

# **DEFENDANTS' EXHIBIT 2**

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ESRB,

4 Plaintiff,

PART I

5 v.

6 JEFFERSON BEAUREGARD SESSIONS,

7 Defendant.

8 -----x  
9 July 24, 2018  
2:45 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13 APPEARANCES

14 THE LEGAL AID SOCIETY  
15 Attorneys for Plaintiff  
16 SARAH GILLMAN  
GREGORY COPELAND  
17 JENNIFER LEVY

18 GEOFFREY S. BERMAN  
United States Attorney for the  
Southern District of New York  
19 MICHAEL J. BYARS  
BRANDON M. WATERMAN  
20 Assistant United States Attorneys

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1 (Case called)

2 THE DEPUTY CLERK: Will everyone please be seated, and  
3 would the parties please identify themselves for the record.

4 MR. COPELAND: Gregory Copeland of The Legal Aid  
5 Society for the plaintiff petitioner.

6 MS. GILLMAN: Sarah Gillman, The Legal Aid Society,  
7 for the plaintiff petitioner.

8 MS. LEVY: Jennifer Levy, The Legal Aid Society, for  
9 the plaintiff petitioner.

10 MR. BYARS: Assistant U.S. Attorney Michael Byars for  
11 the respondent.

12 MR. WATERMAN: Assistant U.S. Attorney Brandon  
13 Waterman on behalf of the respondents.

14 THE COURT: So I have received a copy of the proposed  
15 order to show cause, as well as the memorandum of law in  
16 support of the order to show cause and the underlying  
17 complaint.

18 I would have thought that the proper way to proceed is  
19 to give the government a short window to put in responding  
20 papers, provided that the status quo remain as is during that  
21 short period.

22 So I was thinking maybe the government could get in  
23 their papers by Thursday morning, and we could hold oral  
24 argument and if necessary -- well, we would hold oral argument  
25 on Thursday afternoon, and if there was an evidentiary hearing

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1 that was needed, then we could hold that on Friday.

2 So any objections to that?

3 MS. GILLMAN: No, your Honor, we do not object to  
4 that.

5 MR. BYARS: Your Honor, this schedule raises some  
6 concern for the government. As I am sure your Honor is aware,  
7 the issue of the reunification of parents and children is under  
8 active management by Judge Sabraw in the Southern District of  
9 California. The judge set a deadline Thursday for  
10 reunifications to take place and the government is working to  
11 make sure that that happens.

12 Last Monday, shortly before 8 p.m., the government was  
13 notified of an action in Part I before Judge Swain. We  
14 appeared Monday night. Judge Swain entered a temporary  
15 restraining order.

16 THE COURT: Are you talking about last week?

17 MR. BYARS: Yes. The case was sent to Judge Furman.  
18 We saw him the next day. Then on Thursday of last week, Judge  
19 Furman entered an order transferring that case to the Southern  
20 District of California, and I am happy to hand up a copy of the  
21 order.

22 THE COURT: I have a copy. Thank you.

23 MR. BYARS: I would like to draw your attention, your  
24 Honor, if I may, to the bottom of page 4, in which Judge Furman  
25 says, "To preserve the status quo, the temporary relief granted

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1 by the court on July 17, 2018, Docket No. 9, is extended to  
2 give Judge Sabraw an opportunity to consider plaintiff's  
3 request for broader emergency relief. The parties should  
4 promptly present those issues to Judge Sabraw so he can decide  
5 whether to maintain, modify, or vacate the order granting  
6 temporary relief."

7 I am hard-pressed to understand what Legal Aid is  
8 asking for in this action that is not encompassed by Judge  
9 Furman's direction, and it raises some very real practical  
10 concerns. On the day that we appeared before Judge Swain,  
11 Judge Sabraw held a hearing. Commander of Public Health  
12 Service Jonathan White appeared and established to Judge  
13 Sabraw's satisfaction that a 12-hour notice period prior to  
14 transporting these children was not needed and would interfere  
15 with the logistics of reuniting these children with these  
16 parents. I am not sure why these issues should be determined  
17 anywhere else but in the Southern District of California. And  
18 I would note that all of the parents whose children are  
19 represented here, all of these parents have told HHS that they  
20 want their children, and they want them as soon as possible.

21 Now, the Southern District of California court was  
22 open last night when we received notice from Legal Aid at 8:19  
23 p.m., 5:19 p.m. California time. That court was open. It  
24 would have been open after-hours.

25 THE COURT: Are you sure it wasn't closed at 5 p.m.?

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1 I don't know, but most courts do close at 5 p.m., and my many  
2 wonderful trips to California suggest to me that working  
3 overtime is not their favorite occupation. So what makes you  
4 think that court was open?

5 MR. BYARS: Judge Sabraw has a jury trial ongoing. I  
6 am sure that Legal Aid could have reached out, certainly this  
7 morning before today's hearing. It's almost noon there. There  
8 is a hearing today on the case at 3 p.m.

9 THE COURT: Just so I understand what your proposal  
10 is. Is your proposal that I transfer this matter forthwith to  
11 Judge Sabraw? Is your proposal that I simply deny the order to  
12 show cause? Is your proposal that I do all that without  
13 hearing anything further from the government in terms of  
14 written submissions? I just want to be clear what you're  
15 specifically asking for.

