶ 14; 31. [Client] was transferred from adult cell to adult cell in the detention center in Texas. *Id.* at ¶ 16. After a cursory interview with an agent who had already prepared and printed paperwork for adult detainees, [client] was informed that he should sign for voluntary departure if

he wanted to return home. *Id.* at ¶¶ 16-17. When [client] informed the agent that she had the incorrect year printed for his birth date—making him 18, not 17, years old—she told him that everything would be delayed if she had to reprint everything. *Id.* at 16. Feeling confused and pressured, [client] signed the paperwork. *Id.*

Having signed for deportation, [client] then was wound through a further maze of cells in the detention center in Texas, culminating in a shower with no privacy in a cell full of adult men. *Id.* at ¶ 19. Late at night, [client] and those in the cell with him were told that they would be returning to their countries. [Client] was shackled up: a belly chain around his waist attached to handcuffs around his wrists, and a chain between ankle cuffs. *Id.* at ¶ 20. [Client], who had never been arrested or incarcerated before, felt like a career criminal. *Id.* at 21. [Client] and the other adults were loaded onto an airplane but were not told where the plane was going.

When daylight broke towards the end of the flight, [client] could see a major metropolis below him. *Id.* at 22. When he got off the plane, [client] did not know where he was, but he was taken to what felt like a jail. *Id.* at ¶ 23. Documents served on [client] by officials during his stay at this second facility indicate that he was in Elizabeth, New Jersey, and that he did not receive legally mandated paperwork until eight days after he was detained. *See* Exhibits B and C.

At the facility, [client] was told he was to await his deportation, which would take place in five days. *Id.* at ¶ 25. [Client] was held in a cell with 11 other Hondurans, all adults. *Id.* at ¶ 23. He shared his predicament with the others: he was a minor, but he was afraid if he told authorities that, as he had previously, they would detain him until he turned 18 years old, which was two months away. *Id.* at ¶ 24. Frightened and confused, [client] began to experience acute chest pains. *Id.* at ¶ 26. Meanwhile, [client]'s cellmates told him that, as a minor, he could be released to family

in the U.S. *Id.* [client] wrote a letter to ICE, informing the agency – again—of his birth date. He also wrote a letter requesting medical attention. *Id.* at ¶ 26.

[Client] saw a doctor a few hours after writing his letter. At the end of the exam, [client] told the doctor that he was 17 years old. The doctor said that [client] should not be detained with adults and indicated that she would speak with agents right away. *Id.* at ¶ 26. [Client] was returned to his cell.

In the middle of the night, an agent came to [client]'s cell, and he was taken to the agent's office. The agent asked for [client]'s family's phone number in Honduras. Four other agents came into the office and stood around [client] while the phone call was being made, which made [client] feel very nervous. *Id.* at ¶ 27. In spite of the late hour, [client]'s brother answered the agent's call and confirmed that [client] was 17 years old. *Id.*

Upon determining that [client] was a minor, agents moved him through three different solitary confinement cells. *Id.* at ¶ 28. One cell was so small that [client] could not move around and he was reduced to tears. He had seen people who were fighting be placed in that cell as punishment. *Id.* Subsequent to solitary confinement, [client] was fingerprinted and processed for release at the detention center. When he was brought to the fingerprinting area, [client] was shackled to the chair. *Id.* at ¶ 29. [Client] was finally released to a children's shelter eight days after he was first detained. *Id.* at ¶ 31.

## Argument

### I. THE REMOVAL PROCEEDING AGAINST [CLIENT] SHOULD BE TERMINATED BECAUSE IMMIGRATION AUTHORITIES VIOLATED THEIR OWN REGULATIONS DURING HIS DETENTION.

When immigration authorities violate their own regulations, removal proceedings should be terminated if that violation caused either a "deprivation of fundamental rights," "conscience-shocking conduct," or prejudice that may affect the rights of the respondent or the fundamental fairness of his proceeding. *Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008). *See also Accardi v. Shaughnessy,* 347 U.S. 260 (1954) (vacating a deportation order because the procedure leading to the order did not conform to the relevant regulations). In this case, Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE) violated several of their own regulations while holding [client] in their custody, depriving [client] of his fundamental rights, shocking the conscience by their treatment of [client], and prejudicing [client]'s rights and ability to defend himself in his removal proceedings. As a result, this Court should grant his motion to terminate removal proceedings.

