No. 19-56326

In the United States Court of Appeals for the Ninth Circuit

JENNY LISETTE FLORES, et al.,
Plaintiffs-Appellees,

v.

WILLIAM BARR, ATTORNEY GENERAL, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California, No. 2:85cv04544-DMG (AGRx)
District Judge Dolly M. Gee

BRIEF OF LEGAL SCHOLARS AND NONGOVERNMENTAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

[Filed With Consent Of All Parties, FRAP 29(a)]

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* certify that they have no parent corporations or any publicly held corporations owning 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*

The *amici* whose views are presented here are legal scholars and nongovernmental organizations with expertise in international law and the internationally recognized human rights of children. *Amici* include human rights organizations, child rights organizations, legal scholars, former United States government officials, as well as current and former international officials at the United Nations, Inter-American Commission on Human Rights, and other intergovernmental organizations having special expertise in these fields.

Amici submit this brief to vindicate the public interest in ensuring a proper understanding and application of international law and related U.S. law to this appeal. The full list of *amici* appears in the Appendix.

Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a).[1] All parties have consented to the filing of this brief.

[1] No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. FED. R. APP. P. 29(a)(4)(E).

INTRODUCTION

Under Article VI of the Constitution and Supreme Court precedent, U.S. courts have an obligation to enforce customary international law binding on the United States, as well as to construe federal law consistently with the United States' obligations under customary international law and treaties ratified by the United States. The Government's enjoined regulations,[2] which repudiate the terms of the Stipulated Settlement Agreement in *Flores v. Barr* ("*Flores* Settlement"), would violate international law, including the United States' treaty obligations and customary international law. This Court should decide the appeal in a manner consistent with U.S. obligations under international law. The policy changes the Government asks this Court to approve would violate the United States' obligations to safeguard the rights of children to be free from unlawful detention. Under international law, the United States must provide children with special measures of protection and ensure children's best interests are always a primary consideration. This Court should therefore affirm the District Court.

[2] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019).

ARGUMENT

I. This Court Should Decide This Appeal in a Manner That Is Consistent with the United States' Obligations Under International Law

Under the Constitution's Supremacy Clause, treaties "shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. Judicial decisions inconsistent with treaty obligations put the United States in breach of its international law obligations.[3] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 301(3) (AM. LAW INST. 2018).

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[3] Although the treaties applicable to this appeal may not be "self-executing," meaning that they do not provide a private right of action in domestic courts absent enabling legislation, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) cmt. c (AM. LAW INST. 1987), they nonetheless "bind the United States as a matter of international law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h; RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 310(1) (AM. LAW INST. 2018) (non-self-executing treaties enforceable in courts through "judicial application of preexisting or newly enacted law"). Accordingly, they are a source of binding obligations when construing a federal law. *See Chew Heong v. United States*, 112 U.S. 536, 548-50 (1884); *Ma v. Ashcroft*, 257 F.3d 1095, 1114-15 (9th Cir. 2001) (construing 8 U.S.C. § 1231(a)(6) as requiring a reasonable time limitation on immigration detention to avoid conflict with International Covenant on Civil and Political Rights).

In addition, a treaty that is not self-executing may provide evidence of customary international law, making it independently operative in U.S. courts. *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.9 (2d Cir. 1980); *cf. Sosa v. Alvarez-Machain*, 542 U.S. at 738 n.29 (a rule based on aspirational principles that is far from full realization is evidence against its status as binding law).

Also, under longstanding Supreme Court precedent, customary international law[4] obligations defined with appropriate specificity are enforced by U.S. courts, regardless of whether the assumption of the obligation is followed by an independent legislative enactment. *See Sosa v. Alvarez-Machain*, 542 U.S. at 737-38; *The Paquete Habana*, 175 U.S. 677, 700 (1900); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (AM. LAW INST. 1987). Judicial decisions inconsistent with such law, including those interpreting contractual or settlement agreement obligations, would put the United States in breach of both federal law as construed by the Supreme Court and the United States' obligations under international law.

