SPLC Southern Poverty Law Center

Fighting Hate
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Submitted via email to ice.regulations@ice.dhs.gov

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U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Sir/Madam:

I am writing on behalf of The Southern Poverty Law Center in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) to express our strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles published in the Federal register on September 7, 2018.

In pursuit of our organizational mission – fighting hate, teaching tolerance, and seeking justice – The Southern Poverty Law Center tracks the efforts of white nationalists and anti-immigrant hate groups to enact racist immigration policies, encourages education to combat prejudice, and directly represents noncitizens both in seeking freedom from detention and through litigation when their rights are under attack. Through this work, we are fortunate to work with, learn from, and represent immigrant children and families who have been subject to both interior immigration enforcement and increased militarization of the border. We also closely track the activity of anti-immigrant "thank-tanks" and their attempts to implement hate-based policies. These groups regularly promote their xenophobic goals through manipulation of data and misleading statistics. This attack on the well-settled rights guaranteed to children through the 1997 *Flores* Settlement Agreement is an outgrowth of this white supremacist agenda and does direct harm to migrant children and families based on a constructed and imagined fear. The proposed regulations provide a system where young children are subject to prolonged detention with limited avenues for release from facilities subject to decreased oversight.

In our work at several adult detention centers in Georgia and Louisiana through the Southeast Immigrant Freedom Initiative (SIFI), we have seen firsthand the impact that detention has on vulnerable populations. Prolonged detention, among other things, deprives children of access to counsel, subjects them to

conditions designed to force them to abandon legitimate claims for asylum and other forms of relief from removal, and fails to provide for their physical, emotional, or mental health. The system proposed by the regulations is a system that denies due process to children; it fails to implement a Settlement that the government entered into over twenty years ago, subverting its stated purpose for invented reasons that do not bear out under even cursory scrutiny.

For the reasons detailed in the comments that follow, DHS and the Department of Health and Human Services (HHS) should immediately withdraw its current proposal, and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, not least through robust, good-faith compliance with the *Flores* Settlement Agreement.

I. The Proposed Regulations are Grounded in Racial Animus

The proposed regulations do not "implement" the *Flores* Settlement Agreement's ("FSA") terms; instead, they undermine the critical protections the Settlement guarantees to children held in immigration prison. This is not the first time that an administration has attempted to enact punitive immigration policy on the basis of fear, xenophobia, and scapegoating. Rather, this latest policy proposal is only the most recent step in furthering the white supremacist goals of a coalition of anti-immigrant policy think tanks with acolytes in the President's Administration.[1]

A core goal of the Federation for American Immigration Reform (FAIR) and other powerful anti-immigrant coalition organizations[2] has been to strip any and all rights to due process from immigrants contesting their deportation. It should come as no surprise that when given basic resources – a lawyer[3], access to a way to collect evidence[4], and, most importantly, *time* to put together their case[5] – migrants in removal proceedings fare better in their pursuit of relief from deportation.[6] Anti-immigrant nativists

[1] *See* Innovation Law Lab, "Sessions, Connections and Bias," https://innovationlawlab.org/sessions-connections/; The Southern Poverty Law Center, *The Trump administration's 'public charge' policy is the latest of many that reflect the playbook of anti-immigrant hate groups* (Oct. 1, 2018), https://www.splcenter.org/hatewatch/2018/10/01/trump-administrations-public-charge-policy-latest-many-reflect-playbook-anti-immigrant-hate.

[2] Southern Poverty Law Center, *Anti-Immigrant: Extremist Files*, https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-immigrant.

[3] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U.Penn. L.R. 1, 34-35, Fig. 8 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review (discussing the disparity in representation rates between detained and non-detained individuals, showing that non-detained respondents were able to secure legal counsel on average 68% of the time, while detained respondents were only able to secure legal counsel 36% of the time).

[4] *See* Julia Harumi Mass & Carl Takei, American Civil Liberties Union, *Forget about calling a lawyer or anyone at all if you're in an immigration detention facility* (June 15, 2016), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/forget-about-calling-lawyer-or-anyone-all-if (describing the complicated detention center phone system, including the inability to leave a voice mail, and financial barriers to making a telephone call out of an immigrant detention center and the impact on a detainee's ability to collect evidence).

[5] Eagly at 33, Fig. 7 (showing a marked difference in availability of continuances where the detainee is detained versus non-detained).

[6] On average, a respondent who was never detained and has legal counsel is thirty times more likely to obtain relief from deportation than a detained respondent without legal counsel. Eagly at 50, Fig. 14. Moreover, a respondent who was never detained is still three times more likely to obtain relief than a represented respondent in detention. *Id.* Detained respondents appear without presentation approximately 86% of the time. *Id.* at 36.

identified this logical result of fair process as a "loophole" as early as 1986 when a FAIR board member, Roger Connor, wrote that FAIR should shift focus to "[c]los[ing] the loopholes which give illegals rights to . . . lengthy bureaucratic procedural rights."[7] The proposed regulations serve exactly this purpose: to make the Department of Health and Human Services both jailer and judge, removing any meaningful review authority or time limits on a child's detention.[8] The detention preference is further entrenched through permission for non-medical DHS enforcement officers to use their best guess in concluding a child's age to be over 18, leading to that child being incarcerated in adult detention without hearing or review.[9] Eviscerating procedures that ensure the law is applied correctly and fairly disproportionately impacts immigrant communities of color, especially Central Americans, who are detained at high rates.[10] Research has further shown that "availability of detention and deportation can incentivize law enforcement to engage in racial profiling of the Latino community."[11]

An outright attack on child migrants is a newer feature in the nativist immigration policy agenda.[12] However, the blatant failure to provide for the particular vulnerabilities of migrant children is nothing new, and the battle to ensure that children's rights are respected has progressed in-step with the modern anti-immigrant movement. In 1985, the same year that a fifteen-year-old girl named Jenny Lisette Flores arrived in the United States having fled civil war in El Salvador[13], John Tanton founded the Center of Immigration Studies (CIS), an offshoot of his primary organization, FAIR, in part through donations made by the Pioneer Fund, a proudly neo-Nazi organization.[14] The *Flores* Settlement itself was signed in 1997, only one year after a victory for anti-immigrant activists in the form of the vague but draconian

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[7] Southern Poverty Law Center, '*WITAN Memo' II*, https://www.splcenter.org/fighting-hate/intelligence-report/2015/witan-memo-ii (publication of a July 11, 1986 memo from Roger Conner to the FAIR Board of Directors).