#### A. Termination Is Appropriate When Immigration Authorities Violate Their Own Regulations.

It is well established that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the [government] fails to adhere to it, the challenged deportation proceeding is invalid." *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993). This is true "'even where the internal procedures are possibly more rigorous than otherwise would be required'" by the Constitution or statute. *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) (*citing Morton v. Ruiz,* 415 U.S. 199, 235 (1974)).

Separately, and even if the violation of regulations does not rise to a violation of fundamental rights, "a regulatory violation or violations so egregious as to shock the conscience

would call for invalidation" of removal proceedings. *Rajah v. Mukasey*, 544 F.3d 427, 446 (2d Cir. 2008).

Finally, when immigration authorities violate their own regulations but have neither violated a fundamental right nor shocked the conscience, termination is still appropriate "upon a showing of prejudice to the rights sought to be protected by the subject regulation," *Waldron*, 17 F.3d at 518, or where the violation prejudices the outcome or overall fairness of removal proceedings. *Rajah* 544 F.3d at 447; *Montero v. I.N.S.*, 124 F.3d 381, 386 (2d Cir. 1997). Prejudice is presumed "when compliance with the regulation is mandated by the Constitution" or "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." *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 329 (BIA 1980).

### B. Immigration Officials Violated Several of Their Own Regulations During [client]'s Detention.

#### 1. Custody of Unaccompanied Immigrant Children is Governed by the TVPRA, Code of Federal Regulations, and the *Flores* Settlement.

Care and treatment of unaccompanied immigrant children in federal custody is dictated by three sources of law: Section 1232 of the Immigration and Nationality Act, 8 CFR 1236.3, and the *Flores* Settlement, "a consent decree that settled all claims regarding the detention conditions" raised in a constitutional challenge to the conditions of detention of juveniles by immigration authorities brought by a class of affected juveniles. *Reno v. Flores*, 507 U.S. 292, 296 (1993). The Department of Homeland Security (DHS) acknowledges that "[t]he *Flores v. Reno* Settlement Agreement governs the policy for the treatment of unaccompanied alien children in federal custody" and that "[t]he Department of Homeland Security is bound by the *Flores v. Reno* Settlement Agreement." Dep't of Homeland Sec., Office of Inspector Gen., *CBP's Handling of*

*Unaccompanied Alien Children*, Sept. 2010, at 1, *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

These three sources oblige CBP and ICE to abide by certain minimum standards of conduct when they detain an unaccompanied immigrant child. Specifically, § 1232(b)(3) of the INA obliges the government to "transfer the custody of such child [from a non-contiguous country] to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child" and to "[a]t a minimum . . . take into account multiple forms of evidence . . . to determine the age of the unaccompanied alien." 8 U.S.C. § 1232(b)(3)-(4). The INA further obliges the government to "ensure that unaccompanied alien children . . . are protected from . . . persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity . . . ." 8 U.S.C. § 1232(c)(1).

In addition, the relevant provision of the Code of Federal Regulations (CFR) mandates that "[a] juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form." 8 CFR 1236.3(g). Section 1236.3(f) of the CFR mandates that "[w]hen a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition."

Finally, the *Flores* Settlement requires appropriate temperature control and ventilation; supervision to ensure safety; and, in the government's own words, placement in "the least restrictive setting appropriate to the minor's age and special needs" and "facilities that are safe and sanitary and consistent with [DHS's] concern for the particular vulnerability of minors." Stipulated Settlement Agreement at 7-8, *Flores v. Meese*, 681 F.Supp. 665 (C.D. Cal. 1996), *available at* http://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf. (*Flores* Settlement).

### 2. Immigration Officials Violated [client]'s Rights Under the INA, CFR, and *Flores* Settlement.

As described below, over the course of [client]'s eight-day detention, for part of which he was shackled and locked in solitary confinement, immigration officials violated numerous regulations and laws that govern the custody of unaccompanied immigrant children.