As a constitutional matter, the President is also obligated to respect international law (based on treaty or custom) as part of the President's duty to faithfully execute the law. U.S. CONST. art. II, § 3. This understanding of the President's obligation is consistent with the intent of the Framers. *See*, *e.g.*, ALEXANDER HAMILTON, PACIFICUS NO. 1 (June 29, 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett ed. 1969) (the Executive is charged with executing all laws, including the Law of Nations, and judging the rights given to other nations by our treaties). Courts must therefore reject

[4] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102.

federal executive action that conflicts with a duly ratified treaty or an obligation under customary international law.

Finally, for over two hundred years, the Supreme Court has admonished that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). This doctrine has been consistently and recently reaffirmed by the Supreme Court, including in the context of immigration. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 561-63 (2006); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 164 (2004); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-41 (1987).

Accordingly, this Court should interpret the commitments of the United States pursuant to the *Flores* Settlement in a manner consistent with fundamental U.S. obligations under treaty and customary international law. The Government's enjoined regulations would violate these international legal obligations and thereby harm the public interest. To prevent unlawful conduct by the Executive Branch, this Court should affirm.

II. The Enjoined Regulations Would Violate International Law

If given effect, the enjoined regulations would authorize the Government to detain children indefinitely, *Flores v. Barr*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. Sept. 27, 2019) ("Order"), at 6, in secure or more secure facilities, Order at 10,

13-15, and to strip children of the ability to challenge certain detention decisions before an independent decisionmaker, Order at 13 (shifting such determinations "away from independent immigration judges . . . strips class members of a 'fundamental protection'"). The enjoined regulations would enable the Government to detain arbitrarily, without an individualized analysis of the best interests of the child, and in disregard of children's need for special measures of protection by the Government. Indeed, these decisions would harm children grievously. *See* Brief of *Amici Curiae* the American Academy of Child and Adolescent Psychiatry *et al.* at 9-24, *Flores v. Barr*, CV 85-4544-DMG (AGRx) (C.D. Cal. Aug. 30, 2019). The regulations would violate U.S. obligations under international law, as well as the terms of the *Flores* Settlement.

This section will discuss minimum standards that international law obligates the United States to respect with regard to the treatment and detention of children. These standards apply to all children within the jurisdiction or under the control of the United States, regardless of nationality or immigration status.[5]

[5] Heightened standards of protection apply to refugees and asylum seekers, and, as discussed in Part II.B.3, detention of childen on account of their migration status violates international law.

A. The Enjoined Regulations Would Allow the Government to Detain Children Arbitrarily in Violation of International Law

Treaty obligations and customary international law both prohibit the United States from subjecting any person, including a child, to arbitrary detention in the context of immigration enforcement.

1. Arbitrary, Unnecessary, and Prolonged Detention of Children, Including in the Context of Immigration, Violates U.S. Treaty Obligations

The United States has ratified numerous multilateral treaties that obligate it not to subject children to arbitrary detention, including in the immigration context. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 ("ICCPR"); Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating without geographic limitation Articles 2 through 34 of the Convention relating to the Status of Refugees ("Refugee Convention"), July 28, 1951, 189 U.N.T.S. 150); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 113 S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 ("Convention Against Torture").[6]

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[6] In addition, the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Res. XXX, Bogotá 1948, *reprinted in* THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 2ND SUPPLEMENT, 1942-1954, at 263 (1958) ("American Declaration"), provides in Article XXV that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court."

The United States has been bound by the substantive terms of the Refugee Convention for more than 50 years, and it codified much of the Convention in the 1980 Refugee Act. United States Refugee Act of 1980, Pub. L. No. 96-212 (Mar. 17, 1980), 94 Stat. 102, codified as amended at 8 U.S.C. ch. 12. The United States has been bound by the ICCPR since ratification in 1992.[7] The United States ratified the Convention Against Torture in 1994, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).[8] These treaties prohibit the arbitrary detention of children, which the Government seeks to impose through the enjoined regulations.

