19-56326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WILLIAM BARR, *et al.,*
Defendants-Appellants

On Appeal from the United States District Court
for the Central District of California,
No. 85-cv-4544, Honorable Dolly M. Gee

BRIEF OF 37 CITIES AND COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* are governmental entities for whom no corporate disclosure is required.

Dated: January 28, 2020

By: */s/ Michael Dundas*
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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

ARGUMENT 9

I. THE RULES ABOLISH THE STATE LICENSING REQUIREMENT, THEREBY ENDANGERING THE HEALTH AND SAFETY OF CHILDREN. 13

a. State Licensing Provides Critical Oversight. 14

b. ICE-Run Facilities Have a History of Poor Conditions and Compliance Issues. 18

c. Eliminating of State-Licensed Facilities Will Result in Longer Detention in Secure Facilities. 23

II. THE FINAL RULE CURTAILS OR ELIMINATES ESSENTIAL PROCEDURAL PROTECTIONS GUARANTEED BY THE FSA. 25

a. The Final Rule Deprives Unaccompanied Minors of Their Right to Be Heard at Bond Hearings. 26

b. The Final Rule Limits Options for Release from Federal Custody. 30

CONCLUSION 33

CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

Page(s)

CASES

Citizens for a Better Environment v. Gorsuch,
718 F.2d 1117 (D.C. Cir. 1983) 12

Ferrell v. Pierce,
560 F. Supp. 1344 (N.D. Ill. 1983) 12

Flores v. Barr,
407 F. Supp. 3d 909 (C.D. Cal. 2019) 1, 2, 28

Flores v. Johnson,
212 F. Supp.3d 864 (C.D. Cal. 2015) 14, 15

Flores v. Lynch,
828 F.3d 898 (9th Cir. 2016) 10, 11, 16

Flores v. Lynch,
212 F. Supp.3d 907 (C.D. Cal. 2015) 11

Flores v. Reno,
No. 85-cv-04544-DMG (AGRx), Dkt. No. 13 (C.D. Cal. Dec. 12, 2001) 11

Flores v. Sessions,
862 F.3d 863 (9th Cir. 2017) 27, 28, 29

Flores v. Sessions,
No. 85-cv-04544-DMG, 2018 U.S. Dist. LEXIS 115488 (C.D. Cal. July 9, 2018) 12

Souza v. Sessions,
No. 18-cv-04412-MSS, Dkt. No. 23 (N.D. Ill. June 28, 2018) 32

STATUTES & REGULATIONS

Title 8, Code of Federal Regulations

section 236.3(b)(9) 13, 14, 17, 22
section 236.3(j) 33

Title 45, Code of Federal Regulations

section 410.302(c) 30
section 410.402 25
section 410.810 26

Title 83, Code of Federal Regulations

section 45486 16
section 45492 16

Title 84, Code of Federal Regulations

section 44392 1

Title 22, California Code of Regulations

section 84000 15
section 89244 15
section 89254 15
section 89255 15

California Health & Safety Code

section 1500 15

Chicago Municipal Code

section 4-76-010 3

Los Angeles Municipal Code

section 57.105.3.9.2.1 3
section 57.105.6.24 3

Chapter 225, Illinios Compiled Statutes

section 10/1 15

Title 18, New York Codes, Rules and Regulations

part 415 15

New York CLS Social Services Law

section 378(5). 15
section 379(1). 15

OTHER AUTHORITIES

Homeland Security Act of 2002
Pub. L. No. 107-296 1165 Stat. 2135 28

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
Pub. L. No. 110-457, 122 Stat. 5044 28

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Human Rights First, *Family Detention: Still happening, Still Damaging* (October 2015) 18, 24

John Burnett, *Several Thousand Migrant Children In U.S. Custody Could Be Released Before Christmas*, NPR (Dec. 18, 2018) 31

Julie M. Linton et al., *Detention of Immigrant Children,* American Academy of Pediatrics (March 2017) 18

Letter from Am. Pediatric Ass'n, et al., to Members of Congress (July 24, 2018) 20

Letter from Judy Melinek, M.D., et al. to Rep. Rosa DeLauro & Rep. Lucille Roybal-Allard (Aug. 1, 2019)..... 19

Letter from Robert R. Redfield, M.D., Dir., Ctrs. for Disease Control & Prevention, to Rep. Rosa DeLauro (Nov. 7, 2019) 18

Letter from Scott Allen, M.D. & Pamela McPherson, M.D., to Chairman Grassley and Vice Chairman Wyden (July 17, 2018)..... 19

October 2016 Report of the ICE Advisory Committee on Family Residential Centers 24

Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, DHS OIG-18-67 (June 26, 2018) 22

Office of Inspector General, *Management Alert - Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, DHS OIG-18-86 (September 27, 2018) 20

Tom Dreisbach, *Despite Findings Of 'Negligent' Care, ICE To Expand Troubled Calif. Detention Center*, NPR (January 15, 2020)..... 22

STATEMENT OF INTEREST

The City of Los Angeles together with 36 cities and counties from across the country respectfully submit this brief, as *amici curiae*,[1] in support of Plaintiffs-Appellees and for affirmance of the order and injunction issued by the United States District Court for the Central District of California. *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019). The full list of *amici* is attached as Exhibit A.

