

No. 19-56326

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

WILLIAM P. BARR, Attorney General of the United States, *et al.*,
Defendants and Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
OF CENTRAL DISTRICT OF CALIFORNIA
HON. DOLLY GEE, JUDGE, CASE NO. 2:85-CV-4544-DMG (AGR)

**MOTION FOR LEAVE TO FILE BRIEF OF CHILDREN’S ADVOCACY ORGANIZATIONS
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF
CHILDREN’S ADVOCACY ORGANIZATIONS**

Pursuant to Federal Rule of Appellate Procedure 29(b), Children’s Rights, as Lead Amicus, hereby submits this Motion for Leave to File a Brief *Amicus Curiae* in support of Plaintiffs-Appellees and Affirmance.¹

**INTEREST OF *AMICUS CURIAE* AND REASONS WHY
THE MOTION SHOULD BE GRANTED**

The proposed Brief *Amicus Curiae* is being filed concurrently with consent of the parties now pending in this Court. *Amici* Children’s Rights, The Center for the Study of Social Policy, The Center for Children & Youth Justice, the Center on Children and Families, The Children’s Advocacy Institute, First Star, Inc., Juvenile Law Center, The Children’s Law Center, and The National Association of Counsel for Children have a substantial interest in the Court’s resolution of this case because the issues this Court will decide will have a direct impact on their work and the populations served by their work—namely, vulnerable children and families, including non-citizens, who are involved in the child welfare, juvenile justice, or immigration systems. As child welfare professionals, *amici* are well-positioned to articulate the nature of the potential harms at the center of this case. *Amici* understand the devastating effect that detention can have on children and their families, particularly if there is ineffective or inadequate oversight of the

¹ Plaintiffs-Appellees and Defendants-Appellants have consented to the filing of the proposed amicus brief.

detention facilities. *See Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (“[T]he classic role of amicus curiae [is] assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.”).

The Defendants-Appellants maintain that the New Regulations² promulgated by Department of Homeland Security (“DHS”) and the Department of Health and Human Services’ (“HHS” and together with DHS, the “Government”) should replace the *Flores* Settlement Agreement (“Agreement”). However, the Agreement establishes the conditions under which children can be incarcerated in immigration detention as well as requirements that ensure those children basic standards of care and protection, and one of those requirements is that children be cared for in state-licensed facilities, and any replacement thereof must ensure the same protections. Agreement, ¶ 6, 19.

As the proposed Brief *Amicus Curiae* details, the Agreement’s requirement for state licensing provides critical expertise in the oversight of child welfare programs, ensuring that DHS’s 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) (licensing provision provides “essential

² Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392-44535 (Aug. 23, 2019) (to be codified at 8 C.F.R. Parts 212 and 236, 45 C.F.R. 410) (the “New Regulations”).

protection of regular and comprehensive oversight by an independent child welfare agency”).³ However, the New Regulations in practice remove the safeguards promised by that requirement, posing a significant risk of great harm and inhumane treatment to children and impermissibly deviating from the Agreement’s legally binding requirements. As the district court correctly noted, the New Regulations, which Defendants-Appellants contend should be allowed to replace the Agreement, are “more than a minor or formalistic deviation from the provisions of the *Flores* Agreement, as “[t]he purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an *independent* child welfare agency.”” *Flores v. Barr*, 407 F. Supp. 3d 909, 919 (C.D. Cal. 2019).

The Agreement wisely requires state law protections that are based on federally mandated mandatory guidelines and informed by decades of the development of practices, research, and scientific progress on child welfare policy and practice. *See* 42 U.S.C. § 671(a)(10). These state licensing programs delineate the standards that a facility must meet and, critically, provide a system to monitor

³ For these reasons, courts, including this one, have taken enforcement of the licensing requirement very seriously. *See Flores v. Sessions*, 85-CV-4544 (DMG)(AGR), 2018 WL 4945000, at *3 (C.D. Cal. July 9, 2018) (rejecting the Government’s request for relief from the state licensing requirements as a “fundamental and material breach of the [*Flores* Settlement]”); *Flores v. Johnson*, 212 F. Supp. 3d 864, 881 (C.D. Cal. 2015) *aff’d Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (finding DHS in violation of the Agreement for holding children in unlicensed and secure facilities); *see also Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *6, *8 (W.D. Tex. Apr. 9, 2007) (finding that [a facility] was unlicensed and thus in violation of the Agreement).

the facilities through a combination of on-site inspections, rapid responses to reports of violations, and follow-up to ensure compliance with the licensing standards.⁴

The New Regulations provide none of these types of protections, in most cases functionally eliminating the state licensing requirement⁵ and permitting the government to license itself as in compliance with child care standards. *See* 84 Fed. Reg. 44418. Additionally, instead of being informed by child welfare and protection principles, the New Regulations are animated by criminal justice principles that prioritize incarceration and detention over child protection and care, and embrace the very conduct that the Immigration and Customs Enforcement Advisory Committee on Family Residential Centers spoke strongly against.⁶ All this, despite the fact that adhering to the Agreement is not optional, and the fact that, just between September 2018 and May 2019, seven children died in or shortly

⁴ *See, e.g.*, OFFICE OF INSPECTOR GENERAL, DEP'T OF HEALTH AND HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN, 2 (2000).

⁵ Under the New Regulations, in states without licensing schemes that specifically address and license facilities that hold entire families instead of just children, DHS may utilize its own "licensed facilities" for minors accompanied by a parent or guardian, and are only required to use state-licensed facilities where states will license family detention centers. *See* 12 C.F.R. 236.3(b)(9). As DHS admits, there are very few (if any, given pending litigation) states that already license family detention centers. *Flores v. Sessions*, CV 85-4544 (DMG)(AGRX), 2018 WL 4945000, at *4 (C.D. Cal. July 9, 2018).

