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November 6, 2018

Via Federal eRulemaking Portal

Secretary Kirstjen Nielsen
Assistant Director Debbie Seguin
Office of Policy for U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW
Washington, D.C. 20528

Secretary Alex M. Azar II
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, D.C. 20201

RE: Comments on Proposed Rule: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 6, 2018) (to be codified at 8 C.F.R. §§ 212.5, 236.3, 45 C.F.R. §§ 410.100-410.810)

Dear Secretary Nielsen, Secretary Azar, and Assistant Director Seguin:

We, the Attorneys General of California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia (the “States”), write today to express our significant concerns with the Proposed Rule:

Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 6, 2018) (to be codified at 8 C.F.R. §§ 212.5, 236.3, 45 C.F.R. §§ 410.100-410.810) (Proposed Rule). The proposed regulation seriously undermines the protections the federal government agreed to provide to immigrant children in the stipulated settlement in *Flores v. Reno*, No. 85-cv-4544 (C.D. Cal. Jan. 17, 1997) (Settlement Agreement).

For decades, the Settlement Agreement has afforded immigrant children a right to release from detention, set standards for the conditions in which they may be confined, and provided meaningful oversight and monitoring. As State Attorneys General, we have a duty to protect the rights of our populations, safeguard their health and safety, and defend state laws. If implemented, the Proposed Rule will have significant negative impacts on states; their respective child welfare licensing schemes; and their residents, including immigrant communities and children.

Protecting immigrant children is important to our States. Every year, thousands of children are released from immigration detention and reunified with family members or other adult sponsors who are residents of our States. These children become members of our communities, where they live in our neighborhoods, attend our schools, and in some cases, grow into adults raising their own families. Together, more than half of all children who will be released from immigration detention by the federal government this year will come to our States.¹ Indeed, more unaccompanied children have been placed in California than any other state in the country since Fiscal Year 2015, including 7,381 children in Fiscal Year 2016 and 6,268 children in Fiscal Year 2017. *Id.* Each of our States has acted to support immigrant children. For example:

- California operates an Immigration Services Unit, which for State Fiscal Year 2018-2019 was funded with \$65 million in State funds, including \$3 million dedicated to serving unaccompanied minors. Since 2014, California has appropriated \$12 million to support legal services for this population. And, in 2017, California established the Newcomer Education and Well-Being project as a wholly state-funded program intended to meet the needs of refugee children in California schools.

¹ Office of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors By State* (June 30, 2017), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>. In Fiscal Years 2017 and 2018, our States received 56 percent and 50 percent, respectively, of all unaccompanied children released from immigration detention by the federal government. *See id.*

- Massachusetts has established the Office for Refugees and Immigrants, which administers programs that provide direct services through a network of agencies to refugees and other immigrant populations.
- Washington’s Office of Refugee and Immigrant Assistance (ORIA) facilitates services for refugees and immigrants who settle in the state. ORIA leverages its annual budget—almost \$28 million in 2018—to provide services to more than 10,000 refugees and immigrants each year, contracting with over 60 different organizations to offer a variety of distinct programs and services to immigrants who are integrating into Washington communities. One of the programs that ORIA administers is the State’s Unaccompanied Refugee Minor (URM) Program, which partners with non-profit organizations to provide foster care and group homes for unaccompanied refugee and immigrant children who have obtained immigration relief.
- Illinois has established a Bureau of Refugee and Immigrant Services within the Department of Human Services that funds programs to help newly arrived refugees, asylum seekers, and low-income immigrants with assistance to achieve self-sufficiency in the United States. Through this program, and others, Illinois immigrant children may receive relocation assistance, medical care, or other social services.
- New Jersey ensures that all immigrant children in foster care receive immigration legal assistance and provides funding for public service agencies to provide legal representation for detained immigrants.
- New York’s Office of Temporary and Disability Assistance (OTDA) provides programs and services to refugees and unaccompanied minors, including assuring proper foster care for unaccompanied refugee and entrant minors. In addition, OTDA is responsible for administering and supervising implementation of the Refugee Resettlement Program State Plan, which provides services to refugees and their families to help them achieve economic and social self-sufficiency. The Refugee Resettlement Program also includes a component that provides services to unaccompanied refugee minors. For fiscal year 2018-2019, \$26 million has been appropriated in the state budget for the Refugee Resettlement Program.

As discussed below, the States are strongly opposed to the Proposed Rule. Section I describes how the Proposed Rule contradicts important protections guaranteed by the Settlement Agreement, including the presumption that all children are eligible for release to our communities. Section II addresses constitutional concerns with the indefinite detention of children and the evidence showing that detention is not a deterrent to immigration. Section III highlights how the Proposed Rule undermines state licensing of children’s residential

placements, which is a fundamental police power traditionally belonging to our States. In Section IV, we discuss the ample evidence of lasting harm to children that results from detention.

I. Instead of Implementing the Settlement Agreement, the Proposed Rule Contravenes Its Terms

The Settlement Agreement is the guiding document applicable to all immigrant youth in federal government custody, including in our States, and released from custody into our communities. In arriving at the *Flores* resolution, the federal government agreed to enact the terms as federal regulations. See Settlement Agreement at ¶ 9 (“Within 120 days of the final district court approval of this Agreement, the INS shall initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation.”). The parties ultimately stipulated (and the court then ordered) that the Settlement Agreement would remain in effect until 45 days after defendants’ publication of final regulations implementing the Agreement. See Stipulation and Order, *Flores v. Reno*, No. 85-cv-4544 (C.D. Cal., Dec. 12, 2001), ECF No. 13 (Stipulation). Thus, the federal government remains obligated by court order to implement the terms of the Settlement Agreement through regulations.

The notice of proposed rulemaking asserts that the Proposed Rule implements the terms of the Settlement Agreement while taking into account “changed circumstances” that require certain modifications. 83 Fed. Reg. at 45487. In fact, the Proposed Rule not only fails to implement the Settlement Agreement, it directly contravenes the Agreement’s terms. Specifically, the Proposed Rule negates the Settlement Agreement’s presumption of release for all immigrant children and strips protections that ensure that such release occurs swiftly. In addition, and as discussed more fully below, on multiple occasions courts have rejected the federal government’s position that changed circumstances or the enactment of federal statutes have obviated the Settlement Agreement, or portions thereof. See, e.g., *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016).

We also note this substantial shift in policy violates the Administrative Procedure Act. The Department of Homeland Security (DHS) lacks the statutory authority necessary to implement the Proposed Rule, including the ability to indefinitely detain children and override state licensing of children’s residential placements. See 5 U.S.C. § 706(2)(B)-(C); see also *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”). Further, the Proposed Rule is arbitrary and capricious because DHS relies on factors Congress did not intend for it to consider, fails to consider important aspects of the problem the agency is addressing, and offers an explanation for the Proposed Rule that runs counter to the evidence. See 5 U.S.C. § 706(2)(A); see also *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, there are no “changed circumstances” with regard to interpretations of the Settlement Agreement or federal statutes that justify the Proposed Rule’s marked deviation from the substantive requirements of the Settlement Agreement, and thus there is no “reasoned

explanation” for the change in course. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (federal agency has “duty to explain why it deemed it necessary to overrule its previous position”).

A. The Settlement Agreement Has Always Applied to Both Accompanied and Unaccompanied Minors, and There is No Justification for Failing to Protect Accompanied Minors Pursuant to Its Terms

The federal government asserts that the Proposed Rule is necessary to take into account certain “changed circumstances,” particularly the “operational shift” caused by “the extension” of the Settlement Agreement “to apply to accompanied minors,” not just unaccompanied children. *See* 83 Fed. Reg. at 45487. However, the Settlement Agreement has always applied to both accompanied and unaccompanied immigrant children. Rather than implement the Settlement Agreement, as the federal government purports to do, the Proposed Rule will eliminate important protections for accompanied immigrant youth and reinstate the conditions that led to the *Flores* litigation in the first place.

Beginning in 1984, the Western Region of the Immigration and Naturalization Service (INS) implemented a policy under which a detained immigrant child could only be released to a parent or legal guardian. 83 Fed. Reg. at 45489. The result was lengthy or indefinite detention of immigrant children. Moreover, the detention conditions during this time were poor: children were strip-searched, held with unrelated adults, and denied educational and recreational opportunities.² Then, as now, children were fleeing dangerous conditions in Central America and traveling to the United States.³ Then, as now, the federal government sought to treat immigrant children in the same manner as immigrant adults.⁴ Then, as now, there were concerns

² *See* Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 Chicano-Latino L. Rev. 589, 596 (1998).

³ M. Aryah Somers, Pedro Herrera, & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. Davis. J. Juv. L. & Pol’y 311, 334 (2010).

