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November 6, 2018

Ms. Debbie Seguin
Assistant Director
Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Submitted via: www.regulations.gov

Re: RIN 1653–AA75, 0970–AC42, DHS Docket No. ICEB-2018-0002 Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Federal Register 45486 (Sept. 7, 2018)

Dear Ms. Seguin:

In response to the proposed regulations, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," published in the Federal Register on September 7, 2018, we are submitting these joint comments of our clients, the American Immigration Council (the "Council") and the American Immigration Lawyers Association ("AILA"), who are partners in the Dilley Pro Bono Project ("DPBP"), which every year provides legal services to thousands of asylum-seeking mothers and children detained in the South Texas Family Residential Center in Dilley, Texas.

Statement of Interests

The Council is a non-profit organization that works to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, AILA's mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws.

Together, the Council and AILA have extensive experience in operating direct service pro bono programs based in facilities housing detained families--initially, during 2015, in Artesia, New Mexico and more recently (through the Dilley Pro Bono Project) at the South Texas Family Residential Center in Dilley,

Texas ("STFRC").[1] The Council and AILA also train and support their members in providing direct representation to minors, both in federal custody and after release. Some AILA members work with children on a daily basis as staff members in legal services organizations; others are in private practice and also represent children and families, often on a pro bono basis. Collectively, the Council's and AILA's members and volunteers have represented thousands of detained or formerly detained children and their family members.

Through their experiences representing detained immigrants and developing related immigration policy, the Council and AILA have gathered extensive data concerning conditions experienced by minors in detention, the physical and mental health impacts detention has on them, and the challenges they face in presenting their substantive claims. The Council and AILA appreciate the opportunity to offer these comments in response to the Notice of Proposed Rulemaking.

Introduction and Background

The proposed regulations referenced above (the "Proposed Regulations") were promulgated on September 7, 2018 by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) (together, the "Agencies"). The Proposed Regulations purportedly seek to implement the Flores Settlement Agreement,[2] which was originally approved by the Court on January 28, 1997. The FSA by its terms provides that it will terminate "45 days following Defendants' publication of final regulations implementing t[he] Agreement."[3] For the decades that the FSA has been in effect, none of the relevant agencies (whether the legacy Immigration and Naturalization Service (INS), DHS, HHS or the Office of Refugee Resettlement (ORR)) made drafting regulations for the protection of *Flores* class members a priority.

The effort to draft regulations has come only now, following failed attempts by the U.S. government (the "Government"), through litigation, to eliminate key protections for children provided by the FSA. Most importantly, in the ongoing *Flores* litigation itself, the Government recently sought, among other things, to have the Court declare that the FSA's 20-day limit[4] on the detention of minors in federal facilities

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1 In Spring 2015, the Council and AILA, in conjunction with the Refugee and Immigrant Center for Education and Legal Services (RAICES) and Catholic Legal Immigration Network, Inc. (CLINIC) created the CARA Pro Bono Project, which provided legal services to detainees at STFRC. In January 2017, CARA was renamed the Dilley Pro Bono Project to reflect a new partnership among the Council, AILA, CLINIC and Texas RioGrande Legal Aid, Inc. (TRLA).

2 Stipulated Settlement Agreement, *Flores v. Reno*, No. CV85-4544-RJK (Px), hereinafter ("FSA").

3 FSA ¶ 40.

4 The FSA (as amended) requires that, within 20 days of a child being in federal immigration detention, the child must be released to a parent or relative or other appropriate sponsor, or, if that is not possible, then placed into a program licensed by a State child welfare agency (a "licensed program"). FSA ¶ 14. Children who have crossed the U.S. border together with a parent (or legal guardian) ("Accompanied Children") generally have been detained with the parent at a federal family residential center ("FRC"), and, if the Government complies with the FSA's 20-day rule, the child and parent are released within 20 days. Children who have not crossed with a parent or legal guardian ("Unaccompanied Children") generally are placed in State-licensed facilities from which, under the FSA, whenever possible, a child should be released to a parent or other relative, or, if even that is not possible, then to another appropriate sponsor, or, if that is not possible, then the child will be held until reaching the age of eighteen. *Id.*

would be inapplicable to children who were detained with a parent ("Accompanied Children") (that is, the Government sought to have the 20-day limit apply only to children *not* accompanied by a parent ("Unaccompanied Children" or "UACs")). The *Flores* Court flatly rejected the Government's request.[5] The Proposed Regulations, if adopted, would grant the request. Notably, the Agencies concede that the Proposed Regulations are being issued not to protect children and minimize the period of their detention (which were the goals of the FSA), but rather because the Agencies want to implement a new policy of keeping children in federal "family residential centers" (FRCs) until the resolution of their and their parents' immigration proceedings[6]--a process that can take months and sometimes years.

The Proposed Regulations have been issued against a backdrop of the highest number of detained children ever, for the longest periods in detention ever, and in conditions reflecting widespread, decades-long violations of the FSA relating to protections for detained children's safety and welfare while in detention. There are 12,800 children currently in immigration detention, which is up from 2,400 children who were in detention in May 2017.[7] Children (including those held in State-licensed programs and in FRCs) are held in detention an average of 59 days, which is up from 35 days in 2016 and 48 days in 2017.[8] The evidence of conditions not meeting the minimal standards set by the FSA include, just in 2018, the death of an 18-month old child from an infection she acquired (and for which she received only

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[5] The Court found that the "plain and unambiguous" language of the FSA clearly covered all children, whether accompanied or unaccompanied. *Flores v. Johnson*, 212 F. Supp. 3d 864, 872 (C.D. Cal. 2015), *affirmed in part, overruled on other grounds*, 828 F.3d 898 (9th Cir. 2016). We note also that, as part of the executive order that claimed to end family separation, President Trump also put into motion a request to the courts to extend the time a child can be held in detention beyond the current 20-day limit under the FSA. *See* Charlie Savage, *Exploring Trump's Executive Order on Family Separation*, NY Times (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html.

[6] The Government states that the usual option when detaining families at the border is to "detain the family unit together at an appropriate FRC during their immigration proceedings. The practical implications of the FSA . . . have effectively prevented the Government from using [this] option for more than a limited period of time." Proposed Regulation [hereinafter ("PR")] § IV.C.1 at 45492. "This rule [(*i.e.*, the Proposed Regulations)] would allow for detention [of children and their parents] at FRCs for the pendency of immigration proceedings . . . ." PR § IV.C.1 at 45493.

[7] Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, NY Times (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html?ftag=MSF0951a18. Notably, the increase in the number of children in detention is not due primarily to an influx of more migrant children, but to the Government's new policies that opt for keeping children in detention for prolonged periods. *See* Tal Kopan, *The Simple Reason More Immigrant Kids Are In Custody Than Ever Before*, CNN (Sept. 14, 2018), https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html (citing HHS spokesman Kenneth Wolfe and other officials). Among the policies the Government has adopted that have led to the higher numbers of children detained and the longer periods of detention have been (i) the "zero tolerance" policy pursuant to which *all* persons crossing the border, even if seeking asylum, are arrested and put in detention; and, as Kopan reports, (ii) a new policy to fingerprint relatives who come forward to sponsor the release of detained children (which discourages these relatives to do so as they oftentimes are themselves undocumented or not yet through their own immigration proceedings), even though, according to officials, relatives already were being effectively screened for things like criminal records and history of abuse without inquiry into their immigration status; and (iii) an alleged practice of intentionally retaining a child in custody until he or she reaches the age of 18 and becomes subject to stricter adult detention policies.

[8] Department of Health and Human Services, Administration for Children and Families, Justification of Estimates for Children and Families (FY 2019) at 68; *see also* Kopan, *supra* note 7 (citing HHS spokesman Kenneth Wolfe).

minimal medical care) while detained in an FRC, as well as sexual abuse of children in another FRC and forced overmedication with psychotropic drugs of children at a State-licensed children's shelter.[9]

The Agencies cite a "crisis at the Southern border" as the motivation for policies that they intend to serve as a disincentive to immigration.[10] We observe, however, that, first, net immigration to the U.S. is at historic lows;[11] second, the vast majority of the immigrants at the Southern border are validly seeking asylum pursuant to U.S. and international laws;[12] and, third, it has been judicially established that immigration policies cannot be based on an objective of disincentivizing immigration.[13]

The Council and AILA oppose the Proposed Regulations on four separate grounds:

1. ***The Proposed Regulations do not "implement" the FSA--and therefore do not fulfill the Government's stated purpose for their adoption***. To the contrary, the Proposed

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[9] *See Flores v. Sessions*, No. 85-cv-04544, at *31–32 (C.D. Cal. July 30, 2018) (holding that the government cannot drug immigrant children without consent); Joel Rose, *A Toddler's Death Adds to Concerns About Migrant Detention*, NPR (Aug. 28, 2018), https://www.npr.org/2018/08/28/642738732/a-toddlers-death-adds-to-concerns-about-migrant-detention; *E.D. v. Sharkey*, 2017 U.S. Dist. LEXIS 74088 (E.D. Pa. 2017) (describing "institutional sexual assault" by staff member at Berks County Residential Center); Caroline Chen & Jess Ramirez, *Immigrant Shelters Drug Traumatized Teenagers Without Consent*, ProPublica (July 20, 2018), https://www.propublica.org/article/immigrant-shelters-drug-traumatized-teenagers-without-consent.

[10] *See* PR § IV.C.1 at 45492-94. *See also* Dara Lind, *Half the People Caught by Border Patrol are Now Children or Families*, Vox (Oct. 23, 2018, 4:00 PM), https://www.vox.com/policy-and-politics/2018/10/23/18014998/families-border-asylum-caravan.