⁶ ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 26 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

after being released from DHS custody.⁷ By creating a scheme that endorses indefinite detention of children, the New Regulations make as their centerpiece a standard of care that has been incontrovertibly shown to cause great harm to children.⁸

CONCLUSION

For these reasons, the Court should grant this Motion, and permit the *Amici* Child Advocacy Organizations, through lead *amicus* Children's Rights, to file their concurrently submitted Brief *Amicus Curiae*.

Dated: January 28, 2020

Respectfully submitted,

By: /s/ Sara T. Ghadiri
Sara T. Ghadiri

*Attorneys for Lead Amicus
Children's Rights*

⁷ Nicole Acevedo, *Why Are Migrant Children Dying in Custody?*, NBC NEWS (May 29, 2019), <http://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316>.

⁸ POLICY STATEMENT, AMERICAN ACADEMY OF PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN 6 (2017).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 28, 2020

/s/ Sara T. Ghadiri
Sara T. Ghadiri

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for *amici* make the following disclosures:

Children's Rights is a non-profit advocacy organization under Section 501(c)(3) of the Internal Revenue Code. Children's Rights does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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STATEMENT OF INTEREST

Children's Rights, together with the below-mentioned entities, respectfully submit this brief, as *amici curiae*, in support of Plaintiffs-Appellees and affirmance. *Amici* are all non-profit organizations that work to improve outcomes for children and youth. Each has extensive experience in child welfare and related areas (such as immigration and juvenile justice), and together *amici* provide a wide range of legal and policy advocacy in those fields.

Amici have a substantial interest in the Court's resolution of this case because the issues this Court will decide will have a direct impact on their work and the populations served by their work, namely, vulnerable children and families, including non-citizens, who interact with the child welfare, juvenile justice, or immigration systems. As child welfare professionals, *amici* are well-positioned to articulate the nature of the potential harms at the center of this case. *Amici* understand the devastating effect that detention can have on children and their families, particularly if there is ineffective or inadequate oversight of the detention facilities. *Amici* include the following child welfare organizations:

Children's Rights is a national advocacy non-profit organization dedicated to improving the lives of vulnerable children in government systems. Children's Rights has successfully challenged unnecessary and harmful practices in the over-institutionalization of children in state custody, especially children who already

have been traumatized as a result of separation from their homes and families. **The Center for the Study of Social Policy (“CSSP”)** is a national non-profit organization recognized for its leadership in reforming public systems and advancing policies that promote equity and improve the lives of children and families. Specifically, CSSP provides technical assistance and policy analysis on a broad set of policies affecting children and families, including best practices regarding safe and supportive out-of-home-placement and requirements to meet the well-being and needs of children and youth. **The Center for Children & Youth Justice (“CCYJ”)** is a 501(c)(3) non-profit organization with a mission to improve—through systems reform—the outcomes of children and youth who enter the juvenile justice, child welfare, and related systems. CCYJ works to ensure that such systems are integrated, unbiased, fueled with innovative ideas, and backed by rules and programs to achieve the best outcomes for children, youth, and young adults. **The Center on Children and Families (“CCF”)** at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an academic organization whose mission is to promote the highest quality teaching, research, and advocacy for children and their families. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency, juvenile justice, and other systems serving children and families. Its faculty has many

decades of experience in advocacy for children and youth in a variety of settings.

The Children’s Advocacy Institute (“CAI”) is an academic, research, and advocacy center founded in 1989 at the University of San Diego School of Law. Conducted through offices in San Diego, Sacramento, and Washington, D.C., CAI’s research and advocacy component leverages change for children and youth at the federal and state levels through impact litigation, regulatory and legislative advocacy, and public education.¹ **First Star, Inc. (“First Star”)** is a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. First Star partners with child welfare agencies, universities, and school districts to ensure foster youth have the academic, life skills, and adult support needed to successfully transition to higher education and adulthood. First Star knows first-hand the harm and trauma that unnecessary detention and institutionalization causes young people, creating trauma and post-traumatic stress that they carry with them for the rest of their lives, which negatively impacts their health and potential to thrive. **Juvenile Law Center (“JLC”)** advocates for rights,

¹ One of CAI’s current lawsuits is *Children’s Advocacy Institute v. Office of Refugee Resettlement, et al.* (Case No. 3:19-cv-00462-GPC-BGS, S.D. Cal.), in which CAI is pursuing judicial relief pursuant to the Freedom of Information Act after the failure of four federal agencies to appropriately respond to requests for information pertaining to the status and well-being of detained children who were separated from their asylum-seeking parents—children who will be dramatically harmed by the abnegation of the Agreement.

dignity, equity, and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy, submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. JLC strives to ensure that laws, policies, and practices affecting all youth, including those involved with the immigration system, advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. **The Children's Law Center, Inc.** ("*CLC*") is a non-profit organization committed to the protection and enhancement of the legal rights of children. For thirty years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. The **National Association for Counsel for Children** ("*NACC*") is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, NACC works to strengthen legal advocacy for children and families by promoting well-resourced, high-quality legal advocacy, implementing best practices, advancing systemic improvement in child serving agencies, institutions and court systems and promoting a safe and nurturing childhood through legal and policy advocacy.

Amici know and understand that practices such as indefinite detention and placement in unlicensed facilities, which are allowed by the New Regulations, are at odds with existing law, opposed to the policies and practices that *amici* fight for, and put children and families at risk of great harm. The New Regulations would subject children and youth to significant trauma, including physical, emotional, and cognitive harm, which will have a lifelong impact on their development and well-being, all because of the New Regulations' failure to include critical safety measures that *amici* and others have worked to implement in state child welfare schemes.

SUMMARY OF ARGUMENT

The Flores Settlement Agreement, *reprinted at* Appellants' Excerpts of Record (“*ER*”) at 227-70, (“*Agreement*”)² establishes the conditions under which children are held in immigration and ensures those children a basic standard of care and protection. One of those requirements is that children be cared for in state-licensed facilities. The district court correctly determined that the New Regulations³ issued by the Department of Homeland Security (“*DHS*”) and the

² *Flores v. Reno*, Stipulated Settlement Agreement, CV 85-4544-RJK(Px) (C.D. Cal. Jan. 28, 1997).

³ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392-44535 (Aug. 23, 2019) (to be codified at 8 C.F.R. Parts 212 and 236, 45 C.F.R. 410) (the “*New Regulations*”).

Department of Health and Human Services’ (“*HHS*” and together with DHS, the “*Government*”) at issue on appeal effectively remove that requirement, and create a significant risk of great harm by impermissibly deviating from the Agreement’s legally binding requirements.

The Agreement wisely requires state law protections that are based on decades of research and experience regarding child welfare policy and practice. These state licensing programs delineate the standards that a facility must meet and, critically, provide a system to monitor the facilities through a combination of on-site inspections, rapid responses to reports of violations, and follow-up to ensure compliance with the licensing standards.

The New Regulations provide none of those protections, removing the state licensing requirement without offering an even minimally adequate replacement. The substitution of state licensing with self-licensing, the district court correctly noted, “is more than a minor or formalistic deviation from the provisions of the *Flores* Agreement, as ‘[t]he purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an *independent* child welfare agency.’” *Flores v. Barr*, 407 F. Supp. 3d 909, 919 (C.D. Cal. 2019).

Defendants-Appellants (the “*Government*”) have set forth their plan in the New Regulations, and doubled down on it on appeal, despite the fact that the DHS

facilities have a long record of failing to adhere to basic child welfare standards, which has resulted in unsafe conditions for children and even deaths. Instead of being informed by child welfare and protection principles, the New Regulations are animated by criminal justice principles that prioritize incarceration and detention at the expense of child protection and care. The *amici*, who have extensive experience working with children and the field of child welfare, are witnesses to the real-world negative consequences of what happens when critical oversights and protections are abandoned. According to these and other experts dedicated to the well-being of children “there is no evidence that **any time** in detention is safe for children.”⁴ This Court, as the district court did, must act to safeguard the important and necessary standards of decency and care that are embedded in the Agreement.

ARGUMENT

I. THE NEW REGULATIONS ARE INCONSISTENT WITH THE TERMS OF THE AGREEMENT.

Despite the Government’s contentions both in the New Regulations and its brief on appeal, a straightforward comparison makes it immediately clear that the New Regulations do not provide the same necessary procedural safeguards as the

⁴ Julie M. Linton, Marsha Griffin, Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 7 (2017), <https://pediatrics.aappublications.org/content/139/5/e20170483> (emphasis added).

Agreement's state-licensing regime. The New Regulations provide limited details on what protections will be in place, and what detail they provide makes it clear that they are fundamentally inconsistent with the Agreement in several key areas, as the district court recognized.

A. The Agreement's State-Licensing Regime Incorporates Basic Child Welfare Practices.

Under the Agreement, 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 236-237 at ¶ 6. The programs that hold children in detention must be licensed by a State agency to provide “residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.” *Id.* In addition to meeting applicable state licensing requirements, a “licensed program” must also meet other qualifications detailed in the Agreement such as “comply[ing] with all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes.” ER 255. Licensed programs may not be secure facilities unless security is required for the health and well-being of a child, such as when the child is experiencing mental illness or drug addiction. *Id.* The Agreement's requirement for state licensing provides critical expertise in the oversight of child welfare programs, ensuring that DHS's

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) (licensing provision provides “essential protection of regular and comprehensive oversight by an independent child welfare agency”).⁵

The Supreme Court has also outlined its expectations in the Agreement context that children in federal immigration custody must receive the same standard of care as children in state custody. Specifically, the Court explained that the principle of state *parens patriae* authority “applies to minors in detention” and therefore, when the federal government is responsible for the custody of a minor, the federal government is tasked with ensuring that “[m]inimum standards [are] met, and the child’s fundamental rights [are not] impaired.”⁶

This principle is underscored by the federal laws that contemplate the role of state agency licensing in the child welfare system as one of providing a mandatory

⁵ For these reasons, courts, including this one, have taken enforcement of the licensing requirement very seriously. *See Flores v. Sessions*, 85-CV-4544 (DMG)(AGRX), 2018 WL 4945000, at *3 (C.D. Cal. July 9, 2018) (rejecting the Government’s request for relief from the state licensing requirements as a “fundamental and material breach of the [*Agreement*]”); *Flores v. Johnson*, 212 F. Supp. 3d 864, 881 (C.D. Cal. 2015) *aff’d Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (finding DHS in violation of the Agreement for holding children in unlicensed and secure facilities); *see also Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *6, *8 (W.D. Tex. Apr. 9, 2007) (finding that a facility was unlicensed and thus in violation of the Agreement).

⁶ *Reno v. Flores*, 507 U.S. 292, 304 (1993).

floor of health and safety regulations and regular monitoring that will protect children from physical harm and enhance well-being. *See* 42 U.S.C. § 671(a)(10). Every state employs a licensing regime to ensure that every facility housing children meets minimum health and safety standards. *See* 42 U.S.C. § 671(a) (requiring that states receiving funding under Title IV-E of the Social Security Act adopt licensing standards). The licensing regime has two main prongs: (1) each state must have licensing standards and policies to ensure the safety and well-being of children placed in residential facilities; and (2) each state must have the ability to ensure compliance with those standards. *See* 42 U.S.C. § 671(a)(22).⁷ These licensing regimes therefore delineate the standards that a facility must meet and, critically, provide a system to monitor the facilities through a combination of on-site inspections, rapid responses to reports of violations, and follow-up to ensure compliance with the state's licensing standards.

⁷ For an in-depth analysis of the plan requirements under Title IV-E, *see* CONG. RESEARCH SERV., REP. NO. R42794, CHILD WELFARE: STATE PLAN REQUIREMENTS UNDER THE TITLE IV-E FOSTER CARE, ADOPTION ASSISTANCE, AND KINSHIP GUARDIANSHIP ASSISTANCE PROGRAM (2014), https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/R42794_gb.pdf.