⁴ *Compare* 83 Fed. Reg. at 45493 (Proposed Rule “would eliminate the disparate legal regime . . . with one regime applying to the minor . . . and another regime applying to the parent”) with Wendy Young and Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 Harv. C.R.-C.L. L. Rev. 247, 250 (2010) (INS “applied the same model of punitive detention to children as it did to adults”).

that immigrant children were being used as bait to draw out family members who would then be swept up in immigration enforcement efforts.⁵

It was this detention policy and these poor conditions that were challenged by Jenny Lisette Flores, a 15-year-old child fleeing civil war in El Salvador, who was arrested near San Ysidro, California, and detained for months in Pasadena, California.⁶ In 1985, together with four other named plaintiffs, Ms. Flores brought a class action lawsuit to challenge the detention and treatment of immigrant children. Complaint, *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal., July 11, 1985), ECF No. 1. Importantly, “[t]he conduct Flores challenged—INS detention conditions and the Western Region release policy—applied to accompanied and unaccompanied minors alike.” *Flores*, 828 F.3d at 907. One of the named plaintiffs, “was accompanied at the time of her arrest by her adult brother, although he was released without her.” *Id.* at 907-08. During litigation, the “class was certified expressly to challenge the . . . policy of not releasing detained minors to anyone other than a parent or guardian,” which “applied equally to accompanied minors.” *Id.* at 907.

The resulting Settlement Agreement included all detained immigrant children. It defines minor as “any person under the age of eighteen (18) years who is detained in the legal custody of the INS.” Settlement Agreement at ¶ 4. The Settlement Agreement specifies the limited circumstances under which unaccompanied children might be subject to different treatment. *See, e.g., id.* at ¶ 25.

Therefore, the application of the Settlement Agreement to all immigrant children is neither an “operational shift,” nor an “extension,” as the federal government now claims. *See* 83 Fed. Reg. at 45487. Indeed, multiple courts have already rejected this argument. *Flores*, 828 F.3d at 898; *Bunikyte ex. rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *3 (W.D. Tex. Apr. 9, 2007) (“[T]he Flores Settlement, by its terms, applies to all ‘minors in the custody’ of ICE and DHS, not just unaccompanied minors.”).

B. The Proposed Rule Undermines a Key Requirement to Prioritize Release Into the Community for Accompanied Children

The Settlement Agreement “sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and . . . supersede[d] all previous INS policies that [were] inconsistent with the terms of th[e] Agreement.” Settlement Agreement at ¶ 9. As part of

⁵ *See* Erin Eileen Gorman, *Reno v. Flores: The INS’ Automatic Detention Policy for Alien Children*, 7 GEO. IMMIGR. L.J. 435, 436 (1993); Tal Kopan, *ICE arrested undocumented immigrants who came forward to take undocumented children*, CNN (Sept. 20, 2018), <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

⁶ Rebeca M. López, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1648 (2012).

this nationwide policy, the Settlement Agreement imposes obligations on federal immigration authorities to release children from immigration detention without unnecessary delay to family members or other sponsors where possible. *See* Settlement Agreement at ¶ 14. The Proposed Rule would improperly eliminate this protection for accompanied children by disallowing their release to anyone other than a parent or legal guardian and, instead of providing for such release, essentially requiring the indefinite detention of accompanied children with their parents.

The Settlement Agreement established a clear policy against the prolonged detention of minor children. Immigration officials are required to release a child “without unnecessary delay” where detention is not required to ensure a child’s safety or timely appearance in his or her immigration case. *See* Settlement Agreement at ¶ 14. In working toward release, officials must prioritize placement with family members and other adults connected to the family, namely: a parent; legal guardian; other adult relative, including a brother, sister, aunt, uncle, or grandparent; and an adult individual designated by a parent or legal guardian. Settlement Agreement at ¶ 14. If a family member or designated adult is not available, officials can look to a licensed program willing to accept custody or other adult individuals seeking custody if “*there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.*” *Id.* (emphasis added). In setting out the order of priority for release, the Settlement Agreement stresses the importance of family reunification and of alternatives to long-term detention.

While the Proposed Rule would continue to allow the release of unaccompanied children in Office of Refugee Resettlement (ORR) custody to the types of sponsors contemplated in the Settlement Agreement, accompanied children in DHS custody could only be released to parents and legal guardians. *See* 83 Fed. Reg. at 45524 (proposed 8 C.F.R. § 212.5). For accompanied children whose parents are in DHS custody, the Proposed Rule would essentially require their indefinite detention during the pendency of immigration proceedings by disallowing release to non-parents and “clear[ing] the way” for the expanded use of family residential centers. *Id.* at 45493. DHS argues that allowing for such detention is necessary to “eliminate the disparate legal regime” that treats parents and their children differently. *Id.* However, the Settlement Agreement is animated by the fact that children *are* different from adults and the government must protect their best interests when they are in government custody, including by preventing prolonged detention where possible. *See infra* at Section IV. Accompanied children are not, and should not be, excluded from these protections.

Instead of implementing the Settlement Agreement’s protections for accompanied children, DHS repeatedly states in the Proposed Rule that it “does not have the legal authority to release a juvenile in its custody to anyone other than a parent or legal guardian.” *E.g.*, 83 Fed. Reg. at 45495. However, the federal laws cited for this proposition in the Proposed Rule do not constrain DHS’ authority to release immigrant children to appropriate non-guardians. The Homeland Security Act of 2002, 6 U.S.C. § 101 (2002) (HSA), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235 (codified in principal part at 8 U.S.C. § 1232 (2008)) (TVPRA), neither conflict with the

Settlement Agreement nor provide a basis for modifying the release standards it established. Under the HSA, INS was abolished, but its duties and functions, including those relating to the detention, transportation, and removal of children were transferred to DHS. *See* 6 U.S.C. § 251. The Act itself contemplated that DHS would continue to be bound by agreements predating the HSA’s enactment, including the Settlement Agreement. *See* 6 U.S.C. § 552 (“[c]ompleted administrative actions...shall not be affected by the enactment of this [Act],” and “the term ‘completed administrative action’ includes...agreements...[and] contracts”). In short, the HSA was an organizational restructuring of federal immigration enforcement agencies, and not a substantive alteration of the Settlement Agreement or immigration law. *See Flores v. Lynch*, 828 F.3d at 910 (“The government also notes that the Homeland Security Act of 2002 reassigned the immigration functions of the former INS to DHS; but there is no reason why that bureaucratic reorganization should prohibit the government from adhering to the Settlement.”).

Similarly, although TVPRA did transfer certain duties and functions regarding unaccompanied immigrant children to ORR, it did not alter the federal government’s obligations under the Settlement Agreement or its ability to carry out the same. *See* 6 U.S.C. §§ 279, 552. Instead, “TVPRA partially codified the Settlement by creating statutory standards for the treatment of unaccompanied minors.” *Flores v. Lynch*, 828 F.3d at 904 (citing 8 U.S.C. § 1232(c)(2)(A)). The Settlement Agreement was the source of these statutory standards and it is clear that Congress understood that the terms of the Settlement Agreement would continue to govern the detention and release of migrant children. *See* 154 Cong. Rec. S10887 (daily ed. Dec. 10, 2008) (statement of Senator Feinstein noting that the bill did not alter children’s immigration rights). TVPRA did not alter the policy favoring release for all immigrant children—accompanied and unaccompanied alike.

In addition to applicable federal law, DHS’ own practices favor the safe release of children to non-parents. DHS has continued to be obligated to comply with the Settlement Agreement as to children in its custody, including releasing children to non-parent relatives as necessary. *See* Detention and Release of Juveniles, 53 Fed. Reg. 17449 (May 17, 1988) (codified at 8 C.F.R. §§ 212, 242) (“We agree with comments that the juvenile’s interests are best served when the juvenile is placed in a home or shelter-care environment.”). Federal regulations in place for thirty years implemented this requirement. *See* 8 C.F.R. §§ 236.3 (DHS release guidelines for juveniles); 212.5 (same for parole into the United States). And, DHS has proved capable of complying with these regulatory preferences for release for years. *Accord Flores v. Johnson*, No. 2:85-cv-04544, ECF No. 177 at 21 (C.D. Cal., July 24, 2015) (“Defendants have proffered no evidence that they have experienced any difficulty implementing the Agreement with respect to unaccompanied children and children apprehended with their fathers in the 13 years since the HSA was passed.”). The Proposed Rule presents no evidence of DHS difficulty in complying with the Settlement Agreement’s release obligations, only the mistaken assertion that it lacks authority to do so. *See, e.g.*, 83 Fed. Reg. at 49495.

C. The Proposed Rule Undermines the Settlement Agreement’s Requirements to Promptly Place Unaccompanied Children in the Least Restrictive Environment and Then Release Them Into the Community

The States also have concerns about the impact of other portions of the Proposed Rule on our respective communities. We know that children do better outside of institutional settings.⁷ Accordingly, we consistently work to safely return children to the community as soon as possible. The Proposed Rule should ensure compliance with the Settlement Agreement’s terms by requiring prompt placement of children in locations where they have family members or other supports. In addition, the federal government should be required to facilitate children’s timely release from custody to their approved adult sponsors.