#### i. Violations of the INA

CBP and ICE violated 8 U.S.C. § 1232(b)(3) of the INA by failing to transfer custody of [client] to the Secretary of Health and Human Services within 72 hours of his apprehension. Together, CBP and ICE held [client] for eight days after his apprehension, a full five days more than allowed by statute. [Client] Affidavit at ¶ 31. Although § (b)(3) allows for an exception to the 72-hour rule in the case of exceptional circumstances, no such circumstances existed at the time of [client]'s apprehension. [Client] was arrested on April 24, 2013. [Client] Affidavit at ¶ 10. That date is nearly fifteen months prior to the government's declaration of a humanitarian crisis due to an influx of unaccompanied minors. Presidential Memorandum, "Response to the Influx of Unaccompanied Alien Children Across the Southwest Border," June 2, 2014, *available at* http://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr (declaring the increase in unaccompanied child minors an "urgent humanitarian situation). Accordingly, [client] should have been transferred within 72 hours.

CBP also violated § 1232 (b)(4) of the INA by refusing to take into account multiple forms of evidence of [client]'s age. The Customs and Border Patrol agent who initially processed [client] used nothing to determine [client]'s age beyond his subjective—and, in this case, highly unreasonable—judgment. Exhibit A at ¶¶ 12-13. That determination was unreasonable in light of several forms of contradictory proof of [client]'s minority age. First, [client] weighs approximately

115 pounds and stands a mere 5'5" tall. A reasonable officer would have noted his small stature and appropriately followed up to confirm [client]'s age. Second, [client] repeatedly insisted to the officers that he was under the age of 18. Agency policy itself directs CBP officers to afford the INA's protections to every arrestee "who appear[s], [is] known, or claim[s] to be under the age of eighteen" and unaccompanied. Exhibit B, p. 2. Despite [client]'s suggestion that immigration officials call his family to confirm his age, and the presumptive availability of medical care at the facility where [client] was detained that could have produced physical evidence of his age, the agent took no evidence of [client]'s age into account. Exhibit A at ¶ 13.

CBP and ICE also violated 8 U.S.C. § 1262(c)(1) by failing to "ensure that unaccompanied alien children . . . are protected from . . . persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity . . . ." By placing [client] alone in cells full of adult immigrants for days on end, the immigration officials who oversaw his detention did not adequately protect him from the risk of victimization that is widely known to affect children placed in adult detention facilities. *See* Section I(C)(2), *infra* (describing children's vulnerability to sexual and other violence when detained with adults)

**ii. Violations of 8 CFR 1236.3**

CBP violated 8 CFR 1236.3(g) by failing to provide access to a phone before offering [client], a minor from Honduras, voluntary departure. [Client] made repeated requests for a telephone call, both because he wanted to prove to immigration officials that he was of minority age and because he was scared and wanted to contact an adult family member. Exhibit A at ¶¶ 13; 32. Despite [client]'s request for a telephone call—a request which, under the procedures mandated by regulation, he did not have make because the call should be offered to him regardless—none was given to him for many days. *Id.* at ¶¶ 13; 27. In fact, [client] was not provided telephone access until he had been detained with adults for over a week, taken a flight while shackled, and was

awaiting deportation in an adult detention facility in New Jersey. *Id.* at ¶ 20; 22; 27; 31. He had been offered—and signed, out of fear and confusion—for voluntary departure several days prior to immigration agents finally calling his family. *Id.* at ¶ 27. Accordingly, CBP violated 8 CFR 1236.3(g).

CBP also violated § 1236.3(f) by failing to provide [client] with an I-770 Notice of Rights and Responsibilities. [Client] was not given an I-770 until he had spent eight days in detention. Exhibit B (dated eight days after [client]'s arrest). The subsequent provision of the I-770 to [client] when he was in adult detention in New Jersey does not cure CBP's original violation of § 1236.3(f). By the time [client] received his I-770, he had already been processed for deportation via voluntary departure, chained and left in a room with unsupervised adults, and then placed in solitary confinement without being told why or when he would leave. This egregious behavior toward a vulnerable child could have been prevented had [client] been provided the I-770 "when apprehended," as mandated by regulation. Accordingly, CBP violated 8 CFR 1236.3(f).