16 MR. BYARS: I would ask for an immediate transfer of  
17 this case to Judge Sabraw. Absent that, then I think that the  
18 case should be -- we can certainly brief the case, but I think  
19 that any interim relief that your Honor were to consider here  
20 is plainly going to delay reunifications of children with  
21 parents who have asked to be reunified with their children, and  
22 that should not happen. It would contradict the court order  
23 that Judge Sabraw has put in place requiring reunifications by  
24 Thursday, and it's just going to slow everything down.

25 Moreover, it appears that what Legal Aid wants to do

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1 is to force the parents to come to New York in order to get  
2 their children, and testify in a proceeding here to the  
3 satisfaction of Legal Aid before they can do that. That just  
4 seems completely contrary to the case's active management in  
5 the Southern District of California. Legal Aid is not a  
6 guardian ad litem here. The parents here have indicated what  
7 their decision is and their decision should be given effect.

8 THE COURT: Let me hear from plaintiff's counsel.

9 MS. GILLMAN: Thank you, your Honor.

10 So we come here today with a very simple ask. We are  
11 simply asking that our clients, the eight children that we have  
12 brought this individual habeas action on behalf of, be given  
13 the opportunity to have a meaningful conversation with their  
14 parents before they make what would be the most important  
15 decision in their young lives. The government frames this as a  
16 very simple issue of reuniting the parents and the children,  
17 but the Legal Aid Society here is representing in this  
18 particular action before your Honor eight individuals, who  
19 range in age from 9 to 17, who were forcibly separated from  
20 their parents.

21 The reason that we brought this action before your  
22 Honor is because the government notified the plaintiff's  
23 counsel that transfer of these children outside the  
24 jurisdiction of New York was going to happen imminently.

25 Number one, we got this notification very late on

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1 Saturday night. The plaintiffs are currently housed in  
2 facilities that are run by the Office of Refugee Resettlement.  
3 Those facilities are not open on the weekend, and so that made  
4 any communication even with counsel seriously difficult.

5 Next, your Honor, again, we are dealing with children  
6 between the ages of 9 and 17. We are not making a big ask  
7 here. There is a group of children who are in our papers  
8 before your Honor. There's four children and one family. So  
9 we are talking about five parents for eight children.

10 THE COURT: I guess what I am unclear about is the  
11 government, if I understand it, says that all the children,  
12 including, presumably, these eight, were being reunified with  
13 their parents. So if that's true, isn't that what you wanted?

14 MS. GILLMAN: Your Honor, we do not oppose  
15 reunification. However, we are here representing the  
16 individual children, eight of them, and in order to ensure that  
17 their rights are protected, including, but not limited, the  
18 right to seek any independent relief such as asylum, that they  
19 have the opportunity to have a meaningful communication with  
20 their parents.

21 THE COURT: Presumably, the way to have that is, in  
22 the first instance, by reuniting them.

23 MS. GILLMAN: Your Honor, the reunification of our  
24 clients, if it was to take place under the framework that the  
25 government is proposing, would not allow for meaningful

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1 communication, number one, between the plaintiffs and their  
2 counsel. Number two, the defendants have not indicated where  
3 these children and their parents are going to be reunited.  
4 They have indicated sort of a suggestion as to where they are  
5 going to be reunited. But there is another issue at play here,  
6 which is that these children cannot be placed in facilities  
7 that are not in compliance with the *Flores* settlement.

8 THE COURT: How did you come to represent these eight?

9 MS. GILLMAN: The Legal Aid Society, part of our  
10 office, your Honor, is comprised of a youth project. The youth  
11 project does outreach with children who are in the custody of  
12 Office of Refugee Resettlement. These eight children are from  
13 a larger group of children that were part of litigation that  
14 was brought last week, which the government made reference to,  
15 and these children are being represented by the Legal Aid  
16 Society through our youth project.

17 THE COURT: Did these children request your  
18 representation?

19 MS. GILLMAN: Yes, they did, your Honor.

20 THE COURT: In what form did they do that?

21 MS. GILLMAN: The way that the youth project works is  
22 that we receive referrals from agencies that go in and  
23 initially meet with children in ORR custody. And then once a  
24 referral is sent to us, we go and meet with the individual  
25 children at the facilities. In this particular instance, the

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1 facilities are in New York, and the children indicated what  
2 their wishes were to us, and we have then followed through with  
3 those wishes, in terms of what we have stated in the papers.

4 THE COURT: Let me go back to defense counsel.

5 So with respect to these eight children, what form is  
6 reunification taking and when?

7 MR. BYARS: My understanding is that they would be  
8 transported to meet with their parents on, I believe, as early  
9 as tomorrow the transportation would take place.

10 THE COURT: Transportation to where?

11 MR. BYARS: Well, it depends on where their parents  
12 are located, but, presumably, some of them are located in  
13 Texas.

14 THE COURT: And this is all pursuant to the order of  
15 the California federal judge?

16 MR. BYARS: It's all under the supervision of that  
17 judge, yes, your Honor.

18 THE COURT: Is the timetable one that that judge set  
19 or not?

20 MR. BYARS: The deadline for Thursday's reunifications  
21 to be completed is set by the Southern District of California,  
22 by Judge Sabraw.

23 THE COURT: Let me go back to plaintiff's counsel.

24 If these children are all going to be taken as early  
25 as tomorrow, and no later than Thursday, to be reunited with

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1 their parents, I am at a loss to see why you object to that.