B. The New Regulations Disregard the Agreement’s State-Licensing Regime.

Under the New Regulations, in states without licensing schemes for facilities that hold entire families instead of just children, DHS may utilize its own “licensed facilities” for minors accompanied by a parent or guardian. 12 C.F.R. 236.3(b)(9). As DHS admits again on appeal, there are very few (and perhaps only one, given pending litigation) states that license family detention centers.⁸ The implication is that the vast majority of these Family Residential Centers (“FRCs”) will be self-licensed by DHS, with oversight by DHS based on standards set by DHS that DHS may change at will. *See* 84 Fed. Reg. at 44418.

Under the New Regulations, DHS will employ an outside auditor to ensure the facility complies with standards which do not themselves appear in the New Regulations. *Id.* at 44394. The New Regulations also contemplate no new grievance process, and DHS instructs that individuals can file grievances through the Office of the Inspector General (“OIG”), the specific facility’s grievance

⁸ *Flores v. Sessions*, CV 85-4544 (DMG)(AGRX), 2018 WL 4945000, at *4 (C.D. Cal. July 9, 2018); *see Grassroots Leadership v. Tex. Dep’t of Family and Protective Servs.*, No. D-1-GN-15-004336, 2016 WL 9234059, at *4 (250th Tex. Jud. Dist. Ct. Dec. 16, 2016) *rev’d*, *Texas Dep’t of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *7 (Tex. App. Nov. 28, 2018), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App. Dec. 5, 2019); *In the Appeal of Berks Cty. Residential Ctr.*, Docket No. 061-15-0025 (Commonwealth of Pennsylvania Department of Human Services, Bureau of Hearings and Appeals filed November 23, 2015) (in administrative appeal).

process, or DHS's Office for Civil Rights and Civil Liberties ("CRCL"). *Id.* at 44489. Further, DHS does not explain how deficiencies will be remediated short of withholding funds to offending contractors. *Id.* at 44420. A comparison between these provisions and those included in state licensing schemes, however, shows that DHS' self-licensing scheme falls very short of the protections provided in the Agreement.

C. The Lack of Protections in the New Regulations Is Inconsistent with the Agreement.

States employ compliance schemes to ensure facilities abide by standards and regulations, including (1) on-site inspections, (2) rapid responses to reports of violations, and (3) follow-up to remedy such violations. As the district court noted, the New Regulations "effectively authorize DHS to place class members in ICE detention facilities that are not monitored by state authorities, but are instead audited by entities handpicked by DHS to 'ensure compliance with the family residential standards established by ICE,'" and as such, the New Regulations are inconsistent with and cannot replace the Agreement. ER 238-239 ¶ 9; *Flores*, 407 F. Supp. 3d at 919.

On appeal, the Government attempts to distance itself from the implication that the majority of FRCs will be self-licensed by stating a "preference" for state-licensed facilities, and asserting that the states bear the responsibility for the proposed self-licensing scheme because states have not issued enough family

detention licenses. ECF No. 10 at 48-49. The New Regulations’ regime, even if it is not “preferred” (as the Government claims), still violates the Agreement.

1. Audits of Federal Residential Centers Are Not Equivalent to State Agency On-Site Inspections.

Most states require licensed facilities to undergo on-site inspections at least annually.⁹ Such annual inspections are thorough, and generally include “an inspection of the physical plant, a review of records, and interviews with children or staff.”¹⁰ The physical review may consist of a walk-through of the facility

⁹ OFFICE OF INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN 2 (2000) (finding most states examined performed licensing inspections at least once a year); see NAT’L ASS’N FOR REGULATORY ADMIN., BEST PRACTICES FOR HUMAN CARE REGULATION 53 (2017) (stating licensing inspection should occur “at least twice-yearly”), <https://www.naralicensing.org/assets/docs/Publications/BestPractices/nara%20best%20practices%20final.pdf> [hereinafter “NARA Best Practices”]; CHILD WELFARE LEAGUE OF AM., STANDARDS OF EXCELLENCE FOR ABUSED OR NEGLECTED CHILDREN AND THEIR FAMILIES § 6.8 (2004) (a licensing agency should “provide for the timely and consistent monitoring of the settings for which they are responsible. Programs should be monitored on-site at least annually, and unannounced monitoring should occur when warranted to ensure the quality care of children.”) [hereinafter “CWLA Standards”]. The National Association for Regulatory Administration and Child Welfare League of America guidelines are of paramount importance under Title IV-E, as state standards are to be “reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes... 42 U.S.C. § 671(a)(10)(A).

¹⁰ OFFICE OF INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN 15 (2000).

looking for safety hazards, examining overall cleanliness, and assessing compliance with standards.¹¹ The record review may include analysis of treatment plans, progress reports, and medical records of children cared for at the facility, in addition to a review of training and background checks for personnel.¹² In interviews with children and staff, an inspector may ask about the food, treatment goals, and any unmet needs.¹³

DHS's plan to monitor family FRCs through infrequent audits is woefully inadequate compared to this paradigm. DHS does not commit to annual inspections. Instead, the new regulations only state that the FRCs will undergo "regular" audits.¹⁴ DHS specifically "decline[d] to include" further details about the use of third parties to conduct inspections in the text of New Regulations.¹⁵ For example, the New Regulations are silent about which third parties will be selected, how they will be selected, and what oversight DHS will have over them.

11 *Id.*

12 *Id.* at 16.

13 *Id.*

14 As illustrated above, in the definition of "licensed facility," the new 12 CFR 236.3(b)(9) provides that if a state licensing scheme for detention of children accompanied by a parent or legal guardian is not available, DHS shall employ an outside entity to perform audits to "ensure compliance with the family residential standards established by ICE." 84 Fed. Reg. 44526.

15 *Id.* at 44418.