1. The Proposed Rule Eliminates Important Considerations as to When and Where Unaccompanied Children Will be Placed

The Proposed Rule would alter the Settlement Agreement’s requirements that children be transferred from DHS to HHS, and that ORR place a minor in a licensed program within 3-5 days. *See* Settlement Agreement at ¶ 12(A). Instead, DHS would only need to meet timeframes “to the extent operationally feasible.” *See* 83 Fed. Reg. at 45526 (proposed 8 C.F.R. § 236.3(f)(4)(ii)). And, ORR would need to place unaccompanied children in a licensed program “promptly.” *See* 83 Fed. Reg. at 45530 (proposed 45 C.F.R. § 410.202(a)). This language is meaningless, fails to impose actual limitations on the federal agencies, and would create a system where transfer timeframes are so vague they are effectively unreviewable. The Proposed Rule should not provide additional latitude to DHS and HHS that could result in further increases in children’s length of stay.

Similarly, the Proposed Rule appears to allow HHS to transfer an unaccompanied child to a secure facility “if there is no appropriate licensed program immediately available,” *see* 83 Fed. Reg. at 45530 (proposed 45 C.F.R. § 410.201(e)), and even if there are no characteristics that would justify the secure placement under the current terms of the Settlement Agreement. *See* Settlement Agreement at ¶ 21. The States are strongly opposed to housing children in jail-like settings when those placements are not necessary to meet the particular needs of a child. The requirement that children be placed in the least restrictive environment is a material term of the

⁷ *See, e.g.,* Dongdong Li et al., *Comparing Long-Term Placement Outcomes of Residential and Family Foster Care: A Meta-Analysis*, Trauma, Violence & Abuse (Aug. 31, 2017), <https://doi.org/10.1177/1524838017726427> (noting “consistently negative views [among researchers] on group residential care as a place to raise young children on a long-term basis,” citing M. Dozier et al., *Institutional Care for Young Children: Review of Literature and Policy Implications*, 6 Soc. Issues & Pol. Rev. 1 (2012)).

Settlement Agreement, which the federal government now seeks to abrogate without sufficient justification.

Relatedly, and especially because unaccompanied children are spending more time in ORR care, the Proposed Rule should prioritize placements in facilities located where children are likely to be released. The States have a strong interest in the smooth transition of unaccompanied immigrant children into our communities. This transition is facilitated when children are placed near the family members to whom they will be released. As currently drafted, 45 C.F.R. § 410.201(c) provides that ORR will make “reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC.” 83 Fed. Reg. at 45530. Instead, ORR should place unaccompanied children where they are apprehended *only if* they are without family contacts or adult sponsors elsewhere. For example, this means that ORR should seek to place the thousands of children who are ultimately released to sponsors in California at facilities within the State.⁸ Moreover, HHS should modify the Proposed Rule to require the agency to provide transportation for the unaccompanied child to the sponsor upon release. *See* 83 Fed. Reg. at 45533 (proposed 45 C.F.R. § 410.500) (leaving transportation to ORR’s discretion).

2. The Proposed Rule Does Not Facilitate Timely Release of Children to Sponsors

As required by the Settlement Agreement—and given the recognized harms to children from detention—the Proposed Rule should promote the timely release of unaccompanied children from custody. Data shows that unaccompanied children are spending longer times in ORR custodial care than before. Whereas in Fiscal Year 2016 the average length of stay was 35 days, it rose to 48 days in Fiscal Year 2017.⁹ So far this year, the average has risen to 59 days.¹⁰ As currently drafted, the sponsor suitability assessment regulation is insufficient to ensure timely release. 83 Fed Reg. at 45531 (proposed 45 CFR § 410.302). This regulation should include: (1) a timeframe for processing sponsorship applications; and (2) a process by which the child, his or her counsel (if any), and the person seeking to sponsor the children are provided with notice and an opportunity to be heard regarding the decision to deny the sponsorship application. These protections are necessary because ORR procedures for family reunification have already been found to be deficient by courts. *See D.B. v. Cardall*, 826 F.3d 721, 741-43 (4th Cir. 2016) (ORR

⁸ Office of Refugee Resettlement, *supra* note 1.

⁹ Dep’t of Health & Hum. Serv. Admin. for Children and Families, Fiscal Year 2019 Justification of Estimates for Appropriations Committees 68 (2018), https://www.acf.hhs.gov/sites/default/files/olab/acf_master_cj_acf_final_3_19_0.pdf.

¹⁰ Tal Kopan, *The simple reason more immigrant kids are in custody than ever before*, CNN (Sept. 14, 2018), <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>.

procedures for family reunification with respect to children in secure custody violated due process). And a lack of clear timeframes can result in unaccompanied children being detained for very long periods of time. *See, e.g., Santos v. Smith*, 260 F.Supp.3d 598, 602 (W.D. Va. 2017) (noting “ORR did not issue a decision [on the] request for reunification until May 31, 2016, more than 17 months after her petition was filed, and more than 14 months after the home study was completed”). The lack of clear timeframes or process in the Proposed Rule is particularly concerning given the other actions that the federal government is taking to discourage and penalize individuals who come forward to sponsor children so they can be released from immigration detention. For example, in recent months, ICE arrested 41 people who applied to sponsor children, and 70 percent of the arrests were for routine immigration violations.¹¹

II. Indefinite Detention of Children is Unconstitutional and Unnecessary

Moving to a model where detention of children is the norm is not the appropriate legal, practical, or moral path. ICE’s own Advisory Committee recommends that DHS “simply avoid detaining families” because “detention . . . for purposes of immigration enforcement [is] *never* in the best interest of children.”¹² Instead, “DHS should discontinue the general use of family detention.” *Id.* Rather than heed this guidance, the Proposed Rule would lead to thousands more children being detained for immigration purposes each year.

A. Indefinite Detention Raises Serious Constitutional Concerns

In proposing to detain accompanied children together with their parents during the pendency of immigration proceedings, the Proposed Rule raises significant due process concerns. Because pursuit of immigration relief may take a significant amount of time, particularly as courts that cover detained populations experience greater caseloads,¹³ there is a very real possibility that families—with minor children of all ages—will be subject to prolonged

¹¹ Kopan, *supra* note 5.

¹² Report of the ICE Advisory Committee on Family Residential Centers, 2 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf> (*emphasis added*).

¹³ Immigration Court Post-Trump Cases: Latest Data, TRAC Immigration (Mar. 21, 2017), <http://trac.syr.edu/immigration/reports/462/>. Because ICE has withheld other comprehensive information and data access, there may also be significant barriers to receiving data on the detention of immigrant families. *See id.* (discussing new ICE barriers to data access). This is especially troubling because DHS has articulated uncertainty at how many individuals will be detained under this rule, and for how long. *See, e.g.*, 83 Fed. Reg. at 45488; *see also* Report of the ICE Advisory Committee on Family Residential Centers (Oct. 7, 2016) at 3 (“ICE was unwilling to share with us information on the length of detainees’ stays”).

detention of months, and even years. *See, e.g.*, 83 Fed. Reg. at 45518. This is particularly true regarding families seeking asylum, which make up a large portion of families who would be subject to detention under the Proposed Rule. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 860 (2018) (Breyer, J., dissenting) (“The record shows that the Government detained some asylum seekers for 831 days (nearly 2 & half years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before they won their cases and received asylum.”).¹⁴

Case law establishes that indefinite detention “would raise a serious constitutional problem.” *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”); *Cf. Jennings*, 138 S.Ct. at 868 (remanding case for consideration of constitutional arguments regarding need for periodic review of immigrant detention status). As the U.S. Supreme Court has articulated, “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Fifth Amendment’s Due Process] Clause protects.” *Zadvydas*, 533 U.S. at 690. There must only be “carefully limited exceptions” to the “general norm” of liberty in our society. *See United States v. Salerno*, 481 U.S. 739, 755 (1987); *see also Zadvydas*, 533 U.S. at 693 (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.”). And detention in the civil immigration context is only permissible “to facilitate deportation, or to protect against risk of flight or dangerousness.” *See Denmore v. Kim*, 538 U.S. 510 (2003).¹⁵

Moreover, even if prolonged civil immigration detention was constitutionally tolerable for adults, it is surely unacceptable for children. Children are different from adults, and courts must therefore analyze their constitutional rights and liberties differently. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (*Miranda* custody analysis is different for children); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (the Eighth and Fourteenth Amendments prohibit the death penalty for juvenile offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (“the experiences of mankind, as well as the long history of our law, recognize[e] that there are differences which must be accommodated in determining the rights” of children compared to those of adults). Indeed, “were a substantial number of young children knowingly placed in

¹⁴ American Immigration Council, *Fact Sheet Asylum in the United States*, (May 14, 2018), at 4, https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf (“Individuals with an immigration court case who were ultimately granted relief—such as asylum—by March 2018 waited more than 1,000 days on average for that outcome.”).

¹⁵ This is consistent with settled law that civil detention cannot be punitive. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to adjudication of guilt in accordance with due process of law.”).

harm's way, it is easy to imagine how viable [Due Process Clause] claims might lie." *Aguilar v. ICE*, 510 F.3d 1, 22 (1st Cir. 2007).

Importantly, recent court decisions do not support the indefinite detention of immigrant children. In June 2017, for example, the administration was enjoined from carrying out its policy and practice of arresting and indefinitely detaining unaccompanied children who were suspected of gang allegations. *Saravia v. Sessions*, ---F.3d ---, 2018 WL 4689978 (9th Cir. Oct. 1, 2018), (upholding preliminary injunction ordering government to provide class members hearings within seven days of rearrest). There, the court found that "[b]y shipping the minors across the country for indefinite detention in a high-security facility before providing the hearing, the government has violated their due process rights." *Id.* at 1177.