[11] For example, the number of Mexican migrants apprehended at the U.S. border in 2015 dropped to the lowest level in nearly 50 years, according to U.S. Border Patrol data. This change came after a period in which net migration of Mexicans to the U.S. had fallen to lows not seen since the 1940s. Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.--Net Loss of 140,000 From 2009 to 2014*, Pew Research Center (Nov. 19, 2015), http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/?_sm_au_=iVVTrPZDWfvPHN1Q. Apprehensions in 2017 were even lower than those in 2015. John Burnett, *Arrests for Illegal Border Crossings Hit 46-Year Low*, NPR (Dec. 5, 2017) https://www.npr.org/2017/12/05/568546381/arrests-for-illegal-border-crossings-hit-46-year-low.

[12] By law, asylum-seekers have the right to seek asylum once they are on U.S. soil. 8 U.S.C. § 1158(1). Notably, the Government has stated that asylum-seekers who cross the border at official border crossings will be deemed to be "legal" immigrants and will have their asylum applications processed; however, "in several cities along the border, asylum seekers who follow those instructions are turned away…." Robert Moore, *At the U.S. border, asylum-seekers fleeing violence are told to come back later*, Washington Post (June 13, 2018), https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe_story.html?utm_term=.2868751b6e79. In fact, the Council currently is challenging U.S. Customs and Border Protection's turning back of asylum-seekers who seek to cross at official ports of entry all along the U.S.-Mexico border. The class action lawsuit challenges CBP's widespread use of unlawful practices, including threats of family separation, among other practices, and alleges an official policy that formalizes this unlawful conduct. *See Al Otro Lado, Inc. v. Nielsen*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.); American Immigration Council, *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers.

[13] *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015).

Regulations, on their face, clearly violate both the terms and the spirit of the FSA--most critically, by eliminating the FSA's core requirement of *expeditious release of children from detention* and replacing it with a scheme that permits *prolonged (indeed, indefinite) detention of children*. Further, the Proposed Regulations eliminate due process protections for children mandated by the FSA (most importantly, by severely limiting the potential for a child to be released from detention on parole). In addition, the Proposed Regulations eviscerate the FSA's minimal standards relating to the conditions for children in detention (by subjecting the current requirements to exceptions when they represent an operational "burden"). Moreover, the adoption of regulations that contravene the FSA, which is a Consent Decree with the force of law, would constitute impermissible rulemaking.

2. ***The indefinite detention of children (which, the Government has acknowledged, the Proposed Regulations are being promulgated to facilitate) is unnecessary and would be patently inhumane.*** While the Government has not cited any information relating to the impact of detention on children, there is substantial, compelling evidence that even a short period of detention, let alone prolonged detention, has devastating, often lifelong effects on children.

3. ***The Proposed Regulations provide for the Agencies to license <u>themselves</u> to house detained children--which is a recipe for a new low in conditions for children in detention***. This self-licensing scheme (which is being invoked to permit the intended new policy of prolonged detention of children) eliminates the protections for children associated with the FSA's requirement of licensing by State agencies with child welfare experience. We note that, even while the FSA has been in effect (with its State-licensing and other requirements, as well as judicial oversight of the Government's compliance), there have been widespread, decades-long violations of these requirements--making *self*-licensing, with no judicial oversight, particularly problematic. Notably, the conditions for children in detention have ranged from poor to horrifying.

4. ***The Proposed Regulations contemplate resumption of a family separation policy--which is unnecessary and would be shockingly cruel.*** The family separation approach has been recently utilized by the Agencies with devastating effect on children and their families; was flatly rejected by the courts as almost certainly unconstitutional; and provoked one of the most intense and widespread public outcries that has ever occurred in response to an immigration policy. Moreover, there is no evidence that the policy had the intended effect of disincentivizing immigration--and, in any event, it has been judicially established that disincentivizing immigration is not a valid basis for an immigration policy.

The FSA is grounded in the truism–which has been generally recognized by our Government throughout its history, and which is enshrined in international and human rights laws–that children in the custody of the Government have a "particular vulnerability [as] minors" and need and deserve "special protection."[14] This universal principle stands regardless of a child's skin color or place of birth, whichever official

[14] FSA ¶¶ 11, 12.A.

documents a child may or may not possess, and whatever other policies or politics the Government wishes to advance.

As discussed, keeping children in indefinite detention does not implement the FSA but directly contravenes it. The Proposed Regulations would undoubtedly lead to conditions that exacerbate--rather than protect against--the inherent risks of detention for children who are especially vulnerable due to both their age and the trauma they have already suffered.[15] Prolonged detention of children is plainly unnecessary, as there are proven, effective, low-cost alternatives;[16] and, most critically, prolonged detention of children would be patently inhumane.[17]

I. THE PROPOSED REGULATIONS CLEARLY DO NOT "IMPLEMENT" THE FSA AND THEREFORE CANNOT JUSTIFY ITS TERMINATION.

The FSA provides that it will terminate "45 days following defendants' publication of final regulations implementing t[he] Agreement."[18] The Government states in the Proposed Regulations that their "primary purpose is to 'implement[ ] the Agreement,' and, in turn, to terminate the FSA."[19] The Agencies assert that the ways in which the Proposed Regulations do *not* implement the FSA reflect merely "minor modifications" intended to "ensure the Government continues to comply with the underlying goals of the FSA."[20]

However, the Proposed Regulations clearly and unambiguously *do not implement the FSA* or comply with its underlying goals. Most importantly, the Proposed Regulations (i) allow for the indefinite detention of children, which is the opposite of the FSA's core requirement that children be expeditiously released from detention; (ii) eliminate key due process protections that the FSA mandates for children in detention (including by (a) limiting a child's right to parole solely to an urgent humanitarian medical need and (b) permitting the redesignation of a child from "unaccompanied" to "accompanied"); and (iii) eliminate specific protections required by the FSA that ensure a minimum standard of conditions for children in detention.

Because the Proposed Regulations directly conflict with the terms and the spirit of the FSA in every material respect, if adopted they would *not* terminate the FSA--and thus they would not fulfill the purpose for which the Government has stated they are intended. Moreover, adoption of the Proposed Regulations

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[15] *See* the discussion at Sec. III.B. below, which reflects that even now, under the FSA, the Government has a very poor record with respect to the care of migrant children in detention; and the discussion at Sec. II.C. below, which reflects the devastating effects of detention on children.

[16] *See* the discussion at Sec. II.A below with respect to alternatives to detention.

[17] *See* the discussion at Sec. II.C. below with respect to the effects of detention on children.

[18] FSA ¶ 40.

[19] PR § IV.B.2 at 45491. "The primary purpose of this action is to promulgate regulations that would ultimately lead to the termination of the FSA, as provided for in FSA paragraph 40." PR, § IV.C.2 at 45494. We note that, with termination of the FSA, the Court's oversight of the Government's actions--which has been critical to date for any accountability for FSA compliance and which has resulted recently in the appointment of a Special Monitor--also would terminate.

[20] PR § V at 45495.

would constitute improper rulemaking as the FSA is a Consent Decree (with the force of law) and agencies cannot promulgate regulations that are contrary to law.

A. The Proposed Regulations Allow for the Indefinite Detention of Children, Which is the Opposite of the FSA's Core Requirement that Children be Expeditiously Released from Detention.

The core principle and requirement of the FSA is that migrant children taken into detention should be released from detention as "expeditiously" as possible. The FSA provides that minors taken into custody must be "expeditiously process[ed]."[21] The section of the FSA entitled "General Policy Favoring Release," provides clearly and unambiguously that "the [Government] shall release a minor from its custody without unnecessary delay" (absent certain limited circumstances).[22] Moreover, while a child is detained, the FSA requires that "the [Government], or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor...," and requires that such efforts "shall continue so long as the minor is in [Government] custody."[23]

The original FSA provided that a child could not be held in detention in an "unlicensed program"[24] for longer than three days or, under some circumstances, five days;[25] and that thereafter the child had to be released to a parent or relative, or if that were not possible, then placed into a program licensed by a State child welfare agency (a "licensed program").[26] If the Government faces an "emergency" or a major "influx" of minor children at the border, however, then the three- or five-day timeframe does not apply and the release must be effected "as expeditiously as possible."[27] In 2014, the Court acceded to the

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[21] FSA ¶ 12.A.

[22] *Id.* at ¶ 14. The only exceptions to expeditious release are the unusual circumstances where there is a particular reason that detention is "required either to secure [the child's] timely appearance before the [Agencies] or immigration court, or to ensure the minor's safety or that of others." *Id.* at ¶ 14.

[23] *Id.* at ¶ 18.

[24] *Id.* at ¶ 12.A. The FSA defines a "licensed program" as "any program, agency of organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors…[and that] meets those standards for licensed programs set forth in Exhibit I [to the FSA]." *Id.* at ¶ 6.

[25] *Id.* at ¶ 12.

[26] The child's release must be to the "least restrictive setting" possible–with priority given, first, to release to a parent or other family member and then to a "licensed program" or, "when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility," then to another suitable adult or entity seeking custody of the child. *Id.* at ¶¶ 11, 14; FSA Exhibit 1 at 2.