2 MS. GILLMAN: Well, the issue, again, your Honor, is  
3 that the government has not indicated what this reunification  
4 means, meaning what happens after there is reunification with  
5 the parents. Does that mean that the child and the parent will  
6 then be detained in a facility that is not compliant with the  
7 *Flores* settlement? Does the reunification mean that the parent  
8 and child will be deported?

9 THE COURT: Aren't those the kind of issues that are  
10 before the judge in California?

11 MS. GILLMAN: They are not, your Honor. The *Ms. L*  
12 class represents the parents and not children, and that's why  
13 we had to come before your Honor on behalf of these eight  
14 children. If the children are sent, as per the plan of the  
15 government, and as your Honor just previously asked defense  
16 counsel, we don't know what is going to happen after they are  
17 moved to be with their parents, and therein lies the problem.  
18 Because of the fact that they were separated from their  
19 parents, because of the fact that they were children --

20 THE COURT: But if the judge in California is dealing  
21 with reunification from the standpoint of the parents, doesn't  
22 it make sense, if there are separate interests involving the  
23 children, that those also be litigated before that same judge?

24 MS. GILLMAN: Not in this particular instance, your  
25 Honor. Again, I am sorry that I keep repeating myself, but we

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1 are dealing with eight young children. By virtue of the fact  
2 that they were separated from their parents, they have  
3 obviously experienced trauma. We have one plaintiff in our  
4 action before your Honor who suffers from attention deficit  
5 disorder, who really has been suffering within the context of  
6 the facility and the separation from his parent. The *Ms. L*  
7 litigation simply seeks to reunify, but it's not representing  
8 the interests of the eight plaintiffs that come before your  
9 Honor.

10 THE COURT: If I were to transfer this case to  
11 California, then you, or your California co-counsel, would  
12 still have full standing to represent the interests of those  
13 children there.

14 MS. GILLMAN: Well, your Honor, I think there are a  
15 couple of problems there. Number one, as defense counsel  
16 referenced, and as is set forth in our moving papers, they are  
17 also under the requirements of the order that was issued by the  
18 Honorable Swain last Monday. Within that order, Judge Swain  
19 required that there be meaningful communication and that  
20 specifically the government advise within 48 hours of the  
21 purpose of the release, detention, or repatriation. We haven't  
22 been advised of any of those things.

23 Moreover, again, the action here before your Honor  
24 really just involves -- it's a very minimal ask. We are simply  
25 asking that the children be able to communicate with their

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1 parents, and that that be facilitated by the parents being  
2 brought to New York so they can actually engage in this  
3 communication. If they are transferred out of this  
4 jurisdiction, it's going to be impossible for them to engage in  
5 that meaningful communication. Again, these children --

6 THE COURT: That's what I am not fully understanding.  
7 Why are they going to have any less meaningful communication in  
8 Texas, for example, where I gather some will be reunited, than  
9 here?

10 MS. GILLMAN: Well, I think there's a few things. The  
11 first thing is we don't know what will happen to them upon  
12 transfer to Texas. So we don't know what the purpose is once  
13 they get there. Are they being deported? Are they not being  
14 deported? Are they going to be able to proceed with their own  
15 independent claims? And again, that's not something we know.  
16 We just simply don't know that.

17 The second thing is that their attorneys are here in  
18 New York, and we think that it's incredibly important for them  
19 to be able to consult with their parents and then have the  
20 ability to consult with their attorneys.

21 Third, I think that again, as I referenced before, we  
22 are not dealing with simply the transfer of -- just the general  
23 transfer. These are children, again, who are just going  
24 through an incredibly difficult time, and if they are sent to  
25 the detention facilities that the government -- again, we don't

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1 exactly know what facilities they are; we don't know what  
2 accommodations are there for these children.

3           These children right now are in facilities in New York  
4 that, although it's very difficult for them, although they are  
5 separated from their parents, although they are going through  
6 trauma, at least in these facilities, these facilities are  
7 compliant with the requirements of the *Flores* agreement, which  
8 allows for certain accommodations to be made for these  
9 children. If these children are transferred across the country  
10 to various detention facilities, we have no indication of what  
11 those facilities will be.

12           Therefore, the idea that they can engage in meaningful  
13 communication and meaningful consultation is virtually  
14 impossible, because you're taking someone who has already been  
15 traumatized, you're sending them from a facility that, although  
16 not perfect, not their home, not with their parent, actually  
17 does have some level of care that can address these child's  
18 needs, and then you're transferring them out of that facility,  
19 where they have already been transferred from their parents  
20 forcibly, and they are put in a situation where we don't know  
21 what is going to happen.

22           Again, we are simply asking for a very small ask, and  
23 I think your Honor's --

24           THE COURT: I am trying to get down to the  
25 practicalities of this. The government says it's under an

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1 order from the judge in California to reunite children and  
2 parents by Thursday. And you say, if I understand you  
3 correctly, that's fine, but they need to be reunited here  
4 rather than someplace else so that they can have, in effect,  
5 communication with you.

6 Do I have that right so far?

7 MS. GILLMAN: Yes, your Honor. I think we are also  
8 asking that our clients' wishes be adhered to here. If they  
9 are transferred out of this jurisdiction, I don't think that  
10 their wishes would be adhered to for all the reasons I  
11 previously stated.

