

November 6, 2018

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RE: *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, Notice of Proposed Rulemaking, 83 Fed. Reg. 45486, DHS Docket No. ICEB-2018-0002.

I. INTRODUCTION

The City of Chicago, City of New York, City of Los Angeles, Los Angeles County, and City and County of San Francisco, together with the Cities of Austin, Boston, Cambridge, Columbus, Minneapolis, New Haven, Philadelphia, Oakland, San Francisco, San Jose, Seattle, Somerville, the County of Santa Clara, the District of Columbia, and the Borough of State College (the “signatories”) submit this comment in response to the proposed rules (“Rules”) published by the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”) (collectively, the “Departments”) in their Notice of Proposed Rule Making (“NPRM”). The Rules are an impermissible and troubling attempt to use the rulemaking process to flout court-mandated safeguards for the detention of immigrant children in United States custody as set forth in the *Flores* Settlement Agreement (“FSA”). Instead of being consistent with the terms of the FSA, the Rules dispense wholesale with its most critical protections, in favor of a new detention policy for which the Departments identify no justification.

The signatories care deeply about their immigrant populations (some of the largest in the country) and have a strong interest in protecting the rights and well-being of immigrant children and their families, including many asylum seekers, as they seek protection in the U.S. These interests are reflected in, among other things, the adoption of welcoming-city ordinances, the oversight of state-licensed facilities housing minor children, the provision of healthcare services, and the provision of funds for immigrant legal services. The signatories are where many of these families and children have gone, and will continue to go, after they are released from detention. Thus, the signatories are on the front lines of connecting these recently-released immigrants to essential health, medical, language, and social services, as well as legal representation throughout all stages of their immigration proceedings. The signatories do this not just because it is good policy and in the public’s interest, but also because the sooner immigrant residents are connected to such services, the better they are able to settle and thrive.

The signatories have grave concerns with the Rules because they would result in longer detentions and lower standards of care for immigrant children, thus increasing the well-documented risks of such detention and impeding the signatories’ ability to properly serve the needs of their immigrant residents.

The Rules as proposed cannot become final. First and foremost, they are inconsistent with—and, indeed, undermine—the FSA’s fundamental purpose, which is to protect immigrant children’s safety and well-being. The Rules weaken the stringent state-licensing requirements for facilities housing children and make it more difficult for children to be paroled from detention, both provisions at the heart of the FSA. This measure would endanger the health and safety of children, thereby creating additional burdens on the signatories. Second, the Rules strip away a number of key substantive and procedural safeguards set forth by the FSA. The Rules eliminate unaccompanied minors’ (“UACs”) rights to be heard in bond redetermination hearings and impose new burdensome requirements on sponsors. Third, and separate from their inconsistencies with the FSA, the Rules are unlawful. The Rules run afoul of the Administrative Procedure Act (“APA”), as they are arbitrary, capricious, and unsupported by any legitimate rationale, and further fail to satisfy constitutional standards. Finally, the Rules dramatically impede the signatories’ ability to serve all of their residents, including recently-arrived immigrants, and to promote all residents’ health and well-being.

II. BACKGROUND

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

Two relevant statutes were passed after the FSA became effective: the 2002 Homeland Security Act (“HSA”), and the 2008 William Wilberforce Trafficking Victims Protection Act (“TVPRA”). The HSA created DHS and Immigration and Customs Enforcement (“ICE”), and transferred responsibility for the care and custody of immigrant children from the now-defunct INS to HHS, and specifically to the Office of Refugee Resettlement (“ORR”). *See* 6 U.S.C. §§ 111, 251. The TVPRA was enacted to protect the vulnerable population of UACs in HHS care, and partially codified the FSA by creating certain statutory standards for the treatment and placement of UACs. *See* 8 USC § 1232(b) and (c). The TVPRA incorporates the key goals of the FSA by requiring that UACs “shall be promptly placed in the least restrictive setting that is in the best interest of the child.” *Id.* at 1232(c)(2)(A). Importantly, both the HSA and TVPRA contain savings clauses that ensure prior administrative actions, including prior agreements such as the FSA, remain in effect. *See* 6 U.S.C. § 552(a)(1) and (2); 8 U.S.C. § 1232(b)(1).

The FSA imposes minimum standards of care for all minors held in detention or in ORR custody, regardless of whether the minors entered the U.S. with their families or as UACs. *See Flores v. Lynch*, 828 F.3d 898, 906-08 (9th Cir. 2016). Specifically, it requires that minors be housed in non-secure, state-licensed facilities and be provided adequate access to medical care,

counseling, language services, and legal representation. *See* FSA, Ex. 1. ICE must transfer children apprehended at the border (and to whom release was denied) to non-secure state-licensed facilities within five days, or “as expeditiously as possible if there is an influx[.]” *Id.*, ¶12A. In 2015, the court overseeing the FSA held that, in the case of an influx, up to 20 days would be considered a reasonable delay. *See Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015), *aff’d in part and rev’d in part on other grounds*, 828 F.3d 898 (9th Cir. 2016).