There is also no indication in the New Regulations that licenses, once given, would ever expire or need to be renewed after auditing. DHS's minimal commitment to third-party audits is not sufficient to protect the welfare of children and families in the facilities, and falls far short of the thorough, on-site inspections that states are required to carry out under child welfare laws and regulations.

2. The New Regulations Do Not Provide an Adequate System for Reports of Abuse or Violations.

In addition to requiring annual on-site inspections, a functioning licensing process under state law requires the licensing authority to respond quickly to reports of violations of licensing standards as well as reports of maltreatment and abuse.¹⁶ The Child Welfare League of America (“*CWLA*”) specifies that a licensing agency should “respond to all reports of child abuse and neglect in any licensed facility and take prompt action to assure the safety of the children in those facilities.”¹⁷ The National Association for Regulatory Administration (“*NARA*”) states that licensing organizations should have “written guidelines to include timeframes for conducting complaint investigations and allegations of illegal

¹⁶ OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN 2 (2000).

¹⁷ *CWLA Standards*, § 6.8.

operations.”¹⁸ To this end, “[a]ll states” require that reports of maltreatment be initiated “in a timely manner, generally within 72 hours,” and even faster when a child may be in imminent danger.¹⁹ States also typically specify timeframes for completing investigations, “generally between 30 and 60 days.”²⁰ California, for example, maintains an anonymous hotline through which an individual or organization can file a complaint regarding a state-licensed community care facility.²¹ Upon receiving a complaint, the licensing agency will make an unannounced visit to the facility within ten days.²² As another example, Illinois requires that licensing investigations begin within two days of the state’s receipt of a complaint and that investigations must be completed within thirty days.²³ This system helps ensure that licensed facilities comply with respective state health and safety standards, protecting vulnerable individuals in their care.

¹⁸ NARA Best Practices at 55.

¹⁹ DEP’T OF HEALTH & HUMAN SERVS. CHILDREN’S BUREAU, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT 4 (2017), <https://www.childwelfare.gov/pubPDFs/repproc.pdf#page=6&view=Summaries%20of%20State%20laws>.

²⁰ *Id.*

²¹ CALIFORNIA DEP’T SOCIAL SVCS. MAKE A COMPLAINT, <https://www.cdss.ca.gov/reporting/file-a-complaint/cld-complaints> (last visited Jan. 14, 2020).

²² *Id.*; CAL. HEALTH & SAFETY CODE § 1538(c)(1).

²³ 89 ILL. ADMIN. CODE § 383.35(b).

Under the New Regulations, by contrast, the Government does not have an adequate system in place to investigate complaints about violations of standards or dangerous conditions in FRCs. In response to comments to the proposed rule that expressed concern about conditions at DHS facilities, DHS explained that individuals may file grievances through the OIG, the specific facility's grievance process, or CRCL. 84 Fed. Reg. at 44489. However, none of these processes provide a timely and effective method for addressing compliance with ICE's standards.²⁴ The OIG and CRCL only investigate a few narrow categories of complaints, which do not fully encompass the safety concerns created by a FRC's failure to comply with child welfare standards.²⁵ Furthermore, in contrast to state licensing rules that require investigations to be promptly commenced and quickly completed, the OIG recommends that complainants wait at least six months before

²⁴ Indeed, even HHS's Office of the Inspector General took from September 2018 until September 2019 to complete its review of the inadequate mental health services for children in HHS custody. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY, at 5 (2019)

²⁵ *Before You Submit a Complaint*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., <https://oig.hhs.gov/fraud/report-fraud/before-you-submit.asp>; OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC. (Sept. 3, 2019), <https://www.dhs.gov/office-civil-rights-and-civil-liberties>.

even following up on a request.²⁶ CRCL investigations often experience lengthy delays because no mandatory timeline governs agency responses to CRCL requests.²⁷ A grievance process through the detention facility is similarly inappropriate for addressing compliance complaints: a facility cannot police its own compliance with the standards through a completely internal process.²⁸ Additionally, while ICE does have an Office of Detention Oversight, it is unclear whether it responds to complaints at all, and it certainly does not conduct unannounced inspections in response to complaints. *See* 84 Fed. Reg. at 44417. These methods of oversight cannot provide the prompt and effective response to complaints necessary to ensure children's health and safety while detained.

3. The New Regulations Do Not Provide a System for Addressing and Correcting Violations of Standards.

The New Regulations also fail to provide adequate means for addressing risks to the health and safety of children when those risks are identified. As noted

²⁶ *Id.*

²⁷ Scott Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security*, CTR. FOR AM. PROGRESS (April 2, 2019) <https://www.americanprogress.org/issues/immigration/reports/2019/04/02/467776/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security/>.

²⁸ U.S. IMMIGRATION AND CUSTOMS ENF'T, ICE/DRO RESIDENTIAL STANDARDS (2007) https://www.ice.gov/doclib/dro/family-residential/pdf/rs_grievance_system.pdf.

above, an adequate licensing regime requires more than merely determining whether a facility passes or fails an audit. The CWLA explains that in addition to setting standards and determining formal compliance, licensing agencies of residential services should “offer consultation in the development of policies, procedures, and organizational guidance to support quality service delivery; and withhold licensing from those agencies that do not meet the licensing requirements.”²⁹ When a state finds that there are standards violations, it will typically “impose corrective action plans that outline what a facility needs to do to correct the violation.”³⁰ Written plans should include “corrective action expectations” and “expected follow up by both the provider and the regulatory program,” and require “completion within appropriation timeframes.”³¹

²⁹ CHILD WELFARE LEAGUE OF AM., STANDARDS OF EXCELLENCE FOR RESIDENTIAL SERVICES §4.12 (2004); *see also* CWLA Standards, § 6.8 (“Following the completion of an investigation into allegations of child abuse or neglect, the licensing agency should establish a definitive plan with the licensee to correct any deficiencies in the setting that were identified in the investigation. The licensing agency should monitor the implantation of this plan and should notify the licensee when the plan has been completed to its satisfaction.”).

³⁰ OFFICE OF INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN 2 (2000).