12 The other issue we have here, your Honor, and why we  
13 had to come before you today --

14 THE COURT: Isn't their single biggest wish to be  
15 reunited with their parents?

16 MS. GILLMAN: No, your Honor. Some of the children  
17 who are here before you today are actually very, very scared of  
18 going back to their country, and they would like the right to  
19 pursue their own independent claim for asylum. But as your  
20 Honor can understand, we are dealing with a situation where  
21 these children are left in a situation where they are being  
22 told you have to reunify with your parents, but you're not  
23 really being told what that means, and where you're going, and  
24 whether or not you're going to have the right to actually  
25 proceed with your own application for relief. And in the same

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1 time, you're dealing with a group of children who have just  
2 suffered trauma and will continue to suffer trauma.

3 And the problem with what the government is proposing,  
4 and I guess their objection to what we have proposed to your  
5 Honor, is that there hasn't been meaningful notice provided to  
6 our clients. Again, we received an e-mail notification very,  
7 very late on Saturday evening, and that notification did not  
8 provide any substance. The only thing it provided was, we are  
9 going to be transferring these children.

10 I think what your Honor proposed in the initial ask to  
11 both the plaintiff and the defendant is more than reasonable.  
12 We are, again, speaking about five parents here. We are not  
13 talking about thousands of parents. We are talking about five  
14 parents, eight children. And all we want to do is make sure  
15 that they have the opportunity to meaningfully engage with  
16 their parents and make a decision after that is done. And it's  
17 just impossible to do if they are taken from New York and  
18 transferred across the country. I don't want to say across the  
19 country in all cases, because I think some of these facilities  
20 are in Texas, so I guess partially across the country.

21 THE COURT: Let me hear from defense counsel.

22 MR. BYARS: A couple of points, your Honor.

23 The Legal Aid attorneys sitting here today have  
24 entered appearances -- at least Mr. Copeland and Ms. Gillman  
25 have -- in the Southern District of California. The case that

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1 they filed last week has been transferred to the Southern  
2 District of California before Judge Sabraw.

3 THE COURT: These children?

4 MR. BYARS: The case that was filed in Part I last  
5 week, the putative class action involving the interest of the  
6 children that Ms. Gillman has been describing, that case has  
7 been transferred by Judge Furman.

8 THE COURT: Were any of these eight individual  
9 plaintiffs in that case?

10 MR. BYARS: My understanding, and you can perhaps  
11 confirm with Legal Aid, but they were purporting to represent  
12 70 children. I understand that the eight that they are  
13 speaking of now are eight out of the 70 children that were  
14 potential class members in last week's action.

15 THE COURT: Let me just stop you there to make sure  
16 your adversary agrees with that.

17 Were these eight within the group that Legal Aid filed  
18 on behalf of the 70?

19 MS. LEVY: Yes, your Honor. These clients were  
20 clients of Legal Aid's, but the proceeding that we filed last  
21 week was one that sought the 48 hours' notice; it did not seek  
22 this relief on behalf of the plaintiff children. What happened  
23 was we filed that case. We received minimal notice late on  
24 Saturday night of 50 of our clients.

25 THE COURT: I have heard about minimal notice on

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1 Saturday night. I, myself, was of course in chambers working.

2 Let me go back a step. You filed an action on behalf  
3 of 70 children, a class action that was filed initially before  
4 Judge Furman; is that right?

5 MS. LEVY: It was initially filed --

6 MS. GILLMAN: Sorry, your Honor. So the action was  
7 initially before, of course, Judge Swain because she was the  
8 Part I judge.

9 THE COURT: Then it was assigned to Judge Furman.

10 MS. GILLMAN: So the eight children that we are  
11 speaking about here today were not individual plaintiffs in  
12 that action.

13 THE COURT: They were just members of the class.

14 MS. GILLMAN: Yes.

15 THE COURT: Did Legal Aid purport nevertheless to have  
16 an attorney-client relationship with these eight in what they  
17 presented to Judge Furman or Judge Swain?

18 In other words, it seems to me there is a difference  
19 here between going in and saying, on behalf of Tom, Joe and  
20 Mary, we are bringing a class action for the following 500  
21 people. If those 500 want their own separate lawsuit, they are  
22 more than entitled to. They, in effect, are opting out of the  
23 class, or seeking additional or corollary relief. If, on the  
24 other hand, Legal Aid goes in, or a lawyer goes in in my  
25 hypothetical and says, We have been authorized by not just Tom,

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1 Joe and Mary, but by the following 70 people to be their  
2 lawyer, then it seems to me the representation was that they  
3 will be bound by the relief in that action. So I am not sure  
4 which of these two scenarios this is.

5 MS. GILLMAN: Can I have just a moment to consult with  
6 my co-counsel?

7 THE COURT: Yes.

8 MS. GILLMAN: So, your Honor, when we went in last  
9 week, the class was for all children in New York State who are  
10 being held in the Office of Refugee Resettlement. Subsequent  
11 to that action being brought, the eight children that we are  
12 here in court before your Honor about were referred to The  
13 Legal Aid Society and are clients of The Legal Aid Society.

14 THE COURT: That only partly answers my question.

15 The action filed before Judge Swain and Judge Furman  
16 was a class action pursuant to Rule 23 or some similar rule?