[8] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018), proposed 45 CFR 410.810.

[9] *Id.*, proposed 8 CFR 236.3(d).

[10] Eagly at 46, Fig. 13.

[11] Eagly at 46.

[12] *Compare* Federation for American Immigration Reform, *An Immigration Reform Agenda for the 109th Congress* (Jan. 2005), *archived at* https://web.archive.org/web/20050511082630/http://www.fairus.org:80/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=2613&c=12 (Jan. 2005) (not mentioning any policies related to children) *with* Center for Immigration Studies, *A Pen and a Phone*, (April 6, 2016), https://cis.org/Report/Pen-and-Phone (outlining 79 steps the incoming president can take to reduce immigration, including four directed at unaccompanied children).

[13] The *Flores* case was the result of over a decade of litigation following the government's horrific treatment of children in detention who had fled from violent Central American civil wars. *See* Women's Refugee Commission, *The Flores Settlement & Family Separation at the Border* (June 15, 2018), https://www.aila.org/File/Related/14111359ab.pdf. The treatment of Central Americans during this era spawned a number of federal court orders recognizing that the United States engaged in discrimination to the detriment of Central Americans. *See Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511-13 (C.D. Cal. 1988) (mandating certain rights for Salvadorans after the court found evidence that the U.S. government had misled Salvadorans about their right to seek asylum, denied Salvadorans access to counsel, and misused solitary confinement); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (nationwide class settlement following allegations that the U.S. government had exhibited bias in adjudication of asylum applications by Salvadoran and Guatemalans); *see also* Ken Sullivan & Mary Jordan, *The Washington Post*, "In Central America, Reagan remains a polarizing figure," June 10, 2004, http://www.washingtonpost.com/wp-dyn/articles/A29546-2004Jun9.html (describing U.S. involvement in Central American civil wars on the basis of fear of Soviet influence).

[14] Southern Poverty Law Center, *John Tanton is the Mastermind Behind the Organized Anti-Immigrant Movement* (June 18, 2002), https://www.splcenter.org/fighting-hate/intelligence-report/2002/john-tanton-mastermind-behind-organized-anti-immigration-movement.

measures to deport purportedly "criminal" noncitizens written into the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[15] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provided critical safety and welfare measures for unaccompanied children in the shadow of a vigorous and hateful defeat of the DREAM Act led by CIS.[16] And now, against the backdrop of children either being ripped from their parents' arms,[17] spirited to a tent city in Tornillo, Texas,[18] or otherwise indefinitely incarcerated with their parents at a family detention center,[19] the Trump administration moves to gut *Flores* in an attempt to strip away even the most basic procedural safeguards and ramp up deportations of primarily Central American immigrants.[20]

Frighteningly, the proposed regulations double down on family detention, removing any shred of oversight through DHS granting itself licensing and inspection authority, and by creating a regulatory hook for indefinite detention of children with their parents.[21] Family detention centers overwhelmingly incarcerate Central American families;[22] considering the administration's open hostility to migrants from Central America,[23] it is indisputable that the burden of this closed system will fall on children from

[15] *See, e.g.*, Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. on Migration and Human Security 1 (2018) (describing the evolution of Democratic "tough-on-crime" legislation as it began to intersect with the discourse on unauthorized migration).

[16] Center for Immigration Studies, *Immigration, Mainstream Media, and the 2008 Election* (Dec. 8, 2007), https://cis.org/Report/Immigration-Mainstream-Media-and-2008-Election-Updated-December-2008 (taking credit for reports that led to the "populist revolt" that defeated the DREAM Act); *see also* The Southern Poverty Law Center, *Center for Immigration Studies: Extremist Files* (quoting Illinois Rep. Luis Gutierrez as stating, "[CIS'] research is always questionable because they torture the data to make it arrive at the conclusion they desire, which is that immigrants are criminals and a burden on the U.S. and our economy. It is the worst kind of deception.").

[17] *See Ms. L v. ICE*, No. 18-cv-0428 at 2 (S.D. Cal. June 26, 2018) (order granting plantiffs' motion for classwide preliminary injunction) ("Over the ensuing weeks, hundreds of migrant children were separated from their parents, sparking international condemnation of the practice.").

[18] Molly Hennessy-Fiske, *Los Angeles Times*, "Trump administration transfers hundreds of migrant children to border tent camp," Oct. 3, 2018, http://www.latimes.com/nation/la-na-texas-tornillo-20181003-story.html.

[19] Tal Copan, *CNN, 'I wouldn't wish it even on my worst enemy': Reunited immigrant moms write letters from detention*, Sept. 30, 2018, https://www.cnn.com/2018/09/30/politics/separated-mothers-reunited-letters/index.html; John Burnett, *NPR*, "Detained fathers turn to hunger strike," Aug. 2, 2018, https://www.npr.org/2018/08/02/634909493/detained-fathers-turn-to-hunger-strike.

[20] Even with the full force of the Settlement terms in place, the government has continually attempted to undermine it and carve out categories of children who it believes are not included within its protective language. *See* American Civil Liberties Union, *ACLU challenges prison-like conditions at Hutton Detention Center* (Aug. 27, 2007), https://www.aclu.org/aclu-challenges-prison-conditions-hutto-detention-center; *In Re Hutto Family Detention Center*, No. 07-ca-164 (Aug. 26, 2007) (settlement agreement); *see also* Stephen Manning, Innovation Law Lab, *Ending Artesia*, (Jan. 2015), https://innovationlawlab.org/the-artesia-report. American Immigration Lawyers Association, *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody* (updated Sept. 7, 2018), https://www.aila.org/infonet/flores-v-reno-settlement-agreement.

[21] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018), proposed 8 CFR 236.3(b) and 8 CFR 236.3(j).

[22] In the first 10 months of 2018, approximately 90% of families in the South Texas Family Residential Center, the family detention center located in Dilley, Texas, were from the Northern Triangle of Central America. Data made available by Katy Murdza, Advocacy Coordinator of the Dilley Pro Bono Project.