Though not a binding treaty, the American Declaration is a source of legal obligation for the United States as a member of the Organization of American States. *See Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm'n H.R., Resolution No. 3/87, ¶¶ 46, 48 (Sept. 22, 1987).

[7] Although Congress has not passed independent legislation separately implementing the ICCPR's terms, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992), when submitting human rights treaties to the Senate for its advice and consent, the Executive Branch has repeatedly assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law in such a manner. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 5, 19, 26-27 (1992) (noting that existing laws obviated the need for further implementing legislation).

[8] The Senate provided advice on and consent to the Convention Against Torture in 1990, 136 CONG. REC. 36192 (1990), but did not transmit its instrument of ratification until October 1994, when new federal criminal provisions addressing torture, *see* 18 U.S.C. § 2340, took effect.

The Refugee Convention[9] specifically forbids the unnecessary or punitive treatment of asylum seekers, including children. Article 31 of the Refugee Convention states in relevant part:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. . . .

Refugee Convention, art. 31, 189 U.N.T.S. 150.

The United Nations High Commissioner for Refugees ("UNHCR")[10] has interpreted Article 31, read in conjunction with other provisions of the treaty, to

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[9] The United States acceded to the Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (committing to the central guarantees of the Refugee Convention without entering any reservation, understanding, or declaration regarding Article 31 or other related provisions). United States of America Declarations and Reservations to the Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, 6257, at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5#EndDec.

[10] The UNHCR is the international official charged with supervising treaties for the protection of refugees. *See* Refugee Convention, pmbl. U.S. courts have frequently deferred to UNHCR as an authority on the content of international refugee law and U.S. domestic obligations under that law. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (noting that UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status "provides significant guidance in construing the [1967] Protocol [Relating to the Status of Refugees], to which

require that "detention of asylum-seekers should be a measure of last resort, with liberty being the default position." UNHCR, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, ¶¶ 13-14 (2012) ("UNHCR Detention Guidelines"). The UNHCR has similarly indicated that under international law, children "should in principle not be detained at all." UNHCR Detention Guidelines, ¶ 51. The UNHCR recently recorded its understanding of state obligations as requiring that:

> [C]hildren should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. Appropriate care arrangements and community-based programmes need to be in place to ensure adequate reception of children and their families.

UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context, at 2, Jan. 2017, https://www.refworld.org/docid/5885c2434.html.

Similarly, the U.N. Special Rapporteur on the Human Rights of Migrants has concluded that:

> Migration-related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As UNICEF and other experts have stressed, detention of children will never be in their best interests.

Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.").

U.N. Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, ¶ 62, U.N. Doc. A/HRC/11/7 (May 14, 2009), https://undocs.org/A/HRC/11/7.

The ICCPR forbids arbitrary detention more generally. Article 9(1) of the ICCPR provides that every person "has the right to liberty" and "[n]o one shall be subjected to arbitrary arrest or detention." ICCPR art. 9(1).[11] When an adult is accused of a crime, the ICCPR requires that detention in custody "shall not be the general rule." ICCPR art. 9(3). As such, criminal detention of even adults "should not exceed a few days from the time of arrest. . . . [A]ny delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances." U.N. Human Rights Comm., General Comment No. 35, ¶ 33, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2004).

Immigration detention in the United States is administrative in nature. As with other forms of administrative detention, the ICCPR requires safeguards that at a minimum ensure that those held administratively are treated at least as well as those in criminal detention. Thus, the ICCPR requires that immigration detention generally be a measure of last resort and as brief as possible.

[11] The United States did not enter any reservation, understanding, or declaration regarding Article 9. 28 WEEKLY COMP. PRES. DOC. 1008 (Sept. 10, 1992), *reprinted in* 92 DEP'T ST. BULL. (Sept. 1992).