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

Government's request that a time period of up to 20 days be considered "expeditious" in light of the then increased numbers of arriving children. The 20-day period was set based on the Agencies' representation to the Court that that is the amount of time required for the Government, "in good faith and in the exercise of due diligence," to screen family members or others to whom a child could be released.[28]

These provisions reflect the FSA's emphasis on (a) release of children in detention "without delay"--even during times of "emergency" or an "influx" of children, and (b) licensing of facilities that house children by State agencies with child welfare experience and expertise. By contrast, the Proposed Regulations expressly provide for *indefinite detention* of Accompanied Children in FRCs (which are *not* State-licensed) pending resolution of the long process of their and their parents' immigration proceedings.[29] As noted, the Proposed Regulations only parrot the Agencies' failed request, made in June 2018 and rejected by the *Flores* Court the following month, for modification of the FSA to permit the detention of children for up to the entire pendency of their and their parents' immigration proceedings.[30] Such proceedings typically take many months and can take years, depending on the availability of counsel, the complexity of the case, and steadily increasing court backlogs.[31]

Thus, the Proposed Regulations, which purport to materially *implement* the FSA, clearly seek to accomplish the *material modification* of the FSA that the *Flores* Court rejected. In denying the Defendants' request for relief from the FSA, the *Flores* Court stated: "Defendants now seek to hold minors in indefinite detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties' Agreement [(*i.e.*, the FSA)]."[32] For this reason alone, the Proposed Regulations should not be adopted.

B. The Proposed Regulations Eliminate Key Due Process Protections for Children in Detention.

Another foundational principle of the FSA is that the Government must accord basic due process to children in immigrant detention. Indeed, the *Flores* litigation arose due to a concern that children were not

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as expeditiously as possible," including the identification of potentially available "licensed programs." *Id.* at ¶ 12.C.

[28] *See Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015).

[29] PR § IV.C.2 at 45493 ("This rule would allow for detention [of children and their families] at FRCs for the pendency of immigration proceedings…."); PR § V.A at 45497 (stating that the proposed rule would allow DHS "to detain minors together with their parents or legal guardians throughout the removal process … [and if] necessary … to maintain custody for more than a brief period.").

[30] *Compare Flores v. Sessions*, No. 85-cv-4544 (Def.'s Mem. of Points in Support of Ex Parte Application for Relief from the Flores Settlement Agreement) (C.D. Cal. June 21, 2018) (requesting court modify the FSA to allow the Government to (1) hold children and parents together in FRCs, and (2) exempt FRCs from the state licensing requirement), *with* PR § IV.C.2 at 45494 (stating that the purpose of the proposed rule is to "allow for detention of families together in federally-licensed programs").

[31] *See* "Immigration Court Backlog Tool," *TRACImmigration*, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Nov. 2, 2018) (hereinafter, "TRAC") (showing the average length of immigration proceedings across all immigration courts is 710 days) (choose "immigration" under "charge type," then "average days" under "what to tabulate").

[32] *Flores v. Sessions*, 2018 U.S. Dist. Lexis 115488, at *8 (C.D. Cal. July 9, 2018).

being extended basic due process rights in the immigration detention process. The Proposed Regulations, however, eliminate key due process protections for children. The Proposed Regulations (i) severely limit the potential for children to be granted a release from detention on parole; and (ii) allow for children who are initially designated as Unaccompanied Children to be re-designated as Accompanied Children (eliminating for them the special protections afforded to the former designation).

- ***Limiting the potential for children to be granted parole.*** The FSA provides that the Government must release a child from detention "without unnecessary delay" so long as there is an appropriate person (as specified in the FSA) to whom the child can be released.[33] The FSA specifies six types of persons who are appropriate persons to whom a child could be released and specifies the order of preference.[34] By contrast, the Proposed Regulations provide that, prior to a child's obtaining a credible fear determination (or after being found not to have a credible fear and not yet having been deported), the child can be released *only in the very limited circumstance* that a determination has been made with respect to the specific child (on a case-by-case basis) that she has a "medical necessity" requiring humanitarian release.[35] There is no clarification as to what kind of medical necessity situation would qualify.

  Further, the Proposed Regulations provide that, when that limited circumstance exists, the child can only be released if the release is to a parent or legal guardian.[36] Thus, for example, regardless of the severity of the child's medical condition, the child could not be released to another close relative, such as an adult sibling or a grandparent. This inflexible standard strips from the officer in closest contact with the child the ability to exercise any discretion to act in the child's best interest under the particular circumstances.

- ***Permitting redesignation of "Unaccompanied Children."*** The Proposed Regulations also would impact due process protections currently afforded to children in that they provide for continual revisiting, and at times altering, of the designation of a child as either Unaccompanied or Accompanied.[37] Under the current process, a designation is

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[33] FSA ¶ 14. The only exception is if continued detention is required "to secure [the child's] timely appearance before the [the Agencies] or the immigration court, or to ensure the minor's safety or that of others…." *Id.*

[34] The child shall be released, "in the following order of preference, to: "(A) a parent; (B) a legal guardian; (C) an adult relative ([sibling], aunt, uncle, or grandparent); (D) an adult individual or entity designated [(in a specified way)] by the parent or legal guardian…; (E) a "licensed program"…; or (F) an adult individual or entity seeking custody, in the discretion of the [Government], when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility." *Id.*

[35] PR § 5.A at 45502. The only other basis for release is that release would serve a "law enforcement need" of the Government. *Id.*

[36] *Id.* at 45503.

[37] PR § V.B at 45505 (the Proposed Regulations "would make clear that ORR's determination of whether a particular person is a UAC is an ongoing determination that may change based on the facts available to ORR."). The Proposed Regulations provide that a child's UAC status must be revisited and reassessed each time the immigration officials encounter the child (such as when the child attains any type of legal status or when a parent or legal guardian has been found to be physically present in the U.S. and available to assume custody of the child). If, for example, an UAC is reunited with a parent who takes custody of the child, the child would be

made only once, near to the time that the child first encounters U.S. Customs and Border Protection (CBP).[38] Even just creating a process of frequently re-examining a child's designation, as proposed, would introduce uncertainty and instability into the current system.

Even more importantly, any change in designation from Unaccompanied (UAC) to Accompanied would eliminate a number of benefits that flow from UAC status--and, in some cases, after the minor has made decisions or taken actions based on having been first designated as an UAC. For example, under the FSA, UACs are detained in "licensed programs," which are less restrictive settings than FRCs, where Accompanied Children and their parents are held.[39] Also, UACs automatically receive an exception to the one-year filing deadline otherwise applicable to asylum applications. In addition, UACs are subject to the jurisdiction of the Asylum Office of the U.S. Citizenship and Immigration Services (USCIS) rather than the Executive Office for Immigration Review (EOIR), and so are entitled to a non-adversarial interview by an asylum officer specially trained in interviewing child applicants (rather than the contested evidentiary hearing, including cross-examination, that Accompanied Children are subjected to)--which is especially critical in cases where the child is not represented by legal counsel.[40] Also, under Asylum Office jurisdiction, UACs obtain a speedier timetable for their proceedings.[41]

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redesignated as an Accompanied Child--and would immediately become subject to the one-year filing deadline, adversarial hearing process, and multi-year delay in receiving an initial adjudication, regardless of the parent's ability to provide practical support to the child and irrespective of whether the child is able to find legal counsel to assist her.

[38] If a child arrives in the U.S. *without* a parent or legal guardian, she is designated as Unaccompanied; and if a child arrives in the U.S. *with* a parent or legal guardian, she is designated as Accompanied. 6 U.S.C. § 279(g) (2012). The designation, once made, does not change, regardless of changes in the child's circumstances. For example, the child could reach the age of majority, or be reunited with a parent, but generally, if previously designated as Unaccompanied, that designation would continue to apply to the child until the conclusion of her immigration proceedings.

[39] Unaccompanied Children are held in a licensed program pending reunification with a parent or other qualified sponsor (or, if there is none, then until the adjudication of their immigration matter). If no relief is granted in the child's proceedings, she is deported to her home country. If relief *is* granted (and there still is no appropriate adult to whom she can be released), she stays in a licensed program until reaching the age of majority and then is released into the U.S. FSA ¶¶ 14, 19.

[40] *See generally J.E.F.M. v. Holder*, No. 2:14-cv-01026 (W.D. Wash. filed July 9, 2014), *sub. nom. F.L.B. v. Lynch*, 2016 U.S. Dist. LEXIS 82653 (W.D. Wash. 2016) (class certification granted in part) (class action lawsuit alleging due process and statutory right to appointed counsel for unrepresented children in immigration proceedings).

[41] *Compare* U.S. Citizen & Immigration Servs., *USCIS Asylum Division Quarterly Stakeholder Meeting* at 3-4 (Aug. 7, 2018) (stating that more than half of USCIS asylum applicants were interviewed within 43 days of filing and it is standard practice to issue a decision within two weeks of the interview), *with Immigration Court Backlog Surpasses One Million Cases*, TRACImmigration (Nov. 6, 2018), http://trac.syr.edu/immigration/reports/536/ ("Pending [Immigration Court] Cases Represent More Than Five Years of Backlogged Work").

C. The Proposed Regulations Eliminate Specific Protections Provided in the FSA That Ensure a Minimum Standard of Conditions for Children in Detention.

Another foundational principle of the FSA is that the Government should be required to maintain a minimum standard for the conditions for children while they are held in detention. The Agencies contend that the Proposed Regulations "materially parallel [the FSA's] standards and protections" and "codify[] the current requirements for complying with the FSA [and subsequently enacted laws]."[42] However, to the contrary, the Proposed Regulations significantly modify most of the key protections provided for in the FSA, and in some cases completely eviscerate those protections.