[23] Southern Poverty Law Center, *Bad Hombres?* (Oct. 2, 2018), https://www.splcenter.org/20181002/bad-hombres; Southern Poverty Law Center, *Trump and his troll army declare war on 'caravan' of migrants fleeing persecution*, (Apr. 2, 2018), https://www.splcenter.org/hatewatch/2018/04/02/trump-and-his-troll-army-declare-war-caravan-migrants-fleeing-persecution.

countries with the highest murder rates in the world.[24] These proposed regulations, shielding the administration's actions from view and scrutiny, are written with the intent and impact of directly harming migrant children,[25] specifically those from Central America, under a perverse theory of deterrence that has been both proven ineffective[26] and decried as unlawful by a federal judge.[27] They undermine the very object of a contract the government willingly signed twenty years ago and insult the dignity of the children the *Flores* Settlement was designed to protect.

II. Detention and Enforcement Based on General Deterrence is Ineffective and Unlawful

A central part of the administration's argument as to why the proposed *Flores* rule is necessary pertains to what it sees as a deterrent effect from being able to apply widespread incarceration in Family Residential Centers to children and families arriving at the southern border. In the proposed rule, the administration argues that the July 2015 court ruling—which held that the FSA protections, including the limitation on holding children in secure, unlicensed facilities for more than 20 days, applied to accompanied as well as unaccompanied children[28]—led to an increase in families arriving at the southern border. In particular the proposed rule argues that "although it is difficult to definitively prove the causal link, DHS's assessment is that the link is real, as those limitations" i.e. the 20-day limit "correlated with a sharp increase in family migration."[29]

Nevertheless, DHS fails to provide any of the data or methods used to make its assessment. But looking at the data on apprehensions before and after the July 2015 federal court ruling, Professor Tom K. Wong of

[24] The last year of recorded data by the U.S. was 2016; at that time, El Salvador had the highest murder rate at a rate of about 82 per 100,000 citizens; Honduras followed closely with a rate of about 57 per 100,000 citizens. United Nations Office on Drugs and Crime, *Intentional Homicide Victims*, https://dataunodc.un.org/crime/intentional-homicide-victims.

[25] Julie M. Linton, Marsha Griffin & Alan J. Shapiro, American Academy of Pediatrics, *Detention of Immigrant Children* (Mar. 2017) ("Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."); DHS Advisory Committee on Family Residential Centers, *Report of the DHS Advisory Committee on Family Residential Centers* (Sept. 30, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf (established under the authority of then-Secretary Jeh Johnson, the committee recommended operationalizing "the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.").

[26] *See, e.g.*, Tom K. Wong, Center for American Progress, *Do Family Separation and Detention Deter Migration?* (July 24, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/ (using DHS data to show that neither detention nor separation deter migration patterns at the southern border).

[27] *R.I.L.R. v. Johnson*, 80 F.Supp.3d 164, (D.D.C. 2015) (granting plaintiffs' preliminary injunction on the basis of DHS' policy to primarily consider deterrence of future migrant in its decisions whether to release Central American mothers and children from custody).

[28] *Jenny Lisette Flores, et al. v. Loretta E. Lynch*, CV 85-04544, United States District Court, Central District of California, August 21, 2015, https://www.aila.org/File/Related/14111359p.pdf.

[29] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," Federal Register, Vol. 83, No. 174, September 7, 2018, pgs. 45493-45494, https://www.regulations.gov/document?D=ICEB-2018-0002-0001.

the University of California, San Diego, finds no statistically significant increase in—nor any statistically significant relationship between—apprehensions of families at the southern border and the July 2015 ruling.[30] Professor Wong used two methodologies, interrupted time series analysis (ITSA) and autoregressive integrated moving average (ARIMA) ITSA to find that the 2015 Flores ruling had no statistically significant effect on apprehensions.[31] This analysis is consistent with other work by Professor Wong which shows that family incarceration as well as family separation has not had a statistically significant impact on family arrivals, and as such, is unlikely to be a deterrent in the future.[32]

Indeed, numerous studies and data have shown that detention and other punitive measures will not deter families from coming to the United States to seek protection. Genuine refugees, like the many families fleeing the Northern Triangle region of Central America, will continue to flee violence to save their lives and those of their children.[33] This was shown after the previous administration attempted to implement the same flawed policy, which resulted in a finding by a federal district court that the policy was unlawful.[34] Moreover, the architect of said policy shift in 2014, former Secretary of Homeland Security Jeh Johnson, recently admitted that this policy failed to achieve its stated goal of halting the numbers of families coming to our borders to seek asylum. Importantly, "[e]xperience teaches that widely publicized changes in immigration-enforcement policy may cause sharp downturns in the level of illegal migration in the short term, but migration patterns then revert to their higher, traditional levels in the long term so long as underlying conditions persist."[35]

The government's arguments regarding deterrence also serve to obfuscate the exorbitant financial cost associated with the rule while failing to engage with the efficacy of less expensive alternatives to detention (ATDs). In the fiscal year 2019 Congressional Budget Justification, ICE estimated the cost of one family detention bed at $318.79, which contrasts to the average daily cost of alternative to detention programming, which costs as little as $4 or $5 per day.[36]

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[30] Tom K. Wong, Center for American Progress, "Did a 2015 *Flores* Court Ruling Increase the Number of Families Arriving at the Southwest Border?" October 16, 2018, https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/.

[31] *Id.*

[32] Tom K. Wong, Center for American Progress, "Do Family Separation and Detention Deter Immigration?" July 24, 2018, https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/.

[33] *See, e.g.*, Medecins sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (June 2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf.

[34] *See* American Civil Liberties Union, Discussion of *R-I-L-R- v. Johnson, July 31, 2015*, *https*://www.aclu.org/cases/rilr-v-johnson.

[35] Jeh Charles Johnson, *Washington Post*, "Trump's 'zero-tolerance' border policy is immoral, un-American, and ineffective," June 18, 2018, https://www.washingtonpost.com/opinions/trumps-zero-tolerance-border-policy-is-immoral-un-american--and-ineffective/2018/06/18/efc4c514-732d-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.a547532ad070

[36] *See* U.S. Immigration and Customs Enforcement, Congressional Budget Justification for FY 2019, *see also* American Immigration Lawyers Association *et al.*, *The Real Alternatives to Detention* (June 2017), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf.