The U.N. Human Rights Committee, the authority charged with interpreting and monitoring compliance with the ICCPR, has stated that immigration detention "must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time," and that even adult asylum seekers should only be detained:

> for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

Human Rights Comm., General Comment No. 35, ¶ 18; *accord* U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families ("U.N. Comm. on Migrant Workers"), General Comment No. 2, ¶¶ 23-26, U.N. Doc. CMW/C/GC/2 (Aug. 28, 2013); *A. v. Australia,* Commc'n No. 560/1993, ¶¶ 9.2, 9.4, Human Rights Comm., U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); U.N. Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, ¶ 53, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

The principle of necessity permits states to resort to detention "only as a last available measure." U.N. Comm'n on Human Rights, Rep. of the Working Group on Arbitrary Detention, ¶ 78, U.N. Doc. E/CN.4/1999/63 (Dec. 18, 1998). This principle also requires states to "take into account less invasive means of achieving the same ends" before resorting to detention. Human Rights Comm., General

Comment No. 35, ¶ 18; *accord C. v. Australia*, Commc'n No. 900/1999, ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002).

The Human Rights Committee has expressed specific concern that the United States' use of mandatory detention that results in non-citizens being detained "for prolonged periods of time without regard to the individual case" raises issues under Article 9 of the ICCPR. U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, ¶ 15 (Apr. 23, 2014).

In *Baban v. Australia*, the Human Rights Committee interpreted Article 9 of the ICCPR in the context of a father and minor son who sought asylum in Australia and were detained for several months. The Committee explained that, as a general rule, detention "should not continue beyond the period for which the State party can provide appropriate justification." Commc'n No. 1014/2001, ¶ 7.2, Human Rights Comm., U.N. Doc. CCPR/C/78/D/1014/2001 (2003). The Committee found Australia in violation of Article 9 because it had failed to demonstrate that detention was the least restrictive means of accomplishing its immigration policy objectives under the circumstances of the individual case. Australia had not considered less invasive alternatives, such as reporting obligations or bond. Because of the

conditions of "the hardship of prolonged detention for [the petitioner's] son," the Committee found the detention arbitrary and in violation of the ICCPR. *Id.*[12]

The detention of migrant children is *a fortiori* subject to the requirements of necessity and proportionality under international law. Because of the differences between children and adults under international law, the detention of children in secure facilities for the purpose of immigration enforcement should only take place "as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors." Human Rights Comm., General Comment No. 35, ¶ 18.

In fact, as discussed further in Part B below, there is widespread agreement that immigration detention of children cannot satisfy the requirements of necessity and proportionality once children's best interests and their extreme vulnerability are

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[12] This also accords with the jurisprudence of the Inter-American Court of Human Rights, interpreting a similar treaty provision under regional law. *"Juvenile Reeducation Institute" v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 147, 225-28 (Sept. 2, 2004) (holding that "a child's right to personal liberty must of necessity take the best interests of the child into account; it is the child's vulnerability that necessitates special measures of protection"; thus, detention of children must be "reserved for the most exceptional cases"), and guidance on the rights of migrants promulgated by the Inter-American Commission on Human Rights. Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Trafficking, Inter-Am. Comm'n H.R., Res. No. 04/19, ¶ 71 (Dec. 7, 2019).

taken into account. The conditions of detention are invariably calculated to maximize the interests of the detaining state in controlling the movement of detained persons, not to ensure the physical, intellectual, and emotional well-being of children.

International treaty obligations binding on the United States prohibit precisely the kind of conduct the Government seeks this Court's permission to pursue: subjecting children to immigration detention for the duration of their proceedings. The enjoined regulations would thus violate international law.

2. Customary International Law Prohibits Prolonged Arbitrary Detention that Would Be Permitted by the Enjoined Regulations

The right to freedom from the kind of prolonged arbitrary detention at issue here is at the core of the rights recognized in the Universal Declaration of Human Rights, arts. 3 and 9, G.A. Res. 217 (III) A (Dec. 10, 1948), and indeed, in every major international and regional human rights treaty. It is so widely recognized that it has become a norm of customary international law. *See, e.g.*, MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 172-73 (2d ed. 2005) ["NOWAK, CCPR COMMENTARY"]; *Kadic v. Karadic*, 70 F.3d 232, 240 n.3 (2d Cir. 1995) (policy of prolonged arbitrary detention is a violation of international law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(e); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981).