On August 23, 2019, the Department of Homeland Security ("DHS") and the Department of Health and Human Services ("HHS") (collectively, the "Departments") published a final rule ("Final Rule") in the Federal Register to amend "regulations relating to the apprehension, processing, care, custody, and release of alien juveniles." 84 Fed. Reg. 44392 (August 23, 2019) (Excerpts of Record ("ER") 34).

The Final Rule is an impermissible and troubling attempt to use the rulemaking process to flout court-mandated safeguards for the detention of immigrant children in federal custody as set forth in the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* obtained the consent of all parties before filing this brief. Counsel for *amici* authored this brief in whole, and no party, no party's counsel, nor any other person has contributed money intended to fund preparation of this brief. *See* Fed. R. App. P. 29(a)(4).

Flores Settlement Agreement ("FSA"). Instead of being consistent with the terms of the FSA, the Final Rule dispenses wholesale with its most critical protections, in favor of a new indefinite detention policy for which Defendants' identify no justification.

Amici have significant interest in and grave concerns with the Final Rule because it will result in longer, possibly indefinite, detentions and lower standards of care for immigrant children. Such detention poses serious risks to children, causing long-term physical and emotional impact thereby limiting their life choices. The Final Rule will increase these well-documented risks and impede *amici*'s ability to serve properly the needs of their immigrant residents. Specifically, the Final Rule will impact three primary interests of *amici:* (1) ensuring the health and wellbeing of immigrant children through state and local licensing of housing facilities; (2) providing essential resources to immigrant children to address the harms of detention; and (3) providing immigrant children with access to legal representation throughout their immigration proceedings.

First, the Final Rule attempts to undo the FSA's requirement that minimum standards of care be met for children while in detention or in

the custody of HHS's Office of Refugee Resettlement ("ORR"), including being housed in state-licensed facilities. *Amici* have an acute interest in protecting the FSA's state licensing requirement. Many *amici,* like the City of Los Angeles, the County of Los Angeles, the City of New York, and the City and County of San Francisco all prosecute violations of child welfare laws and health and safety codes in their respective jurisdictions. Cases are routinely referred to these offices for prosecution by the State of California's and the State of New York's licensing agencies. And in addition to enforcing state laws, some *amici* have local ordinances requiring state-licensed facilities to abide by local fire, building, and other safety codes that ensure the safety not only of the children, but also of the staff and first responders.

For example, Chicago's and Los Angeles's municipal codes subject state-licensed child care institutions to additional oversight, inspections, and penalties beyond those provided for by the State of Illinois and State of California, respectively. *See* Chi. Mun. Code § 4-76-010 *et seq.*; L.A. Mun. Code §§ 57.105.3.9.2.1, 57.105.6.24. These state licensing schemes and local laws reflect *amici's* interests in ensuring protection for immigrant children – protections that will not exist for children housed

in facilities self-"licensed" by the Departments. ICE's poor track record regarding facility conditions, provisions of medical and mental health services, and access to educational services makes the lack of licensing and oversight only more troubling. *See* discussion *infra* Part I.a.

Second, because the Final Rule will result in the detention of immigrant children for longer periods of time than the FSA permits, and in facilities that do not meet the minimum standards of the FSA, the Final Rule will require *amici* to dedicate additional resources to address the harms to immigrant youth caused by that longer detention, including trauma, in order to support the health and vitality of those children as they are integrated into our communities after release.

New York City's response to the needs of separated immigrant children held in federal custody within its city limits provides an example of how local governments have had to step in to support the well-being of immigrant youth who have confronted traumatic circumstances in federal custody. In the wake of the family separation crisis in the summer of 2018, New York City engaged in a multi-pronged response to: (1) help ORR meet the medical needs of the approximately 300 separated immigrant children sent to ORR-contracted facilities in New York City,

many of whom were suffering from trauma as a result of having been separated from their family; and (2) streamline access to city services for these children, as well as for their family, sponsors, ORR foster care parents, and the non-profit provider staff caring for them.

New York City delivered workshops to staff at ORR facilities to help ORR staff recognize and support immigrant children impacted by trauma. And when the population of separated children exhibited pressing physical and mental health needs that exceeded the treatment capabilities of the ORR-contacted agencies, New York City set up an expedited referral hotline to link children to emergency and outpatient psychiatric care; provided a bilingual child and adolescent psychiatrist to collaborate on-site with ORR mental health clinicians; trained mental health clinicians from the ORR facilities in trauma skills groups for young children; and contracted with the health insurance company covering the children at the ORR-contracted agencies to ensure that insurance issues would not impede access to medical care. New York City also provided trainings on trauma-related care to ORR foster care parents and ORR-contracted agency staff caring for immigrant children.