The very genesis of the *Flores* litigation was the documented, repeated, severely substandard conditions for migrant children held in detention at that time.[43] The FSA provides, as a matter of "general applicability," that "all minors in…custody [must be treated] with dignity, respect and special concern for their particular vulnerability as minors." Specifically, the FSA requires that facilities in which minors are held must be "safe and sanitary," consistent with minors' "particular vulnerability" and that "every effort must be taken" to ensure the children's well-being.[44]

The FSA mandates certain (albeit minimal) requirements for facilities where children are detained: there must be "access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor." Further, the Government must immediately "segregate unaccompanied minors from unrelated adults" (for example, children should not have to sleep in beds next to adult strangers)--and, if segregation is not possible immediately, then it must be accomplished within 24 hours.[45]

Although the text of the FSA relating to the specific requirements for a minimum standard of conditions of detention has been reproduced in the Proposed Regulations (almost verbatim, as the Proposed Regulations emphasize[46]), critically, *exceptions have been added that clearly and completely swallow the rules*. Just two key examples are as follows:

Contact between a child and her parents following their arrest together. The FSA requires that, following the arrest of a child with family members, the Government will provide for "contact" between the child and the family members who were arrested with the child.[47] While there are no specified requirements as to how much contact, what kind of contact, or when the contact will occur, the

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[42] PR § III.C at 45488.

[43] *See* Rebeca M. López, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1647 (Summer 2012) (describing pre-*Flores* conditions of "prolonged detention of [] vulnerable unaccompanied children in inhumane conditions," such as being "placed in cells with unrelated adults of both sexes, detained in penal-like settings, and [being] victims of abuse by guards and other prisoners.").

[44] FSA ¶ 12.A.

[45] *Id.*

[46] *Id.* (representing that the Proposed Regulations modify the FSA only in "limited cases").

[47] FSA ¶ 12.A.

Government apparently views this minimalist requirement as too onerous. The Proposed Regulations thus provide that the Government need not comply with this requirement if doing so "place[s] an undue burden on agency operations."[48] We observe that providing any contact at all creates some level of "burden on agency operations" and there is no guideline provided as to what would constitute an "undue" burden. With a specified exception based on any "undue burden" on an agency's operations, it is easy to imagine that contact with other family members in this context might rarely, if ever, occur.

Not housing unaccompanied minors with unrelated adults. The FSA requires that a child in detention who is not accompanied by her parent will not be housed in detention with unrelated adults; and provides, further, that if "such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours."[49] The Proposed Regulations provide that these rules do not apply (that is, unaccompanied minors *can* be housed with unrelated adults for more than 24 hours, and without *any* limit) "in the case of an emergency or other exigent circumstances." "Emergency" is defined in the Proposed Regulations as "an act or event…that prevents timely transport or placement of minors, *or impacts other conditions* provided by this section"[50] (emphasis added). The breadth of the definition of "Emergency"[51] eviscerates the protection--clearly, *any* act or event arguably "impacts" the "condition" at issue (that is, impacts in some way the ability to house an unaccompanied child with unrelated adults).[52] For good measure, the Agencies also added the exception for "other exigent circumstances" (which is not defined and, thus, could mean, presumably, *any* additional inconvenience whatsoever that the facility chooses to rely upon as justification).

The Proposed Regulations' elimination, for all practical purposes, of these and other specific protections required under the FSA reflects, again, that the Proposed Regulations do not implement the FSA but, rather, provide for the opposite of what the FSA mandates.

D. The Adoption of Regulations that Contravene the FSA Would Constitute Impermissible Rulemaking.

The FSA is a court-approved Stipulated Settlement Agreement that was voluntarily entered into by the Government and the *Flores* plaintiffs, with the parties agreeing that the Agreement is a Consent Decree.[53]

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[48] PR § V at 45500.

[49] FSA ¶ 12.A.

[50] PR § VII at 45525. It is somewhat unclear what "conditions provided by this section" refers to, as the section in which the definition appears is a section containing definitions for defined terms. Presumably, the intention is that the phrase refers to the conditions at issue in the section in which the term "emergency" appears (in this case, the conditions relating to segregating Unaccompanied Children from unrelated adults in detention housing).

[51] Notably, the Government concedes in the Proposed Regulations that the breadth of the definition is intentional. "The definition of 'emergency' is flexible and designed to cover a wide range of possible emergencies." PR § V.A at 45496.

[52] We take this opportunity to make, separately, the unsettling observation that neither the FSA nor the Proposed Regulations prohibits the housing of Accompanied Children with unrelated adults. Thus, for example, a typical room in an FRC consists of a number of sets of bunk beds, with children sleeping next to adults to whom they are not related (as long as their parent is also housed in the same room).

[53] *Flores v. Johnson*, 212 F. Supp. 3d 864, 870 (C.D. Cal. 2015).

As a Consent Decree, the FSA has the force of law. A government agency cannot promulgate regulations that contravene law.[54] As the Proposed Regulations clearly contravene the FSA, their adoption not only would not fulfill the purpose for which the Government contends they are intended (*i.e.*, to implement the FSA), but also would constitute improper rulemaking.

II. INDEFINITE DETENTION OF CHILDREN IS UNNECESSARY AND PATENTLY INHUMANE.

The very reason for the FSA was to provide for expeditious release of children from detention because prolonged detention of children is both unnecessary and patently inhumane.

A. There Are Tested, Effective, Low-Cost Alternatives to Prolonged Detention of Children.

The Agencies ignore several more humane, low-cost options that have been very effective in ensuring that families released from detention appear at their immigration hearings and comply with removal orders. These have included a Family Case Management program that required family members to supervise a detainee's release (but which was discontinued by the Government in 2017); release with an ankle monitor; release on bond; as well as other programs. Each of these alternatives to detention has proven to be effective in ensuring widespread compliance, "with approximately 99 percent of the program's participants successfully attend[ing] their court appearances and ICE check-ins."[55] Each of these alternatives involves a miniscule financial cost to the Government as compared to detention (on the order of $4-5 per day per person rather than $319 per day per person held in family detention).[56] These effective and cost-saving alternatives should not be rejected out of hand. We note that these (or other) alternatives are not even mentioned in the Proposed Regulations despite the fact that ICE already places nearly 90,000 people across the country on alternatives to detention.[57]

B. Prolonged Detention of Children Will *Not* Be a "Disincentive" to Immigration.

The Agencies state that they do not wish to return to the policy of release of families crossing the border together pending their immigration proceedings, because such a policy would encourage parents "to enter the United States illegally with juveniles or make the dangerous overland journey to the border with

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[54] 5 U.S.C. § 706 (1966).

[55] Aria Bendix, *ICE Shuts Down Program For Asylum Seekers*, The Atlantic (June 9, 2018), https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/.

[56] *See DHS Immigration and Customs Enforcement Congressional Justification for FY 2018* at 131, available at https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf (indicating the cost of family detention beds); Policy Brief, *The Real Alternatives to Detention, National Immigrant Justice Center* 1 (June 18, 2017), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf (comparing the costs of immigration detention beds with the daily cost of ATD programs).

[57] By the end of fiscal year 2017, ICE had enrolled 83,993 individuals into an "Alternative to Detention" program (ATD). DHS/ICE Budget Overview, FY 2019 Congressional Justification, at 147-149.

juveniles, a practice that puts juveniles at significant risk of harm."[58] Indeed, the Proposed Regulations, while acknowledging that "it is difficult to definitively prove a causal link given the many factors that influence migration," suggest that the Government's decision after 2014 to place families in detention (rather than to release them) during the pendency of their immigration proceedings, "helped stem the border crisis, as it correlated with a significant drop in family migration."[59]

Based on the thousands of discussions DPBP has had with asylum-seekers from Central America who were detained at STFRC, it is clear that these families will risk everything to seek asylum in the U.S. because they view the alternative of staying in their home country as almost certainly leading to their imminent death.[60] The policy of releasing migrant families pending their immigration proceedings (as was the Government's policy until 2014)[61] coincided with an increase in migration due to worsening conditions in Central America. Although, as noted in the Proposed Regulations, there was a dip in immigration from 2014-2015, that dip presumably would have continued if harsh detention policies (such as a family separation policy) were effective in disincentivizing immigration. Instead, after 2015, when families generally were no longer released at the border, the numbers of families apprehended at the Southwest border surged (to 77,674 family units in 2016–and stayed roughly at that level in 2017 and, despite the family separation policy, increased to a record high in 2018).[62] A "disincentive" that is neither legal nor effective surely should not be the linchpin of a new policy.

C. There Are Severe, Often Lifelong Adverse Psychological Effects on Children from Even Short-Term Detention.

Detention facilities are extremely stressful environments.[63] The Council, AILA and DPBP have witnessed the extensive damage that detention does to children and their parents. In Exhibits B & C, we provide just a few examples of the severe psychological trauma and physical harm that routinely results from family detention. We note, also, that a systematic review of studies investigating the impact of immigration detention on the mental health of children and adults found that "high levels of mental health problems in detainees" was reported in all ten of the studies reviewed. Anxiety, depression, post-traumatic stress

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58 PR § IV.C.1 at 45493.

59 *Id*. The drop was from 68,445 family units apprehended at the southwest border in 2014 to 39,838 such family units in 2015. *Id.*

60 *See* the Declaration of Shaylyn Fluharty, Managing Attorney of the Dilley Pro Bono Project, attached as Exhibit A.

61 *Flores v. Johnson*, 212 F. Supp. 3d 864, 874 (C.D. Cal. 2015) ("It is uncontroverted that, prior to June 2014, ICE generally released children and parents upon determining that they were neither a significant flight risk nor a danger to safety.").