The government states in the NPRM that indefinite family incarceration is necessary to ensure families attend all immigration proceedings in their cases. This premise has been proven false and inaccurate. ATDs are extremely effective at ensuring compliance with immigration check-ins, hearings, and, if ordered, removal. DHS's own Congressional Budget Justification released in May 2017 notes that, "[h]istorically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings."[37]Although participants may be enrolled on ATD for a longer period of time due to court delays when they are not detained, using its own calculations in 2014 the Government Accountability Office found that an individual would have had to be on ATD for 1,229 days before time on ATD and time in detention cost the same amount.[38] Immigration detention is driven by profit and politics, not public safety; it continues to be used widely despite the availability of effective and cost-efficient alternatives to detention (ATD). A spectrum of alternatives to detention has long existed as the option the government should use in place of mass detention.[39] Alternatives to incarceration in the context of the criminal justice system have been broadly endorsed by organizations across the political spectrum, including the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, and the Texas Public Policy Foundation.[40]

III. Harmful Prolonged Detention is More Likely Where a Child's Ability to Challenge Detention in Severely Limited

A. Due process concerns with the standards set out for "810 hearings"

HHS proposes, through this NPRM, to replace the FSA's requirement that an immigration judge review a child's placement in a custody redetermination ("bond") with hearings run by an HHS administrative officer, in effect making HHS both jailer and judge. Currently, FSA paragraph 24(A) requires that a child in deportation proceedings "shall be afforded a bond redetermination hearing before an immigration judge in every case", a mandate upheld by the Ninth Circuit Court of Appeals in *Flores v. Sessions*.[41] Despite this, HHS claims that a child's opportunity to be heard by a neutral, independent arbiter is reasonably replaced by an HHS employee reviewing his own agency's placement decision.[42]

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[37] U.S. Immigration and Customs Enforcement Congressional Justification for FY 2018 at page 179, https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

[38] American Immigration Lawyers Association *et al.*, *The Real Alternatives to Detention* (June 2017), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf.

[39] In 2009, a bipartisan Independent Task Force on U.S. Immigration Policy sponsored by the Council on Foreign Relations called for an expansion of the use of alternatives to immigration detention as one of its recommendations to ensure that all immigrants have the "right to fair consideration under the law and humane treatment." Council on Foreign Relations, Independent Task Force Report No. 63: U.S. Immigration Policy (2009), https://www.cfr.org/sites/default/files/pdf/2009/08/Immigration_TFR63.pdf.

[40] *See* Julie Myers Wood and Steve Martin, *The Washington Times*, "Smart Alternatives to Immigrant Detention", Mar. 28, 2013, http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/; and American Civil Liberties Union, "Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up", : https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigrationdetention-atd.

[41] *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017).

[42] 83 FR 45509-10, 45533-34.

As such, proposed 45 C.F.R. 410.810 fails to ensure that the due process rights of unaccompanied children are protected. Due process requires a UAC to receive detailed and meaningful notice of the charges and evidence against them, and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). This opportunity must come before a neutral, independent arbiter in order to safeguard "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980). Indeed, "involuntary confinement of an individual for any reason is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Federal courts have evaluated similar ORR procedures to those proposed in 45 C.F.R. 410.810 and found them lacking:

> Virtually all of those procedures, however, consisted of internal evaluation and unilateral investigation. In effect, Respondents contend that due process was satisfied here because ORR made a significant effort to reach the correct decision. But due process does not concern itself only with the degree to which one can trust the government to reach the right result on its own initiative; rather, due process is measured by the affected individual's opportunity to protect his or her own interests. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("the Due Process Clause grants the aggrieved party the opportunity to present his case").

Beltran v. Cardall, 222 F. Supp. 3d 476, 486–87 (E.D. Va. 2016).

Moreover, if the government wants to detain a child in a secure setting, "the government must establish the necessity of detention by clear and convincing evidence. . . This is no less true where the government is claiming detention is necessary due to dangerousness." *Santos v. Smith*, 260 F. Supp. 3d 598, 613 (W.D. Va. 2017) (citing *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (pretrial detention); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (finding due process violation where an individual detained on grounds of dangerousness was denied an adversarial hearing in which the state had to prove his dangerousness by clear and convincing evidence); Va. Code Ann. §§ 37.2–800 et seq. (setting forth requirements for involuntary civil commitment of an adult, which includes a judicial hearing in front of a district judge or special justice)).

First, the well-laid out requirements of procedural due process require the provision of notice to the UAC of the specific reasons and evidence HHS is depending upon for its dangerousness determination prior to any 810 hearing, with sufficient time to allow the UAC to gather their own evidence to counter HHS's assertion of dangerousness. Due process mandates that such notice be provided *prior to* a child's transfer to a secure or staff-secure facility (and the associated severe deprivation of his or her liberty), to allow the child to contest the evidence and transfer decision. Nonetheless, there is no requirement in this section or any other that HHS provide detailed notice to the UAC explaining the evidence upon which it relied to determine that the child must be placed in a secure setting. It would be impossible for a child to present evidence proving that he or she is not dangerous without seeing the evidence upon which the government

is relying to make such a determination. Notice of hearing procedures does not satisfy the meaningful notice requirements of due process.

Second, the burden of demonstrating that the UAC will be a danger to the community or flight risk would properly rest on HHS, rather than on the UAC. As HHS engages in its own internal research and decision-making regarding dangerousness and risk of flight, which they otherwise do not share with the UAC who is the subject of that determination, it is grossly unfair to require a detained child to provide evidence to the contrary without first seeing the evidence against them. This is in line with the Ninth Circuit's view that the bond hearings required under paragraph 24A of the FSA "compel the agency to provide its justifications and specific legal grounds for holding a given minor." *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017). It is also consistent with the Flores Settlement Agreement's requirement that the government place detained children in the "least restrictive setting appropriate to the minor's age and special needs," and its presumption of a general policy favoring release. Flores Settlement at ¶¶ 11, 14; § VI. Given the gravity of the consequences of this determination (continued detention, or continued detention in a lockdown facility), the government should demonstrate that the child is a danger to the community or flight risk by clear and convincing evidence. The clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Given that children's liberty interests are at stake in the context of detained UACs, this higher standard of proof must be applied. *See, e.g., In Re Gault*, 387 U.S. 1 (1967).