³¹ NAT’L ASS’N FOR REGULATORY ADMIN., BEST PRACTICES FOR HUMAN CARE REGULATION 56 (2017), <https://www.naralicensing.org/assets/docs/Publications/BestPractices/nara%20best%20practices%20final.pdf> (Explaining that organizations should have

State regulations and local codes typically follow these patterns.³² For example, the California Department of Social Services suggests several methods of enforcing compliance, including denial of an application for capacity increase, citation of deficiencies, suspension or revocation of a license, civil penalties, and noncompliance conferences.³³ New York also provides a range of possible enforcement actions, including the development of corrective action plans, civil penalties, and temporary suspension or limitation of a license.³⁴

While DHS's response to comments on the proposed rule makes vague references to addressing deficiencies, 84 Fed. Reg. at 44417, the only concrete suggestion in the New Regulations is to withhold or deduct contractual funds for unsatisfactory performance. 84 Fed. Reg. 44420. While this may be an effective resolution for a simple breach of contract, it cannot be the sole remedy for violations of safety standards, especially considering that decreasing funding

“written guidelines to include timeframes for conducting complaint investigations and allegations of illegal operations.”).

³² OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., OEI-02-98-00570, STATE OVERSIGHT OF RESIDENTIAL FACILITIES FOR CHILDREN 2 (2000).

³³ CALIFORNIA DEP'T SOCIAL SVCS. PUBLIC INFO AND POLICIES, <http://www.cdss.ca.gov/inforesources/Childrens-Residential/Public-Info-and-Policies> (last visited Jan. 16, 2019); *see also, e.g.*, CAL. HEALTH & SAFETY CODE § 1548.

³⁴ 18 N.Y. COMP. CODES R. & REGS. § 413.3(a).

would compound those issues, leaving facilities with inadequate resources to care for their vulnerable populations.

II. THE FAILURE TO REQUIRE STATE-LAW LICENSURE FOR FAMILY RESIDENTIAL CENTERS WILL HARM CHILDREN AND THEIR FAMILIES.

In additional to the clearly inconsistent functional details described above, there are also inconsistencies between the application of the Agreement and New Regulations. These include (1) the Government's reliance on standards for criminal incarceration rather than child-welfare standards, and (2) DHS's inability or unwillingness to meet basic safety standards, as evident by its treatment of children in its care. For these additional reasons, the New Regulations should not supplant the Agreement.

A. **The New Regulations' Treatment of Children as Prisoners is Inconsistent with the Terms of the Agreement.**

Not only are DHS's licensing procedures inconsistent with the Agreement, but DHS's standards themselves are inconsistent with the child welfare standards incorporated into the Agreement. All facilities licensed by state child welfare systems are required by law to act in the best interest of the children in their care.³⁵

³⁵ DEP'T OF HEALTH & HUMAN SERVS. CHILDREN'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2016), https://www.childwelfare.gov/pubpdfs/best_interest.pdf. ("All States ... have statutes requiring that the child's best interests be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues.").

State child welfare systems must, for example, place children in the least restrictive placement appropriate, which in all but rare cases means a non-secure home or facility.³⁶ Child welfare systems are also required to take steps to give children in their custody as normal a childhood as possible.³⁷

The Family Residential Standards established by Immigration and Customs Enforcement, which DHS states it will apply, are “based upon, and extremely similar to, standards developed by the American Correctional Association for adult criminal defendants incarcerated pretrial.”³⁸ Those standards were specifically

³⁶ 42 U.S.C. § 675(5)(A) (requiring the state develop a case plan “designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting”).

³⁷ *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 111, 128 Stat. 1919 (2014) (amending 42 U.S.C. 675 to require that states implement a “reasonable and prudent parent standard” for decisions made by a foster parent or a designated official for a child care institution, which protects the child while also allowing them to experience normalcy); *see also, e.g.*, CAL. WELF. & INST. CODE § 16001.9(a) (stating that foster children have the right to, among other things, participate in extracurricular and cultural activities, develop job skills, and have social contact with people outside of foster care); COLO. REV. STAT. § 19-7-101(1) (same); PA. CONS. STAT. § 2633 (same); ARK. CODE ANN. § 9-28-113 (stating that “[e]very child in foster care is endowed with the opportunities inherently belonging to all children”).

³⁸ ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CTRS., REPORT OF ICE COMMITTEE ON FAMILY RESIDENTIAL CENTERS 27-28 (2016) [hereinafter “ICE Committee on FRC Report”] (explaining the origin of DHS’s Family Residential Standards). DHS also explains in promulgating the New Regulations that it utilizes standards developed by the American Correctional Association in its oversight of the FRCs. 84 Fed. Reg. at 44420 (noting that the Performance Requirements Summary, which ICE uses to conduct quality

created for jails and prisons to “ensure staff and inmate safety and security; enhance staff morale; improve record maintenance and data management capabilities; assist in protecting the agency against litigation; and improve the function of the facility or agency at all levels.”³⁹ In contrast to prison standards, licensing standards used in child welfare specifically focus on “protect[ing] children from risks against which they would have little or no capacity for self-care and protection.”⁴⁰ To this aim, any standards set by such licensing must “protect the safety and well-being of children.”⁴¹

In October 2016, at the request of then-DHS Secretary Jeh Johnson, the ICE Advisory Committee on Family Residential Centers reviewed DHS’s policies and practices relating to family detention, and recommended that DHS should “eliminate as many characteristics of criminalization and prisonization as practicable, and become as normalized as possible in their design and operation.”⁴²

assurance surveillance and to guide inspections of facilities, is based on standards developed by the American Correctional Association’s Standards for Adult Local Detention); 84 Fed. Reg. at 44434 (noting that medical issues at FRCs are managed by the ICE Health Service Corps, which utilize standards drawn from the American Correctional Association among others to oversee the health care provided to detainees in ICE custody).

39 *Id.*

40 CWLA Standards at xvi.

41 *Id.* at § 6.8.