62 *See* PR § IV.C.1 at 45,493; U.S. Customs & Border Protection, *Southwest Border Migration FY2018*, https://www.cbp.gov/newsroom/stats/sw-border-migration (Oct. 23, 2018) (in fiscal year 2018, the number of family units apprehended at the Southwest border exceeded 100,000 for the first time ever).

63 Raul Reyes, *America's Shameful 'Prison Camps'*, CNN online (July 23, 2015), https://www.cnn.com/2015/07/23/opinions/reyes-immigration-detention/ (describing immigration detention facilities as "prisons and jails"); Jamie Ducharme, *Separating Kids from Parents Can Cause Psychological Harm. But Experts Say Detaining Them Together Isn't Much Better*, Time (June 21, 2018), http://time.com/5317762/psychological-effects-detaining-immigrant-families/.

disorder (PTSD), self-harm and suicidal ideation all were commonly reported. Further, there was a strong correlation between the length of time in detention and the severity of distress. [64] Another study found that suicidal ideation became common in more than half of the young detained immigrants studied; that a third of children who previously had never engaged in self harm began to do so; and that detention was the cause of the stress.[65] Moreover, while there was some evidence for an initial improvement in mental health occurring subsequent to release, longitudinal results show that "the negative impact of detention persists."[66]

The conditions of detention not only cause psychological harm themselves, but they also exacerbate previously experienced trauma. Jodi Berger Cardoso, Assistant Professor of Social Work at the University of Houston, has found that arriving immigrant children have an average of eight traumatic life events, "a clinical category that includes experiences like kidnapping, sexual assault, and witnessing violent crimes."[67] Further, "[a]bout 60% of those [children] met the criteria for PTSD (posttraumatic stress disorder) and 30% for depressive disorder."[68] Numerous forensic evaluations of the DPBP clients detained at STFRC recognized that most of them already were severely traumatized when they arrived in the U.S. and that the detention itself was an additional, independent, and severe stressor.[69]

In addition, family detention provides unique mental health challenges for immigrant children because of the effect of detention on their parents.[70] Children rely on their caregivers to help them understand the world, and to formulate responses to it.[71] "For young children, witnessing a threat to their caregiver has been identified as the most potent predictor of PTSD."[72] Thus, witnessing their parents languish in detention and suffer their own mental health conditions magnifies the mental health challenges for

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64 Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. OF PSYCHIATRY 306 (2009)).

65 Kevin Loria, *Trump Now Claims Migrant Children will be Reunited with their Families. Here are the Lifelong Psychological Consequences These Kids Face.*, Business Insider (June 21, 2018), https://www.businessinsider.com/how-family-separation-and-detention-affect-children-2018-6?utm_source=copy-link&utm_medium=referral&utm_content=topbar&utm_term=desktop. *Id.* (*citing* Robjant, *supra* note 65).

66 Robjant, *supra* note 65.

67 Loria, *supra* note 28.

68 *Id.*

69 *See* Exhibit B & C hereto, which provides a short summary of psychological evaluations performed on certain detained persons at STFRC. We note, for example, the Psychological Evaluation of "Celia," at 5 (Exh B.) ("Detention has the effect of creating an environment that forces Celia to re-experience her trauma on a daily basis, which serves to re-traumatize her."); and the Psychological Evaluation of Cecilia, at 3 (Exh C.) ("[Cecilia's] daughter cries every night. After her daughter goes to sleep she herself weeps every night. She cannot sleep. It is a mixture of awful memories and dread about being trapped in this prison.").

70 Ducharme, *supra* note 48.

71 Sarah Mares & Jon Jureidini, *Psychiatric Assessment of Children and Families in Immigration Detention -- Clinical, Administrative and Ethical* issues, 28 AUSTL. & N.Z. J. PUB. HEALTH 520, 521 (2004).

72 Loria, *supra* note 28.

immigrant children. Further compounding the problem, mental health services in family detention facilities are limited, and typically the availability falls below even ICE's own guidelines.[73]

III. THE FEDERAL GOVERNMENT'S PROPOSED FAMILY RESIDENTIAL CENTER SELF-LICENSING REGIME ELIMINATES THE PROTECTIONS FOR CHILDREN ASSOCIATED WITH THE FSA'S REQUIREMENTS FOR STATE LICENSING.

Another critical way in which the Proposed Regulations do not implement the FSA--but, rather eliminate key protections for children provided under the FSA--is that the Proposed Regulations permit the Agencies to, in effect, license themselves. The Proposed Regulations acknowledge that the self-licensing provision is a "notable change" to the FSA.[74] Moreover, clearly, self-licensing does not reflect a "guiding principle" of having "special concern for the[] particular vulnerability [of] minors."[75]

The FSA mandates that children "shall" be placed with a "licensed program," that is, a "program, agency, or organization that is *licensed by an appropriate State agency* to provide residential, group, or foster care services for dependent children" when release to a parent or guardian is not possible.[76] While the FSA seeks the release of children from federal residential facilities "as expeditiously as possible,"[77] the Proposed Regulations would enable the Government to self-license federal family residential centers as a means to detain children indefinitely.[78] History indicates that allowing the Government to self-license would be a recipe for disaster.

A. The lack of availability of State licensing for an FRC underscores that the housing of children with unrelated adults is contrary to basic child welfare standards.

The Agencies justify their proposed licensing scheme (of federal government licensing itself to house detained children) by pointing out that it is very difficult to accomplish licensing of federal FRCs by State agencies because few States have agencies that establish standards and provide licenses for facilities that house children together with parents. We observe, however, that family homeless shelters, for example, house parents and children and are State-licensed. The critical feature of FRCs that results in a lack of licensing is that each family is not housed in its own separate space; rather, children are *housed in the same room* with unrelated adults. The reason that State licensing is not available to FRCs is that the arrangement violates a basic child welfare standard. Indeed, in Texas, courts have found that altering the

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[73] Julie M. Linton, *et al.*, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 5 (2018). We note that all medical providers at STFRC are employees of U.S. Immigration and Customs Enforcement (ICE) and that ICE accords no confidentiality to detainees' information.

[74] PR § V at 45495.

[75] PR § III.C.2 at 45494.

[76] FSA ¶¶ 6, 14, 19 (emphasis added).

[77] FSA ¶ 12.C.

[78] The Government never specifies how long children will be detained in FRCs under the Proposed Regulation, but admits that "this rule may result in additional or longer detention for certain minors," PR § III.C at 45488, and that the proposed "alternative licensing process that would allow FRCs to be considered 'licensed programs' under FSA paragraph 6, and thus suitable for detention…for longer periods of time than they are currently used," PR § V at 45495.

State regulations to allow for licensing of facilities in which children sleep in rooms with unrelated adults would be impermissible as it is contrary to the best interest of the child and the intent of the State legislature.[79]

Thus, the Agencies' emphasis on the lack of licensing for facilities housing children with their parents highlights that self-licensing by the federal government simply would be the equivalent of no licensing. Also highlighted is the fact that children who are detained with their parents in FRCs are not, even under the FSA, protected by basic licensing-type standards set by appropriate agencies. The only counterweight to this problem is that, at least, under the FSA, the detention in federal facilities has been limited to 20 days.[80] The risk to children would be heightened exponentially if the detention period were not time limited.

B. The Government has a long history of non-compliance with its own standards for conditions of detention, despite engaging third-party operators.

There has been extensive media coverage detailing substandard living conditions in many ICE detention facilities.[81] Indeed, the Government *itself* has identified numerous occasions of non-compliance. For example, the DHS Office of the Inspector General reported on September 27, 2018 that "serious issues relating to safety, detainee rights, and medical care" were identified at the Adelanto ICE Processing Center.[82] These issues included staff "not taking seriously the recurring problem of detainees hanging

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[79] *See Grassroots v. TDFPS*, No. D-1-GN-15-004336, at *3 (353rd Dist. Ct., Travis County, Tex. Sept. 30, 2015).

[80] As discussed below, however, Accompanied Children are currently being held in FRCs far longer than 20 days. According to ICE data released pursuant to a Freedom of Information Act request, the average length of detention in Berks County Family Shelter during fiscal year 2017 was 58 days. See Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, National Immigrant Justice Center (Mar. 12, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet. The Government has attempted to justify this lack of compliance with the FSA by arguing that the litigation against family separation was settled on the basis that families would not be separated. Therefore, the Government asserts, it cannot release the children without the parents under the settlement terms. We observe that what the Government really means is that, under the settlement, it cannot do what it wants to do (keep the parents in detention) without also releasing the children–so it simply keeps the children in detention and claims that it "has to" do so.

[81] *See, e.g.*, Michael Garcia Bochenek, *US Family Detention Centers Not 'Like Summer Camp'*, Human Rights Watch (Aug. 1, 2018), https://www.hrw.org/news/2018/08/01/us-family-detention-centers-not-summer-camp ("[D]etention is traumatic ... destructive … and dangerous -- ICE has a long and terrible history of providing subpar medical care[] for adults and children."); Alfonso Gonzales, *Why We Need to End Family Detention--Again*, Politico (Mar. 30, 2015), https://www.politico.com/magazine/story/2015/03/family-detention-centers-border-crisis-116521 (describing the Karnes detention center as a place "where there have been widespread reports of sexual abuse, psychological violence from guards, [detainees are] fed rotten or otherwise inedible food and being deprived of adequate medical treatment.").