The FSA was intended to be a temporary measure, but in 2001, the parties stipulated that it would remain in place until “45 days following defendants’ publication of final regulations” governing the treatment of detained minors. *See Flores v. Reno*, Stipulation and Order, Case No. 2:85-cv-04544 DMG (AGRx), Dkt. No. 13 (C.D. Cal., Dec. 12, 2001). Any such regulations, however, “shall not be inconsistent with the terms” of the FSA. FSA, ¶9. Thus, while the Departments have now proposed “final regulations,” the FSA remains in effect until regulations, consistent with the terms of the FSA, are implemented.

III. THE RULES IMPERMISSIBLY CONFLICT WITH THE FSA.

Having had their attempts to amend or terminate the FSA rebuffed by the courts, the Departments now improperly attempt to circumvent the guarantees of the FSA through the rulemaking process.¹ Although the Rules profess to “adopt in regulations provisions that parallel the relevant and substantive terms of the FSA, consistent with the HSA and TVPRA, with some modifications . . . to reflect intervening statutory and operational changes while still providing similar substantive protections and standards,” NPRM at 45486, in practice the Rules directly undermine the protections at the heart of the FSA. Specifically, they seek to undo the state-licensing requirements and procedural protections set forth in the FSA, which are essential to the well-being of immigrant children. The Rules can and should be withdrawn on this basis alone.

A. The Rules Abolish the State-Licensing Requirement, Thereby Endangering the Health and Safety of Children.

1. The Rules Eliminate the State-Licensing Requirement Guaranteed by the FSA.

One of the most consequential features of the Rules is the elimination of the FSA’s requirement that detained minors must be held in non-secure state-licensed facilities during the pendency of their immigration proceedings. Under the FSA, minors apprehended by border

¹ For example, earlier this year, the federal district court overseeing the FSA rejected the Departments’ request for “limited” relief from the FSA’s state-licensing requirements, holding that the Departments’ request, if allowed, would constitute a “fundamental and material breach of the parties’ Agreement.” *Flores v. Sessions*, Order Denying Defendants’ “*Ex Parte* Application for Limited Relief from Settlement Agreement,” Case No. 2:85-cv-04544-DMG-AGR, Dkt. No. 455 at 3-4 (C.D. Cal. July 9, 2018). As detailed below, this is only the most recent example of the courts having rejected the government’s efforts to circumvent the FSA. Unable to find a court willing to sanction such efforts, the Departments now engage in a transparent effort to end-run the binding terms of the FSA through administrative rulemaking. This is unlawful. *See, e.g., Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1124-29 (D.C. Cir. 1983) (EPA could not use rulemaking to avoid settlement agreement with environmental group where regulations contained less stringent criteria for regulating toxic waste discharge than settlement agreement); *Ferrell v. Pierce*, 560 F. Supp. 1344, 1364-70 (N.D. Ill. 1983) (HUD prohibited from implementing proposed regulations where they conflicted with settlement agreement regarding mortgages).

patrol officials, and not otherwise eligible for release, may only be transferred to “licensed programs.” FSA, ¶ 19. A “licensed program” is “any program, agency or organization that is licensed by an appropriate state agency,” *id.*, ¶ 6, and it “must comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes,” *id.*, Ex. 1.

The Rules abandon this critical requirement, providing instead that, where no state-licensed programs are available, DHS, through ICE, may house minors with their families in its own family detention centers exempt from state-licensing requirements. *See* Proposed Rule, 8 CFR § 236.3(b)(8-9). These ICE facilities will be considered “licensed” if DHS “employs an outside entity to ensure that the facility complies with family residential standards established by ICE.” NPRM at 45497. Proposed Rule, 8 CFR § 236.3(b)(5) also includes an “out” for noncompliance: DHS would have the authority to delay or suspend services such as meals, snacks, or counseling, due to “emergency” situations (such as a natural disaster, facility fire, civil disturbance, or medical concerns). Thus, DHS has already anticipated—and provided cover for—falling short of its own minimum standards of care.

In sum, the Rules allow ICE to set its own standards of care for its own facilities, avoid oversight from independent state regulators, and rely on unnamed “outside entities” to inspect the facilities and ensure compliance. This is woefully inadequate to ensure the health and welfare of vulnerable children.

2. Licensing Provides Critical Oversight.

State licensing provides critical oversight of child welfare programs, ensuring that their operations provide minimum standards of care for the health and safety of immigrant children. *See, e.g., Flores v. Johnson*, 212 F. Supp. 3d 864, 879 (C.D. Cal. 2015) (licensing provision provides “essential protection of regular and comprehensive oversight by an independent child welfare agency”). Most signatories are located in States that have licensing regulations that, among other things, detail standards of care, require regular inspections, and grant local entities the authority to vigorously address noncompliance through such measures as prosecution of violations, imposing fines, corrective action plans, suspending licenses for programs, or suspending the ability for a program to house children. *See, e.g., 225 ILCS 10/1 et seq.* (Illinois Child Care Act regulating facilities housing children); Cal. Health & Safety Code § 1500 *et seq.* (California Community Care Facilities Act); 22 CCR § 84000 *et seq.* (regulations governing group homes in California); 22 CCR §§ 89254-89255 (setting forth various penalties for non-compliance in California); NY CLS Soc Serv § 379(1). In addition, many States already supervise and license programs that provide care to parents with their children, such as mother/child foster care and domestic violence shelters for families. *See, e.g., 22 CCR § 89244* (discussing authority of licensing agency to inspect and evaluate foster homes and interview children placed in such homes in California); NY CLS Soc Serv § 378(5), 18 NYCRR Art. 3.