Third, the "opportunity to be heard" in the proposed regulations does not meet due process requirements. We strongly disagree with HHS's assertions that "as the legal custodian of UACs who are in federal custody," it "clearly has the authority to conduct the hearings envisioned by the FSA," 83 Fed. Reg. 45486, 45509 (Sept. 7, 2018) (to be codified at 8 CFR pts. 212 and 236, 45 CFR pt. 410), or that HHS could possibly provide "the same type of hearing paragraph 24(A) [of the FSA] calls for." *Id.* By removing the option for UACs to come before an immigration judge working as a part of the DOJ, this proposed rule positions HHS/ORR as both judge and jailer. This is problematic for several reasons.

First, the Ninth Circuit Court of Appeals has already considered and rejected the same arguments advanced by HHS in the proposed regulations regarding its authority to conduct hearings that would comply with paragraph 24(A) of the FSA. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017). The court went into detail about the benefits provided by the bond hearing guaranteed to children in paragraph 24(A), despite their differences from bond hearings for accompanied minors or adults, including the importance of having their detention assessed by an independent immigration judge. *Flores* v. *Sessions*, 862 F.3d at 867 ("The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed *by an independent immigration judge*.") (emphasis added).

Not only is proposed regulation 45 C.F.R. 410.810 completely at odds with the FSA and the Ninth Circuit's decision interpreting that provision, but in practice, the enumerated benefits of having access to a *Flores* bond hearing would be extremely curtailed were HHS to assume the role of arbiter in re-evaluating detention decisions. In fact, there is an inherent tension in the idea that the very same agency that has the power to make placement and release decisions for UACs, including whether they are a danger to the community or present a flight risk, could neutrally re-evaluate its own decisions.

The proposed regulations raise several additional concerns. The appeal process set forth in 45 C.F.R. 410.810(e) is not only insufficient, but inappropriately tasks a political appointee with deciding the outcome of a child's appeal. This all but ensures that political considerations will take precedence over any neutral consideration of the merits of the appeal and the best interests of the child.[43] If UACs will not be provided the ability to challenge the basis for their detention in front of an independent immigration judge, they should at a minimum be advised of their right to appeal a decision of an HHS adjudicator to an independent judge in a federal court, as a binding HHS decision would constitute final agency action. An internal review by the agency itself is in no way sufficient given the liberty interests at stake, the long-term health and mental health consequences that result from the detention of children, and the relatively small population of children held in secure or staff-secure detention. Finally, best practices in child welfare and fairness require a UAC's 810 hearing to occur in person rather than through video- or teleconferencing. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Northwestern U. L. Rev. 4, 933 (2015).

The limitation on "810 hearings" in subsection (h) to disallow the use of these hearings for challenges to placement or level of custody decisions is in direct conflict with the Ninth Circuit's decision in *Flores v. Sessions*, and will strip children of one of the most meaningful protections provided by such a hearing. As the Ninth Circuit pointed out, "[p]roviding unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause." *Flores v. Sessions*, 862 F.3d at 868. The level of ORR detention in which children are held can drastically affect their experiences and length of detention, so this is not to be taken lightly. *See e.g.* Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018); *see also, L.V.M. v. Lloyd*, 318 F.Supp. 3d 601 (S.D. N.Y. 2018); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

B. Importance of Evaluating Custodial Criteria through a Best Interest Lens before an Independent Arbiter (Judge)

The "810 hearings" proposed at 45 C.F.R. 410.810[44] repudiate the evidence-based consensus on best practices in evaluating custody determinations for children and youth. Again, troublingly, the NPRM fails to engage in any meaningful analysis of the large body of evidence militating against the efficacy or fairness of a custody redetermination process that casts the same government agency as judge and jailer.[45]

Custody decisions made regarding a young person's flight risk and danger to self or others should be made using objective criteria related to those specific factors. These factors should be weighed by a neutral and independent arbiter – in this case, a judge. This is precisely how custody decisions are made in other contexts, including in this country's juvenile justice system. In jurisdictions throughout the country, officials make detention decisions using a detention screening instrument, which assesses a

[43] Examples of harm to children from politically-driven decisions by political appointees at HHS continue to accumulate. A notable example found that such agency decision-making represented the "zenith of impermissible agency action". *LVM v. Lloyd*, Opinion and (June 27, 2018), https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant (noting that the agency's creation of the release policy without a record indicating need for a change "is at the zenith of impermissible agency actions").
[44] 83 FR 45533-34.
[45] 83 FR 45509.

youth's likelihood of failing to appear in court or committing a new offense prior to the adjudication of their case.[46] These instruments contain a set list of factors and assign points based on a youth's background and circumstances. Youth who receive a high score are detained, youth who score in the middle range are assigned to a detention alternative program, and youth who score in the low range are released upon conditions to appear in court.[47] These instruments also allow for a limited use of overrides to release or detain a young person when circumstances warrant reconsideration of the youth's assigned score. The use of a detention screening instrument helps ensure that decisions are made fairly and consistently, and in a way that reserves the most expensive interventions for the relatively small number of young people who are determined to require secure custody.

Independent judicial review of custody decisions is necessary to ensure that detention decisions are made through a best interest lens that applies appropriate weight to the factors listed above and the costs and benefits of potential placements. The U.S. Department of Justice has noted youth in this country's juvenile justice system are entitled to detention hearings before a judicial officer and an assessment of probable cause for their detention within 48 hours of being taken into custody.[48] Even in jurisdictions that use detention screening instruments described above to make initial decisions at the time of youth's contact with law enforcement, judicial officers ultimately make custody decisions using the results of those instruments alongside a number of other factors, including a presumption of placing youth in the least restrictive setting possible consistent with public safety and the youth's likelihood of failing to appear. Independent judicial review ensures that all legal factors are weighed independently, fairly, and objectively.