**iii. Violations of the *Flores* Settlement**

CBP and ICE violated the *Flores* Settlement by refusing to provide appropriate temperature control and ventilation. During [client]'s detention by CBP, he was exposed to cold temperatures for prolonged periods. In this way, his treatment was not unlike that of prisoners held in Guantánamo Bay, treatment widely believed to amount to torture. The *New York Times* recently described the conditions under which one prisoner at Guantánamo was interrogated: "Chained, barefoot and wearing only a thin uniform in an interrogation room chilled to 49 degrees, [the prisoner] found himself on the receiving end of a barrage of questions." Helene Cooper, *Family Seeks Release of a Guantánamo Detainee Turned Author*, N.Y. TIMES, Jan. 20, 2015, *available at* http://www.nytimes.com/2015/01/21/us/family-seeks-release-of-a-guantanamo-detainee-turned-

author.html. Similarly, [client] describes the cells in which he was initially held as freezing, using the Spanish word for icebox, "hielera." *See* Exhibit A at ¶ 14.

CBP and ICE also violated the *Flores* Settlement by refusing to provide proper supervision to ensure safety. Rather than separate [client] with other children his age, the government left him unsupervised with adults during his detention in both Texas and New Jersey. *Id.* at ¶ 14; 24. Alone and in chains with a room full of adults, [client] was at great risk for victimization.

Finally, CBP and ICE violated the *Flores* Settlement by failing to place [client] in "the least restrictive setting appropriate to the minor's age and special needs" and to provide him with "facilities that are safe and sanitary and consistent with [DHS's] concern for the particular vulnerability of minors." Instead, the government placed [client] in arguably the most restrictive setting possible: in chains and in solitary confinement. Exhibit A at ¶¶ 20-22; 28-29. The government's conduct is patently inconsistent with DHS's declared concern for the particular vulnerability of minors. Accordingly, the government violated the *Flores* Settlement.

### C. The Government's Treatment of [Client] Violated His Fundamental Rights and Shocks the Conscience.

When the government violated its own regulations while [client] was in its custody, it engaged in conduct that was both a violation of [client]'s fundamental rights and a shock to the conscience. Accordingly, [client]'s removal proceedings should be terminated.

#### 1. The Government's Treatment of [Client] Violated his Fundamental Rights.

By violating both their own regulations and Congress's mandated procedures for the initiation of removal proceedings against unaccompanied children, immigration officials violated [client]'s fundamental right to due process. This right is guaranteed by both the Fifth Amendment to the Constitution and by federal statute.

"It is well established that the Fifth Amendment entitles aliens to due process of law in [removal] proceedings[.]" *Reno v. Flores,* 507 U.S. 292, 306 (1993). The provisions of the INA and the CFR at issue here are entirely about the launch of the removal process for an unaccompanied child immigrant detained at the border. Form I-770—reflecting the federal regulations and statutory language—lays out the initial steps that must be taken before removal proceedings may be fully opened against a child. Thus, the framework at issue here is inextricably and intricately linked to removal proceedings, and therefore due process.

Moreover, the procedural safeguards that these provisions enacted to ensure a child immigrant received due process—notice and the opportunity to appear before a judge, with counsel whenever possible—are the key elements of due process that the Constitution mandates. *Pierre v. Holder,* 588 F.3d 767, 777 (2d Cir. 2009) (observing that notice and an opportunity to be heard are at the "core" of due process in immigration proceedings). To wit, Form I-770 is characterized as a "Notice," both on its face and in the CFR. Exhibit B; 8 CFR 1236.3(f).

The U.S. Supreme Court has previously recognized the inappropriateness of deportation proceedings where an immigrant's due process rights have been violated. *Bridges v. Wilson*, 326 U.S. 135, 152-53 (1945) (holding that deportation is inappropriate where immigration officials violated rules affording the immigrant due process intended to" provide safeguards against essentially unfair procedures"). A parallel conclusion should be drawn in this case: deportation proceedings against [client] are inappropriate because his due process rights, guaranteed under the Fifth Amendment, were violated.

[Client]'s statutory right to due process was similarly violated. The U.S. Supreme Court has made clear that the process that Congress sets out in a federal statute is sufficient to satisfy an immigrant's right to due process under the law. In *Knauff v. Shaughnessy*, the Court commented,

"Whatever the procedure authorized by Congress is, it is due process as far as an alien . . . is concerned." 338 U.S. 537, 544 (1950). In this case, the procedure authorized by Congress is that set out in the INA, discussed in detail above. Under the rule of *Knauff*, such procedures constitute the due process to which [client] was entitled, since they were authorized by the Congress. Since the statute was violated, [client]'s due process rights were also violated. Thus, under both the INA and the Constitution, [client] had a fundamental right to due process. That right was violated and accordingly this Court should terminate the proceedings against [client].