42 ICE Committee on FRC Report at 27.

As the Advisory Committee recognized, holding children and their families as if they are pretrial defendants or convicted inmates “contributes to the erosion of their physical, psychological, and social well-being.”⁴³ Such treatment is particularly harmful to children.⁴⁴ Children in immigration detention suffer from high rates of post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.⁴⁵ The detention of children, whether with their families or otherwise, also impedes a child’s educational development.⁴⁶ Even detention **of less than two weeks** is “associated with negative health outcomes and potential long-term health and developmental consequences.”⁴⁷ One child psychiatrist noted that, even controlling for past trauma, age and country of origin,

⁴³ ICE Committee on FRC Report at 26.

⁴⁴ See INT’L DETENTION COAL., NEVER IN A CHILD’S BEST INTERESTS 2 (2017), http://idcoalition.org/wpcontent/uploads/2017/06/Briefing-Paper_Never-in-a-childsbest-interests_June-2017.pdf

⁴⁵ Julie M. Linton, Marsha Griffin, Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 10 (2017).

⁴⁶ See DETENTION WATCH NETWORK, EXPOSE & CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO 2 (2014); ICE Committee on FRCs Report at 18; see also Caitlin Dickerson, *Despite Warnings, Trump Moves to Expand Migrant Family Detention*, N.Y. TIMES (DEC. 9, 2019) <https://www.nytimes.com/2019/12/09/us/migrant-family-detention-border.html> (there is “years of scientific consensus that detaining children, even with their parents, can cause permanent developmental damage”).

⁴⁷ HUMAN RIGHTS FIRST, FAMILY DETENTION: STILL HAPPENING, STILL DAMAGING 1 (2015).

“[i]t becomes extremely clear that it is detention which is the variable which is creating, literally, mental illness in these children.”⁴⁸ As the American Academy of Pediatrics explained, “there is no evidence that any time in detention is safe for children.”⁴⁹

Rather than using standards developed with the intent of protecting the safety and well-being of children in such a stressful environment, DHS has chosen to employ standards intended for use in correctional facilities. This is inconsistent with the Agreement’s state-licensure requirement, and results in harmful conditions for the children detained.

B. DHS’s History Shows That Its Treatment of Children in Detention Is Inconsistent with State Licensing Standards.

DHS cannot be an appropriate entity to license facilities that hold children because it has routinely violated child welfare standards by mistreating children in its custody. On May 10, 2018, Mariee Juárez, a nineteen-month-old-child, healthy when taken into ICE custody, died of a viral lung infection shortly after being

⁴⁸ Caitlin Dickerson, *Despite Warnings, Trump Moves to Expand Migrant Family Detention*, N.Y. TIMES (DEC. 9, 2019), <https://www.nytimes.com/2019/12/09/us/migrant-family-detention-border.html>.

⁴⁹ Julie M. Linton, Marsha Griffin, Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 6 (2017).

released from the Dilley FRC.⁵⁰ On May 20, 2019, 16-year-old Carlos Gregorio Hernandez Vasquez, died while in immigration custody after “writhing for at least 25 minutes on the floor and a concrete bench” and “staggering to the toilet and collapsing the floor, where he remained in the same position for the next four and a half hours.”⁵¹ And these are just two instances: at least seven children are known to have died in, or shortly after having been released from, immigration custody between September 2018 and May 2019.⁵² Since 2009, ICE has been forced to close two FRCs because of inhumane conditions, including “unreasonably cold rooms, substandard food, and inadequate medical care.”⁵³ It is clear that DHS has not instituted effective policies to safeguard the well-being and safety of children, both in state-licensed and in DHS-run facilities.

⁵⁰ Julia Webster, *Her 19-Month-Old Daughter Died After Being Held at an ICE Facility. Here's What Yazmin Juárez Told Congress*, TIME (July 11, 2019) <https://time.com/5624391/yazmin-juarez-migrant-mom-congressional-testimony/>.

⁵¹ Robert Moore, Susan Schmidt & Maryam Jameel, *Inside the Cell Where a Sick 16-Year-Old Boy Died in Border Patrol Care*, PROPUBLICA (Dec. 5, 2019), <https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care.>)

⁵² Nicole Acevedo, *Why Are Migrant Children Dying in Custody?*, NBC NEWS (May 29, 2019), <http://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316>.

⁵³ Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 794 (2018).

The Government has failed to address substandard conditions, and most recently, have actively frustrated attempts to verify poor conditions. As recently as February 2019, immigration advocates wrote to DHS officials to complain about sub-standard medical treatment provided to infants detained at the Dilley FRC.⁵⁴ Similar issues are currently being litigated.⁵⁵ In addition, in June 2019, conditions at the Berks FRC triggered the need for a special report and audit from the Pennsylvania Auditor General (“PAG”).⁵⁶ Aspects of the PAG’s report, issued in December 2019 (“PAG Report”) are very troubling. The PAG Report noted that “federal authorities, through the Berks County solicitor’s office, refused to allow staff from the Department of the Auditor General to tour [Berks FRC] to gather a firsthand look at the conditions inside.”⁵⁷ Thus, it appears that DHS has actively

⁵⁴ Letter from Am. Immigration Council, Am. Immigration Lawyers Association, and Catholic Legal Immigration Network, Inc. to Cameron Quinn and John V. Kelly (February 28, 2019) *available at* http://americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_urges_immediate_release_of_infants_from_immigration_detention.pdf.

⁵⁵ *See Abdallah Fraihat et al. v. U.S. Immigration and Customs Enf’t et al.*, Case No. 19-cv-01546-JGB-SHK (C.D. Cal).

⁵⁶ *See* Press Release, Pennsylvania Auditor General, Auditor General DePasquale Launches Review of Detainees’ Treatment in Berks County Residential Center (June 13, 2019), <https://www.paauditor.gov/press-releases/auditor-general-depasquale-launches-review-of-detainees-treatment-in-berks-county-residential-center>.