Similarly, over the summer of 2018, the City of Los Angeles and

the County of Los Angeles – which are destinations for many reunited families – convened regional stakeholders, including a range of local service providers, to coordinate assistance to separated and reunited families in Southern California. Through its Office of Immigrant Affairs ("OIA"), the County of Los Angeles reunited and supported children and their parents who were living in the County and who were impacted by the family separation crisis. An OIA liaison was assigned to each family impacted by the federal government's policy and worked with those families to connect them with available County and non-County social, health, consumer, and legal services. The County has continued to support reunified families, including by providing medical services, health assessments and immunizations, and mental health services.

Both the County and the City of Los Angeles also provided the impacted families with enrollment assistance in education, aid from legal service providers, and connections to a range of social, work, education, and family support services, including English classes, food distribution, employment support, and benefit screenings.

Third, the Final Rule eliminates the right to bond redetermination hearings, which will prolong detention times. This will undoubtedly

interfere with immigrant children's ability to receive adequate access to counsel, and *amici*'s ability to provide such counsel.

Amici have a strong interest in ensuring legal representation to their immigrant residents, especially immigrant children. In line with this interest, several *amici* fund legal representation for immigrants in their jurisdictions. For example, Chicago provides funding to the National Immigrant Justice Center ("NIJC"), including to NIJC's Asylum Project, to help immigrant residents receive the legal services they need. In 2017, Chicago approved two contracts totaling $1.8 million to fund legal aid for immigrants through 2018, and awarded an additional $1.55 million in 2019.

New York City, likewise, has made substantial investments in legal services for its immigrant residents, totaling more than $40 million for 2019 alone. This includes $4.1 million earmarked for: (1) increasing capacity for legal defense in deportation proceedings for immigrant youth; (2) increasing funding for social work and case management resources to address the acute needs of these children; and (3) providing legal risk assessment and screening services to immigrants, including family members, seeking to be sponsors of unaccompanied minors, thus

facilitating their release from ORR facilities. In addition, New York City has pioneered innovative models for immigrant legal representation, such as the New York Immigrant Family Unity Project, which provides free, high-quality legal representation to detained immigrants facing deportation, and the Immigration Children Advocates Relief Effort, serving unaccompanied minors.

In 2017, the City of Los Angeles, Los Angeles County, and two philanthropic foundations created the LA Justice Fund, a $10 million public-private partnership that funds organizations providing immigration legal services. The LA Justice Fund was expanded in 2018 to provide legal representation to children who were separated from their families and who are detained or housed in Los Angeles as well as their respective parents or sponsors. Further, Los Angeles County engaged the American Academy of Pediatrics ("AAP") to train pediatricians to conduct trauma assessments and write medical reports necessary for children and parents' legal relief cases. More recently, the County, in conjunction with AAP and legal services providers throughout Southern California organized a training summit to explore ways that doctors and lawyers can more closely collaborate to protect the rights of separated immigrant

children and their families.

Many other *amici* also provide legal aid funds or support services to their immigrant communities. *See*, *e.g.*, Santa Clara County (Office of Immigrant Relations provides community and legal services to immigrants and immigrant children); City of Seattle (Office of Immigrant and Refugee Affairs provides community and legal services to immigrants and refugees through community partnerships, including representation to unaccompanied and separated immigrant children in immigration and removal proceedings).

Because the Final Rule strips away critical procedural protections guaranteed by the FSA, the Final Rule impedes access by immigrant children to crucial legal services and undermines *amici*'s investments in these services. With these interests at stake, and for the following reasons, *amici* assert that order of the district court should be affirmed and the permanent injunction be maintained.

ARGUMENT

The FSA provides critical protections for children in immigrant detention. Rather than implement those protections, the Final Rule strips them away. The FSA was thoughtfully crafted over many years of

litigation and negotiation between the federal government and a class of immigrant children apprehended at the United States border and detained by the Immigration and Naturalization Service ("INS"). On January 28, 1997, the parties entered into the FSA, which "sets out nationwide policy for the detention, release, and treatment of children in the custody of the INS [now DHS and HHS]." ER 238 (¶ 9). The FSA announced a "General Policy Favoring Release," ER 239 (¶ 11), 241-42 (¶ 14), and requires that the government place children "in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and immigration courts and to protect the minor's well-being and that of others," ER 239 (¶ 11). Thus, the FSA strives to protect the welfare of immigrant children at the highest level possible while still ensuring the government's legitimate enforcement needs are met.

The FSA imposes minimum standards for all children held in detention or in ORR custody, regardless of whether the children entered the United States with their families or as unaccompanied minors. *See Flores v. Lynch*, 828 F.3d 898, 906-08 ("*Lynch*") (9th Cir. 2016).

Specifically, it requires that children be housed in non-secure, state-licensed facilities and be provided adequate access to medical care, counseling, language services, and legal representation. *See* ER 255-58 (Ex. 1). Immigration and Customs Enforcement ("ICE") must transfer children apprehended at the border (and to whom release was denied) to non-secure state-licensed facilities within five days, or "as expeditiously as possible if there is an influx[.]" ER 239-41 (¶ 12A). In 2016, this Court upheld an earlier ruling of the district court that, in the case of an influx, up to 20 days would be considered a reasonable delay. *See Lynch*, 828 F.3d at 910, *aff'g in part and rev'g in part on other grounds, Flores v. Lynch*, 212 F. Supp.3d 907, 914 (C.D. Cal. 2015).