B. Detention of Immigrant Families is Not—and Cannot Be Used as—a Deterrent to Unlawful Entry

The Proposed Rule relies on a false premise: that family detention is a deterrent to unlawful entry. It asserts in several places that families with children may have been incentivized to immigrate to the United States because of an expectation that they would be able to remain in the country and outside of immigration detention. *See, e.g.*, 83 Fed. Reg. at 45493. Without presenting data or other studies of immigration trends, DHS asserts that the agency's use of family detention is "correlated with a significant drop in family migration." *Id.* ("DHS' assessment is that this change helped stem the border crisis."). Federal government officials have also publicly articulated a policy preference for deterrence.¹⁶ The agency's factual premise is not supported by evidence, and deterrence is an invalid basis for the detention of children.

The federal government's position on deterrence is not supported by the data. Indeed, the federal government's own data undermines its position that family detention is a deterrent. Earlier this year, the federal government highlighted a "significant reduction in family units crossing the border in FY 2015 when the Government was holding families together," and a "near[] doubl[ing]" in family crossings "in the months after the decision." Defs.' Mem. of P. & A. in Supp. of *Ex Parte* Appl. for Limited Relief from Settlement, *Flores v. Sessions*, No. 85-cv-4544, ECF. No. 435-1 at 7-9 (C.D. Cal. June 21, 2018). However, an independent review by Professors Adam Cox and Ryan Goodman revealed that while "at first blush, these numbers do sound like there is at least a correlation between *Flores* and families' migration decisions . . . the

¹⁶ *See* Philip Bump, *Here are the administration officials who have said that family separation is meant as a deterrent*, The Washington Post, June 19, 2018, https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?noredirect=on&utm_term=.62de9daaba53.

apparent relationship is based on the *selective use of only a small slice of apprehensions data.*¹⁷ Beyond the small slice provided by the federal government, the data shows “border apprehensions began rising months before the decision” and the *Flores* district court decision “was simply not an inflection point.” Therefore, per Professors Cox and Goodman, “[f]orget causation: there’s not even a correlational relationship between *Flores* and family migration, as the government asserted in its brief,” *id.*, and continues to claim here. *See* 83 Fed. Reg. at 45493. The professors also compared data regarding accompanied and unaccompanied minors because “if the *Flores* decision really had changed the incentives for families, you would expect crossings for families and unaccompanied minors to respond differently after the decision.”¹⁸ In a “striking” result, “[t]he pattern of apprehensions for these two groups track each other almost perfectly over time.” *Id.* This is “devastating evidence against the government’s contention that rising rates of family apprehensions in the second half of 2015 were caused by the court’s July decision in *Flores.*” *Id.*

Professor Tom K. Wong also examined data on family detention and migration trends and found that “[t]he expanded use of family detention is not statistically significantly related to decreases in the monthly number of U.S. Border Patrol apprehensions of families at the southwest border.”¹⁹ Specifically, when the federal government expanded family detention in July 2014, “there was no statistically significant decrease in apprehensions.” *Id.* The same held true when running a series of models to account for “the possibility that policy changes need time to take effect” and “taking seasonal trends into account.” *Id.* In total, fifteen different models were run, and each produced similar results. “In other words, the data continue to show that these policies do not act as deterrents to families attempting to enter the United States.” *Id.* In addition, and consistent with the findings of Professors Cox and Goodman, Professor Wong’s

¹⁷ Adam Cox & Ryan Goodman, *Detention of Migrant Families as “Deterrence”*: *Ethical Flaws & Empirical Doubts*, justsecurity.org, June 22, 2018, <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/> (emphasis added).

¹⁸ Cox and Goodman, *supra* note 31.

¹⁹ Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, Center for American Progress, July 24, 2018, <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>. Professor Wong also submitted these findings in a sworn declaration in the multistate case brought by the States challenging the federal government’s family separation policy. *See* Decl. of Tom K. Wong in Supp. of Pls.’ Mot. for Expedited Disc., *Washington v. United States*, No. 18-cv-1979, ECF No. 15-4 (S.D. Cal. July 2, 2018).

analysis shows: “There is no statistically significant relationship between the July 2015 *Flores* ruling and the monthly number of apprehensions of families at the southwest border.”²⁰

Even if prolonged detention were an effective deterrent, such deterrence would not be a permissible justification for the Proposed Rule. Courts have previously enjoined the federal government from considering deterrence in making immigration detention decisions. *See R.I.L. v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015) (granting preliminary injunction prohibiting government from considering deterrence as a factor to justify detention of women and children who had entered the United States fleeing persecution in Central America). In *Johnson*, the class of immigrant mothers and their minor children alleged that their detention during the pendency of their immigration proceedings was the result of a DHS policy “with the aim of deterring potential *future* immigrants.” *Id.* at 170 (emphasis in original). There, the court characterized as “novel” the “interest proposed by the Government” in “deterrence of mass migration.” *Id.* at 188. Similarly, the federal government conceded “it ha[d] no federal cases on point to support its view that this interest is permissible.” *Id.* In holding that the class of detained mothers and children was likely to succeed on the merits, the court found the federal government’s interest in deterrence “particularly insubstantial.” Other courts have held the same. *See, e.g., Aracely R. v. Nielsen*, 319 F. Supp. 3d 110 (D.D.C. 2018) (granting preliminary injunction to plaintiff class because of likelihood of success on the merits that “Defendants have implemented a policy of taking immigration deterrence into account when making individual parole determinations for . . . asylum seekers”); *Cf. Order, Flores v. Lynch*, Case No. 85-CV-4544, ECF No. 177 at 24 n.11 (C.D. Cal. July 24, 2015) (declining to address issue of deterrence because “Defendants have failed to present any evidence that the policy they have implemented either causes or addresses the recent change in factual circumstances”).

C. The Federal Government Can Enforce Immigration Law Using Less Restrictive Means

The federal government seeks to take the extreme step of indefinitely detaining children without any evidence that this will help them enforce immigration laws.²¹ Without evidentiary support, the federal government claims “a significant number of aliens who are not in detention either fail to appear at the required proceedings or never actually seek asylum relief.” 83 Fed. Reg. 45494. Since 2001, however, 86 percent of families who were released from detention

²⁰ Tom K. Wong, *Did a 2015 Flores Court Ruling Increase the Number of Families Arriving at the Southwest Border?*, Center for American Progress, Oct. 16, 2018, <https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>.

²¹ *See Fatma E. Marouf, Alternatives to Immigration Detention*, 38 Cardozo L. Rev. 2141 (2017) (“Despite the range of alternatives to detention that are currently available, ICE still chooses to detain far more people than it releases.”)

attended their immigration court hearings.²² Compliance rose to 96 percent with families applying for asylum, and to 97 percent when families were represented by counsel. *Id.* There is no evidentiary justification for detaining these families indefinitely where the data confirms that they appear for their immigration proceedings.

Moreover, the federal government has proven capable of enforcing immigration laws by using alternatives to detention. Indeed, as DHS stated in its congressional justification for Fiscal Year 2018, “[h]istorically, ICE has seen strong alien cooperation with [Alternatives to Detention] requirements during the adjudication of immigration proceedings.”²³ For example, according to the DHS Office of Inspector General, during the Family Case Management Program for asylum seekers, 99 percent of the program’s participants attended their ICE check-ins and there was 100 percent attendance at immigration court appearances.²⁴ The Family Case Management Program provided support to immigrants in our communities—including in Los Angeles, Baltimore, Chicago, and Washington D.C.—using social workers to guide participants through the immigration court system, and help them access housing, healthcare, and schooling for their children. *Id.* And, stakeholders were permitted to identify and refer potential participants. For this population of participants, there was a 79.4 percent compliance rate with removal orders.²⁵

The Intensive Supervision Appearance Program is another alternative to detention used by the federal government, which relies on a combination of GPS ankle bracelets, court management services, and home and office visits to promote compliance with immigration obligations.²⁶ As with other programs, the Intensive Supervision Appearance Program yielded

²² Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Cal. L. Rev. 785, 792 (2018).

²³ U.S. Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview, Fiscal Year 2018 Congressional Justification*, 170 (2018), <https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf> (ICE Budget Overview)

²⁴ DHS Office of Inspector General, OIG-18-22, *US. Immigration and Customs Enforcement’s Award of the Family Case Management Program Contract*, 5 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>. The Family Case Management Program was discontinued in 2017. Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, *The Atlantic* (June 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>.

²⁵ American Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up* at n.9, <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd>.

²⁶ ICE Budget overview, *supra* note 23 at 179-80.

high compliance rates—participants appeared for immigration court hearings 99 percent of the time.²⁷

D. The Federal Government Underestimates the Number of Children Who Will be Subject to Prolonged Detention

The Proposed Rule’s estimation of impact neglects to include the thousands of children seeking asylum who will likely not be paroled during their immigration proceedings, and will therefore be subject to immigration detention.