⁵⁷ PENNSYLVANIA AUDITOR GEN., BERKS COUNTY RESIDENTIAL CENTER REVIEW BY PENNSYLVANIA AUDITOR GENERAL EUGENE A. DEPASQUALE 8

blocked state regulators from visiting state-leased facilities. Most importantly, however, the PAG said the Berks FRC “appears to be routinely violating the Flores Agreement” and “called on the federal government to stop holding immigrating and asylum-seeking families at the Berks [FRC].”⁵⁸

This maltreatment is not only occurring in FRCs, but in other DHS facilities as well. As recently as June 2019, it was reported that for children in the DHS facility at the McAllen Central Processing Center, “basic hygiene just doesn’t exist.”⁵⁹ As of July 2019, conditions at DHS’s border facility in Clint, Texas were worse: there, “children had no adequate access to medical care, had no basic sanitation, were exposed to extreme cold and did not have adequate access to drinking water or food.”⁶⁰ Moreover, agency leadership knew for months that

(2019),
https://www.paauditor.gov/Media/Default/Reports/RPT_BCRC_Berks_Center_121119_FINAL.pdf.

⁵⁸ Press Release, Pennsylvania Auditor General, Auditor General DePasquale Urges Federal Government to Stop Using Berks County Facility to Hold Immigrating, Asylum-Seeking Families (Dec. 11, 2019), <https://www.paauditor.gov/press-releases/auditor-general-depasquale-urges-federal-government-to-stop-using-berks-county-facility-to-hold-immigrating-asylum-seeking-families>).

⁵⁹ Riane Roldan, *Lawyer: Inside an immigrant detention center in South Texas, "basic hygiene just doesn't exist"*, THE TEXAS TRIBUNE (June 23, 2019) <https://www.texastribune.org/2019/06/23/immigrant-detention-center-mcallen-overcrowded-filthy-conditions/>.

⁶⁰ Simon Romero *et al.*, *The Stuff of Nightmares: Inside the migrant detention center in Clint, Texas*, EL PASO TIMES & N.Y. TIMES (July 6, 2019)

“some children had no beds to sleep on, no way to clean themselves and sometimes went hungry.” *Id.* In addition, DHS’s own Office of the Inspector General issued a “management alert” in July 2019, citing conditions of extreme overcrowding, prolonged detention, and “limited” access to clean clothing and hot meals.⁶¹ A recent USA Today investigation into detention centers used by ICE released in December 2019 found “more than 400 allegations of sexual assault or abuse, inadequate medical care, regular hunger strikes, frequent use of solitary confinement, more than 800 instances of physical force against detainees, nearly 20,000 grievances filed by detainees and at least 29 fatalities” since January 2017.⁶² The investigation uncovered more than 15,000 violations of standards in detention facilities since 2015, yet “more than 90% of those facilities received passing grades by government inspectors.”⁶³ These complaints are echoes of the

<https://www.elpasotimes.com/story/news/immigration/2019/07/06/border-patrol-el-paso-sector-migrant-detention-center-clint-immigration/1663750001/>.

⁶¹ See OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SECURITY, OIG-19-51. MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY, at 2-3 (2019).

⁶² Monsy Alvarado, *et al.*, *Deaths in custody. Sexual violence. Hunger strikes. What we uncovered inside ICE facilities across the US*, USA TODAY (Dec. 22, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002/>.

⁶³ *Id.*

same exact conditions that forced the closure of the Hutto and Artesia FRCs in 2009 and 2014.⁶⁴ These abuses are happening in non-state licensed facilities, and provide insight into DHS's performance when state oversight is absent.

DHS does not deny that children are being harmed in its border facilities. In fact, DHS's only responses to the abuses in CBP facilities is to state that "the only facilities required to be licensed under this rule (and under the Agreement) are the FRCs" and further states that "these licensing requirements—and the public reporting of inspections—do not apply to DHS's short-term holding facilities (such as CBP facilities)." This assertion is untrue and inconsistent with the Agreement.⁶⁵ Given the well-documented shortcomings of oversight and compliance in DHS-run detention facilities, any assurances that federal licensing will both meet the requirements under the Agreement and actually be enforced is unpersuasive.

⁶⁴ Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 794 (2018).

⁶⁵ ER 239-244 ¶¶ 12.A, 19; *see also* U.S. CUSTOMS AND BORDER PROTECTION, HOLD ROOMS AND SHORT TERM CUSTODY POLICY (June 2, 2008), https://foiarr.cbp.gov/docs/Policies_and_Procedures/2011/200842354_378/1104271006_Hold_Room_Custody_Directive_Reading_Room.pdf. The Hold Rooms and Short Term Custody Policy ("*Policy*") applies to both adults and children, and purports to establish the "national policy for the temporary detention, transport and escort of persons by CBP." The Policy specifically cites and incorporates the Agreement. *See id.* at § 6.2.4.1.

CONCLUSION

As the district court correctly determined, the New Regulations are inconsistent with the terms of the Agreement because they dispense wholesale with its most critical protections in favor of a new detention policy without supportable justification. Furthermore, the New Regulations impermissibly conflict with the express terms and the underlying purpose of the Agreement—to protect the health and well-being of immigrant children. To abandon the longstanding protections of the Agreement for Defendants-Appellants’ new policy will put children at severe and immediate risk of harm. For these reasons, *amici* respectfully request this Court affirm the district court’s decision to grant Plaintiffs-Appellees’ Motion to Enforce Settlement Notwithstanding Publication of Final Rule and deny Defendant-Appellant’s Motion to Terminate the Flores Settlement Agreement.

Respectfully submitted,

Dated: January 28, 2020

CHAPMAN AND CUTLER LLP

By: /s/ Sara T. Ghadiri

Sara T. Ghadiri

**ATTORNEYS FOR LEAD AMICUS
CHILDREN’S RIGHTS**

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2019 Times New Roman 14-point font.

Dated: January 28, 2020

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CERTIFICATE OF SERVICE

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

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 28, 2020

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