The FSA, as a document, was intended to be a temporary measure, but the settlement's principles of child health and welfare were intended to be permanent. In 2001, the parties stipulated that the FSA would remain in place until "45 days following defendants' publication of final regulations" governing the treatment of detained children. *See Flores v. Reno*, Stipulation and Order, No. 85-cv-04544-DMG (AGRx), Dkt. No. 13 (C.D. Cal. Dec. 12, 2001). Any such regulations, however, "shall not be inconsistent with the terms" of the FSA. ER 238 (¶ 9).

Defendants' attempts to amend or terminate the FSA have been consistently rebuffed by the courts.[2] Unable to find a court willing to sanction such efforts, Defendants now engage in a transparent effort to end-run the terms of the FSA through rulemaking. This is unlawful. *See, e.g., Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1124-29 (D.C. Cir. 1983) (holding the EPA could not avoid a settlement agreement with environmental group by issuing regulations that contained less stringent criteria for regulating toxic waste discharge than the settlement); *Ferrell v. Pierce*, 560 F. Supp. 1344, 1364-70 (N.D. Ill. 1983) (prohibiting HUD from implementing proposed regulations where they conflicted with settlement agreement regarding mortgages).

Although the Final Rule professes to adopt "regulatory measures that materially parallel the FSA standards and protections," codify "the current requirements for complying with the FSA," and "respond to changed factual and operational circumstances," ER 39, the Final Rule, in practice, directly undermines the protections for vulnerable children

[2] For example, in 2018, the district court rejected Defendants' request for "limited" relief from state licensing requirements, holding that, if allowed, such relief would constitute a "fundamental and material breach of the parties' Agreement." *Flores v. Sessions*, No. 85-cv-04544-DMG (AGRx), 2018 U.S. Dist. LEXIS 115488 at 8 (C.D. Cal. July 9, 2018)("July 2018 Order").

who are at the very heart of the FSA.

I. THE RULES ABOLISH THE STATE LICENSING REQUIREMENT, THEREBY ENDANGERING THE HEALTH AND SAFETY OF CHILDREN.

One of most consequential features of the Final Rule is the elimination of the FSA's requirement that detained children must be held in non-secure state-licensed facilities during the pendency of their immigration proceedings. Under the FSA, children apprehended by border patrol officials who are not otherwise eligible for release, may only be transferred to "licensed programs." ER 244 (¶ 19). A "licensed program" is "any program, agency or organization that is licensed by an appropriate state agency," ER 236 (¶ 6), and it "must comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes." ER 255-58 (Ex. 1).

The Final Rule abandons this critical requirement, providing instead that, where no state-licensed programs are available, DHS, may house children with their families in ICE detention centers exempt from state licensing requirements. *See* 8 C.F.R. § 236.3(b)(9). These ICE facilities will be considered "licensed" if DHS employs "an entity outside of DHS that has relevant audit experience to ensure compliance with the

family residential standards established by ICE." *Id.*

In short, the Final Rule allows the federal government to set its own standards of care for its facilities, avoid oversight from independent state regulators, and rely on unnamed "outside entities" to inspect the facilities and ensure compliance. This is woefully inadequate to ensure the health and welfare of vulnerable children and is contrary to the FSA's requirement that any rule promulgated to address the detention of immigrant children be consistent with its terms. *See* ER 238 (¶ 9).

a. State Licensing Provides Critical Oversight.

State licensing provides critical oversight of child welfare programs, ensuring that such operations provide minimum standards of care for the health and safety of immigrant children. *See, e.g., Flores v. Johnson*, 212 F. Supp.3d 864, 879 (C.D. Cal. 2015) (finding that the FSA's licensing provision provides "essential protection of regular and comprehensive oversight by an independent child welfare agency").

Most *amici* are located in States that have licensing regulations that, among other things, detail standards of care, require regular inspections, and grant local entities the authority to address noncompliance vigorously by prosecuting violations, imposing fines,

developing corrective action plans, suspending licenses for programs, or suspending the ability for a program to house children. *See*, *e.g.*, Illinois Child Care Act, 225 Ill. Comp. State. 10/1 *et seq*. (regulating facilities housing children); Cal. Health & Safety Code § 1500 *et seq*.; Cal. Code Regs. tit. 22 § 84000 *et seq*. (setting regulations governing group homes in California); Cal. Code Regs. tit. 22 §§ 89254-89255 (setting forth various penalties for non-compliance in California); N.Y. CLS Soc. Serv. § 379(1).

In addition, many States supervise and license programs that provide care to parents with their children, such as mother/child foster care and domestic violence shelters for families. *See*, *e.g.*, Cal. Code Regs. tit. 22 § 89244 (discussing authority of licensing agency to inspect and evaluate foster homes and interview children placed in such homes); N.Y. CLS Soc. Serv. § 378(5); N.Y. Comp. Codes R. & Regs. tit. 18, pt. 415.