17 MS. GILLMAN: Yes, your Honor.

18 THE COURT: Then I come back now to defense counsel.  
19 If they were not the named plaintiffs, these eight, and they  
20 were just members of the class, that doesn't in any way  
21 preclude this lawsuit.

22 MR. BYARS: I believe that these eight individuals  
23 were on a list of 70 children that were provided to us.

24 THE COURT: But that's like saying, if I brought a  
25 securities class action and I said, Judge, John Jones is a

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1 shareholder and here is a list of -- we don't have to guess, we  
2 know who the other 69 shareholders are. Here they are, and we  
3 will seek certification of the class, and so we are bringing  
4 this as a class action. Until and unless that class is  
5 certified, and maybe even then, those other 69 in my  
6 hypothetical are free to bring whatever action they want. They  
7 are not in any way, shape or form precluded by the fact that  
8 John Jones said he is representing the class.

9 So I would have to see the transcript, but they  
10 brought the other action as a class action. Nothing precludes  
11 these other members of the class from seeking different or  
12 alternative relief.

13 MR. BYARS: Your Honor, just looking at page 2 of  
14 Judge Furman's order, in a footnote it refers to Judge Swain's  
15 granting emergency relief to prohibit the government from  
16 removing putative class members represented by Legal Aid from  
17 New York State without providing 48 hours' notice. I think  
18 that the eight individuals at issue in this case are on the  
19 list of 70 that was provided by Legal Aid and would be part of  
20 the putative class. I think they are either represented by  
21 Legal Aid or members of the putative class, but subject to the  
22 relief granted by Judge Swain, and extended by Judge Furman,  
23 and extended by Judge Furman with the specific direction that  
24 this temporary relief would give Judge Sabraw an opportunity to  
25 consider requests for broader emergency relief. I think that

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1 is what is happening here.

2 THE COURT: I don't see anything in a footnote that  
3 detracts from the right of any individual member to seek the  
4 relief that is being sought here. Judge Swain ordered a  
5 prohibition on the government from removing putative class  
6 members represented by Legal Aid from New York State without  
7 providing 48 hours' notice. They are not seeking to remove  
8 them from New York State. They want them to stay in New York  
9 State and have the parents brought here. So there is no  
10 contradiction there. Moreover, I think the key adjective there  
11 is "putative." Nothing that I know in the law precludes  
12 someone who has been brought in as a class member, but is not  
13 an individual class representative, from saying, I don't want  
14 to be part of that class, I want to opt out, I want my own  
15 relief, which is, in effect, at best, at most, what is being  
16 asked for here. Now, whether it presents Legal Aid with a  
17 conflict, that's a different question.

18 So I don't understand what in this footnote you think  
19 creates a problem for what they are asking for here.

20 MR. BYARS: I think what was directed in the footnote  
21 was temporary emergency relief that applied to the eight  
22 individuals who are seeking broader relief here. And the  
23 purpose of the transfer was to allow that to happen in such a  
24 fashion so that the district judge that is actively managing  
25 the reunification process could consider all of the issues that

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1 are in this case as well as in the *Ms. L* case.

2 I note that, for example, one of the things that Judge  
3 Sabraw has done is to institute a seven-day stay of removal  
4 following reunification. That's the kind of thing that the  
5 judge can do there in order to try to provide for protections  
6 for the reunification process. Judge Sabraw is actively  
7 involved in doing this. In fact, in about two hours and 32  
8 minutes he is going to be having another hearing in the *Ms. L*  
9 case, and presumably will also be considering the *NTC* case as  
10 well. So there is a very real risk here of this action  
11 delaying the directions of Judge Sabraw in the Southern  
12 District of California case. The order that he has directed  
13 the government to reunify children with their parents by  
14 Thursday evening is very --

15 THE COURT: In a case where there is a potential  
16 conflict between two federal judges, my normal practice would  
17 be to, on consent of the parties, call the other judge and find  
18 out whether there really is a conflict or not in the other  
19 judge's mind. So does anyone have any objection to my calling  
20 Judge Sabraw right now?

21 MR. BYARS: Your Honor, the government has no  
22 objection, and we note further that Judge Furman actually did  
23 the exact same thing last week. He called Judge Sabraw to  
24 figure out -- I don't know what they talked about, but he did  
25 call him about the *NTC* case.

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1 THE COURT: I am glad that the younger judges know in  
2 advance to follow the path set by the older judges.

3 Any objection from Legal Aid?

4 MS. GILLMAN: We have no objection to the Court  
5 calling the judge in the *Ms. L* litigation, but we think it's  
6 appropriate, given the claims that are being brought before  
7 your Honor which involve the *Flores* settlement, for your Honor  
8 to call Judge Gee, who is the judge in the *Flores* case.

9 THE COURT: In which case?

10 MS. GILLMAN: In the *Flores* case. It's the *Flores*  
11 settlement. Your Honor, of course we have no objection to you  
12 calling the *Ms. L* judge, but it would also be, I think,  
13 appropriate and necessary, given the claims before this Court,  
14 that you call Judge Gee. We understand that in that case there  
15 is a hearing scheduled before Judge Gee on Friday.

16 THE COURT: A hearing on what?

17 MS. GILLMAN: A hearing on these issues involving what  
18 is going on with the children who are subject to the *Flores*  
19 settlement, in terms of the reunification of the parents in the  
20 *Ms. L* litigation.