IV. Harm From Detention is More Likely Under the Proposed Regulations Where DHS is the Sole Regulator of their own Family Detention Centers

A. The Stated Purpose and Effect of the Proposed Regulations Is to Provide for *Indefinite* Detention of Children--Which is the Opposite of the FSA's Stated Purpose and Requirement of *Expeditious* Release of Children from Detention

The core principle and requirement of the FSA is that migrant children taken into detention should be released from detention as "expeditiously" as possible. The FSA provides that minors taken into custody must be "expeditiously process[ed]."[49] The Section of the FSA entitled "General Policy Favoring Release," provides clearly and unambiguously that "the INS shall release a minor from its custody without unnecessary delay" (absent certain limited circumstances).[50] Moreover, while a child is detained, the FSA requires that "the INS, or the licensed program in which the minor is placed, shall make and

[46] The Annie E. Casey Foundation, *Juvenile Detention Risk Assessment: A Practice Guide for Juvenile Detention Reform* (2006), https://www.aecf.org/resources/a-practice-guide-to-juvenile-detention-reform-1/.
[47] *Id.*
[48] Letter from Assistant Attorney General Thomas E. Perez to Mississippi Governor Phil Bryant (Aug. 10, 2012), http://www.justice.gov/iso/opa/resources/264201281012173367479 1.pdf. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1974); *In re Gault*, 387 U.S. at 33-57; *see also Moss v. Weaver*, 525 F.2d 1258, 1260 (5th Cir. 1976) (holding that Gerstein probable cause hearings are required for youth).
[49] FSA, ¶ 12A.
[50] FSA, ¶ 14. The only exceptions to expeditious release are the unusual circumstances where there is a particular reason that detention is "required either to secure [the child's] timely appearance before the INS or immigration court, or to ensure the minor's safety or that of others." FSA, ¶ 14.

record the prompt and continuous efforts on its part toward family reunification and the release of the minor...," and requires that such efforts "shall continue so long as the minor is in INS custody."[51]

The FSA requires that, within 3 (or, under certain circumstances, 5) days of a child being in federal immigration detention, the child must be released to a parent or relative, or if that is not possible then placed into a program licensed by a State child welfare agency (a "licensed program"). The FSA provides that a child cannot be held in detention in an "unlicensed program"[52] for longer than 3 (or, under some circumstances, 5) days.[53] If the Government faces an "emergency" or a major "influx" of minor children at the border, then the 3 or 5-day timeframe does not apply and the release must be effected "as expeditiously as possible."[54] In 2014, the court acceded to the Government's request that a time period of up to 20 days be considered "expeditious" in these circumstances. The 20-day period was set based on the government's representation to the court that that is the amount of time required for the Government, "in good faith and in the exercise of due diligence," to screen family members or others to whom a child could be released.[55]

Further, under the FSA, the child's release must be to the "least restrictive setting" possible--with priority given, first, to release to a parent or other family member and then to a "licensed program" or, "when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility," then to another suitable adult or entity seeking custody of the child.[56] These provisions reflect the two basic premises of the FSA. First, pending a child's further immigration proceedings, the child should be released almost immediately to family members or other acceptable sponsors rather than held in detention. Second, if a child will remain in detention longer term (as contemplated by the FSA, because there are no family members or acceptable sponsors to whom the child can be released), then the child should not be in a federal immigration facility (*i.e.*, a facility such as an FRC--which, we note, is similar to a prison setting), but, rather, should be in a setting that is licensed by a State child welfare agency for the longer-term housing and care of children (such as a group home, foster home or juvenile delinquent facility).

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[51] FSA, ¶ 18.

[52] FSA, ¶ 6A "licensed program" is defined in the SFA as "any program, agency of organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors…and that] meets those standards for licensed programs set forth in Exhibit I [to the FSA]."

[53] FSA, ¶ 12.

[54] FSA, ¶ 12A(3). The term "emergency" is defined as follows: "[A]ny act or event that *prevents* the [transfer] within the time frame provided." The FSA provides that "such emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors)." The phrase "influx of minors into the United States" is defined as follows: "[T]hose circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program…, including those who have been so placed or are awaiting such placement." The FSA requires that, "[i]n preparation for an 'emergency' or 'influx,'…the INS shall have a written plan that describes the reasonable efforts that it will take to place all minors as expeditiously as possible" (including the identification of potentially available "licensed programs"). *Id*.

[55] *See* Order re Response to Order to Show Cause, *Jenny L. Flores et al. v. Loretta Lynch*, Case No. CV 85-04544 (U.S. Dist. Ct. Central Dist. Cali. Aug. 21, 2015), p. 10, https://www.aila.org/File/Related/14111359p.pdf.

[56] FSA, ¶ 14.

By contrast, the Proposed Regulations provide for *indefinite* detention of Accompanied Children in federal immigration facilities pending resolution of the long process of their and their parents' immigration proceedings. The Proposed Regulations provide that Accompanied Children can be kept in detention in FRCs *indefinitely* during the pendency of their and their parents' immigration proceedings.[57] These regulations mirror the Government's request in [July 2017] to the *Flores* court to modify the FSA to permit detention of children for up to the entire pendency of their and their parents' immigration proceedings.[58] We note that these proceedings typically take many months and can take years.[59] The court rejected that request. Judge Gee noted that in July 2017, the government, "now seek[s] to hold minors in indefinite detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties' Agreement."[60] The Government now seeks, through the Proposed Regulations that it contends materially *implement* the FSA, to accomplish the *material modification* of the FSA that the Government sought from the court and the court rejected.

B. The Federal Government's Grant to Itself of a Right to *Self*-License Detention Facilities for Prolonged Detention of Children Eviscerates the Core Protections of the FSA

The Proposed Regulations accomplish the Government's preferred policy of indefinite detention of children by providing that the federal Government can self-license its own federal detention facilities. The Government explains in the Proposed Regulations that, to avoid the requirement of releasing children within 20 days from an FRC to a parent or relative or (if no parent or relative is available) to a State child welfare agency-licensed program, the federal Government will consider parents in detention as not available and will authorize itself to *self*-license FRCs for the housing and care of children on a long-term basis.[61] With the FRCs thus transformed into "licensed programs" for children, the Government explains, children could then be kept in the FRCs beyond 20 days (*i.e.*, indefinitely pending resolution of all of the immigration proceedings relating to the child and his or her parents).

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[57] 83 FR 45493. We note that, under the FSA, the Government's policy with respect to *Unaccompanied* Children (*i.e.*, children who cross the border *without* a parent or legal guardian) has been to place them in a licensed program pending resolution of their immigration claims--at which time they would then, depending on the resolution, either be removed from the country or returned to a licensed program until they reached the age of majority and could be released. The Proposed Regulations would not change this policy relating to Unaccompanied Children. The change that the Proposed Regulations would effect is that *Accompanied* Children (*i.e.*, children who cross the border with a parent or legal guardian) would be detained indefinitely in federal immigration facilities (FRCs) pending resolution of their and their parents' immigration claims--rather than, as was the case before 2014, being released with their parents (subject to ankle monitoring, bond, or other compliance programs), or, as was the case under the family separation policy in April-June 2018, forcibly separated from their parents to be housed alone in a licensed program.