Some of the signatory cities provide additional protections, requiring by ordinance that facilities abide by local fire, building, and other safety codes that ensure the safety not only of the minors, but also of the staff and first responders. For example, Chicago’s Municipal Code subjects state-licensed child care institutions to additional oversight, inspections, and penalties beyond those provided for by the State of Illinois. *See* Chicago Mun. Code § 4-76-010 *et seq.*;

see also Los Angeles Mun. Code § 57.105.3.9.2.1, 57.105.6.24. These state-licensing schemes and local laws reflect the signatories’ interests in ensuring protection for immigrant minors—protections that will not necessarily exist for children housed in federally-“licensed” facilities.

The Departments have previously tried to evade the FSA’s state-licensing requirement to house children in unregulated ICE facilities, but have had such efforts rebuffed as material breaches of the FSA. *See, e.g., Flores v. Johnson*, 212 F. Supp. 3d at 877-80 (defendants materially breached FSA by failing to house unreleased minors in non-secure, state-licensed facilities); *Flores v. Sessions*, Order Denying Defendants’ “*Ex Parte* Application for Limited Relief from Settlement Agreement,” Case No. 2:85-cv-04544-DMG-AGR, Dkt. No. 455 at 3-4 (C.D. Cal. July 9, 2018) (“July 9 Order”) (“Defendants now seek to hold minors in *indefinite* detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties’ Agreement.”). The Departments have also been unsuccessful in their attempts to modify the FSA to allow such federal custody because there are no changed circumstances justifying modification. *See Flores v. Lynch*, 828 F.3d at 910 (affirming denial of motion to amend FSA to allow ICE to house minors in unlicensed facilities); July 9 Order at 5.

Undeterred, DHS now seeks to codify what the courts have repeatedly found to be a material breach of the FSA. In an effort to overcome these court rulings, DHS states that the Rules are different from the previous attempts to avoid the state-licensing requirement because they “create[] an affirmative proposal of a federal-licensing scheme,” which, it claims, has not previously been considered by a court. NPRM at 45492. In other words, DHS argues that merely by designating the ICE facilities “licensed programs,” they are suddenly equivalent to (and thus consistent with) the FSA’s state-licensing requirement. That cannot be so. The Rules do not provide any detail regarding the licensing scheme contemplated for these facilities. Without that information, it is impossible to determine whether the federal licensed facilities would adequately protect the children who would be housed there. More fundamentally, the Rules lack the *accountability* of state and local licensing that is central to the FSA: state regulations and local codes provide consequences such as fines, penalties, and license suspension or revocation on noncompliance. Although the Rules do not provide detail regarding the contemplated oversight of the ICE-run facilities, it is likely that such oversight will be less stringent than state and local licensing. Without this accountability, the federal facilities will lack incentive to ensure that even regular inspection and minimal standards are being met.

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

The signatories’ have well-founded concerns about the conditions at ICE-run facilities that children will experience in the federally-licensed facilities contemplated by the Rules. ICE-run detention facilities historically and routinely fail to meet even their own minimum standards of care. *See, e.g.,* human rights *first*, “Family Detention: Still happening, Still Damaging,” October 2015 (“human rights *first* Report”) (discussing reports of substandard care at family detention centers including Karnes, Dilley, and Berks).² Pediatric and mental health advocates who visited ICE family detention centers in 2015 and 2016 found “discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited

² Available at <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

mental health services.” Julie M. Linton, Marsha Griffin, Alan J. Shapiro, “Detention of Immigrant Children,” American Academy of Pediatrics, March 2017, at 8 (“AAP Report”).³ Two of DHS’s own medical and psychiatric experts, so alarmed by the conditions and risks to the children’s well-being, wrote to the Senate Whistleblowing Caucus to voice their concerns. See Scott Allen, Pamela McPherson, Letter to Chairman Grassley and Vice Chairman Wyden, July 17, 2018.⁴ After conducting ten investigations over four years at ICE family detention facilities, Doctors Allen and McPherson concluded that children housed in ICE family detention centers are at “high risk of harm,” due to serious compliance issues such as lack of timely access to medical care, lack of sufficient medical staffing, inadequate trauma care and counseling, and inadequate access to language services. *Id.* at 4; see also Academic Pediatric Association, *et al.*, July 24, 2018 Letter to Congress (letter submitted by 14 medical and mental health associations seeking congressional oversight of DHS-run facilities, and stressing that “conditions in DHS facilities, which include open toilets, constant light exposure, insufficient food and water, no bathing facilities, extremely cold temperatures, and forcing children to sleep on cement floors, are traumatizing for children.”).⁵