Reflecting customary international law, the Human Rights Committee has described "arbitrary deprivations of liberty" as among acts "in violation of . . . peremptory norms of international law." Human Rights Comm., General Comment No. 29, ¶ 11, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001). *See also* U.N. Working Group on Arbitrary Detention, Rev'd Delib. No. 5, ¶ 8, *in* U.N. Human Rights Council, Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/39/45, annex (July 2, 2018) ("Rev'd Delib. No. 5") (noting that the "prohibition on arbitrary detention" has become "absolute, meaning that it is a non-derogable norm of customary international law, or *jus cogens*"). Such peremptory norms are binding without exception on every state. Thus, customary international law categorically forbids the United States from engaging in precisely the conduct for which the Government seeks this Court's permission: subjecting children to prolonged detention.

B. Children Are Entitled to Special Measures of Protection and to Have Their Best Interests Be a Primary Consideration in All Decisions that Affect Them

In addition to the prohibition on arbitrary detention, this Court must consider two other principles of international law specifically protecting children, both of which derive from treaty obligations binding on the United States as well as customary international law. First, children are entitled to special measures of protection under international law. Second, children have a right to have their best

interests be a primary consideration in all decisions that affect them.[13] Both these rights would be violated if this Court were to reverse the District Court's decision and allow the Government to violate the *Flores* Settlement.

1. Under the ICCPR, the United States Must Provide Children with Special Measures of Protection and Ensure that Children's Best Interests Are Always a Primary Consideration

As a state party to the ICCPR, the United States has committed to providing "special measures" to protect children. ICCPR, art. 24.[14] Special measures comprise all appropriate measures necessary to protect children's health, well-being, and development. *See* Human Rights Comm., General Comment No. 17, ¶ 3, U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/44/40 (1989); *see also* NOWAK, CCPR COMMENTARY at 546 ("Pursuant to Art. 24(1), the State is under a comprehensive duty to guarantee that all children subject to its jurisdictional authority are afforded protection . . . .").

The ICCPR's requirement of "special measures" should be interpreted in light of the 1959 United Nations Declaration on the Rights of the Child, G.A. Res. 1386

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[13] Courts in the United States and elsewhere routinely employ the best interests principle in a range of child-related proceedings, including "custody, family relations, alternative care, healthcare, criminal justice, disabled children, education, and survival." Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 4 (1994) (collecting cases).

[14] The United States did not enter any reservation, understanding, or declaration regarding Article 24. 28 WEEKLY COMP. PRES. DOC. 1008 (Sept. 10, 1992), *reprinted in* 92 DEP'T ST. BULL. (Sept. 1992).

(XIV), (Nov. 20, 1959) ("Child Rights Declaration"),[15] which was adopted unanimously, and to which the ICCPR drafters referred repeatedly in the drafting of Article 24. NOWAK, CCPR COMMENTARY at 547. It should also be interpreted in light of the Convention on the Rights of the Child, which was adopted by the U.N. General Assembly in 1989 and reflects an effectively universal consensus on the rights of children worldwide. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.[16]

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[15] The United States voted in favor. 1 OFFICE OF THE U.N. HIGH COMM'R ON HUMAN RIGHTS (OHCHR), LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD, U.N. Doc. HR/PUB/07/1, U.N. Sales No. E.07.XIV.3 (2007). A similar Declaration previously was adopted by the League of Nations in 1924. Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 179 (1924), *reprinted in* 1 OFFICE OF THE U.N. HIGH COMM'R ON HUMAN RIGHTS, LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 3.

[16] Because the United States has signed but not ratified the Convention on the Rights of the Child, it is not technically bound by the treaty. As a signatory, however, the United States must refrain from actions that would defeat the treaty's object and purpose. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. (Although the U.S. has not ratified the Vienna Convention on the Law of Treaties, it regards this convention as reflecting customary international law that binds the U.S., and "the authoritative guide to current treaty law and practice." S. EXEC. DOC. L., 92-1 (1971), at 1.)