Under federal law, immigrants who are subject to expedited removal shall be detained. *See* 8 U.S.C. § 1225(b)(2)(A). As currently implemented in regulation, undocumented immigrants who have been in the United States 14 days or less since entering without inspection and encounter an immigration officer within 100 miles of the border are subject to expedited removal. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004). If an individual subject to expedited removal seeks asylum and receives a positive credible fear determination, then the individual becomes eligible for parole, but parole is at the discretion of the federal government. *See* 8 U.S.C. § 1182(d)(5). Until now, the federal government has understood “the only clearly viable option under current law for the treatment of family units that demonstrate a credible fear of persecution is . . . to release the families pending their removal proceedings in immigration court.”²⁸ As a result, the federal government exercised its parole authority to release families with positive credible fear determinations.

In Fiscal Year 2017, 16,807 children detained in family residential centers went through the credible fear screening process and were released. 83 Fed. Reg. at 45519. This number includes 14,993 children who received positive credible fear determinations. *See id.* These children would likely be subject to detention under the Proposed Rule.

DHS concedes that children seeking asylum, like the almost 15,000 children with credible fear determinations during the last year alone, may be detained during the pendency of the immigration process under the Proposed Rule.²⁹ According to the Proposed Rule, DHS is

²⁷ Government Accountability Office, GAO-15-26, *Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (2014), <https://www.gao.gov/assets/670/666911.pdf>.

²⁸ *The “Flores Settlement” and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, Congressional Research Service, R45297, Sept. 17, 2018 at 1, <https://fas.org/sgp/crs/homesecc/R45297.pdf>.

²⁹ This is also consistent with the federal administration’s previous instruction that DHS limit use of the agency’s parole authority. *See* Executive Order 13767 (Border Security and Immigration Enforcement Improvements), 82 Fed. Reg. 8793, 8795-96 (Jan. 25, 2017).

proposing changes to its current practice for parole determinations, “which may result in fewer minors or their accompanying parent or legal guardian being released on parole.” 83 Fed. Reg. at 45488. DHS identifies “aliens who have received a positive credible fear determination” as those who “may be held throughout their asylum proceedings.” *Id.* at 45518-45519. Although DHS accounts for other categories of children in estimating those who will have their length of stay in detention increased, including those with negative credible fear determinations, administratively closed cases, or final orders of removal, the Proposed Rule fails to include accompanied children with positive credible fear determinations. *Id.* at 45519. Thousands of children fall into this category, and equal *over five times* the total 2,787 children that DHS has calculated as those “who might be detained longer” at a family residential center. *Id.* at 45519.³⁰

III. The Proposed Rule Will Undermine State Licensing of Children’s Residential Facilities

The Settlement Agreement unambiguously requires that detained children be placed in a licensed facility, and states are the entities that license residential facilities for children. Under this licensing scheme, the states are responsible for initial approval of a license, and for ensuring ongoing compliance with all applicable laws and regulations. The federal government has never—for immigration purposes or in any other child welfare context—licensed facilities for children. The Proposed Rule would create a shadow licensing scheme, in which family residential centers that do not meet state licensing requirements would be “licensed” by the federal government to detain immigrant families with minor children. The federal government lacks the authority to intrude into this area of law traditionally reserved to the states, particularly because the purpose of doing so is to detain children in secure facilities that states and courts have already determined are not appropriate placements for children.

A. DHS Lacks the Authority to Override the State Police Power Over Child Welfare

Fundamental to our system of government is the understanding that our federal government is one of limited powers. The “state governments . . . clearly retain all the rights of sovereignty which they before had, and which were not . . . *exclusively* delegated to the United States.” The Federalist No. 32, at 198 (emphasis in original). As the Supreme Court has noted, “the States unquestionably do retain a significant measure of sovereign authority.” *Garcia v. San*

³⁰ In Executive Order 13767, the Secretary of DHS was instructed to apply expedited removal to the fullest extent permissible under the statute. *See* Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). Any increase in the federal government’s use of expedited removal would likewise increase the number of children subject to immigrant detention.

Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985).³¹ Numerous cases recognize the principle that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.” *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *see also Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (“States [may] exercise . . . undoubted power to promote the health, safety, and general welfare . . .”); *Troxel v. Granville*, 530 U.S. 57, 97 (2009) (“States have the authority to intervene to prevent harm to children.”) (citations omitted); *Moore v. Sims*, 442 U.S. 415 (1979) (“Family relations are a traditional area of state concern.”).

Ensuring child welfare, including licensing residential placements for children, is a police power vested in the states. From the first emergence of child welfare systems in this country, the states have understood their important role in licensing children’s residential placements. As historians have recognized, “[r]elated to the development of state systems of child care was the introduction of state policies and procedures for licensing and regulating child care facilities.”³² Accordingly, the states have licensed and monitored placements for over a century. By the 1890s, the states understood supervision over child caring agencies to encompass the principles that: (1) the state should know where its dependent children are; and (2) state agents should visit and inspect these institutions and agencies at regular intervals, and full reports should be made to the state.³³ Leaders in the child welfare field have long recognized “the importance of strong regulatory systems, including licensing, service monitoring, and case accountability to protect the system.”³⁴

Consistent with this constitutional design, the federal government has long recognized the states’ role in protecting child welfare.³⁵ This is true in the context of administering a

³¹ While the District of Columbia is not a sovereign, the District has quasi-sovereign interests and the authority to enforce its laws and uphold the public interest. *See* D.C. Code. § 1-301.81. *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 n.15 (1982) (recognizing that Puerto Rico “has a claim to represent its quasi-sovereign interests . . . at least as strong as that of any State”).

³² Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *Child Welfare for the Twenty-first Century: A Handbook of Practices, Policies, and Programs* at 18-19 (2005), http://www.nrcpfc.org/ifcpc/module_1/pre%20training%20reading.pdf.

³³ Grace Abbott, *The Child and the State* 17-18 (1938).

³⁴ McGowan, *supra* note 31 at 19.

³⁵ U.S. Dep’t of Health & Human Services, Children’s Bureau, *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America’s Children* (Apr. 2014) at 21 (citing Federal Advisory Board, *Working Together: A Plan to Enhance Coordination of Child Abuse and Neglect Activities* (1980)) (“[W]e wish to emphasize that child abuse and neglect can only be prevented and treated when states and communities organize, coordinate, and carry out

comprehensive immigration system in which the best interests of children are protected.³⁶ Congress has not acted to override the states' child welfare police power. *See Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (Congress "legislates against the backdrop of certain unexpressed presumptions," including "those grounded in the relationship between the Federal Government and the States"). When "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (if the federal government seeks to "radically readjust[] the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit").

Indeed, DHS has identified no authority permitting the agency to create a new federal licensing scheme for residential placements of immigrant children. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Absent clear authorization from Congress, DHS lacks the authority to create a federal licensing scheme. *See Gonzales v. Oregon*, 546 U.S. 243 (2006) ("The background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

Government interventions that result in children being held apart from their families are "not benign" and "placement in foster care traumatizes children in complex ways."³⁷ Entry into foster care itself lies outside of the range of typical childhood experience, further challenging

necessary preventive and child protective programs. The federal government role is to enhance local program capacities . . ."), https://www.acf.hhs.gov/sites/default/files/cb/capta_40yrs.pdf.

³⁶ *See, e.g., U.S. Citizenship and Immigration Services Policy Manual*, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter3.html#S-A-1>; 58 Fed. Reg. 42847 (Aug. 12, 1993) (discussing states role in determining children's best interests).

³⁷ Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1197&context=jlasc>.

already vulnerable children.”³⁸ As a result, each of the States follows a policy of placing children in the least restrictive setting to meet their particular needs. *See, e.g.*, Cal. Welf. & Inst. Code §§ 706.6(c)(2)(B), (d)(2), 16501(d); Mass. Gen. Laws ch. 119 § 32; Wash. Rev. Code 74.13.065; Va. Code Ann. §§ 16.1-281, 16.1-282; 22 Va. Admin. Code § 40-201-40; 11 Pa. Stat. and Cons. Stat. Ann. § 2633(4); N.J. Stat. Ann. § 9:6B-4; N.J. Admin. Code § 3A:12-1.7; 20 Ill. Comp. Stat. 505/7; 705 Ill. Comp. Stat. 405/2-27-405/2-27.2; 89 Ill. Admin. Code Part 301.60(b)(1). Similarly, each State maintains a comprehensive licensing scheme for all placements used to house children. *See, e.g.*, Cal. Code Regs. tit. 22, div. 6; Mass. Gen. Laws ch. 15D, §§ 2(c), 6, 7; 606 Mass. Code Regs. 3, 5; Wash. Rev. Code ch.74.15, ch. 388-145 Wash. Admin. Code; Va. Admin. Code tit. 22, Agcy. 40, Ch. 100; 22 Va. Admin. Code § 40-151; 55 Pa. Code ch. 3700; N.J. Stat. Ann. §§ 30:4C-27.6—27.25; N.J. Admin. Code §§ 3a:51-2.1—56-10.25; 225 Ill. Comp. Stat. 10/7; 89 Ill. Admin. Code Parts 401-404. And each State has a robust system for ensuring meaningful oversight, accountability and enforcement of these licensed placements. *See, e.g.*, Cal. Health & Safety Code §§ 1550-1557; 606 Mass. Code Regs. 3, 5; Wash. Rev. Code ch.74.15, ch. 388-145 Wash. Admin. Code; 55 Pa. Code ch. 3700; N.J. Admin. Code §§ 3a:13-3.1—3.12; 225 Ill. Comp. Stat. 10/8, 10/18.