Defendants have previously tried to evade the FSA's state licensing requirement and to house children in unregulated ICE facilities, but courts have rebuffed such efforts, finding them to be material breaches of the FSA. *See, e.g., Flores v. Johnson*, 212 F. Supp.3d at 877-80 (holding that defendants materially breached FSA by failing to house unreleased

minors in non-secure, state-licensed facilities); July 2018 Order, 2018 U.S. Dist. LEXIS 115488 at 8 ("Defendants now seek to hold minors in *indefinite* detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties' Agreement"). Defendants have also been unsuccessful in their attempts to modify the FSA to allow such federal custody because there are no changed circumstances or operational shifts justifying modification. *See Flores v. Lynch*, 828 F.3d at 910 (affirming denial of motion to amend FSA to allow ICE to house children in unlicensed facilities); July 2018 Order, 2018 U.S. Dist. LEXIS 115488 at 7.

Undeterred, the Departments now hope to codify what the courts have repeatedly found to be a material breach of the FSA. In an effort to overcome these court rulings, Defendants assert that this rulemaking process is novel because the Final Rule creates a "federal-licensing regime," which has not previously been considered by a court. *See* Notice of Proposed Rulemaking ("NPRM"), 83 Fed. Reg. 45486, 45492 (Sept. 7, 2018) (Supplemental Excerpts of Record 287). In other words, DHS argues that merely by self-designating ICE facilities as "licensed programs," they are suddenly equivalent to facilities that are *actually*

licensed by states and, thus, consistent with the FSA's state-licensing requirement. That cannot be so.

The Final Rule does not provide any detail regarding the licensing scheme contemplated for these facilities. The rule merely requires ICE to, at some point in the future, create "family residential standards" for its "detention facilities." 8 C.F.R. § 236.3(b)(9).

Moreover, the Final Rule lacks the accountability of state and local licensing that is central to the FSA: State regulations and local codes provide consequences for noncompliance such as fines, penalties, and license suspension or revocation. Although the Final Rule does not provide details regarding the contemplated oversight of the ICE-run facilities, it is clear that such oversight will be less stringent than state and local licensing. The only change to this section of the Final Rule from the NPRM resulted in the addition of a requirement for ICE to release the results of any compliance checks conducted by ICE's outside auditor. ER 36. Without the possibility of fines, penalties, and license suspension or revocation for noncompliance, federal detention facilities will lack incentive to ensure that regular inspection and minimal standards are ever met.

b. ICE-Run Facilities Have a History of Poor Conditions and Compliance Issues.

Amici's concerns about the conditions at the ICE-run self-licensed facilities contemplated by the Final Rule are well founded. ICE-run detention facilities historically and routinely provide substandard care to children and adults, failing to meet even their own minimum standards of care. *See*, *e.g.*, human rights *first*, "Family Detention: Still happening, Still Damaging," October 2015, ("human rights *first* Report") (discussing reports of substandard care at family detention centers) (Available at: https://perma.cc/JAZ7-ZG5K). Pediatric and mental health advocates who visited ICE family detention centers in 2015 and 2016 found "discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services." Julie M. Linton et al., *Detention of Immigrant Children*, American Academy of Pediatrics, March 2017 at 8 ("AAP Report") (Available at: https://perma.cc/9HGG-HFRH).

In the past year, DHS has refused to follow recommendations from the CDC and its *own* advisory council that children be vaccinated against the flu within 24 hours of entering DHS custody. *See* Letter from Robert

R. Redfield, M.D., Dir., Ctrs. for Disease Control & Prevention, to Rep. Rosa DeLauro (Nov. 7, 2019) (Available at: https://perma.cc/FPF3-5MND); Homeland Security Advisory Council, CBP Families and Children Care Panel Final Report, at 41-42 (2019) (Available at: https://perma.cc/2WLP-3WED). Three children have died of the flu as a result, nine times the fatality rate for children in the general population during flu season. *See* Letter from Judy Melinek, M.D., et al. to Rep. Rosa DeLauro & Rep. Lucille Roybal-Allard (Aug. 1, 2019) (Available at: https://perma.cc/7EWE-5ZUJ).

Two of DHS's own medical and psychiatric experts, so alarmed by the conditions and risks to detained children's well-being, wrote to the Senate Whistleblowing Caucus to voice their concerns. *See* Letter from Scott Allen, M.D. & Pamela McPherson, M.D., to Chairman Grassley and Vice Chairman Wyden (July 17, 2018) (Available at: https://perma.cc/2S6H-QNJX). After conducting ten investigations over four years at ICE family detention facilities, Doctors Allen and McPherson concluded that children housed in ICE detention centers are at "high risk of harm," due to serious compliance issues such as lack of timely access to medical care, lack of sufficient medical staffing,

inadequate trauma care and counseling, and inadequate access to language services. *Id.* at 4; *see also* Letter from Am. Pediatric Ass'n, et al., to Members of Congress (July 24, 2018) (stressing that "conditions in DHS facilities, which include open toilets, constant light exposure, insufficient food and water, no bathing facilities, extremely cold temperatures, and forcing children to sleep on cement floors, are traumatizing for children") (Available at: https://perma.cc/PQM2-V5L2).