The Convention on the Rights of the Child entered into force over 30 years ago and now has 196 parties, meaning that every U.N. member state in the world except the United States has explicitly accepted it as binding international law. The Convention is the most widely ratified human rights treaty in history. *See* UNICEF, *What is the Convention on the Rights of the Child?*, *at* http://unicef.org/child-rights-convention/what-is-the-convention (visited Jan. 23, 2020). The U.S. contributed more language to the Convention than any other government in the world. 1 OHCHR, LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD at iii; Cynthia Price Cohen, *Role of the United States in Drafting the Convention on*

The 1959 Declaration on the Rights of the Child calls on governments to take measures to safeguard children's rights. Child Rights Declaration, princ. 4, 7, 9 (noting special measures of protection in relation to the rights to adequate nutrition, housing, recreation, medical services, and education, and protection against all forms of neglect and cruelty). This Declaration also established the best interests of the child as a primary consideration in matters affecting children. *Id.* at princ. 2.

The United Nations Human Rights Committee has relied on the "best interests of the child" standard as the basis for several of its decisions and comments interpreting provisions of the ICCPR. *See, e.g.*, *Buckle v. New Zealand*, Commc'n. No. 858/1999, ¶ 5.7, Human Rights Comm., U.N. Doc. CCPR/C/70/D/858/1999 (2000); U.N. Human Rights Comm., General Comment No. 17; U.N. Human Rights Comm., General Comment No. 19, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 28 (July 29, 1994).[17]

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the Rights of the Child: Creating A New World For Children, 4 LOY. POVERTY L.J. 9 (1998).

[17] Other international and regional human rights treaties incorporate the "best interests" principle. *See, e.g.*, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption arts. 1, 4, May 29, 1993, 1870 U.N.T.S. 167; Convention on the Elimination of All Forms of Discrimination Against Women arts. 5, 16, Dec. 18 1979, 1249 U.N.T.S.13; Convention on the Rights of Persons with Disabilities arts. 7, 12, 23, Dec. 13, 2006, 2515 U.N.T.S. 3; American Convention on Human Rights ("American Convention"), art. 17(4), Nov. 22, 1969, 1144 U.N.T.S. 123. Regional human rights commissions and courts—such as the European Court of Human Rights and the Inter-American Court of Human Rights—

2. Under Customary International Law, the United States Must Provide Children with Special Measures of Protection and Ensure that Children's Best Interests Are Always a Primary Consideration

The principles that children must be afforded special measures of protection and their best interests must always be a primary consideration in matters affecting them—including in decisions about their custody and care—have longstanding acceptance in both international and domestic law. The consistent affirmation of these principles, including in treaties ratified by virtually the entire community of nations, and their widespread use as binding legal norms, show these principles to have become settled rules of customary international law.

Myriad human rights instruments, including declarations and treaties, recognize the obligation to provide children with special measures of protection.[18]

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regularly refer to the best interests principle. S*ee, e.g.*, *Hendriks v. Netherlands*, App. No. 8427/78, 5 Eur. Comm'n H.R. Dec. & Rep. 223 (1982); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, *passim* (Aug. 19, 2014), *available at* http://www.corteidh.or.cr/docs/ opiniones/seriea_21_eng.pdf).

[18] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25(2) (Dec. 10, 1948) ("Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection"); American Declaration art. VII ("All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."); American Convention art. 19 ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."); African Charter on Human and Peoples' Rights art. 18, June 27, 1981, 1520 U.N.T.S. 217 ("The State shall . . . ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.").