Just last month, an especially troubling DHS Inspector General report on an ICE-run adult detention facility revealed astonishingly substandard and harmful conditions. See September 27, 2018 Office of Inspector General Management Alert - Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California, OIG-18-86.⁶ The report was the result of an unannounced inspection of the adult Adelanto ICE Processing Center conducted in May and identified “serious violations” of ICE’s national detention standards, representing “significant threats to the safety, rights, and health of detainees.” Report at 2. One such violation was the presence of “nooses” (*e.g.*, braided bed sheets), which are prohibited, in 15 of the 20 cells they visited. *Id.* at 2-3. The inspectors concluded that ICE “has not taken seriously the recurring problem,” as these “nooses” have often been used in suicides or attempted suicides. *Id.* at 4. The inspectors also found that detainees were often placed prematurely in segregation without the required disciplinary hearing or findings and, once there, were being improperly handcuffed, shackled, and deprived of communication assistance. *Id.* at 5-7. Finally, the report detailed numerous failures by ICE to ensure that the detainees receive timely and necessary medical and dental care, resulting in tooth loss, exacerbated health conditions, and in some instances contributing to detainee death. *Id.* at 7-8. The report concluded that “although this form of civil custody should be non-punitive, some of the center conditions and detainee treatment we identified during our visit and outlined in this management alert are similar to those one may see in criminal custody.” *Id.* at 9. This report exposes the very real and ongoing failures of ICE to maintain its standards for ICE adult facilities—the risk of harm to vulnerable children resulting from such substandard levels of care at family detention centers would be vastly greater than the risk to adults.

The Rules further exacerbate the health risks posed by ICE-run detention facilities by leaving compliance in the hands of an “independent entity”—*i.e.*, for-profit, third-party

³ Available at <http://pediatrics.aapublications.org/content/139/5/e20170483>.

⁴ Available at <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC>.

⁵ Available at https://www.acponline.org/acp_policy/letters/letter_house_oversight_request_on_child_detention_centers_2018.pdf.

⁶ Available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>

contractors. This compliance system has already proven to be woefully inadequate. In a June 2018 report, inspectors from DHS’s Office of Inspector General found that Nakamoto, the third-party contractor most frequently used by ICE to conduct inspections at adult detention facilities, did not always examine actual conditions, was not consistently thorough, and frequently failed to identify compliance deficiencies. *See* June 26, 2018 Report: “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements.”⁷ Indeed, the report found that, in some instances, Nakamoto even misrepresented results in their reports to ICE. *Id.* at 9. ICE employees reported that the Nakamoto inspections “breeze by the standards,” and were “very, very, very difficult to fail.” *Id.* The report further found that ICE does not “ensure adequate oversight or systemic improvements in detention conditions; certain deficiencies remain unaddressed for years.” *Id.* at 4 (problems identified in 2006 still persisted in 2017).

The Rules embrace and adopt this subpar inspection regime. They do not set forth any details, much less requirements, about how the contracts to third parties will be awarded, how the contractors will be vetted, how often the facilities will be inspected, what the inspection process will entail, or how deficiencies will be addressed and corrected. Without such details, the signatories are left with little more than the government’s assurances that the new federal licensing scheme will meet the rigorous state-licensing standards set forth in the FSA. Given the well-documented shortcomings of oversight and compliance in ICE-run detention facilities, such assurances ring hollow.

4. Eliminating the State-Licensing Requirement Will Result in Longer Detention, Thereby Increasing the Ill Effects on Children.

It is well-documented that any amount of detention can be harmful to vulnerable children. The recent American Academy of Pediatrics report analyzed first-hand accounts from children, doctors, and parents, as well as qualitative studies, and concluded that even short-term detention could produce long-term negative physical and emotional symptoms among detained children. *See* AAP Report at 10 (“[R]eports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.”); *see also* human right *first* Report at 1 (research from pediatricians, physicians and social workers who visited family detention centers “confirms that detention of less than two weeks is associated with negative health outcomes and potential long-term health and developmental consequences”). DHS’s own advisory committee, formed to advise ICE and DHS on how to improve family detention, itself warned of the risks posed by detention of children. *See* October 2016 ICE Advisory Committee on Family Residential Centers (“[D]etention is generally neither appropriate nor necessary for families.... [D]etention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.”).⁹

⁷ Available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>

⁹ Available at <http://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

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

A system that allows for detention-like custody in ICE facilities for even a brief amount of time, and even under the best of circumstances, is detrimental to children's health. If implemented, the Rules would permit DHS to hold children and their families in detention-like settings indefinitely (rather than the current 20-day limit currently in place), because ICE facilities would be deemed "licensed" by ICE. As a result, the risk of harm to the physical and mental health of these children would greatly increase.

5. The Rules Will Require the Signatories to Expend Significant Resources to Address Immigrant Youth Trauma and Facilitate Integration into Communities.