An especially troubling DHS Inspector General report on an ICE-run adult detention facility revealed astonishingly substandard and harmful conditions. *See* Office of Inspector General, *Management Alert - Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, DHS OIG-18-86 (September 27, 2018) (Available at: https://perma.cc/PL8E-ZV36). The report was the result of an unannounced inspection of the adult Adelanto ICE Processing Center conducted in May and identified "serious violations" of ICE's national detention standards, representing "significant threats to the safety, rights, and health of detainees." *Id.* at 2.

One such violation was the presence of "nooses" (*e.g.*, braided bed sheets), which are prohibited, in 15 of the 20 cells they visited. *Id.* at 2-3.

The inspectors determined that ICE "has not taken seriously the recurring problem," exhibiting "a disregard for detainee health and safety," as these "nooses" have often been used in suicides or attempted suicides. *Id.* at 4. The inspectors also found that detainees were often placed prematurely in segregation without the required disciplinary hearing or findings and, once there, were being improperly handcuffed, shackled, and deprived of communication assistance. *Id.* at 5-7. Finally, the report detailed numerous failures by ICE to ensure that the detainees receive timely and necessary medical and dental care, resulting in tooth loss and exacerbated health conditions, and in some instances contributing to detainee death. *Id.* at 7-8. The report concluded that "although this form of civil custody should be non-punitive, some of the center conditions and detainee treatment we identified during our visit and outlined in this management alert are similar to those one may see in criminal custody." *Id.* at 9.

This report exposes the very real and ongoing failures of ICE to maintain its standards for *adult* facilities; the risk of lasting harm to vulnerable children resulting from such substandard levels of care at family detention centers would be vastly greater than the risk to adults.

Even more troubling is the fact that, despite the report's scathing findings, ICE has decided not only to renew but to expand the contract with the private for-profit operator that runs the subject facility. Tom Dreisbach, *Despite Findings Of 'Negligent' Care, ICE To Expand Troubled Calif. Detention Center*, NPR, January 15, 2020. (Available at: https://perma.cc/Z7FP-YFDN).

The Final Rule further exacerbates the health risks posed by ICE-run detention facilities by leaving compliance checks in the hands for-profit, third-party contractors. 8 C.F.R. § 236.3(b)(9). This compliance system has already proven to be woefully inadequate. In a June 2018 report, inspectors from DHS's Office of Inspector General found that Nakamoto – the third-party contractor frequently used by ICE to conduct inspections at adult detention facilities – did not always examine actual conditions, was not consistently thorough, and frequently failed to identify compliance deficiencies. *See* Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, DHS OIG-18-67 (June 26, 2018) (Available at: https://perma.cc/K57T-LV9N).

Indeed, the report found that Nakamoto misrepresented results in

their reports to ICE. *Id.* at 9. ICE employees reported that the Nakamoto inspections "breeze by the standards" and were "very, very, very difficult to fail." *Id.* The report further found that ICE does not "ensure adequate oversight or systemic improvements in detention conditions; certain deficiencies remain unaddressed for years." *Id.* at 4-5 (noting that problems identified in 2006 persisted in 2017).

The Final Rule embraces and adopts this subpar inspection regime. In contrast to the FSA, the regulations do not set forth any details, much less requirements, about how the contracts to third parties will be awarded, how the contractors will be vetted, how often the facilities will be inspected, what the inspection process will entail, or how deficiencies will be addressed and corrected. *Amici* are left with little more than Defendants' argument that the new federal licensing scheme will meet the rigorous state-licensing standards set forth in the FSA. Given these well-documented shortcomings, such assurances ring hollow.

c. Eliminating of State-Licensed Facilities Will Result in Longer Detention in Secure Facilities.

The Final Rule permits DHS to hold children and their families in secure, detention-like settings *indefinitely* because ICE facilities would be deemed "licensed" by ICE. As a result, the risk of harm to the physical

and mental health of these children would greatly increase. It is well-documented that any amount of detention can be harmful to vulnerable children.

The recent AAP Report analyzed first-hand accounts from children, doctors, and parents, as well as qualitative studies. It concluded that even short-term detention could produce long-term negative physical and emotional symptoms among detained children. *See* AAP Report at 10 ("[R]eports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems."); *see also* human rights *first* Report at 1 (stating that research from pediatricians, physicians and social workers "confirms that detention of less than two weeks is associated with negative health outcomes and potential long-term health and developmental consequences").

DHS's own advisory committee, formed to counsel ICE and DHS on how to improve family detention, warned of the risks posed by detention of children. *See* October 2016 Report of the ICE Advisory Committee on Family Residential Centers ("[D]etention or the separation of families for purposes of immigration enforcement or management are never in the

best interest of children.") (Available at: https://perma.cc/QZ3Y-5KL4).

And the Final Rules' purported requirements regarding medical care do nothing to assuage these health concerns. *See* 45 C.F.R. § 410.402. Indeed, the onus appears to be on the licensed facility to set its own standard of "appropriate" or "routine" medical care. Outside of immunizations, there is no reference to national standards or clinical guidelines, and the directive to administer "prescribed medications" is rendered meaningless without comprehensive rules establishing the preventative care, testing, and medical services that must be provided to detained children. Nor are there any requirements local health departments be notified of that children suspected or diagnosed with a disease of public health concern, as is required by state and local laws – once again ensuring that these facilities remain unchecked.