B. The Federal Government Has Not Conducted an Adequate Analysis of Federalism Impacts

DHS’s attempts to override the state police power raise significant federalism concerns. As the Proposed Rule acknowledges, Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that has federalism implications. 83 Fed. Reg. at 45523. DHS and HHS conclude that the Proposed Rule “does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.” *Id.* This conclusion is wrong.

In this Proposed Rule, DHS seeks to erect “an alternative federal licensing scheme,” for certain placements for children, 83 Fed. Reg. at 45488. Contrary to DHS’ assertion, encroachment into this traditional area of state police power will both “affect the States” and the “relationship between the National Government and the States [and] the distribution of power and responsibilities among the various levels of government.” 83 Fed. Reg. at 45523. Whereas HHS “designed agency policies to complement appropriate State and licensing rules,” DHS acts to “supplant or replace the requirements.” *See id.*

Notably, in the Proposed Rule the federal government effectively concedes it wants to “clear the way” and “eliminate a barrier” to the detention of immigrant families. *Id.* at 45492, 45493. Having determined that state licensing of placements for children is a hurdle, DHS

³⁸ Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 *Development and Psychology*, Mar. 2006, at 57, 58-59, <https://cca-ct.org/Study%20Impact%20of%20Foster%20Care%20on%20Child%20Dev.pdf>.

simply proposes to eliminate the States from the process—an action incompatible with the Settlement Agreement and impermissible under Executive Order 13132.

In previous rulemaking efforts involving licensing schemes overseen by the States, DHS has complied with its obligation to consider the federalism implications. For example, when promulgating the REAL ID Rule, DHS “engaged in extensive consultations with the States,” and sought to “maximize State policymaking discretion” even though the agency concluded that the rule was consistent with the Tenth Amendment and state sovereignty. 73 Fed. Reg. 5272, 5330 (Jan. 29, 2008) (“DHS has concluded that the rule is consistent with the Tenth Amendment to the U.S. Constitution and does not constitute an impermissible usurpation of State sovereignty.”). In contrast to the REAL ID Rule “in which the Federal and State governments acted voluntarily in tandem to achieve a common policy objective,” *id.* at 5330, here no such involvement or consideration was afforded to the States. We are extremely concerned about the overreach reflected in this Proposed Rule and the clear intent to override state laws and policy choices that are legal, supported by Congress, account for the best interests of children, and reflect best practices regarding the care of children garnered from over a century of engagement by the States in this area.

C. Eliminating State Licensing of Children’s Residential Placements Contravenes the Settlement Agreement

The Settlement Agreement provides that children should only be placed in licensed programs, defined as those licensed by a state to provide care for children. *See* Settlement Agreement ¶ 6 (defining “licensed program” as “a program, agency, or organization that is licensed by an appropriate State agency to provide residential, group or other foster care services for dependent children”). The Settlement Agreement in several instances contemplates state licensing of children’s residential placements in the overall system of detention of immigrant children. *See, e.g., id.* at ¶¶ 19 (providing “minor[s] shall be placed temporarily in a licensed program”); 23 (mandating “[a]ll homes and facilities operated by licensed programs . . . shall be non-secure as required under state law”).

Moreover, it was *always* contemplated that state licensing requirements applicable to all placements for children would continue even after the regulations were finalized and the underlying case terminated. For example, the termination provision of the Settlement Agreement originally provided that state licensing of all facilities would continue after termination. Settlement Agreement at ¶ 40 (“All terms of this Agreement shall terminate . . . *except* that the INS shall continue to house the general population of minors in INS custody in facilities that are licensed for the care of dependent minors.”) (emphasis added). In 2001, when the parties entered into a Stipulation extending the Settlement Agreement, which modified the conditions under which termination would occur, the survival of the state licensing requirement beyond termination remained. *See* Stipulation (“All terms of this Agreement shall terminate 45 days following defendants’ publication of final regulations implementing this Agreement.

Notwithstanding the foregoing, the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors.”).

Our State licensing schemes provide meaningful local oversight of children’s residential placements, including children in immigration detention. As the Ninth Circuit has recognized, this state licensure has an “obvious purpose . . . to use the existing apparatus of state licensure to independently review detention conditions.” *Flores*, 828 F.3d at 906. This is particularly important here because if the Proposed Rule is implemented, independent monitors like State agency personnel or class counsel will no longer be entitled to access the facilities holding children or examine case files to review detention conditions. *See* Settlement Agreement at ¶¶ 29, 32; *see also* 83 Fed. Reg. at 45486 n.11 (“[T]he FSA grants Flores class counsel special access to covered minors and to certain facilities that hold such minors; it is unnecessary to codify these provisions in regulation. Similarly, paragraphs 29 to 31 include special reporting requirements with respect to class counsel and the supervising court; reporting to these entities would be unnecessary following termination of the FSA.”).

D. The Federal Government’s Proposed Licensing Scheme Will Not Provide the Protections that State Licensing Affords

The federal government’s “alternative licensing scheme” is not a meaningful substitute for state licensing. *See* 83 Fed. Reg. at 45488. The Proposed Rule identifies a “goal” of “provid[ing] materially identical assurances about the conditions” of the family residential facilities licensed by the federal government so that they will be substantially similar to the facilities licensed by the states. *See* 83 Fed. Reg. at 45488. The Proposed Rule also states that the alternative licensing scheme would include “residential standards established by ICE . . . that meet the requirements for licensing under the FSA.” *Id.* at 45518. The Ninth Circuit has already determined that the ICE residential standards do not comply with the requirements of the Settlement Agreement. *See Flores*, 828 F.3d at 904 (“ICE’s Family Residential Standards . . . do not comply with the Settlement.”). Moreover, the federal licensing scheme contemplated does not include the “Minimum Standards for Licensed Programs” required by the Settlement Agreement, which contain detailed requirements for medical and mental health care, individualized needs assessments, education, recreation, counseling, acculturation and adaptive services, religious services, and privacy. *See* Settlement Agreement at Exhibit 1. Therefore, the federal licensing scheme will not provide the same level of protection as state licensing schemes, and, as a matter of law, the federal government’s alternative licensing scheme will not meet the requirements of the Settlement Agreement.

The lack of protection in the new federal licensing scheme is particularly concerning given the federal government’s track record of providing substandard care for children in its three family residential centers. Researchers have found that family residential centers function as jails, with adults required to wear orange jumpsuits and individuals color-coded by “threat

level.”³⁹ These facilities have concrete walls, doors monitored by guards, metal detectors, and flood lights that stay on all night. *Id.* Thus, the family residential centers operated by ICE have already been determined to be secure, despite the Settlement Agreement’s requirement that children be held in non-secure facilities. *See Flores v. Sessions*, No. 85-cv-4544 (C.D. Cal. June 27, 2017), ECF No. 363 at 29, *appeal pending*, No. 17-56297 (9th Cir.) (docketed Aug. 28, 2017) (“the family residential centers are secure, unlicensed facilities”); *see also Flores*, 828 F.3d at 904. In addition, there have also been numerous allegations of sexual assault at these family detention centers.⁴⁰ Mothers at the Karnes Residential Center said they were “removed from their cells and forced to engage in sexual acts.” *Id.* Others allege that they were kissed and groped by staff members. *Id.* And, a guard at the Berks Family Residential Center was convicted of sexual assault of a detained 19-year-old mother.⁴¹

The family detention centers also lack adequate health and mental health care, and staff members who make children feel safe.⁴² Families describe being told to just “drink more water” in response to “broken bones, concerns over weight loss, and . . . fainting spells.”⁴³ One mother

³⁹ George Diepenbrock, *Immigrant detention centers referred to as family centers but resemble prisons, researchers find*, University of Kansas (Aug. 15, 2017) <https://news.ku.edu/2017/07/11/immigrant-detention-centers-referred-family-centers-resemble-prisons-researchers-find>; *see also* Andrea Gomez Cervantez, Cecilia Minjivar, & William G. Staples, “Humane” Immigration Enforcement and Latina Immigrants in the Detention Complex, 12 *Feminist Criminology* 269 (2017).

⁴⁰ Amanda Sakuma, *Assaulted and shamed in family detention*, MSNBC (Aug. 15, 2015), available at <http://www.msnbc.com/msnbc/assaulted-and-shamed-family-detention>.

⁴¹ Emily Kassie and Eli Hager, *Inside Family Detention, Trump’s Big Solution*, The Marshall Project (June 22, 2018), <https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution>.

⁴² Human Rights First, *Long Term Detention of Mothers and Children in Pennsylvania*, (August 19, 2016) at 4–5, <http://www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf>.