**2. The Government's Treatment of [client] Shocks the Conscience.**

In addition to violating [client]'s fundamental right to due process, the government treated him in a way that shocks the conscience and merits the termination of these proceedings.

According to the *Flores* Settlement minors in federal immigration custody must be treated with "dignity, respect and special concern for their particular vulnerability as minors." *Flores* Settlement at ¶ 12.A. *Flores* remains in effect today, and, indeed, is the root of the entire framework in place for minors caught up in the immigration detention system. Treatment by immigration authorities that was degrading, exposed [client] to unreasonable and substantial risk of trauma and victimization, and exacerbated, instead of evincing concern for, his particular vulnerabilities as a child was at total odds with the twin principles established by *Flores* and shocks the conscience. This Court accordingly should terminate these proceedings.

**i. [Client] Was Treated Disrespectfully and His Dignity Was Violated By Agents' Shocking Conduct.**

In the *Flores* Settlement, the federal government committed itself to providing for the safety and well-being of minors. In the government's own words, "Every effort must be taken to ensure that the safety and well-being of the minors detained in these facilities are satisfactorily provided for by staff." *Flores* Settlement at ¶ 12.A. As discussed *supra*, section (B)(2)(iii), the

government's treatment of [client] was shockingly at odds with its stated commitment to child welfare.

Rather than treating [client] as a particularly vulnerable child in need of refuge, the government placed him in a numbingly cold cell, surrounded by adults. Exhibit A at ¶ 14. Placement in a freezing cell is an infamous interrogation technique used at Guantanamo Bay. It shocks the conscience to subject a small refugee child at the end of an arduous journey to the same conditions.

Moreover, [client] was not afforded any privacy in which to shower and use the toilet while locked in a crowded cell of adult men. *Id* at ¶ 19. CBP agents intimated that [client] was a liar, ignored his requests for assistance, and kept him in the dark about what was happening. *Id.* at ¶¶ 13; 14; 21; 28. The horrific, undignified, and disrespectful treatment [client] received at the hands of immigration authorities shocks the conscience and should provide this Court with ample reason to terminate these proceedings.

**ii. Agents Shockingly Disregarded The Particular Vulnerability of the Minor.**

The indiscriminate disregard by agents in this case for what the *Flores* Settlement calls "the particular vulnerability of the minor," also shocks the conscience.

**1. Agents Subjected the Vulnerable [client] to the Adverse Impact of Solitary Confinement.**

*Flores* calls for the detention of minors in immigration custody in the least restrictive setting possible. Surely, solitary confinement within an adult detention facility, which [client] experienced for more than a day, does not constitute a least restrictive setting. Exhibit A at ¶¶ 28-29. The negative impact of solitary confinement on adolescent children is widely known in the scientific and policy communities. Indeed, because of solitary's proven lasting damaging effects, New York City recently banned its use on prisoners under the age of 21: "A large body of scientific

research indicates that solitary confinement is particularly damaging to adolescents and young adults because their brains are still developing. Prolonged isolation in solitary cells can worsen mental illness and in some cases cause it, studies have shown." Michael Winerip and Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, *available at* http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html.

Human Rights Watch, reporting on the use of solitary confinement on children across the United States, found that experts had reached a similar conclusion about the damage done by this sort of confinement on teenagers:

> Experts assert that young people are psychologically unable to handle solitary confinement with the resilience of an adult. And, because they are still developing, traumatic experiences like solitary confinement may have a profound effect on their chance to rehabilitate and grow. Solitary confinement can exacerbate, or make more likely, short and long-term mental health problems. The most common deprivation that accompanies solitary confinement, denial of physical exercise, is physically harmful to adolescents' health and well-being.

HUMAN RIGHTS WATCH/ACLU, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 2 (2012).

In this case, [client] experienced feelings of desperation while he was in a Kafka-esque solitary confinement environment, being transferred from solitary cell to solitary cell, including one that was hidden from the rest of the facility and one that was excessively small. Exhibit A at ¶ 28. He felt isolated and punished. *Id.* After some time in solitary, he was reduced to tears. He was deprived of physical exercise while locked in a cell that was too small to move around in comfortably. *Id.* [client] is still affected by what happened and woke up in the middle of the night when he was first released. *Id.* at 31. Agents' disregard for regulations designed to prevent [client]'s placement in such traumatic and damaging settings is shocking.