Because the Rules will result in the detention of immigrant children for longer periods of time than the FSA permits, and in facilities that do not meet the minimum standards of the FSA, the Rules in turn are likely to require the signatories to dedicate resources to address the harms to immigrant youth caused by detention, including trauma, in order to support the health and vitality of immigrant youth who are released as they are integrated into communities.

New York City's response to the needs of separated immigrant children held in federal custody in New York City provides an example of how local governments have stepped in to support the well-being of immigrant youth in their jurisdictions who have confronted traumatic circumstances. In the wake of the "family separation crisis" in the summer of 2018, New York City engaged in a multi-pronged response to: (1) help ORR meet the medical needs of the approximately 300 separated immigrant children sent to ORR-contracted facilities in New York City, many of whom were suffering from trauma as a result of having been separated from their family; and (2) streamline access to city services for these children, as well as for their family, sponsors, ORR foster care parents, and the non-profit provider staff caring for them. New York City delivered workshops to staff at ORR facilities to help ORR staff recognize and support immigrant children impacted by trauma. And when the population of separated children exhibited pressing physical and mental health needs that exceeded the treatment capabilities of the ORR-contacted agencies, New York City set up an expedited referral hotline to link children to emergency and outpatient psychiatric care, provided a bilingual child and adolescent psychiatrist to collaborate on-site with ORR mental health clinicians, trained mental health clinicians from the ORR facilities in trauma skills groups for young children, and contracted with the health insurance company covering the children at the ORR-contracted agencies to ensure that insurance issues would not impede access to medical care. New York City also provided trainings on trauma-related care to ORR foster care parents and ORR-contracted agency staff caring for immigrant children.

Similarly, over the summer, the City of Los Angeles and the County of Los Angeles, which was a destination for many reunited families, convened regional stakeholders, including a range of local service providers, to coordinate assistance to separated and reunited families in Southern California. Through its Office of Immigrant Affairs (“OIA”), the County of Los Angeles worked to reunite and support children and their parents who were living in the County and who were impacted by the family separation crisis. An OIA liaison was assigned to each family impacted by the federal government’s policy and worked with those families to connect them with available County and non-County social, health, consumer, and legal services. The County has continued to support reunified children, including providing medical services such as health assessments and immunizations, and mental health services. And both the County and the City of Los Angeles also provided the impacted families with enrollment assistance in education, connections to legal service providers, and access to a range of social, work, education, and family support services, including English classes, food distribution, employment support, and benefit screenings.¹⁰

In light of the well-documented adverse physical and emotional impacts of detention on children, the signatories are understandably concerned that both by increasing the amount of time immigrant children will spend in detention, and by failing to ensure that detention facilities meet appropriate standards, immigrant children impacted will require significant medical and mental health services upon release, and the signatories will be required to expend substantial resources to ensure the successful integration of the children into the signatories’ communities.

B. The Rules Curtail or Eliminate Essential Procedural Protections Guaranteed by the FSA.

The Rules also strip away a number of key substantive and procedural safeguards required by the FSA. The Rules eliminate UACs’ rights to be heard in bond redetermination hearings and impose new requirements on sponsors. They also pave the way for extended periods of detention for immigrant children, which undermines the central purposes animating the FSA—to protect children’s welfare by limiting their time in detention. Finally, the Rules will significantly impede children’s access to crucial legal services.

1. The Rules Deprive UACs of Their Right to be Heard at Bond Hearings.

Under the FSA, UACs in deportation proceedings “shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates . . . that he or she refuses such a hearing.” FSA, ¶ 24(A). This hearing allows UACs an opportunity to challenge ORR’s initial determination that they are not entitled to release because they pose a flight risk or a danger to the community, as well as to challenge whether they will be placed in a secure versus non-secure facility. *See id.*, ¶ 24(B). The Rules replace the procedure for redetermination hearings with a new administrative process, whereby an UAC is only afforded such a hearing if she affirmatively requests one and any such redetermination is made

¹⁰ *See* Cities for Action & Lumos Foundation, “On the Frontlines of the Family Separation Crisis,” Sep. 2018, p. 18 available at https://d3n8a8pro7vhmx.cloudfront.net/citiesforaction/pages/29/attachments/original/1537804683/Family_Separation_Crisis_Report_WEB-SINGLES_21SEP18.pdf?1537804683.

not by an immigration judge, but by a hearing officer “employed by HHS.” Proposed Rule, 45 CFR § 410.810. By placing the onus on UACs—who lack familiarity with their rights and the immigration process in general—to request a redetermination hearing, the Rules will inevitably lead to fewer minors receiving such hearings and, therefore, prolonged detention.¹¹

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

To support the proposed elimination of this right, the Departments rely on the HSA and the TVPRA, claiming that the two statutes supersede the FSA and no longer authorize, much less require, bond redetermination hearings before an immigration judge. NPRM at 45509. Specifically, the Departments contend that because Congress failed to explicitly provide for bond hearings in the two laws, and because the breadth of ORR’s responsibility over UACs effectively precludes immigration judges in the Department of Justice from having any authority over UAC detention, the bond hearing requirement is no longer legally valid. *Id.* at 45509-10.