Similarly, the "best interests" principle has been pervasively recognized, including in the Declaration of the Rights of the Child (1959); the Convention on the Rights of the Child (1989); the U.N. Convention on the Rights of Persons with Disabilities arts. 7, 12, 23, Dec. 13, 2006, 2515 U.N.T.S. 3;[19] the U.N. Convention on the Elimination of All Forms of Discrimination Against Women arts. 5, 16, Dec. 18, 1979, 1249 U.N.T.S. 13;[20] the African Charter on the Rights and Welfare of the Child arts. 4, 9, 19, 20, 24, 25, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990), https://au.int/en/treaties/african-charter-rights-and-welfare-child; the American Convention on Human Rights art. 17(4), Nov. 22, 1969, 1144 U.N.T.S. 123; the European Convention on the Exercise of Children's Rights pmbl., arts. 1, 6, 10, Jan. 25, 1996, 2135 U.N.T.S. 267; and the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption arts. 1, 4, May 29, 1993, 1870 U.N.T.S. 167.[21]

The most widely ratified human rights treaty, the Convention on the Rights of the Child, includes the best interests of the child as a "leading principle." *See* Comm.

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[19] The U.S. has signed (but not yet ratified) this treaty, and thus must not do anything to undermine the treaty's objectives pending ratification. Proclamation 8398, Anniversary of the Americans with Disabilities Act 2009, 74 Fed. Reg. 37,921 (July 24, 2009); *see* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

[20] The U.S. also signed this treaty. Message to the Senate Transmitting the Convention, 16 WEEKLY COMP. PRES. DOCS. 2715 (Nov. 12, 1980).

[21] The U.S. signed this treaty, too. 2494 U.N.T.S. 88.

on the Rights of the Child, General Comment No. 14, ¶ 1, U.N. Doc. CRC/C/GC/14 (May 29, 2013); *see also* Comm. on the Rights of the Child, General Comment No. 5, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) (identifying four core principles underlying the Convention: nondiscrimination, the best interests of the child, the right to life and development, and respect for the views of the child). Crucially, Article 3(1) of the Convention states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." *See also* Comm. on the Rights of the Child, General Comment No. 14, ¶ 6; Comm. on the Rights of the Child, General Comment No. 5, ¶ 12; Declaration on the Rights of the Child, princ. 2.

U.S. state and federal courts consistently employ the "best interests of the child" in their domestic jurisprudence relating to myriad aspects of children's interests, including custody decisions and cases involving child abuse or neglect. *See, e.g.,* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J.L. & FAM. STUD. 337 (2008); D. Marriane Blair & Merle Hope Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAMILY L.Q. 247, 247 (2005).

In short, the best interests principle has been repeatedly and consistently affirmed by the overwhelming majority of countries for more than 60 years. It has

been applied by domestic and regional courts and international authorities as a binding rule of law. Thus, the "best interests of the child" principle constitutes customary international law.

3. International Legal Authorities Have Found that the Detention of Children on Account of Their Migration Status Violates International Law

Numerous international human rights authorities have concluded that the detention of children in the context of immigration enforcement is a violation of children's rights. The U.N. Committee on the Rights of the Child, charged with interpreting and monitoring state compliance with the Convention on the Rights of the Child, has found that "[t]he detention of a child because of their or their parent's migration status . . . always contravenes the principle of the best interests of the child." Comm. on the Rights of the Child, Rep. of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, ¶ 78 (2012); *accord* Comm. on the Rights of the Child, General Comment No. 6, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005). The Committee has also determined that "States should expeditiously and completely cease the detention of children on the basis of their immigration status." *Id*. The Committee reaffirmed this conclusion in a joint comment issued with the U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. U.N. Comm. on Migrant Workers & U.N. Comm. on the Rights of the Child, Joint General Comment No. 4

(Comm. on Migrant Workers) and No. 23 (Comm. on the Rights of the Child) on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination, and Return, ¶ 5, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017) ("Joint General Comment"). Similarly, the U.N. Special Rapporteur on Torture has stated that "the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child . . . ." Human Rights Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015).

In line with these interpretations, the Parliamentary Assembly of the Council of Europe has considered itself bound to call on states to "acknowledge that it is never in the best interests of a child to be detained on the basis of their or their parents' immigration status." Eur. Parl. Ass., Res. 2020, ¶ 9.1 (2014), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en. The Inter-American Court of Human Rights has likewise found that the detention of children solely on the basis of their migration status exceeds the requirement of necessity, is contrary to children's best interests, and thus, incompatible with regional human rights treaties. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 154-60 (Aug. 19, 2014).