### 2. Agents Ignored [client]'s Vulnerabilities to Victimization in Adult Detention.

The *Flores* agreement requires immigration authorities to segregate detained child immigrants from adults with whom the child is not related. *Flores* Settlement at ¶ 12.A. This procedure shields child immigrants from the risk of victimization by adult detainees, a particular vulnerability they have as children. The deliberate disregard of this particular vulnerability shocks the conscience.

Studies from the criminal justice system in this case are instructive. As the U.S. Congress has found, children incarcerated in adult detention facilities are five times more likely to be sexually assaulted in adult facilities than in juvenile ones. 42 U.S.C. § 15601 (2003) (congressional findings in support of Prison Rape Elimination Act). Further, "Studies show that youth held in adult facilities are 36 times more likely to commit suicide . . . ." National Juvenile Justice Network, *Keep Youth Out of Adult Courts, Jails, and Prisons*, *available at* http://www.njjn.org/about-us/keep-youth-out-of-adult-prisons. [Client], a mere 5'5", was confined among large groups of adult men for over a week. Exhibit A at ¶¶ 31; 19. There was no privacy, and not enough space to sleep. *Id.* at ¶ 19. While there is no evidence that [client] was in fact victimized in this setting, agents willfully placed him at a substantial risk of victimization by ignoring his claim that he was a minor and locking him in with adults. This Court should be shocked by such disregard for his vulnerabilities as a child to this sort of trauma, and terminate the proceedings against him.

### 3. Agents Ignored [client]'s General Vulnerability to Trauma as an Adolescent.

An objective shared by the *Flores* agreement and the INA is the placement of minors in detained settings that impart feelings of safety and security to child immigrants—in other words, conditions that generally minimize the risk of the traumatization of the minor throughout his or her detention.

Unfortunately, in this case, [client] was traumatized by many of the actions of immigration officials. In addition to exposing him to the trauma of solitary confinement, [client] underwent the traumatic experience of full body shackles for an extended period of time. Exhibit A at ¶¶ 20-21. [Client] was detained in exceedingly cold temperatures in cells with insufficient beds for the number of people detained therein—in some of the cells where he was detained, there were no beds at all, and he was forced to attempt to sleep on a cold cement floor. *Id.* at ¶¶ 14-15. [Client] spent eight days confined with unrelated adults, discussed in more detail below.

Research amply demonstrates the particular vulnerabilities of children to trauma. Researchers at the University of Florida summed up the literature in 2007:

> Adolescents are especially vulnerable to the effects of trauma, and trauma can have a significant impact on their development. . . . [T]rauma experienced by adolescents is particularly important because significant physical and emotional growth is occurring at this age. The stressors that an adolescent encounters will help to shape his or her growth and perspective, and can have long-lasting impacts. For example, adolescence is a time of increased brain development. There is evidence that the stress associated with traumatic events can change major structural components of the central nervous system and the neuroendocrine system. Severe traumatic stress affects the chemicals in the brain, and can change brain structures, leaving a lasting effect.

Ashley Eckes and Heidi Liss Radunovich, "Trauma and Adolescents," *Document FCS2280*, Dep't of Family Youth and Community Sciences Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida (Oct. 2007), http://edis.ifas.ufl.edu/pdffiles/FY/FY100400.pdf (internal citations omitted). Policies and regulations intended to minimize the effects of trauma while in immigration detention were shunted to the side in this case, exposing [client] to significant and prolonged traumatic conditions as his first interaction with the United States, a place where he had come to seek refuge from a traumatic childhood. Nothing could be more shocking.

Because immigration agency action was so flagrant in this case, [client] respectfully asks this Court to terminate the proceedings against him.

**D. The Government's Treatment of [Client] Prejudiced Him.**

Should this Court not find that [client]'s detention violated his fundamental right to due process or shocks the conscience, it should nonetheless terminate the proceedings against [client] because they prejudiced him.