21 THE COURT: To move this along, let me go see if I  
22 could reach Judge Sabraw. If I decide as a result of that  
23 conversation that I should also call Judge Gee, does the  
24 government have any objection?

25 MR. BYARS: Your Honor, I think the two are distinct.

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1 I think that Judge Gee, first of all, her proceeding on Friday  
2 is necessarily after the deadline that's of real importance and  
3 urgency here, which is the Thursday deadline. I am not sure  
4 how Judge Gee's views on the *Flores* settlement case would  
5 inform the issues before the Court.

6 THE COURT: That all may be true. That's why I may or  
7 may not feel the need to call Judge Gee. But my question is,  
8 just to move this along, because we are under various time  
9 pressures, if after talking with Judge Sabraw I feel it would  
10 be useful for the Court to call Judge Gee, do you have any  
11 objection?

12 MR. BYARS: No, your Honor.

13 THE COURT: So we will take a short break and I will  
14 try to reach one or both of those judges.

15 (Recess)

16 THE COURT: So I had a very useful conversation with  
17 Judge Sabraw, and before I rule I want to go back to the  
18 government.

19 Tell me exactly what was the notice that you sent on  
20 Saturday evening.

21 MR. BYARS: I can check my phone. I can tell you  
22 exactly.

23 THE COURT: Sure.

24 MR. BYARS: Your Honor, there is a cover e-mail to Mr.  
25 Copeland from an HHS attorney, and the cover e-mail says,

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1 "Please find attached the list that ORR received from DHS of  
2 children in the *NTC* class that are cleared for reunification  
3 with their parent. The spreadsheet indicates where the parent  
4 is located and where the reunification will take place. I  
5 realize it is late on Saturday night. However, we wanted to  
6 provide this information to you as soon as possible in order to  
7 comply with the 48-hour notice. The federal field specialists  
8 are arranging for transportation for the children. HHS is also  
9 instructed to provide the following information. The  
10 information merely reflects the intent of ICE --"

11 THE COURT: Speak a little louder.

12 MR. BYARS: "The information merely reflects the  
13 intent of ICE at the current time, and based on currently  
14 available information. All custody and removal determinations  
15 will be made at the time the minor and parent are detained in  
16 ICE custody. ICE is not bound by this initial information and  
17 provides such information merely to inform The Legal Aid  
18 Society pursuant to the injunction in the *NTC v. ICE*, case  
19 number 18-6428, SDNY, filed July 16, 2018."

20 Then there is a spreadsheet. It has, I think it's 70  
21 names. There's various information at the top. There is an  
22 identifying number, family name, given name, gender. Then  
23 there is a facility name, reunification site; a column for  
24 final order yes or no, final order executable, final order  
25 date, matching child first name, matching child last name, and

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1 then an identifying number. Then a column that says "want  
2 child?" A column for criminality, whether there has been a  
3 conviction or charge or no charge, suspected of gang  
4 affiliation, most serious conviction, most serious pending  
5 charge, and various comments, and a custody decision. So it  
6 has all that information in the spreadsheet.

7 THE COURT: Let me go back to plaintiff's counsel.

8 What is it that you think, if anything, the government  
9 was required to provide in that notice that they didn't  
10 provide?

11 MS. GILLMAN: So, your Honor, the information that  
12 they provided in that e-mail that was just read by Mr. Byars is  
13 wholly insufficient. In particular, the end part of that  
14 e-mail I think frames the problem with the notice that was  
15 required, in that it says "this information merely reflects the  
16 intent of ICE at the current time." The meaning of notice is  
17 that the person actually gets real notice and the opportunity  
18 to respond to that notice.

19 The other problem in that notification that Mr. Byars  
20 just read is that it failed to indicate whether these children  
21 were going to be facing long-term detention with their parents  
22 in facilities that were noncompliant with the *Flores* settlement  
23 and whether or not they were facing deportation upon  
24 reunification.

25 If you would excuse me one moment, your Honor. Sorry.

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1           THE COURT: So the reason I asked this in part is that  
2 Judge Sabraw brought to my attention that he has put in place  
3 all sorts of provisions to address the very issues you just  
4 raised, that he was cognizant even before the action brought  
5 before Judge Swain and Judge Furman that the interests of the  
6 children are not necessarily coincident with the parents'  
7 interests at all times, but that at the same time  
8 reunification, at least in the short-term, was something he  
9 wanted to bring about promptly. So he, as I understand it, has  
10 arranged at each of the facilities where reunification is  
11 taking place, pursuant to his order, that there will be present  
12 people who will analyze and then report back to him on those  
13 kinds of issues so that he can make an informed judgment.

14           He also told me something that I must say was quite  
15 surprising to me, which was that Legal Aid had not made any  
16 efforts to appear before him since Judge Furman transferred the  
17 case other than filing a pro hac vice motion. One would have  
18 thought, given the exigencies that plaintiff's counsel has  
19 raised, that since it's the same counsel in the class action,  
20 that those matters would have been sought to be brought before  
21 him on a highly expedited basis, as it was in this court.

22           Did you want to say anything about that?

23           MS. GILLMAN: Your Honor, I think while we, of course,  
24 appreciate the fact that Judge Sabraw has indicated that he has  
25 put in place what he believes are -- I don't know how you want

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1 to refer to them -- requirements, that still doesn't address  
2 the issues that are before this Court. The issue is that --  
3 and why we specifically asked for your Honor to call Judge  
4 Gee -- is that our individual clients that are appearing before  
5 your Honor cannot have their interests properly represented in  
6 the actions that are being taken by the *Ms. L* litigation,  
7 because, again, the issue here is that --

8 THE COURT: To the extent that they have interests  
9 that are not being represented, now that the class action is  
10 before Judge Sabraw, why haven't you taken emergency action to  
11 bring those interests to his attention?