The Inter-American Commission has also affirmed this norm in its principles on the human rights of migrants. *Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking*, Inter-Am. Comm'n H.R., Res. No. 04/19, ¶ 71 (Dec. 7, 2019).

In 2017, the Committee on the Rights of the Child and the Committee on Migrant Workers jointly reaffirmed that "children should never be detained for reasons related to their or their parents' migration status" and called on states to "eradicate the immigration detention of children." Joint General Comment, ¶ 5. Similarly, the U.N. Secretary-General has concluded: "Detention of migrant children constitutes a violation of child rights." U.N. Secretary-General, *International Migration and Development*, ¶ 75, U.N. Doc. A/68/190 (July 25, 2013).

The UNHCR and the U.N. High Commissioner for Human Rights have also interpreted international law as forbidding the detention of children for immigration-related purposes, regardless of the legal/migratory status of the children or their parents, partly because detention is never in a child's best interests. *See*, *e.g.*, UNHCR's Position Regarding the Detention of Refugee and Migrant Children in the Migration Context, Jan. 2017, http://www.refworld.org/docid/5885c2434.html. Indeed, in 2018, in response to the emerging situation at the U.S. southwestern border, the Office of the U.N. High Commissioner for Human Rights stated that, in the migration context: "Detention is never in the best interests of the child and

always constitutes a child rights violation." Press Release, Office of the U.N. High Comm'r on Human Rights, Press Briefing Note on Egypt, United States, and Ethiopia, ¶ 2 (June 5, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E.

Successive U.N. Special Rapporteurs on the Human Rights of Migrants have interpreted the relevant treaties and customary international law to the same effect. *See, e.g.,* Rep. of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, ¶ 62; Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, ¶ 44, U.N. Doc. A/HRC/29/36 (May 8, 2015); Declaración del Sr. Felipe González Morales, Relator Especial sobre los derechos humanos de los migrantes, at 3 (June 20, 2018), https://www.ohchr.org/Documents/Issues/SRMigrants/HRC38_SR%20MIGRANTS_20June2018.PDF.

For similar reasons, the U.N. Working Group on Arbitrary Detention, an independent group of experts appointed by the U.N. Human Rights Council, concluded in 2018: "The deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited." Rev'd Delib. No. 5, ¶ 11. *See also id.*, ¶ 40 ("Detaining children because of their parents' migration status will always violate the principle of the best interests of the child."); U.N. General Assembly, Report of the Working Group on Arbitrary

Detention: U.N. Basic Principles and Guidelines on Remedies and Procedures of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, princ. 21, ¶ 46, U.N. Doc. A/HRC/30/37 (July 6, 2015).

The independent expert leading a U.N. global study on children deprived of liberty observed in his July 2019 report: "[M]igration-related detention of children cannot be considered as a measure of last resort and is never in the best interests of the child and, therefore, should always be prohibited." U.N. General Assembly, Manfred Nowak (Independent Expert), Global Study on Children Deprived of Liberty, U.N. Doc. A/74/136 (July 11, 2019) at 12/23.

As the overwhelming consensus of these and other authorities make clear, subjecting children to immigration detention because of their parents' status is not in children's best interests. An ethic of care—not detention or enforcement—needs to govern all actions taken with regard to children, and the principles of minimal intervention and the best interests of the child should always apply. Joint General Comment, ¶ 12; *see generally* G.A. Res. 64/142, Guidelines for the Alternative Care of Children (Feb. 24, 2010).

In sum, treaties and customary international law require that the best interests of the child be a primary consideration, and that children be entitled to special protection and assistance, in the immigration context. The Government may not

disregard these obligations in pursuit of other policy goals, and these principles render the Government's enjoined regulations unlawful.

CONCLUSION

For the foregoing reasons, *amici* request that the Court uphold the decision of the District Court.

RESPECTFULLY SUBMITTED this 28th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2020.

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DATED this 28th day of January, 2020.

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