II. THE FINAL RULE CURTAILS OR ELIMINATES ESSENTIAL PROCEDURAL PROTECTIONS GUARANTEED BY THE FSA.

The Final Rule also strips away a number of key substantive and procedural safeguards required by the FSA. The Final Rule eliminates unaccompanied minors' rights to be heard in bond redetermination hearings and impose new requirements on sponsors. They also pave the way for extended periods of detention for immigrant children,

undermining the central purpose animating the FSA – to protect immigrant children's welfare by limiting their time in detention as much as possible. Finally, the Final Rule significantly impedes children's access to crucial legal services.

a. The Final Rule Deprives Unaccompanied Minors of Their Right to Be Heard at Bond Hearings.

Under the FSA, unaccompanied minors in deportation proceedings "shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates . . . that he or she refuses such a hearing." ER 246 (¶ 24A). This hearing allows unaccompanied minors an opportunity to challenge ORR's initial determination that they are not entitled to release because they pose a flight risk or a danger to the community, as well as to challenge whether they will be placed in a secure versus a non-secure facility. *See* ER 246-47 (¶ 24B). The Final Rule replaces the procedure for redetermination hearings with a new administrative process, whereby an unaccompanied minor is only afforded such a hearing if she affirmatively requests one, and any such redetermination is made not by an immigration judge, but by a hearing officer "employed by HHS." 45 C.F.R. § 410.810. By placing the onus on unaccompanied minors – who lack familiarity with their rights and the

immigration process in general – to request a redetermination hearing, the Final Rule will inevitably lead to fewer children receiving such hearings. Thus, children will be subjected to prolonged detention

Bond redetermination hearings provide a vital check against unnecessary or overly-restrictive detentions of unaccompanied minors. And such hearings grant invaluable protections to unaccompanied minors even if they do not ultimately result in release: They allow for representation by counsel, an opportunity for the unaccompanied minor to make an oral statement, the creation of an evidentiary record, and the right of appeal. *Flores v. Sessions*, 862 F.3d 863, 879 (9th Cir. 2017). Further, such hearings "compel the agency to provide its justifications and legal grounds for holding a given minor." *Id.* at 867. Without such hearings, "these children have no meaningful forum in which to challenge ORR's decisions regarding their detention or even to discover why those decisions have been made." *Id.* Bond redetermination hearings, therefore, provide an independent, transparent process through which the government must account for its decisions affecting these vulnerable children.

To support the elimination of this right, Defendants rely on the very

same arguments that this Court rejected in 2017. Citing to the 2002 Homeland Security Act ("HSA") and the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA"), the federal government asserts that the two statutes supersede the FSA and no longer authorize, much less require, bond redetermination hearings before an immigration judge. ER 120. Defendants contend that because Congress failed to explicitly provide for bond hearings in the two laws – and because the breadth of ORR's responsibility over unaccompanied minors effectively precludes immigration judges in the Department of Justice from having any authority over unaccompanied minor detention – the bond hearing requirement is no longer legally valid. ER 118.

Defendants' position has already been rejected by this Court, which ruled that "in enacting the HSA and TVPRA, Congress did not terminate Paragraph 24(A) (the bond hearing requirement) of the *Flores* Settlement with respect to unaccompanied minors." *Sessions*, 862 F.3d at 867. As this Court reasoned, because the "overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less," *id.* at 880, "[d]epriving these children of their existing right to a bond hearing is incompatible with such an aim." *Id.* at 874. Examining

the text of each statute and the statutory framework as a whole, this Court held that the HSA and TVPRA neither explicitly supersede the FSA's bond hearing requirement nor create a framework incompatible with such hearings. *Id.* at 875, 880.

The Departments' response to this Court's ruling is that the case was wrongly decided. *See* ER 118 (stating that this Court "did not identify any affirmative statutory authority for immigration judges employed by DOJ to conduct the custody hearings"). Whatever the Departments' view of the merits of that decision, it remains governing law.

Defendants' also attempt to justify the Final Rule's elimination of the FSA's bond redetermination procedure by arguing that it "is sensible, as a policy matter, for HHS to conduct the hearings envisioned by the FSA, because unlike immigration courts, HHS as an agency has expertise in social welfare best practices, including child welfare practices." *Id.* Such a position, however, directly conflicts with an unaccompanied minor's right under the FSA "to have the merits of [her] detention assessed by an independent immigration judge." *Sessions*, 862 F.3d at 880. It is also far from sensible; rather than provide an independent arbiter to assess HHS's bond determinations, the Final Rule makes HHS

both jailer and judge.

b. The Final Rule Limits Options for Release from Federal Custody.