[58] *Jenny L. Flores et al. v. Jefferson B. Sessions, III, et al.*, Case No. CV 85-4544-DMG, U.S. Dist. Ct. Central Dist. Cal., July 9, 2018.

[59] *Id.*

[60] *Id.* at 4.

[61] 83 FR 45525. The Government explains that, under the requirements of the FSA, the Government has three options with respect to the custody of migrant children who are accompanied by a parent (or legal guardian): "1) parole all family members into the United States; 2) detain the parent(s) or legal guardian(s) and either release the juvenile to another person or legal guardian or transfer them to HHS to be treated as an UAC [(*i.e.*, detain the children, separately from the parents, in state-licensed facilities for children who are dependent on the state)]; or 3) detain the family unit together by placing them at an appropriate FRC [(family residential center)] during [(i.e.., for "the pendency of] their immigration proceedings." The Government states that it prefers the third option--and needs the Proposed Regulations because the FSA creates "a barrier" to the utilization of this option given that the FSA prohibits prolonged (more than 20 days) detention of children in facilities that are not licensed by a State child welfare agency. PR, § IV.C.1 (pp. 29-31).

Self-licensing is the equivalent of no licensing. *Self*-licensing is an oxymoron, a contradiction in terms.[62] It is axiomatic that one cannot license one's self. There is no assurance of standards associated with "licensing" when the entity being licensed is also setting the licensing standards and monitoring compliance with the standards set. The concept of licensing inherently requires review or oversight by *another entity* than the one being regulated--or the concept of licensing is transformed into "do as you wish." At a minimum, it is a clear perversion of the FSA's requirement that children who are detained on a longer-term basis must be protected through the establishment and monitoring of appropriate standards for their care and well-being (taking into account their "special vulnerability as minors"). This perversion of the FSA's concept of a "licensed program" that is suitable for children underscores that the Proposed Regulations do not implement--and, in fact, flatly contradict--the key terms and the very purpose of the FSA.

Ample evidence demonstrates that the Government is incapable of effectively or meaningfully inspecting its immigration detention facilities, a cruelly negligent failure of governance that puts the lives of children and adults alike at risk. Of particular note are recent reports from the Department of Homeland Security's own Office of the Inspector General (OIG), finding that Immigration and Customs Enforcement (ICE)'s inspections are "very, very, very difficult to fail".[63] This systemic failure is borne out by, among other examples, the "untimely and inadequate detainee medical care" and "nooses in detainee cells" found in the OIG's unannounced inspection of an ICE detention facility in Adelanto, California that had passed its most recent inspection only last year.[64] In another example, the Stewart Detention Center in Georgia passed its inspection just days before the suicide of a mentally-ill detainee kept in solitary confinement in violation of ICE's own detention standards.[65] These failures strongly indicate that the removal of the core outside licensing and monitoring protections of Flores in favor of the Government's proposed self-licensing scheme will jeopardize children's lives. For additional information and analysis, see **Government oversight failures.**

The Government justifies its proposed "licensing scheme" by pointing out that it is very difficult to accomplish the licensing of federal FRCs by State agencies because few States have agencies that establish standards and provide licenses for facilities that house children together with adults. Rather, State agencies typically license only facilities for the care of children who are alone and therefore "dependent" on the state, the Government explains. We submit that the very fact of the rarity of licensing for a situation where children are detained with their parents underscores that the natural, expected course

[62] The concept of "self-licensing" does not even really exist. If one Googles "self- licensing," the only result is a Wikipedia definition of a term "used in social psychology and marketing to describe the subconscious phenomenon whereby increased confidence and security in one's self-image or self-concept tends to make that individual worry less about the consequences of subsequent immoral behavior and, therefore, [to be] more likely to make immoral choices and act immorally." *See, e.g.*, https://en.wikipedia.org/wiki/Self-licensing.

[63] DHS Office of the Inspector General (OIG), ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG -18-67, June 26, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.

[64] DHS OIG, Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California, OIG 18-86, Sept. 27, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf.

[65] Spencer Woodman and Jose Olivares, *The Intercept*, "Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell," Oct. 8, 2018, https://theintercept.com/2018/10/08/ice-detention-suicide-solitary-confinement/.

would be children being released together with their parents to care for them (as was the Government's policy until 2014)[66], rather than detained together with their parent to be cared for by the Government.

Also, we observe that children in detention with their parents actually *are* "dependent" on the Government, as it is the Government (not the child's parents) that makes the rules, enforces discipline, provides the food and water, determines when medical attention can be sought and what the medical care will be, etc.[67] Thus, the Government's emphasis on the lack of licensing for facilities housing children with their parents highlights that children who are detained with their parents in FRCs are not, even under the FSA, protected by basic licensing-type standards set by appropriate agencies. The only counterweight to this problem is that, at least, under the FSA, the detention in federal facilities has been limited to 20 days.

V. The Department of Homeland Security Has a Poor Track Record of Accountability and Transparency with Respect to Immigration Detention Facilities

Under the proposed regulation that would supersede *Flores*, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency. The proposal would allow DHS to "employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE [Immigration and Customs Enforcement]."[68] DHS claims that this would provide "materially identical assurances about the conditions" of family detention centers while allowing for longer periods of detention.[69]

If implemented, the regulation would also end both *Flores* class counsel's access to DHS and Health and Human Services (HHS) facilities that hold minors, and ongoing reporting and monitoring requirements imposed by the court.

Self-inspections by DHS and its contractors are much weaker than the protections that *Flores* provides. **DHS's record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal**. This record demonstrates just how dangerous it would be to allow DHS to bypass state certification standards for facilities that detain children.

A. Gaps in Inspections of Family Residential Centers

[66] *See* Wil S. Hylton, *The New York Times Magazine*, "The Shame of America's Family Detention Camps," Feb. 8, 2015, https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html.
[67] In this connection, we take the opportunity to make the observation that currently, even under the FSA, Accompanied Children in detention in FRCs are not afforded the basic protections that State licensing affords to Unaccompanied Children in licensed programs even though the child in an FRC is still "dependent" on the Government. For example, children in FRCs are routinely housed in rooms with bunk beds accommodating several families so that a child sleeps right under, over, or next to unrelated adults (which, under the FSA, would not be allowed in a licensed program).
[68] Department of Homeland Security and Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register*, Vol. 83, No. 174, Sept. 7, 2018, p. 45525. https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf (Downloaded Oct. 15, 2018)
[69] *Id.*, p. 45488.