**1. The Government Violated Procedural Frameworks, so Prejudice is Presumed.**

Because the government violated [client]'s fundamental rights derived from both the Constitution and federal statute, this Court should assume that he was prejudiced and terminate removal proceedings. *Garcia-Flores*, 17 I. & N. Dec. at 329. In the alternative, prejudice should also be presumed because the government's treatment of [client] constitutes a violation of "an entire procedural framework, designed to insure the fair processing of an action affecting an individual." *Id.* In their treatment of [client], immigration agency officials evinced a wholesale disregard for the system of safeguards set out by statute, regulation and the *Flores* settlement. More than violating an individual regulation, or even a series of regulations stemming from one source, officials violated entire frameworks for treatment of detained immigrant child immigrants that arise out of three different sources of law. They provided [client] with none of the protections or process that the immigration system is supposed to offer a child, instead routing him directly into the adult detention system, exposing him to trauma and risk, and depriving him of due process. This Court should therefore terminate these proceedings.

As noted above, the INA and CFR set out a robust framework for ensuring that unaccompanied child immigrants are safe and protected from harm in immigration detention. That framework establishes a comprehensive procedure for any person who makes a reasonable claim to be less than 18 years old. Someone who makes such a claim should promptly receive a rights

form, have access to a telephone, and be the beneficiary of diligent efforts by immigration officials to make telephonic contact with an adult of the child's choosing. Only when these procedural safeguards have been satisfied may a child immigrant sign for voluntary departure. In [client]'s case, the entire framework was violated when [client]'s claim that he was a minor was unreasonably rejected, his request for a phone call was ignored, and he was permitted to sign for voluntary departure without making telephone contact with anyone.

Additionally, [client]'s treatment violates the framework laid out in the stipulated agreement reached in *Flores v. Reno*. That suit created the modern, comprehensive framework for juveniles detained in U.S. immigration custody still in place today. *Flores* makes clear that the agreement was intended to create a national, comprehensive framework: "This agreement sets out *nationwide policy* for the detention, release, and treatment of minors in the custody of INS . . . ." *Flores* Settlement at ¶ 9 (emphasis supplied). *Flores* created a series of substantive mandates for the treatment of children in immigration detention. As an example, *Flores* commands, "Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors." *Flores* Settlement at ¶ 12.A. Similarly, *Flores* requires immigration agencies to "segregate unaccompanied minors from unrelated adults." *Id.*

As with the INA and CFR, officials followed none of the provisions of the *Flores* agreement in [client]'s case. [Client] was not segregated from unrelated adults, but instead held in unsafe and unsanitary conditions. Finally, the immigration agency evinced no concern whatsoever for his particular vulnerabilities as a child. Because the government violated an entire procedural framework, this Court should therefore presume that he was prejudiced and terminate the proceedings against him.

**2. The Government's Conduct Actually Prejudiced [client].**

Termination is appropriate "upon a showing of prejudice to the rights sought to be protected by the subject regulation," *Waldron*, 17 F.3d at 518, or where the violation prejudices the outcome or overall fairness of removal proceedings. *Rajah* 544 F.3d at 447; *Montero v. I.N.S.*, 124 F.3d 381, 386 (2d Cir. 1997). The government's conduct prejudiced the rights sought to be protected by the regulations it broke and prejudiced the overall fairness of [client]'s removal proceedings.

First, [client]'s due process right, which the regulation intended to protect, was prejudiced by immigration agents' actions. As [client]'s affidavit states, had he been provided with the procedural protections afforded to child immigrants when he was initially detained, he would have taken advantage of them. Exhibit A at ¶ 32. [client]'s very presence in the United States today is testament to this—when [client] was ultimately afforded the protections that child migrants are due, after eight days of detention in adult facilities culminating in his confinement in a solitary cell for more than 24 hours, he took advantage of them. He exercised his right to a telephone call, was released to a sponsoring adult, and is now represented by counsel. Because these rights were not initially protected, however, they were prejudiced.

Second, the serious harms that the regulations intend to prevent child immigrants from experiencing—exposure to additional trauma through prolonged detention, vulnerability to the adverse effects of solitary confinement, and risk of victimization in adult detention facilities—were all visited upon [client] in this case. This rendered these proceedings unfair. Instead of providing [client] safety, security, and adequate process under the law as required, agents exposed him to risk and trauma at the very beginning of his immigration proceedings. To then expect a traumatized child to endure ongoing removal proceedings is unfair. This Court should rectify that by terminating them.

Because [client] can demonstrate both actual and presumed prejudice in this case, this Court should terminate the proceedings against him.