[82] Dept. of Homeland Security Office of Inspector General, OIG-18-86, Management Alert -- Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California (Sept. 27, 2018) at 2.

bedsheet nooses,"[83] and routinely placing detainees in disciplinary segregation without a panel hearing or "opportunity to appeal, thereby violating the detainee's right to due process."[84]

The DHS Office of Inspector General this year found that the existing internal inspection system "do[es] not ensure adequate oversight or systemic improvements in detention conditions; certain deficiencies *remain unaddressed for years*." In fact, ICE facilitates chronic non-compliance through a waiver system, which "allow[s] facilities to exempt themselves from standards that ICE deems critically important, including those related to health, safety, and security."[85] In one situation documented by the DHS Inspector General, ICE allowed a facility to commingle detainees of different custody levels because compliance, the facility asserted, could only be achieved at "overwhelming expense … [and] may prove to be an undue burden upon the facility."[86] Thus, in adult facilities, operational concerns have given rise to exceptions that swallow the rules, and the Proposed Regulations forecast the same in a self-licensing model with responsibility for children.

Another glaring illustration of the dangers of leaving the Government to provide oversight of itself is the debacle that resulted from the Government's implementation of its Zero Tolerance Policy in Spring 2018. According to the Government's own report, the Government was "not fully prepared to implement the Zero Tolerance Policy" or to "deal with certain effects" of the policy. The report chronicles numerous problems in connection with the implementation--from not having a sufficient technology system to track immigration information, to encouraging asylum-seekers to come to ports of entry to make their asylum claims and then restricting their entry ("which may have led [the asylum-seekers] to [make] illegal border crossings").[87]

As discussed, the FSA recognizes the "particular vulnerability of minors"[88] and endeavors to advance their health, safety, and expeditious release. Any regulations attempting to "satisfy the basic purpose of the FSA," as the Proposed Regulations purport to do, would implement a licensing system that prioritizes health, safety, and security standard compliance. But the Proposed Regulations instead provide that children can be detained in a facility "for the time needed to complete immigration proceedings" as long as "DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE." This purported "alternative licensing scheme" for FRCs (under an unknown, unnamed entity) compares *unfavorably* with the inspection system already used for oversight of ICE adult detention facilities, which, as noted, has failed. Most ICE facilities are operated by private contractors with substantial experience in adult correctional facilities. The notion that the Agencies could do better on their own for children and families, without even a model to build on, is untenable.

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[83] *Id.* at 3.

[84] *Id.* at 5.

[85] Dept. of Homeland Security Office of Inspector General, OIG-18-67, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* (June 26, 2018) at 13.

[86] *Id.*

[87] Dept. of Homeland Security Office of Inspector General, OIG-18-84, *Special Review--Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (September 27, 2018) at 2, 6.

[88] FSA ¶ 11.

C. The Agencies have failed repeatedly to comply with the FSA, reflecting that they are a poor steward for FSA protections.

The proposal for self-licensing in the Proposed Regulations comes against a backdrop of a long history of repeated failures (including very recently) by the Agencies to comply with the terms of the FSA. As just one blatant example, DPBP has reported to the Council and AILA that there have been numerous families held in detention for approximately *two years* (a rather blatant violation of the *20-day* rule). In addition, the Agencies have repeatedly sought modifications of the FSA, and have on numerous occasions asserted interpretations of the FSA that would eliminate or minimize the FSA's protections for children. Regulation of the Agencies by the Agencies themselves would almost certainly lead to a new low in detention center conditions for children–conditions which are seriously problematic even now, without self-regulation, and without termination of the FSA and the Court oversight that goes with the FSA.

We note, for example, the following (just since 2015):

(i) In July 2015, the *Flores* Court found the DHS to be in breach of the FSA and rejected the DHS's request to modify the FSA. On appeal, the Ninth Circuit affirmed the lower court's refusal to amend the FSA and rejected the Government's argument that the FSA applied only to unaccompanied minors and not to children in family detention centers with a parent.

(ii) In June 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's order appointing a special monitor for detained migrant children after concluding that children continued to be held longer than 20 days in secure, unlicensed facilities in defiance of the FSA (and of the Court's previous orders). The Court found that almost all Rio Grande Valley sector facilities in which children and adults were held had unsafe and unsanitary conditions, with inadequate food, inadequate access to clean drinking water, inadequate hygiene, cold temperatures and inadequate sleeping conditions.

(iii) In July 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed an order granting the motion of a plaintiff class to enforce the FSA by granting migrant children held in detention the right to a bond hearing before an immigration judge. The court also rejected the Government's contention that the Homeland Security Act and the Trafficking Victims Protections Reauthorization Act had terminated certain requirements in the FSA for unaccompanied migrant children (a claim that the Government makes again in the Proposed Regulations and cites as a key reason why the Proposed Regulations should be adopted).

(iv) In July 2018, the *Flores* Court denied the Government's *ex parte* application for relief from the FSA, stating: "Defendants seek to light a match to the *Flores* Agreement and ask this Court to upend the parties' agreement by judicial fiat."[89]

(v) Also in July 2018, the *Flores* Court found that conditions at the Government's Shiloh Residential Treatment Center in Manvel, Texas violated the FSA. The Court ordered all children removed from the facility and ultimately appointed an independent Special

[89] *Flores v. Sessions*, No. 85-cv-04544, at *3 (C.D. Cal. July 9, 2018) (Order Denying Defendants' "*Ex Parte* Application for Limited Relief from Settlement Agreement").

Master to monitor the Government's compliance with the FSA. The allegations reviewed by the Court included abuse and overmedication with psychotropic drugs against the children held there. The Court ordered the Government to obtain parental consent or a court order before giving children psychotropic drugs except in emergency circumstances as described in the Texas Family Code.

IV. THE PROPOSED REGULATIONS CONTEMPLATE A RETURN TO THE SHOCKINGLY CRUEL AND LIKELY UNCONSTITUTIONAL POLICY OF FAMILY SEPARATION.

Another critical way in which the Proposed Regulations do not implement the FSA (but, again, provide for the very opposite) is that they contemplate a renewal of the Government's failed family separation policy. Family separation represents the very opposite of the FSA's focus on the best interests of the child taking into account children's extreme vulnerability--as well as its provisions on reunification of families and preference for release of a detained child to the parent. Moreover, the Government's family separation policy implemented during Spring 2018 was found by the courts to have been likely unconstitutional, as well as "brutal, offensive, and…shock[ing] the conscience."[90]

A. The Proposed Regulations Clearly Contemplate Family Separation.

The Proposed Regulations state that they are intended to provide maximum optionality for the Agencies with respect to the detention of parents and their children who cross the border together. DHS has "three primary options," according to the Proposed Regulations--one of which is to "detain the parent... and either release the juvenile … or transfer [the juvenile] to HHS to be treated as an UAC."[91] This option is the family separation option--i.e., detention of a parent and treating the child (although she was accompanied by a parent) as a UAC who will thus be detained separately in a facility for UACs. The Proposed Regulations, the Agencies state, "would, when finalized, . . . allow for the full range of options at each stage of proceedings"[92]—that is, the range of options available to the Agencies expressly includes the family separation option.

Indeed, whenever there is a reference in the Proposed Regulations to detaining families together in detention, the statement is a *qualified* one. There are many references to "family detention," but they

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90 *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1167 (S.D. Cal. 2018). Judge Dana Sabraw (a former President George W. Bush appointee) wrote in his decision: "The government actors responsible for the 'care and custody' of migrant children have, in fact, become their persecutors. . . . These allegations sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child, and is emblematic of the exercise of power without any reasonable justification in the service of an otherwise legitimate governmental objective . . . . Such conduct . . . is brutal, offensive, and fails to comport with traditional notions of fair play and decency. At a minimum, the facts alleged are sufficient to show the government conduct at issue 'shocks the conscience' and violates Plaintiffs' constitutional right to family integrity." *Id.* at 1166-67.

91 PR § IV.C.1 at 45492. The other two options are (i) parole of the parent and child together–which the Government makes clear it strongly opposes, *see id.* at 45,493; and (ii) the preferred option of indefinite detention of the parent and child together which would be possible if the desired termination of the FSA were effected.

92 PR § IV.C.1 at 45492.

never appear without a qualifier such as "family detention *as appropriate*"[93] or the "ability to use family detention when it will be an *effective tool*" (emphases added).[94] This phraseology underscores that "family unity" will be the objective only as and when the Government views that option as being preferable *for its purposes* as compared to the family separation option.[95]

In addition, since the Proposed Regulations were issued, the Government has expressly confirmed that it does indeed seek to reinstate a family separation policy.[96] One option being seriously considered (which is referred to as the "binary option") is that the "government [would] detain asylum-seeking families together for up to 20 days, then give the parent a choice--stay in family detention with their child for months or years as their immigration case proceeds, or allow children to be [separated from the parents]…."[97] This "binary option" is essentially a choice between (a) a child being taken from her parent

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93 *See, e.g.*, PR § IV.C.1 at 45493; PR § IV.C.1 at 45494; PR § VI.A.4 at 45520.

94 *See, e.g.*, PR § VI.A.4 at 45520 ("Without…this rule, family detention is a less *effective* tool to meet the enforcement mission of ICE"); § IV.C.1 at 45494 (referring to DHS's desire to be able "to *effectively* use family detention") (all emphases added). We would note that the Council and AILA have long taken the view that family detention, which is both unnecessary and inhumane, should never (or only very rarely) be considered appropriate or an effective tool. *See, e.g.*, the Complaint filed with DHS's Office of Civil Rights and Civil Liberties (CRCL), by the Council, AILA and the Women's Refugee Commission, on the serious mental health impact of family detention on children and mothers. AILA Doc. No. 15062536 (June 30, 2015), https://www.aila.org/advo-media/press-releases/2015/impact-family-detention-mental-health/complaint-mental-health-family-detention.