⁴³ American Immigration Council, et al., *Letter to DHS Office of Civil Rights and Civil Liberties and Office of Inspector General, Re: ICE’s Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities* (July 30, 2015) at 2, <https://www.aila.org/advo-media/press-releases/2015/deplorable-medical-treatment-at-family-detention-ctrs/public-version-of-complaint-to-crcl>.

with breast cancer was repeatedly denied care.⁴⁴ And, at least 250 children were administered adult doses of the Hepatitis A vaccine. *Id.*

In family detention facilities, children are particularly vulnerable, and experience weight loss, gastro-intestinal problems, and suicidal thoughts.⁴⁵ Detained mothers have described how their children “grab the chords that hold their ID cards and tighten them around their necks, saying they want to die if they don’t get out” of detention.⁴⁶ And these facilities do not employ the necessary staff who are experienced working with children—the DHS Office of Inspector General noted one facility went over a year without a pediatrician.⁴⁷

There is no reason to think that expanded use of family detention—particularly without independent oversight—would be different. Instead, with state licensors powerless to fulfill their statutory mandates to ensure quality standards for children in care, conditions would likely further deteriorate in family detention centers.

IV. Detaining Children for Long Periods Causes Lasting Harm

Prolonged detention causes lasting damage to children, permanently altering their emotional and cognitive functioning, their physical health, and their ability to achieve long-term positive educational, employment, and psychosocial outcomes. Healthy child development relies on the presence of normal intellectual and social stimuli which, in interaction with the developing brain, allow the child to achieve age-appropriate milestones.⁴⁸ Stressful or traumatic

⁴⁴ American Immigration Council, *Deplorable Medical Treatment At Family Detention Centers* (July 20, 2016), <https://www.americanimmigrationcouncil.org/news/deplorable-medical-treatment-family-detention-centers>.

⁴⁵ National Immigrant Justice Center, *Costly Family Detention Denies Justice to Mothers and Children* (August 2014), <http://grassrootsleadership.org/sites/default/files/uploads/Family%20Detention%20Factsheet.pdf>

⁴⁶ Maderes de Berks, *Mothers to Homeland Security: We Won’t Eat Until We Are Released*, N.Y. Times (Aug. 12, 2016), https://kristof.blogs.nytimes.com/2016/08/12/mothers-to-homeland-security-we-wont-eat-until-we-have-asylum/?_r=0#more-14003.

⁴⁷ Office of Inspector General, Dep’t of Homeland Security, Results of Office of Inspector General FY 2016 Spot Inspections of U.S. Immigration and Customs Enforcement Family Detention Facilities (June 2, 2017) at 4, <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-65-Jun17.pdf> (“Staff at this facility said they had been trying to hire a pediatrician since 2015 and were continuing recruiting efforts, but given the remote location of the facility, it has been difficult to recruit a suitable candidate.”).

⁴⁸ See, e.g., Sharon E. Fox et al., *How the Timing and Quality of Early Experiences Influence the Development of Brain Architecture*, 81 *Child Dev.* 28, 31-32 (2010) (using sensory

experiences and deprived environments interrupt this natural process, changing the way that a child's brain architecture and hormone regulation systems develop.⁴⁹ The impact of each such interruption will compound across the child's life, as each new developmental phase that a child enters relies on the foundation that should have been laid in the preceding phase.⁵⁰ Thus, the Proposed Rule exposes children to risk of lifetime harm by subjecting more children to both the deprived environments of detention facilities and the stress of separation from family. These harms become clearer when examining historical and psychological research on the impacts of institutionalization and indefinite detention on children.

Children's health suffers in institutionalized care. Children spending portions of their formative years in institutions, whether due to being held pre-adoption or being placed in group homes through the child welfare or juvenile justice systems, show developmental delays and deficits as compared to their non-institutionalized peers. Restricted environments have particularly harmful cognitive effects for children in the areas of memory and executive function (e.g., the ability to pay attention, delay gratification, and control one's behavior and impulses), which develop during several distinct critical periods across childhood.⁵¹ Children who spent

development as example of brain-environment interaction); Allan N. Schore, *Attachment and the Regulation of the Right Brain*, 2 *Attachment & Hum. Dev.* 23, 29-33 (2000) (describing brain development occurring in response to relational experiences between infant and caregiver).

⁴⁹ See, e.g., Aniko Korosi et al., *Early-life Stress Mediated Modulation of Adult Neurogenesis and Behavior*, 227 *Behav. Brain Res.* 400 (2012) (adverse early-life experience impacts neuronal growth in areas of brain related to memory and stress response); Linda L. Carpenter et al., *Decreased ACTH and Cortisol Responses to Stress in Healthy Adults Reporting Significant Childhood Maltreatment*, 62 *Biological Psychiatry* 1080 (2007) (abuse and neglect impacts hormone levels over life course contributing to depressive disorders and PTSD); F. Cirulli, A. Berry & E. Alleva, *Early Disruption of the Mother-Infant Relationship: Effects on Brain Plasticity and Implications for Psychopathology*, 27 *Neuroscience and Biobehav. Rev.* 73 (2003) (early emotional deprivation may impact levels of nerve-growth-related compounds thus changing brain structure).

⁵⁰ See, e.g., Fox et al., *supra* note 48 at 33-35 (reviewing literature comparing "sensitive periods" of brain development, in which a young brain is primed to respond to certain types of stimuli, with "critical periods" in which the absence of a certain stimulus will lead to irreversible impairment; describing need for development of lower-level functions to enable higher-level functions).

⁵¹ See Karen J. Bos et al., *Effects of Early Psychosocial Deprivation on the Development of Memory and Executive Function*, 3 *Frontiers in Behav. Neuroscience* 1, 2 (2009) (citing impact of early life stress on memory and importance of critical periods in development of executive functioning); María Beatriz Jurado & Mónica Rosselli, *The Elusive Nature of Executive Functions: A Review*, 17 *Neuropsychol. Rev.* 213, 220-223 (2007) (reviewing

time in institutions as infants and toddlers showed exactly these sort of deficits in later childhood, including higher rates of Attention Deficit Hyperactivity Disorder and related difficulty regulating behavior,⁵² lower IQ scores including poorer memory and language function,⁵³ lower brain volumes,⁵⁴ higher rates of autism spectrum disorder and other disorders impacting normative social engagement,⁵⁵ and in some instances higher baseline cortisol levels

literature on development of several aspects of executive functioning across childhood and adolescence).

⁵² See Edmund J. S. Sonuga-Barke et al., *Child-to-Adult Neurodevelopmental and Mental Health Trajectories After Early Life Deprivation: The Young Adult Follow-up of the Longitudinal English and Romanian Adoptees Study*, 389 *Lancet* 1539 (2017) (greater incidence of autism spectrum disorder, disinhibited social engagement, inattention and overactivity in young adults who spent more than 6 months in institution in early childhood); Mark Kennedy et al., *Adult Disinhibited Social Engagement in Adoptees Exposed to Extreme Institutional Deprivation: Examination of its Clinical Status and Functional Impact*, 211 *Brit. J. Psychiatry* 289 (2017) (early deprivation linked with “inappropriate, overfamiliar, and socially intrusive” behavior as young adults); Mark Kennedy et al., *Early Severe Institutional Deprivation is Associated with a Persistent Variant of Adult Attention-Deficit/Hyperactivity Disorder: Clinical Presentation, Developmental Continuities and Life Circumstances in the English and Romanian Adoptees Study*, 57 *J. Child Psychol. & Psychiatry* 1113 (2016) (increased risk of ADHD when spent greater than 6 months in institution before adoption).

⁵³ Michelle M. Loman et al., *Postinstitutionalized Children’s Development: Growth, Cognitive, and Language Outcomes*, 30 *J. Dev. & Behav. Pediatrics* 426 (2009) (greater length of time in institution in early life correlated with greater deficits in IQ and language function in middle childhood); Marinus H. van Ijzendoorn et al., *Adoption and Cognitive Development: A Meta-Analytic Comparison of Adopted and Nonadopted Children’s IQ and School Performance*, 131 *Psychol. Bull.* 301 (2008) (finding lower IQs for children in residential group care across many studies); Bos et al., *supra* note 51 at 6-7 (early deprivation associated with impaired memory and executive functioning, only some of which is remedied by later improvements in care environment).

⁵⁴ Margaret A. Sheridan et al., *Variation in Neural Development as a Result of Exposure to Institutionalization Early in Childhood*, 109 *Proceedings of the Nat’l Acad. Sci. U.S. (PNAS)* 12927 (2012) (children with institutional history in early life show lower gray matter volume regardless of later life adoption status, white matter volume also lower but can increase after remedial years living with family).

⁵⁵ Sonuga-Barke et al., *supra* note 52 (higher rates of autism spectrum or disinhibited social engagement disorder when spent more than 6 months in institution before adoption).

resulting in biologically-based difficulty responding to stress.⁵⁶ When children experience changes in placement setting, the instability can exacerbate these behavioral problems.⁵⁷

Increased length of institutionalization is correlated with poorer outcomes.⁵⁸ Children placed in out of home care at any point during their formative years suffer mortality risk throughout their adulthood that is three times higher than expected levels, and which is even higher for children who are placed as adolescents.⁵⁹ They are more prone to various health risks including asthma, diabetes, hypertension, stroke, heart disease, cancer, and epilepsy.⁶⁰

Children's educational outcomes also suffer in institutionalized care. Children placed in restricted settings during their school years lose important educational opportunities that tend to increase enthusiasm for learning like individualized attention and the ability to participate in extracurricular activities.⁶¹ The highly structured environment of these institutionalized settings does not provide sufficient opportunity to learn how to function as an adult in society.⁶² These

⁵⁶ Darlene A. Kertes et al., *Early Deprivation and Home Basal Cortisol Levels: A Study of Internationally Adopted Children*, 20 Dev. Psychopathology 473 (2008) (finding relationship between growth delay and impairment in baseline cortisol levels, impacting stress management, in children previously in institutions).