## II. TERMINATION OF [CLIENT]'S REMOVAL PROCEEDINGS STRIKES AN APPROPRIATE BALANCE BETWEEN PROTECTING THE RIGHTS OF IMMIGRANT CHILDREN, DETERRING GOVERNMENT MISCONDUCT, AND ENABLING REASONABLY EFFICIENT LAW ENFORCEMENT.

In deciding a motion to terminate for violation of agency regulations, courts must "strike a balance between protecting the rights of aliens, deterring government misconduct, and enabling reasonably efficient law enforcement." *Rajah v. Mukasey*, 544 F.3d 427, 447. To strike this balance, courts should bear in mind that termination for lack of "agency compliance with its own rules would actively encourage such compliance. Careless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law." *Montilla v. I.N.S.*, 926 F.2d 162, 169 (2d Cir. 1991).

Termination in this instance strikes an appropriate balance. [Client]'s eight-day ordeal in adult immigration detention could have been avoided with a simple telephone call to his family. Instead, [client] was placed in shackles in cells of adults and subjected to solitary confinement. Termination of [client]'s proceeding instructs CBP and ICE that agency heads meant what they wrote when they committed to treat unaccompanied immigrant children with "dignity, respect and special concern for their particular vulnerability as minors." *Flores* Settlement at ¶ 12.A. Moreover, it deters rogue immigration officials from flouting Congress's mandated procedures for custody of unaccompanied immigrant youth.

Finally, the burden to efficient law enforcement of complying with the law on custody of unaccompanied minors is not only negligible, but indeed, cost-saving. A five-minute telephone call to [client]'s family at the beginning of detention would have saved CBP and ICE hours of time

and thousands of dollars in expense in confining [client] in cells with shackles, preparing immigration paperwork meant for adults, and transferring him at government expense for deportation processing in New Jersey.

Because termination would protect the rights of other immigrant children, deter future misconduct on the part of immigration officials, and encourage savings of time and cost for law enforcement, this Court should grant [client]'s motion.

## Conclusion

Under both Second Circuit and Board of Immigration Appeals precedent, [client] has demonstrated that his proceedings should be terminated. Immigration agents violated the regulations of their agencies. Those regulations protected his fundamental right to due process guaranteed by the U.S. Constitution and by federal statute. The conduct that gave rise to their violations shocks the conscience. Additionally, [client] has demonstrated both presumed and actual prejudice as a result of immigration agents' actions. Accordingly, he asks this Court to find that he has demonstrated that under *Montero*, *Rajah*, and *Garcia-Flores*, ongoing removal proceedings against him are invalid because of those violations. As a result of that finding, he also respectfully asks this Court to terminate the deportation proceedings against him, and grant any other relief that the Court finds appropriate.

Respectfully submitted,

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*Counsel for [client]*

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**NEW YORK, NEW YORK**

----------X

In the Matter of

**[CLIENT]** **[A number]**

In removal proceedings.
----------X

**EXHIBIT LIST IN SUPPORT OF MOTION TO TERMINATE REMOVAL PROCEEDINGS PURSUANT TO INVALID AGENCY ACTION**

A. Affidavit of [client]
B. Form I-770, dated May 1, 2013
C. Notice to Appear, dated May 1, 2013

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**NEW YORK, NEW YORK**

----------X

In the Matter of

**[CLIENT]** **[A number]**

In removal proceedings.
----------X

## ORDER OF THE IMMIGRATION JUDGE

Upon consideration of [client]'s *Motion to Terminate Removal Proceedings Pursuant to Invalid Agency Action*, it is HEREBY ORDERED that the motion be GRANTED because:

□ DHS does not oppose the motion.
□ A response to the motion has not been filed with the court.
□ Good cause has been established for the motion.
□ The court agrees with the reasons stated in the opposition to the motion.
□ The motion is untimely per _____.
□ Other:

_____ _____
Date Judge X
Immigration Judge

Certificate of Service
This document was served by: [ ] Mail [ ] Personal Service
To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS

_____ _____
Date Court Staff

**[CLIENT]**
**[A number]**

**PROOF OF SERVICE**

I, _____, hereby certify that on January 29, 2015, a copy of the foregoing MOTION TO TERMINATE REMOVAL PROCEEDINGS was served via hand delivery to the Department of Homeland Security, Office of Chief Counsel at the following address:

Office of Chief Counsel
26 Federal Plaza, Room 1130
New York, New York 10278

1/29/15 _____
Date