95 We note that, in other contexts, legislators have recognized, and taken action to avoid, the inherent conflict of interest when an agency has a dual role as both the party making the determinations about a child's detention status and also being the safe-keeper of the child's well-being while in detention. This conflict was the motivating force behind the transfer of responsibility for custody of Unaccompanied Children from ICE to ORR (so that ICE was not both the child's "protector" and "deporter" at the same time). This inherent conflict (although arguably particularly acute in the case of Unaccompanied Children) is relevant in the context of Accompanied Children as well. Indeed, the Council and AILA are aware of numerous instances in which ICE has been unable to make appropriate, individualized, child welfare-based choices regarding placement of children that are required by the FSA (such as whether a child is a flight risk or a danger to others). Through DPBP, the Council and AILA are aware that ICE's blanket approach, which is that all children currently must be detained, has led to children being kept in detention who were amputees with no arms, had serious seizure disorders, had cerebral palsy, were actively suicidal after having been detained for several months, and had been in detention for two years. In addition, an 8-1/2 months pregnant mother was kept in detention (and lost her baby).

96 *See, e.g.*, Philip Rucker, *Trump Says He is Considering a New Family Separation Policy at U.S.-Mexico Border*, Washington Post (Oct. 13, 2018), https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html?utm_term=.67fa33e1ef7d (President Trump confirmed that "he is considering a new family separation policy at the U.S.-Mexico border because he believes the administration's earlier move to separate migrant children from parents was an effective deterrent to illegal crossings"); Phil Helsel, *Trump Suggests Support for Family Separation, after Earlier Practice Caused Outcry*, MSNBC (Oct. 13, 2018, 6:58 PM), https://www.nbcnews.com/politics/politics-news/trump-suggests-support-family-separations-after-earlier-practice-caused-outcry-n919866 (quoting the president as saying "I will say this: If they feel there will be separation, they don't come.").

97 Nick Miroff, et al., *Trump administration weighs new family-separation effort at border*, Washington Post (Oct. 12, 2018), https://www.washingtonpost.com/local/immigration/trump-administration-weighs-new-family-separation-effort-at-border/2018/10/12/45895cce-cd7b-11e8-920f-

(who is left in detention), being treated as an Unaccompanied Child, and being detained--for what should be a maximum of 20 days--in a facility that is licensed by a child welfare agency, or (b) a child being detained with her parent, but indefinitely and in a facility that is not licensed as being suitable for children. The choice necessarily contravenes at least one of the twin objectives of the FSA of (i) providing for appropriate conditions while a child is detained and (ii) prompt release from detention to one's family.

Thus, while the Proposed Regulations are cloaked in the narrative that the Government's objective is to "keep families together" and "maintain family unity," the Proposed Regulations would accommodate--and, indeed, clearly contemplate-- a return to a family separation policy.

B. The Proposed Regulations, in Contemplating a Family Separation Policy, Do Not "Implement" *Flores* But Reflect Its Opposite.

As discussed in Section I.C. above,[98] the FSA generally requires that the Government "treat[] all minors with . . . special concern for their particular vulnerability as minors"[99] and that "every effort must be taken [by the Government] to ensure . . . the well-being" of minors held in detention.[100] The FSA requires specifically that, with respect to any child in immigration detention who is not in detention with a parent, under whatever circumstances, the Government (or the non-Government detention facility, as applicable) must make "continuous efforts on its part toward family reunification and the release of the minor . . . ." and "[s]uch efforts at family reunification shall continue so long as the minor is in [Government] custody."[101]

It goes without saying that nothing about forcibly separating a child from a parent could be considered to reflect a special concern for children's particular vulnerability as minors, nor an effort to ensure the well-being of children. It goes without saying that forcibly separating a child from a parent is the very opposite of making continuous efforts to achieve family reunification.

C. A Return to a Family Separation Policy Would Be Unnecessary, Improper, and Shockingly Inhumane.

Further, according to the Government's own report on the family separation policy, the Government violated the FSA by holding separated children "for long periods of time in facilities intended solely for short-term detention." Specifically, hundreds of children were held more than the permissible 72 hours in CBP custody (about a quarter of the children were detained in CBP holding cells for over five days; and one child was in CBP custody for 25 days), with very limited access to clear drinking water, food and hygiene products.

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dd52e1ae4570_story.html?utm_term=.c36628e64404 ("In addition to considering 'binary choice' and other options, officials have proposed new rules that would allow them to withdraw from [the FSA] that bars ICE from keeping children in custody for more than 20 days").

98 *See* Sec. I.C. above.

99 FSA ¶ 11.

100 *Id.* at ¶ 12.A.

101 *Id.* at ¶ 18.

Even the Government does not contend that family separation is *necessary*, or even appropriate, other than as a deterrent to immigration,[102] and, as discussed, the courts have rejected the concept that migrant families can be detained--let alone separated--for the purpose of deterrence.[103] Further, based on the Council's and AILA's extensive, personal experience with detained families, it is clear that deterrence is a faulty premise. Asylum-seeking parents leave their homes and everything they own and know for a dangerous journey and uncertain future only out of the sheer desperation that comes from fear of imminent death in their home countries. They view themselves as having no choice but to try to get themselves and their children here so that their asylum claims can be heard and decided.[104]

We note that the DHS's own Advisory Committee on Family Residential Centers, in its 2016 report, issued a unanimous recommendation that "…detention is generally neither appropriate nor necessary for families—and that detention of the separation of families for purposes of immigration enforcement or management are never in the best interest of children." The Committee's recommendation was clear-cut: Do not separate children from parents in order to keep the parents in detention.[105] The UNHCR, in a 2012 declaration of "The Rights of All Children in the Context of International Migration," wrote: "[R]egardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violations of the children's rights, is never in their best interests and is not justifiable."[106] We note that the American Academy of Pediatrics has formally adopted a position that "children in the custody of their parents should never be detained, nor should they be separated from a parent…."[107]

The courts flatly rejected the previous family separation policy.[108] The widespread public outrage about the Government's family separation policy during summer 2018–one of the most vociferous, widespread reactions to any immigration policy in recent years–is a reflection that family separation is a failed, unnecessary and improper concept. In response to the pressures of judicial rulings and public outcry

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[102] *See* PR § IV.C.1 at 45493 ("It is important that family detention be a viable option … [because] [t]he expectation that adults with juveniles will remain in the United States outside of immigration detention may incentivize [immigration].").

[103] *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (civil detention "for the sake of sending a message … appears out of line with [] Supreme Court decisions" because "the Court has declared such 'general deterrence' justifications impermissible.").

[104] *See* the discussion above at Sec. II.B.; *see also* Exhibit A [Fluharty Decl.].

[105] DHS Advisory Comm. on Family Residential Centers, *Report of the DHS Advisory Committee on Family Residential Centers* (Sept. 30, 2016) at 10 (stating that family separation "raises serious concerns and violates the best interests of the child–which requires prioritizing family integrity and the maintenance of emotional ties and relationships among family members.").

[106] Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* at 10 (Sept. 28, 2012), United Nations Human Rights, https://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012crc_dgd-childrens_rights_internationalmigration.pdf.

[107] Julie M. Linton, et al., *Policy Statement: Detention of Immigrant Children*, Am. Academy of Pediatrics (Apr. 2017), http://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf.

[108] *See Ms. L v. ICE*, No. 180428 (S.D. Cal.); *Dora v. Sessions*, No. 01938 (D.D.C.); *MMM v. Sessions*, No. 1832 (S.D. Cal).

against the family separation policy, the U.S. President issued an Executive Order formally ending the policy and purportedly adopting "a policy of this Administration to maintain family unity."[109]

Family separation is a starkly inhumane policy. It has been referred to as "an unmitigated moral catastrophe."[110] It has been compared to "kidnapping by the government"[111] and policies that were implemented in Nazi Germany.[112] The President of the American Psychological Association, in response to the family separation policy, issued a letter decrying that the Government's continuing to "place the mental and physical health of migrant children and their families in jeopardy."[113]

According to the U.S. Government Accountability Office report issued in October 2018, during the family separation policy implemented from approximately April through June 2018, 2,654 children were forcibly taken from a parent.[114] These children were transported to detention facilities throughout the country, without the parent being told where or when (or even *if*) he or she would ever be reunited with the child. Over 100 of these children were the age of four or less.[115] Many were left to "advocate" for themselves in the legal process, including appearing at interviews and hearings that affected their right to be in the country, the possibility of their being reunified with their parent, and the possibility of their

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109 E.O. 13841 § 1, 83 Fed. Reg. 29435 (June 20, 2018).

110 Dan Desai Martin, *White House Seeking to Reinstate Family Separation Policy*, The National Memo (Oct. 15, 2018), http://www.nationalmemo.com/white-house-seeking-to-reinstate-family-separation-policy/.

111 *See* Patrick Timmons, *Trump Child Separation Policy Akin to Kidnapping - Senior Texas Official*, The Guardian (June 20, 2018), https://www.theguardian.com/us-news/2018/jun/20/trump-family-separation-policy-texas-el-paso.

112 *See, e.g.*, Harriet Sinclair, *Former CIA Chief Compares Trump Administration to Nazi Germany Over Border Policy*, Newsweek (Nov. 1, 2018), https://www.newsweek.com/former-cia-chief-compares-trump-administration-nazi-germany-over-border-policy-980348.