This position, like the attempt to circumvent the state-licensing requirement, has already been rejected by the Ninth Circuit, which held that “in enacting the HSA and TVPRA, Congress did not terminate Paragraph 24(A) of the *Flores* Settlement with respect to unaccompanied minors.” *Sessions*, 862 F.3d at 867. As the court reasoned, because the “overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less,” “depriving these children of their existing right to a bond hearing is incompatible with such an aim.” *Id.* at 874.

The Departments’ only response to the Ninth Circuit’s ruling is that the case was wrongly decided. *See* NPRM at 45509. Whatever the Departments’ view of the merits of the Ninth Circuit’s ruling, the decision has not been overturned and therefore remains in effect. It is plain that a party’s disagreement with a court decision does not provide grounds for disregarding it or violating it.

The Departments also attempt to justify the Rules’ elimination of the FSA’s bond redetermination procedure by arguing that it is “more sensible for the same agency (HHS) charged with responsibility for custody and care of UACs also to conduct the hearings envisioned by the FSA.” *Id.* at 45509. Such a position, however, directly conflicts with a UAC’s right under the FSA “to have the merits of [her] detention assessed by an independent immigration judge.” *Sessions*, 862 F.3d at 880. It is also far from sensible—rather than provide

¹¹ The Rules also narrow the scope of the hearings, should they occur, by prohibiting review of the UAC’s level of custody. *Id.* at 45 CFR § 410.810(h).

an independent arbiter to assess HHS's bond determinations, the Rules make HHS both jailer and judge. Finally, under the system set forth in the Rules, appeals would go directly to the Assistant Secretary for the Administration of Children and Families, instead of being heard by judges on the Board of Immigration Appeals, who possess far more institutional knowledge of the issues and are better suited to assess bond redetermination decisions.

2. The Rules Limit Options for Release from Federal Custody.

Moreover, even if a minor has been approved for release by DHS or HHS, the Rules significantly curtail to whom, and when, such minor may *actually* be released. Under the FSA, potential sponsors must undergo a rigorous vetting process that requires, among other things, that they execute an Affidavit of Support agreeing to provide for the minor's well-being and ensure appearance of the minor at all future immigration proceedings; in addition, potential sponsors may be required to submit to a "positive suitability assessment," which includes investigations into the custodian's living conditions, identification, and employment. FSA, ¶ 15. The Rules go further and place additional vetting procedures on potential sponsors, adding to the suitability assessment a required "fingerprint-based background and criminal records check," not just for the sponsor, but also on "adult residents of the prospective sponsor's household." Proposed Rule, 45 CFR § 410.302. The addition of the requirement for fingerprint-based criminal background checks on all adult household residents is suspect in light of this Administration's aggressive immigration enforcement efforts. This information will necessarily be shared with ICE, who may then actively use the information for purposes beyond those contemplated by the FSA, such as for raids, arrests, and other enforcement actions. While the signatories' utmost concern is to ensure that minors are released to safe, stable, and responsible custodians, the expanded fingerprint-based background checks do not serve this purpose, will be harmful to the signatories' immigrant residents, and will keep children in detention longer than necessary.

The Rules also add restrictions to whom DHS may release children beyond what the FSA contemplates. Under the FSA, minors may be released from either DHS or HHS custody to, in preferred order: (1) a parent, (2) a legal guardian, (3) an adult relative (brother, sister, aunt, uncle, or grandparent), or (4) an adult individual or entity designated by the parent or legal guardian who provides sufficient documentary sworn evidence of capability of care to the satisfaction of officers. FSA, ¶ 14. Under the Rules, however, children in DHS custody may only be released to a parent or legal guardian not in detention. *See* Proposed Rule, 236.3(j). This change would curb the ability of a minor to be released to a relative, rather than remain in prolonged and unregulated family detention, should the family prefer. Given the already rigorous suitability tests for sponsors, there is no simply no justification for removing adult relatives from the list of approved custodians.

Finally, the Rules conflict with the FSA's procedural protections for asylum-seekers. Children seeking asylum are placed in expedited removal proceedings, which means they are subject to mandatory detention unless or until they can show a credible fear of persecution in their home countries. 8 U.S.C. § 1225(B)(iii)(IV). Under the FSA, DHS has the discretion to release children seeking asylum based on a case-by-case determination that includes not only medical necessity or law enforcement needs (the two exceptions that apply to adults), but also "urgent humanitarian reasons" or "significant public benefit." FSA, ¶ 14. The Rules would

remove these additional bases for release and provide that the parole standards that apply to minors in expedited removal proceedings are restricted to the same strict standards for adults. *See Proposed Rule, 8 CFR § 212(5)(b)(3)* The Rules provide no explanation for eliminating DHS's authority to consider unique circumstances that may arise for children seeking asylum.

3. The Rules Significantly Restrict Access to Legal Representation.

As shown, the Rules allow ICE to detain children in unregulated facilities with ill-defined and substandard protections, eliminate the right to bond redetermination hearings, and prolong detention times. These factors will undoubtedly impact immigrant child welfare and health, and will further interfere with the children's ability to receive adequate access to counsel, and the signatories' ability to provide such counsel.