The proposed regulations make clear that DHS does **not** intend to increase oversight of family detention centers as part of its new licensing authority. DHS asserts in its proposed regulation that "ICE currently meets the proposed licensing requirements" because it currently requires family detention facilities to comply with ICE's detention standards and hires inspectors to monitor compliance, and therefore "DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing scheme."[70]

Since May 2015, DHS has contracted with a company called Danya International to inspect family detention centers for compliance with ICE's internal standards. According to court documents, Danya has conducted unannounced monthly inspections of all three family residential centers since August 2015.[71] Only three reports from those inspections—one from each facility, as selected by ICE—are publicly available.[72] With respect to the others, the only information available to the public is an assertion by an ICE official in a court declaration that "Danya has generally found the FRCs to be compliant with a majority" of standards, and "[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process."[73] These vague descriptions provide very little information about what individual standards were violated, or how severe and prolonged those violations were.

ICE denied requests by DHS's own Advisory Committee on Family Residential Centers for access to the other Danya International inspection reports.[74]

DHS's Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, but those documents and reports are likewise unavailable to the public. Two medical doctors who served as subject matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations "frequently revealed serious compliance issues resulting in harm to children."[75] Drs. McPherson and Allen stated that family detention centers "still have significant deficiencies that violate federal detention standards," including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and gave detailed examples of cases when children have been harmed by inadequate medical care.

B. Systematic Failings in Inspections of Adult Detention Centers

[70] *Id*., p. 45518.
[71] Declaration of Jon Gurule, ¶6, *Flores* v. *Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016) https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf (Downloaded Oct. 11, 2018)
[72] *Id*., exhibits 1, 2 and 3.
[73] *Id*. ¶6.
[74] *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 93 https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf (Downloaded Oct. 11, 2018)
[75] Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018 https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf (Downloaded Oct. 11, 2018)

More information is publicly available regarding DHS's record on inspections of adult ICE detention centers—but that record provides further evidence that the agency's self-inspections are a poor substitute for state child welfare agencies or court supervision.

A DHS Office of Inspector General (OIG) investigation published in June found that because of the flaws in inspections of ICE detention facilities, deficiencies "remain uncorrected for years."[76] The most frequent inspections of ICE facilities are conducted by a private contractor called the Nakamoto Group. The OIG found that Nakamoto's inspections were severely lacking. According to OIG, "typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE." An ICE employee told the OIG that this was not "enough time to see if the [facility] is actually implementing" required policies. Other ICE personnel described Nakamoto inspections as "very, very, very difficult to fail" and "useless."

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee interviews. But contrary to what Nakamoto's contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it "would not characterize them as interviews." (OIG found that inspections conducted by the Office of Detention Oversight were much more thorough, but occurred only once every three years on average, and ICE did not adequately follow up to ensure that problems were corrected.)

C. Inaccurate Statements by DHS Leadership

In addition to the systemic flaws in detention monitoring described above, DHS's current leadership has shown a disturbing pattern of deceiving Congress and the public about the agency's treatment of children. Over the last few months, Secretary of Homeland Security Kirstjen Nielsen has claimed that DHS does not detain children;[77] that DHS did not have a policy of family separation;[78] that deterrence was not one of the purposes of family separation;[79] and that parents deported without their children had been given the

[76] Department of Homeland Security Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights* (OIG-18-67), June 26, 2018 https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf (Downloaded Oct. 11, 2018)

[77] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Threats to the Homeland," Oct. 10, 2018 [Quote at 1:29:43]. https://www.c-span.org/video/?452548-1/secretary-nielsen-fbi-director-wray-testify-homeland-security-threats&live&start=5375 (Downloaded Oct. 15, 2018)

[78] Kirstjen Nielsen, Twitter Post, June 17, 2018, 2:52 p.m. https://twitter.com/secnielsen/status/1008467414235992069?lang=en (Downloaded Oct. 15, 2018).

[79] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Authorities and Resources Needed to Protect and Secure the United States," May 15, 2018. [Quote at 56:58]. https://www.c-span.org/video/?445411-1/homeland-security-secretary-kirstjen-nielsen-testifies-senate-panel&start=3406 (Downloaded Oct. 15, 2018)

opportunity to reunite and declined to take it.[80] All of those statements are false, and provide further evidence that DHS cannot be trusted to monitor itself with regard to treatment of children in detention.[81]

VI. Conclusion

Whereas the proposed regulations serve to undermine, rather than implement, a contract that the government willingly entered into with the express purpose of protecting the rights of vulnerable children, we object to their implementation as written and offer the foregoing comments. Regulations guided by racial animus cannot be permitted; the regulations here rely on conjecture and disregard data in order to punish children, families, and communities through prolonged detention of minors. Unchecked detention determinations put the children in a far more vulnerable position – without independent review of the decisions, the same agency is both jailer and judge while an internal licensing program shields conditions from scrutiny. As written, the proposed regulations use aggressive treatment of children as a tool to deter future migration. Data shows that increased border enforcement and prolonged detention do not deter long-term migration, and federal courts have refused to hold that deterrence of future migration is a strong enough interest to curtail the rights of an individual. Rather than punishing children, the United States should implement the Flores Settlement through regulations that strengthen its protections through independent review of detention determinations, independently licensed facilities, regular inspections with open reports to the public, and most importantly an approach guided by compassion and rule of law.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact the Southern Poverty Law Center to provide further information.

Sincerely,

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[80] Samuel Chamberlain, "DHS Secretary Nielsen says White House is 'on track' to reunite separated families by deadline," *Fox News*, July 24, 2018. https://www.foxnews.com/politics/dhs-secretary-nielsen-says-white-house-is-on-track-to-reunite-separated-families-by-deadline (Downloaded Oct. 15, 2018)

[81] Letter from Danielle Brian and Lisa Rosenberg to Sens. Ron Johnson and Claire McCaskill, Oct. 2, 2018. https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/ (Hereinafter Brian and Rosenberg Letter); Department of Homeland Security Office of Inspector General, "Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, Sept. 27, 2018. https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf (Downloaded Oct. 12, 2018)