12 MS. GILLMAN: Well, your Honor, to begin with, we,  
13 again, got this e-mail notification from the government very  
14 late on Saturday night.

15 THE COURT: I understand that. But Judge Furman's  
16 order came down before that.

17 MS. GILLMAN: Your Honor, can I have one moment. I'm  
18 sorry.

19 THE COURT: Yes, of course.

20 MS. GILLMAN: So, your Honor, again, not to repeat  
21 myself, but if you will just excuse me I will do it one more  
22 time. We got this e-mail notification very late on Saturday  
23 night.

24 THE COURT: I must say that I made a point of bringing  
25 that to Judge Sabraw's attention, because it seemed to me that

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1 that was arguably quite heavy-handed on the government's part,  
2 but I am sure they would say they were trying to expedite  
3 things as quickly as possible. Nevertheless, it, at least on  
4 its face, smacks a little bit of gamesmanship, but then so does  
5 this action smack of gamesmanship.

6 MS. GILLMAN: I will not repeat myself again. We will  
7 start from the late e-mail notification. After receiving the  
8 late e-mail notification, my colleagues at The Legal Aid  
9 Society made efforts to reach out to government counsel to  
10 clarify the ambiguity that is inherent in the notice that Mr.  
11 Byars --

12 THE COURT: Excuse me. Forgive me. So who called  
13 whom?

14 MS. GILLMAN: We reached out to the individual who  
15 sent us the e-mail, and we --

16 THE COURT: Who is the individual who sent the e-mail?

17 MS. GILLMAN: My colleague, Mr. Copeland, is going to  
18 do this.

19 MR. COPELAND: These were mostly e-mail  
20 communications. It was with the Department of Health and Human  
21 Services. I think it's a Ms. Lisette Mestre reached out to me.

22 THE COURT: I'm sorry. The person who sent you the  
23 e-mail, which we will hereinafter refer to as "the Saturday  
24 night e-mail," was whom?

25 MR. COPELAND: So --

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1 THE COURT: Is that not a question that can be  
2 answered by a name?

3 MR. COPELAND: Yes. I think I said it. Lisette  
4 Mestre.

5 THE COURT: Spell it for the record.

6 MR. COPELAND: L-I-S-E-T-T-E, last name M E S T R E.

7 THE COURT: Does that person give in the e-mail her  
8 position?

9 MR. COPELAND: Yes, your Honor. She is an attorney  
10 with the Office of General Counsel, Children, Families and  
11 Aging, U.S. Department of Health and Human Services.

12 THE COURT: OK. Who was it from your end who then  
13 e-mailed her with requests for more information, if that's what  
14 happened?

15 MR. COPELAND: That was me.

16 THE COURT: So we have got the real party interest.  
17 What did you ask her?

18 MR. COPELAND: I asked her what -- I just want to make  
19 sure I speak properly. She had e-mailed me earlier on  
20 Saturday, not just the Saturday night e-mail. She sent me an  
21 earlier e-mail that was asking for us to waive the protections  
22 of the TRO as to two siblings that wanted to be reunited in  
23 advance. So that's how our communication started. She  
24 indicated that she was the lead counsel for Health and Human  
25 Services on this case.

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1           So she sent me that. We looked into that case,  
2 determined that this was somebody that did indeed want to be  
3 reunited on a more expedited basis, didn't have any of the  
4 issues that we are facing with the eight children that we are  
5 here in court for today.

6           So to respond to your question, I believe it was the  
7 next morning, there was more communications between myself and  
8 attorney Mestre. Then at some point we learned that prior to  
9 the expiration of the 48 hours, even going from the time of the  
10 Saturday night e-mail, what would be 48 hours there, that one  
11 of our clients had actually been moved, and I think that that  
12 happened on early Monday.

13           So our understanding was that that was not complying  
14 with the order. So we reached out to attorney Mestre about  
15 that, as well as indicating that we had these additional  
16 clients that form, I think, the majority of the named  
17 plaintiffs in this action, who we indicated we wanted to know  
18 the status of whether or not they would be moved because we  
19 were aware of the fact that they had expressed wishes to not be  
20 reunited in detention or some other sort of issue in terms of  
21 their reunification.

22           THE COURT: Just so I am clear, you wanted to know,  
23 number one, whether any of them were about to be imminently  
24 moved, and if so, whether it's for purposes of detention or  
25 deportation. Do I have that right?

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1 MR. COPELAND: That is correct, your Honor.

2 THE COURT: What was the response?

3 MR. COPELAND: There was further communication with  
4 Ms. Mestre that didn't address that request yesterday, in terms  
5 of we had also provided other individuals that were part of the  
6 TRO that also wanted to waive.

7 Then we received an e-mail yesterday evening, I  
8 believe it was from the Department of Justice's -- one of the  
9 lead attorneys in the *Ms. L* litigation, I believe his name is  
10 August -- I am going to mispronounce his last name -- Lente, or  
11 something of that nature, which essentially said that the  
12 notice provided on Saturday night was compliant notwithstanding  
13 the fact that we had raised the issue that given --

14 THE COURT: So they had given you what they thought  
15 was required, and they weren't giving you anything else, is  
16 that the gist of it?