The signatories have a strong interest in ensuring legal representation to their immigrant residents, especially immigrant children. For example, Chicago provides funding to the National Immigrant Justice Center ("NIJC"), including to NIJC's Asylum Project, to help immigrant residents receive the legal services they need. In 2017, Chicago approved two contracts totaling \$1.8 million to fund legal aid for immigrants through 2018, and will add to this figure in 2019. Similarly, in 2017, the District of Columbia launched the Immigrant Justice Legal Services (IJLS) Grants Fund, which provides grants to community-based organizations, private organizations, associations, and law firms that provide legal assistance to immigrants in the District. The fund has grown as the need has grown, from \$500,000 in 2017 and 2018 to \$900,000 in 2019.

New York City likewise has made substantial investments in legal services for its immigrant residents, totaling more than \$40 million dollars for 2019. This includes \$4.1 million earmarked for: (1) increasing capacity for legal defense in deportation proceedings for immigrant youth; (2) increasing funding for social work and case management resources to address the acute needs of these children; and (3) providing legal risk assessment and screening services to immigrants, including family members, seeking to be sponsors of UACs, thus facilitating their release from ORR facilities. In addition, New York City has pioneered innovative models for immigrant legal representation, such as the New York Immigrant Family Unity Project, which provides free, high-quality legal representation to detained immigrants facing deportation, and the Immigrant Children Advocates Relief Effort, serving UACs.

In 2017, the County of Los Angeles, the City of Los Angeles, and two foundations created the LA Justice Fund, a \$10-million public-private partnership that funds organizations providing immigration legal services. The LA Justice Fund was expanded in 2018 to provide legal representation to children who were separated from their families and who are detained or housed in Los Angeles and their respective parents or sponsors. The Fund connected attorneys to local organizations that coordinated immigration pro bono networks. In addition, the County engaged the American Academy of Pediatrics ("AAP") to train pediatricians to conduct trauma assessments and write medical reports necessary for children and parents' legal relief cases. More recently, the County, in conjunction with AAP and legal services providers throughout Southern California, began organizing a November 2018 training summit to explore ways that

doctors and lawyers can more closely collaborate to protect the rights of separated immigrant children and their families.¹²

Many other signatories also provide legal aid funds or support services to their immigrant communities. *See, e.g.*, the City of Berkeley (\$50,000 in legal aid funds); Santa Clara County (dedicated Office of Immigrant Relations providing community and legal services to immigrants and immigrant children); Minneapolis (\$75,000 for immigration legal services between June 2017-June 2018). Because the Rules strip away critical procedural protections guaranteed by the FSA, the Rules impede access by immigrant children to crucial legal services and undermine the signatories' investments in these services.

IV. THE RULES ARE UNLAWFUL

As demonstrated above, the Rules flout, rather than comply with, the judicially-enforceable requirements of the FSA. This alone makes the Rules untenable. Even if, however, the Departments were somehow permitted to adopt regulations that ignore the essential protections of the FSA—which they are not—the Rules are unlawful and unconstitutional.

A. The Rules Are Arbitrary and Capricious and Therefore Violate the APA.

The Administrative Procedure Act (“APA”) requires courts to “hold unlawful and set aside” agency action that is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to constitutional right, power, privilege, or immunity,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A)-(D); *see also Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 608 (7th Cir. 2015). An agency acts arbitrarily or capriciously “when it fails to provide a reasoned explanation for its action.” *Schurz Commc’ns v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992); *see also Motor Vehicle Mfrs. Ass’n of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must show that it “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.”); *American Ass’n of Cosmetology Schools v. Devos*, 258 F. Supp. 3d 50, 71 (D.D.C. 2017) (the “touchstone of arbitrary-and-capricious review is reasoned decisionmaking.”). None of the Departments’ justifications for the Rules withstands scrutiny under the APA.

1. The Rules are Not Supported by Legitimate Rationale.

DHS relies on several faulty and irrational presumptions to justify its creation of a system of ICE-operated family detention centers exempt from state-licensing requirements. First, DHS claims that ICE facilities are necessary because “operational difficulties” arose due to the “extension of the [FSA] agreement to apply to accompanied minors.” NPRM at 45487. DHS’s claim is a non-starter. As the Ninth Circuit explained, the FSA clearly and unambiguously applies to *all minors*—accompanied and unaccompanied alike. *See Flores v. Lynch*, 828 F.3d at 906-08. The government has had over twenty years since the FSA became effective in 1997 to consider any “operational difficulties” posed by the need to find suitable housing, consistent with the FSA, for detained children and families. Not once during that time

¹² *See* Cities for Action & Lumos Foundation at 18.

period did DHS raise any concerns about the state-licensing requirement or difficulties in finding satisfactory housing. *See also* July 9, 2018 Order at 5 (finding that the Departments “have not shown that they made any efforts [to bring online state licensed facilities that house both adults and children], since July 2015, let alone 1997, nor have they demonstrated that any such attempt would be futile”). And although DHS suggests that there are “operational difficulties” now, they have provided no evidence supporting that claim.