⁵⁷ Alexandra L. Trout et al., *The Academic Status of Children and Youth in Out-of-Home Care: A Review of the Literature*, 30 Child. & Youth Serv. Rev. 979 (2008) (out-of-home population at greater risk of multiple placements that negatively impact educational success); David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 Pediatrics 336 (2007) (behavioral problems increase when placement stability decreases).

⁵⁸ See, e.g., Sonuga-Barke et al., *supra* note 52 (finding low levels of symptoms when institutional placement less than six months, but greater susceptibility to mental health problems when placement is extended); Loman, *supra* note 53 (problems of lower IQ and impaired language ability become more severe as length of placement increases).

⁵⁹ Menghan Gao et al., *Exposure to Out-of-Home Care in Childhood and Adult All-Cause Mortality: A Cohort Study*, 46 Int'l J. Epidemiology 1010 (2017) (showing increased mortality risk in study of adults ages 20-56 who were placed in out-of-home care any time before age 19).

⁶⁰ *Id.*

⁶¹ Richard P. Barth, *Institutions v. Foster Homes: The Empirical Base for a Century of Action* i-ii (Chapel Hill, NC: UNC, School of Social Work, Jordan Institute for Families, 2002).

⁶² Joseph P. Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 Child. & Youth Serv. Rev. 1088 (2008); Barth, *supra* note 61 at i.

children score lower on measures of age-appropriate adaptive behavior skills and language ability than do their peers who are more socially integrated.⁶³

After release, these children continue to struggle with achieving markers of financial and social success, and have higher rates of truancy, unemployment, substance use, economic hardship, single parenthood, divorce, and arrest.⁶⁴ In comparison, youth who are able to stay in the community with families go on to have an easier time integrating this experience into their adult lives and show larger and more stable social networks and family relationships, residential stability, continued education, greater likelihood of marriage and of child custody among men, and overall life satisfaction and optimism.⁶⁵

The experience of Japanese-American individuals detained during the Second World War provides some of the best evidence of what happens when children are detained for prolonged periods of time. In studies and treatment programs following the mental health outcomes of this population, adults who were interned with their families as children showed ongoing psychological symptoms decades after the experience, including depression, lack of trust in others, low self-esteem, exaggerated fear of risks, shame, poor emotional coping, difficulties in interpersonal relationships, and other psychosomatic symptoms.⁶⁶ Those interned at younger ages were more vulnerable to having flashbacks and more severe symptoms of post-traumatic

⁶³ See Aubyn C. Stahmer et al., *Associations Between Intensity of Child Welfare Involvement and Child Development Among Young Children in Child Welfare*, 33 *Child Abuse & Neglect* 598 (2009).

⁶⁴ See Lars Brännstrom et al., *Children Placed in Out-of-Home Care as Midlife Adults: Are They Still Disadvantaged or Have They Caught Up With Their Peers?*, 22 *Child Maltreatment* 205 (2017) (adults who experienced out-of-home care in youth twice as likely to be in most disadvantaged outcome profile, as measured across 55-year follow-up); Barth, *supra* note 61 at 18.

⁶⁵ Barth, *supra* note 61 at 18.

⁶⁶ See Lynda E.M. Yoshikawa, *The Legacy Continues after 60 Years: The Transgenerational Effects of the Japanese American World War II Incarceration on Third Generation Males 19-21* (ProQuest Dissertations & Theses, 2005); Amy Iwasaki Mass, *Psychological Effects of the Camps on Japanese Americans*, in *Japanese Americans: From Relocation to Redress* 159, 160 (Roger Daniels et al. eds., 1983); Donna K. Nagata & Garyn K. Tsuru, *Psychosocial Correlates of Self-Reported Coping Among Japanese Americans Interned During World War II*, 77 *Am. J. Orthopsychiatry* 221, 226-228 (2007); Donna K. Nagata et al., *Long-Term Effects of Internment During Early Childhood on Third-Generation Japanese Americans*, 69 *Am. J. Orthopsychiatry* 19, 20-21 (1999) (citing Satsuki Ina, *Counseling Japanese Americans: From internment to reparations*, in *Multicultural Issues in Counseling: New Approaches to Diversity* 189 (C.C. Lee ed., 1997)).

stress disorder,⁶⁷ while adolescents showed high levels of depression and low self-esteem due to being interned at a key time of identity development.⁶⁸

Internment also had a lasting impact on family dynamics, culture, and educational outcomes in the Japanese-American community. The structure and lack of opportunity in the camps disrupted the family structure, as parents saw their authority over their children undermined, which in turn interfered with the effectiveness of discipline.⁶⁹ Families adapted by developing avoidant, nonresponsive communication styles that persisted after release and that were correlated with increased depressive symptoms later in life.⁷⁰ These emotional consequences were passed on to later generations, with children of interned parents showing increased feelings of shame, humiliation, and rejection, and lack of trust in their own civil rights.⁷¹ It was, therefore, common for Japanese-Americans touched by internment to suffer repressed symptoms of depression, post-traumatic stress, and psychosomatic disorders.⁷² Academically, some Japanese-Americans interned during their school years experienced interruptions in education from which they never recovered; while education was provided, some youth lost enthusiasm for learning, or sought not to excel academically in order to avoid attracting unwanted attention in their position as detainees.⁷³ As one adult who was interned as a child described the experience of being educated in the camps, “I was learning, as best one could

⁶⁷ Gwendolyn M. Jensen, *The Experience of Injustice: Health Consequences of the Japanese American Internment* 339 (ProQuest Dissertations & Theses, 1997).

⁶⁸ Lane Ryo Hirabayashi, *The Impact of Incarceration on the Education of Nisei Schoolchildren*, in *Japanese Americans: From Relocation to Redress* 159, 49 (Roger Daniels et al. eds., 1983) (“...the identities and self-images of the Nisei schoolchildren were frequently devastated because of the situation into which they were forcibly placed.”); Mass, *supra* note 66 at 160.

⁶⁹ See Satsuki Ina, *Racism, Culture & Trauma: The Japanese American Internment* 13 (The Children of the Camps Documentary and Educational Project, 2001); Commission on Wartime Relocation and the Internment of Civilians, *Personal Justice Denied* 176-77 (University of Washington Press, 1997) (“CWRIC”).

⁷⁰ Nagata & Tsuru, *supra* note 66 at 222; Yoshikawa, *supra* note 66 at 28-38; Ina, *supra* note 69 at 29-30.

⁷¹ Donna K. Nagata & Yuzuru J. Takeshita, *Coping and Resilience Across Generations: Japanese Americans and the World War II Internment*, 85 *Psychoanalytic Rev.* 587, 604 (1998).

⁷² Yoshikawa, *supra* note 66 at 19-20; Mass, *supra* note 66.

⁷³ Hirabayashi, *supra* note 68; Mass, *supra* note 66 at 160.

learn in Manzanar, what it meant to live in America. But I was also learning the sometimes bitter price one has to pay for it.”⁷⁴

Extended family detention also impacted the physical health and longevity of Japanese-Americans. A review of decades of health records demonstrated that interned individuals were twice as likely to suffer from cardiovascular disease as those in the general population, and 1.3 times as likely to die prematurely.⁷⁵ Rates of suicide were twice as high as those in the general population, and four times as high as they had been in the Japanese-American population prior to internment.⁷⁶

Several of the internment camps were located in California, Oregon, and Washington. Individuals returned to those communities after internment experienced long term harms that were addressed by state systems. Similarly, it is the States that would need to address harms resulting from detention once individuals are released to our communities.

V. Conclusion

We urge you to reconsider this Proposed Rule, which contravenes the Settlement Agreement, is unconstitutional and unnecessary, undermines state licensing authority, and will have devastating effects on children and families, including many in our States. We can, and must, do better than detaining children for prolonged periods of time. DHS and HHS should adopt regulations that fully implement the Settlement Agreement in *Flores*, including the requirements that DHS and HHS release children as quickly as possible, place them in the least restrictive settings necessary, and rely on facilities licensed by the States when children must remain in federal custody. Protecting the health, safety, and well-being of children and our communities from harm is something we must work together to accomplish.

⁷⁴ CWRIC, *supra* note 69 at 172.

⁷⁵ Jensen, *supra* note 67 at 195, 335, 351 (surveying health data for population of formerly-interned Japanese-Americans, including those interned as children).

⁷⁶ Jensen, *supra* note 67 at 323-24.

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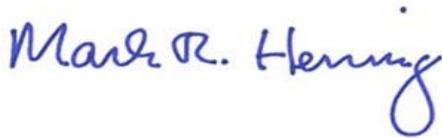
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