The Final Rule further conflicts with the essence of the FSA by significantly curtailing to whom, and when, a minor who has been approved for release by DHS and HHS may *actually* be released. Under the FSA, potential sponsors must undergo a rigorous vetting process that requires, among other things, that they execute an "Affidavit of Support" agreeing to provide for the minor's well-being and ensure appearance of the minor at all future immigration proceedings. ER 242-43 (¶ 15). In addition, potential sponsors may be required to submit to a "positive suitability assessment," which includes investigations into the custodian's living conditions, identification, and employment. *Id.*

The Final Rule goes much further and places additional vetting procedures on potential sponsors, adding to the suitability assessment a required "fingerprint-based background and criminal records check," not just for the sponsor, but also for any "adult residents of the prospective sponsor's household." 45 C.F.R. § 410.302(c). The addition of the requirement of fingerprint-based criminal background checks on all adult household residents is all but certain to cause harm to children through

extended detention and family separation. And the benefits of this additional vetting are suspect in light of this Administration's own prior statements on the efficacy of such a program.

In December 2018, three months after the NPRM and in the midst of an overcrowding crisis resulting from the extended detention of asylum-seeking unaccompanied children because of an HHS requirement that all adults in a child-sponsor's household be fingerprinted and receive an extensive background check, HHS announced that it was dropping the expanded vetting requirement. John Burnett, *Several Thousand Migrant Children In U.S. Custody Could Be Released Before Christmas,* NPR, Dec. 18, 2018 (Available at: https://perma.cc/ZQ8M-LCPX). At the time of the policy rollback, approximately 15,000 immigrant children were being held in detention, some for more than 50 days and many even after their respective parents/sponsors had cleared their security checks. *Id.*

Lynn Johnson, Assistant Secretary of HHS's Administration for Children and Families, stated in an interview with NPR at the time, "I don't want to cause any additional harm by keeping kids in care any longer than they need to when they have a thoroughly vetted parent waiting for them." *Id.* Notably, Assistant Secretary Johnson explicitly

acknowledged that any benefits of screening were far outweighed by the harm being caused by the resulting detention. "The government makes lousy parents," and "we're finding [the extra screening] *is not adding anything to the protection or the safety of the children,*" she said. *Id.* (emphasis added).

A recent court case out of Chicago also shines a light on how the extended background checks have been found to cause emotional harm to, and result in unnecessary detention of, immigrant children. Federal officials had refused to reunite a mother and child until adults living with the mother produced background information and consented to be fingerprinted. Judge Manish S. Shah, in the District Court for the Northern District of Illinois, found that there was no basis for a delay in releasing the child from custody, holding that the continued separation likely violated the mother and son's due process rights and, most importantly, subjected them to irreparable harm. *Souza v. Sessions*, No. 18-cv-04412-MSS, ECF Dkt. No. 23 (N.D. Ill. June 28, 2018).

Separately, the Final Rule also restricts to whom DHS may release children beyond what the FSA contemplates. Under the FSA, minors may be released from either DHS or HHS custody to, in preferred order: (1) a

parent, (2) a legal guardian, (3) an adult relative (brother, sister, aunt, uncle, or grandparent), or (4) an adult individual or entity designated by the parent or legal guardian who provides sufficient documentary sworn evidence of capability of care to the satisfaction of officers. ER 241-42 (¶ 14). Under the Final Rule, however, children in DHS custody may only be released to a parent, legal guardian, or adult relative not in detention. *See* Final Rule, 8 C.F.R. § 236.3(j). This change would curb the ability of a minor to be released to an adult individual or entity designated by the parent or legal guardian, rather than remain in prolonged detention, should the family prefer. This change, is therefore "inconsistent with the terms" of the FSA. *See* ER 238 (¶ 9). Moreover, given the already rigorous suitability tests for sponsors, there is no simply no justification for removing any persons or entities from the FSA list of approved custodians.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court to affirm the order of the district court and to uphold the permanent injunction preventing the federal government from implementing or enforcing the Final Rule.

Dated: January 28, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the brief contains 6,425 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Century Schoolbook.

By: */s/ Michael Dundas*
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EXHIBIT A

Exhibit A: Complete List of *Amici Curiae*

- The City of Los Angeles, California;
- The County of Alameda, California;
- The City of Albany, California;
- The City of Albuquerque, New Mexico;
- The City of Alexandria, Virginia;
- The City of Atlanta, Georgia;
- The City of Austin, Texas;
- The City of Baltimore, Maryland;
- The City of Berkeley, California;
- The City of Boston, Massachusetts;
- The City of Cambridge, Massachusetts;
- The City of Chicago, Illinois;
- The City of Cleveland Heights, Ohio;
- The City of Columbus, Ohio;
- Contra Costa County, California;
- Cook County, Illinois;
- The City of Cupertino, California;
- The City of Houston, Texas;
- The City of Long Beach, California;
- Los Angeles County, California;
- The City of Madison, Wisconsin;
- The County of Monterey, California;
- The City of New York, New York;
- The City of Oakland, California;
- The City of Philadelphia, Pennsylvania;
- The City of Phoenix, Arizona;
- The City of Pittsburgh, Pennsylvania;
- The City of Portland, Oregon;
- The City of Providence, Rhode Island;
- The City of Sacramento, California;
- The City and County of San Francisco, California;
- The City of San Jose, California;
- Santa Clara County, California;
- Santa Cruz County, California;
- The City of Seattle, Washington;
- The City of Somerville, Massachusetts;
- The City of West Hollywood, California;