17 MR. COPELAND: Basically, yes.

18 THE COURT: Let me go back to the government.

19 I am not quite sure why you weren't giving more  
20 information.

21 MR. BYARS: Your Honor, I think HHS and Main Justice  
22 were providing what they could to Legal Aid, and they believed  
23 that they had satisfied the requirement.

24 THE COURT: Well, there is a question of whether they  
25 have satisfied the requirements and there is a question of

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1 whether they are operating in the spirit of Judge Furman's  
2 orders, Judge Swain's orders, and to the extent relevant, Judge  
3 Sabraw's orders. I don't understand why more of an attempt  
4 couldn't have been given to answer some of those inquiries.

5 Do you have any objection to providing more  
6 information?

7 MR. BYARS: Your Honor, I do not know what information  
8 can be provided. I understand that this is a huge logistical  
9 undertaking by numerous people to make this happen under the  
10 timeline that's ordered by the Southern District of California.  
11 So I am not able to say -- I do know that at the hearing, a  
12 week ago Monday, the judge was impressed with Commander  
13 Jonathan White's presentation about how logistically  
14 complicated this was and, in fact, was satisfied, based on our  
15 presentation, that even a 12-hour advance notice would be an  
16 impediment to providing the quickest possible reunification of  
17 child to parent.

18 So I really am unable to give you the kind of  
19 blow-by-blow breakdown of this process in a way that Commander  
20 White would be able to do. And I think that that's really what  
21 Judge Sabraw is trying to do in San Diego.

22 THE COURT: Do you know anything about this one  
23 instance that was referred to of someone who was moved on  
24 Monday?

25 MR. BYARS: I do not, your Honor.

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1           THE COURT: All right. So this is obviously a matter  
2 of great importance. It's important, first and foremost, to  
3 the parents and to the children, whose interests may not always  
4 coincide and therefore need to be separately expressed. It's a  
5 matter of great public interest. It is a matter that also  
6 impacts the proper effectuation of the orders now of several  
7 different courts: Judge Gee's approval of the *Flores*  
8 settlement, Judge Sabraw's various orders requiring  
9 reunification, Judge Swain and Judge Furman's temporary  
10 restraining orders, and now the matter before this Court.

11           I think the common sense of it is that these matters  
12 should, to the maximum extent possible, be consolidated before  
13 as few judges as possible. In my discussion before with Judge  
14 Sabraw, he felt that what was being requested here, arguably,  
15 conflicted with his orders, but he stressed that that was not  
16 his determination to make, it was the determination to be made  
17 by this Court. But there is a certain lack of common sense in  
18 not placing before a single judge, or at most two judges, the  
19 coordination of what is unquestionably a substantial  
20 undertaking of great importance. The potential for conflict,  
21 for even inadvertent conflict, is high in these kinds of  
22 situations. Therefore, I am going to forthwith transfer this  
23 entire case to the Southern District of California to Judge  
24 Sabraw.

25           I asked him how early he could hear from counsel in

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1 this case. He said he was holding a status conference today,  
2 at 3 p.m. California time, which is 6 p.m. New York time,  
3 therefore, about an hour and 20 minutes from now, and he would  
4 be pleased to hear from counsel for the plaintiffs here about  
5 the issues they have raised. For example, he has set in place,  
6 as I mentioned earlier, all sorts of provisions that he  
7 believes are addressed to making sure that the interests of the  
8 children are separately represented, but counsel in this case  
9 is in a very good position to bring to his attention why they  
10 don't think that may be true in the case of these nine children  
11 or whatever.

12 So he invited the appearance of counsel in this case  
13 at his hearing today. I assume he means by telephone since he  
14 knew they were in New York. I forgot to ask him that  
15 expressly, but I think it's implicit. And if there are any  
16 problems with that, you can come back to me and I will talk to  
17 Judge Sabraw because that clearly was my understanding.

18 I will issue a written order within the next few  
19 minutes transferring this case, but I think the most important  
20 thing is for counsel for the plaintiffs to call Judge Sabraw's  
21 chambers and arrange to be heard at 6:00 New York time, 3:00  
22 his time, on your various requests. In calling, his phone is  
23 initially answered by his secretary who probably is less  
24 familiar with this, so I would suggest you talk initially to  
25 the law clerk who is handling this matter, who was also on the

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1 phone during my conversation with Judge Sabraw so knows the  
2 full representations that were made. And as I say, if there is  
3 for any reason, which I would think extremely unlikely, any  
4 problem in facilitating that telephonic conversation, come back  
5 to me and I will call Judge Sabraw and clear that up.

6 Is there anything else we need to take up today?

7 MR. BYARS: Your Honor, I would just would ask that  
8 you consider noting in your order, there is a local civil rule  
9 83.1 that imposes a seven day --

10 THE COURT: I am going to slavishly copy the wording  
11 of Judge Furman, which addressed all that, and I am grateful to  
12 Judge Furman for giving me a model to follow.

13 Anything else?

14 MR. BYARS: I think just making sure that our case is  
15 docketed and we get a docket number.

16 THE COURT: Yes. Of course.

17 Very good. Thanks very much.

18 (Adjourned)

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