113 Jessica Henderson Daniel, PhD, *Statement of APA President Regarding Administration's Proposal to Detain Child Migrants Longer Than Legally Allowed* (Sept. 6, 2018), https://www.apa.org/news/press/releases/2018/09/detain-child-migrants.aspx.

114 U.S. Gov't. Accountability Office, GAO-19-163, UNACCOMPANIED CHILDREN: Agency Efforts to Reunify Children Separated from Parents at the Border (2018) at 26 [hereinafter ("GAO Report")]. We note that the number of children who were separated could be higher than the number reported by the Government. *See* Tal Kopan, *Administration 'Discovers' More Separated Children--Have Others 'Fallen Through the Cracks'?*, San Francisco Chronicle (Oct. 26, 2018), https://immigrationcourtside.com/category/courts/usdc-sdca/judge-dana-sabraw/mmm-v-sessions/ (stating that Government officials conceded in a court filing that the Government "failed to recognize that 14 children in its care for months had been separated from their families at the Mexican border . . . The disclosure raises fresh questions about whether the administration neglected to account for additional children after separating them from their parents under its 'zero tolerance' immigration policy . . . Two recent government reports faulted the administration's tracking efforts, and one said officials feel no obligation to find children who were released to other homes before a judge ordered an accounting of the youths, suggesting the total separated under the policy may never be known.").

115 GAO Report at 26.

release from detention.[116] Some were coerced into signing forms voluntarily waiving their rights.[117] The children's suffering was unimaginable.[118]

Four-hundred and thirty-seven children were still not unified with a parent or other relative as of September 10, 2018.[119] At least 64% of these children[120] likely have been *permanently orphaned* by the Government as their parents were deported during the separation and now, due to the government's essentially non-existent record keeping[121] on the basic question of which children belonged to which

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[116] Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA Today (June 27, 2018), https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/ (describing a three-year-old climbing on the table during his legal proceedings); Tal Kopan, *Kids in Immigration Court: A Maze With Life and Death Consequences*, CNN (July 1, 2018), https://www.cnn.com/2018/06/30/politics/children-in-court/index.html ("[T]here is no minimum age. Toddlers and infants do, in fact, appear before judges in the system to defend themselves against deportation.").

[117] For example, five-year-old Helen, an asylum-seeker from Honduras, was separated from her grandmother (after the family separation policy was purportedly ended). Helen requested an immigration judge, but later, "with assistance from officials," filled out a form to withdraw her request. Helen remained in detention, separated from her family, until a pro bono attorney was able to navigate "a complete maze" just to discover where Helen was being held. Soon thereafter, Helen was transferred to foster care. Helen's family and attorneys publicized her case and organized a petition; each time a new signature was added, ORR officials received an email. Ten thousand people signed the petition. Helen was finally returned to her family after the Government had detained her for more than two months. *See* Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights*, The New Yorker (Oct. 11, 2018), https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights. *See also* the Complaint (Aug. 23, 2018) filed by the Council and AILA, with CRCL and OIG, on behalf of numerous parents who were separated from their children and who were subject to explicit and implicit coercion while in DHS custody. https://americanimmigrationcouncil.org/advocacy/illegal-and-systematic-practice-coercing-separated-families-must-be-investigated

[118] *See* Exhibit D (which contains letters written by detainees at STFRC, describing the impact of being separated from their children).

[119] GAO Report at 33.

[120] *Id.*

[121] Nick Miroff, et al., *'Deleted' Families: What Went Wrong With Trump's Family-Separation Effort*, Washington Post (July 28, 2018), https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.05ba5d88bf56 ("Compounding failures to record, classify and keep track of migrant parents and children pulled apart by President Trump's 'zero tolerance' border crackdown were at the core of what is now widely regarded as one of the biggest debacles of his presidency."); Jonathan Blitzer, *The Government Has No Plan For Reuniting The Immigrant Families It Is Tearing Apart*, The New Yorker (June 18, 2018), https://www.newyorker.com/news/news-desk/the-government-has-no-plan-for-reuniting-the-immigrant-families-it-is-tearing-apart ("No protocols have been put in place for keeping track of parents and children concurrently, for keeping parents and children in contact with each other while separated, or for eventually reuniting them."); Lydia Wheeler, *Watchdog Sues Trump Administration Over Family Separation Records*, The Hill (Oct. 26, 2018), https://thehill.com/homenews/administration/413405-watchdog-sues-trump-administration-over-family-separation-records (reporting Citizens for Responsibility and Ethics (CREW) lawsuit against the Government, which alleges "rarely has a records management failure had such catastrophic consequences: DHS ripped thousands of children away from their parents, failed to make and preserve adequate documentation of individuals taken into custody, and, consequently, has been unable to reunify each of the families it separated").

parents and how to subsequently reach parents who were deported, the Government now is unable to find the parents who were deported.[122] Most of these children and their parents now will simply have to live the rest of their lives without each other.

Even if these outrageous record-keeping and other abuses were corrected in the context of a new family separation policy, the fact of family separation itself takes a devastating human toll. We note that, in connection with issuing the Proposed Regulations, the Government has not conducted or cited a single study or expert on the impact of separation of families. Rather, the Government completely ignores the abundant evidence (in addition to the dictates of basic common sense) that family separation has both short-term and long-lasting severely traumatic effects on parents and, especially, on children.[123] This fact reveals that the Agencies' true purpose in the proposed Regulations is not to do what is best for the children as the FSA mandates, but rather what is expedient for them in achieving their (already judicially rejected) policy goals.

The Council, AILA and DPBP themselves have extensive first-hand experience observing the trauma that adults and children have experienced through family separation. In Exhibit F, we have summarized a small number of examples of the suffering of mothers and children who were separated under the family separation policy in effect over Spring 2018. These are not abstract "stories" but the real, lived experiences of real adults and children whose psychological well-being will be affected for the rest of their lives. As a country, we should not resume this path.

It shocks the conscience that, having terminated its family separation policy, the Government would seek to reintroduce it just a few months later--under the guise, no less, of Proposed Regulations purportedly being issued to foster "family unity" and to implement *Flores*. \Such a cynical approach, with such an inhumane result, with the unnecessary suffering of innocent children as its centerpiece, surely is, as it was the first time, beneath our great nation.

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[122] "The unfortunate reality," the court wrote in *Ms. L v. ICE*, "is that…migrant children [were] not accounted for with the same efficiency and accuracy as *property*…[that is] routinely catalogued, stored, tracked and produced upon a detainee's release…[such as] money, important documents, and automobiles, to name a few." No. 180428, at *14-15 (S.D. Cal.). *See also* the Dept. of Homeland Security Office of Inspector General, OIG-18-84, *Special Review--Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (September 27, 2018), which reports that the Government had no system in place to track the families it was separating, that fewer families might have been separated if officials had not wished to avoid "additional paperwork" to track them; and that "pre-verbal children" (*i.e.*, babies and toddlers) were not given "wrist bracelets or other means of identification, nor did the [Government] fingerprint or photograph most children during processing to ensure that they [could] be easily linked with the proper file."

[123] *See* Kevin Loria, *Trump Now Claims Migrant Children will be Reunited with their Families. Here are the Lifelong Psychological Consequences These Kids Face.*, Business Insider (June 21, 2018), https://www.businessinsider.com/how-family-separation-and-detention-affect-children-2018-6?utm_source=copy-link&utm_medium=referral&utm_content=topbar&utm_term=desktop (discussing studies and testimonials by experts documenting the significant psychological impact of family separation); *see generally* Johayra Bouza, et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, Society for Research in Child Development (June 20, 2018), https://www.srcd.org/sites/default/files/documents/the_science_is_clear.pdf (describing the terrible mental health impacts of family separation).

CONCLUSION

As evidenced by the terms of the Proposed Regulations themselves, the Agencies do not truly intend to "implement" the FSA through the Proposed Regulations but rather seek to *circumvent* the FSA and avoid further judicial oversight. Specifically, the Agencies wish (i) to implement a policy of prolonged detention of children--in facilities which the *Flores* Court found long ago, and has steadfastly maintained over decades, are unsatisfactory for children beyond a short period of time, and (ii) at the same time, to effectively eviscerate the basic due process and living condition protections provided by the FSA for children while they are in detention.

The policy of prolonged detention of children that the Agencies seek to effect is wholly unnecessary and would be inhumane. Alternative policies that comply with the FSA are clearly available. These alternatives have proven to be effective in ensuring compliance with immigration court appearances, and at far lower cost than prolonged detention.

The Government's new desired policy would be effected through the Proposed Regulations by permitting the Agencies, on their own authority, to transform their federal immigration facilities (FRCs) into "licensed programs" (although the FSA required licensing by State agencies with experience, expertise and authority in child welfare protocols--which federal agencies lack).

Put simply, the Proposed Regulations *permit* (indeed, are adopted for the very purpose of authorizing) precisely what the FSA *prohibits*. Rather than "implementing the FSA," the Proposed Regulations are simply an attempt to eliminate the key requirements of the FSA so that the Government will no longer have to comply with it. That is the *opposite* of "implementation" of the FSA. The Proposed Regulations thus do not at all fulfill their stated objective; and consequently should not be adopted. Moreover, their adoption would lead to a shameful new low in our treatment of immigrant children.

Sincerely,

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Gail Weinstein

On behalf of:

AMERICAN IMMIGRATION COUNCIL

AMERICAN IMMIGRATION LAWYERS ASSOCIATION