Second, DHS attempts to rationalize the elimination of the state-licensing requirement in favor of ICE-operated family detention centers by claiming that federal facilities are the only viable option for handling the supposed influx of family migration that began in 2014. DHS argues that: (1) because there are few to no state-licensed options that house children together with adult family members, and (2) because separating families “is to be avoided when possible,” ICE-run detention facilities provide the only solution. NPRM at 45493. This ignores the obvious and viable option of parole, which would further the FSA’s primary objectives. As the court overseeing enforcement of the FSA explained, “[a]bsolutely nothing prevents Defendants from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion.” July 9, 2018 Order at 5. Although DHS tries to discount release as an option by citing to reports that purport to show a high percentage of flight risk, *see* NPRM at 45494, the data tracking UACs and immigrant families shows that they are, in reality, very likely to appear at their immigration proceedings. *See* July 9, 2018 Order at 4 (“Executive Office of Immigration Review data shows that between 2001 and 2016, 86% of family detainees attended all of their court hearings – a much higher number than average without families.”).

DHS’s lack of support for its position is not surprising, because deterrence is its true motivation for family detention. Indeed, DHS admits that the Rules, which will permit families to be detained during the pendency of their immigration proceedings, are intended to discourage “a powerful incentive for adults to bring juveniles” across the border. NPRM at 45494. Stated plainly, DHS argues that without family detention, immigrants will bring children with them across the border solely to avoid federal custody.

This argument fails for two independent reasons. First, there is no credible evidence linking any decrease of family migration, or subsequent surges, to family detention policies. DHS acknowledges as much, conceding that “it is difficult to definitively prove a causal link[.]” NPRM at 45494. In fact, the data overwhelmingly shows that migrant influxes from Central American nations are due to poor security and socioeconomic conditions, high violent crime rates, significant gang activity, and high levels of poverty and inequality. *See, e.g.,* Congressional Research Service, *Unaccompanied Children from Central America: Foreign Policy Considerations*, February 10, 2015 at 16 (and citations therein).¹³ In light of this evidence, the *Flores* court has already rejected the government’s efforts to establish a causal link between the FSA and a surge in family border crossings, finding that “[a]ny number of other factors could have caused the increase in illegal border crossings, including civil strife, economic degradation, and fear of death in the migrants’ home countries.” July 9, 2018 Order at 2. DHS’s position here is equally “‘dubious’ and unconvincing,” *id.* at 3, and certainly insufficient justification to support its rulemaking under the APA. *See Devos*, 258 F. Supp. 3d at 72 (finding

¹³ Available at <http://trac.syr.edu/immigration/library/P10211.pdf>

Department of Education’s methodology for determining average income for federal financial aid program arbitrary and capricious and emphasizing that when an agency’s reasoning “involves a non-obvious, essential factual assumption, the agency must justify that assumption”).

Second, even if DHS had data showing that release of families causes an influx in border crossings, the Rules would still be arbitrary and capricious because the Departments may not appropriately consider deterrence in drafting the Rules. As courts have recognized, immigrants may be detained in civil immigration proceedings where the immigrant would be a flight risk or a danger to the community. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690-92 (2001) (citing “preventing flight” and “protecting the community” from immigrants found to be “specially dangerous” as interests that justify detention of noncitizens awaiting immigration proceedings). General deterrence, though, is not an appropriate basis for detaining individuals in civil proceedings. *See, e.g., Kansas v. Crane*, 534 U.S. 407, 412 (2002) (deterrence is punitive; government may not inflict punitive measures for lawful acts in order to deter others); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 181-182 (D.D.C. 2015) (holding that government policy of indefinite detainment of asylum-seekers for purposes of deterrence is most likely unlawful). Thus, DHS cannot rely on a policy of general deterrence to justify the Rules.

The Departments likewise fail to support their decision to jettison many of the FSA’s procedural protections. As discussed in Part III, the Departments rely on arguments that have been repeatedly rejected by the courts, such as claiming that the HSA and TVPRA do not permit the protections, or that legal precedent is wrong and need not be followed. In most instances, however, the Departments simply fail to provide any rationale, legitimate or otherwise.

2. The Rules Do Not Adequately Consider the Associated Costs

An agency also acts arbitrarily and capriciously when it does not adequately consider the costs of its proposed action. *See, e.g., National Ass’n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (when agency decides to rely on cost-benefit analysis as part of its rulemaking, serious flaw undermining that analysis can render rule arbitrary); *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (“we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses”).

Here, the Departments purport to have performed a cost-benefit analysis. NPRM at 45488. However, the only costs DHS associates with the Rules are: (1) the increased costs of family detentions in its alternative licensing process, and (2) increased costs due to its new (*i.e.*, more strict) parole procedures, which would result in fewer releases. *Id.* DHS claims that it is “unable to provide a quantified estimate” of even these costs, because it cannot adequately estimate how many children will be held in family detention facilities, and for how long. *Id.* In fact, the NPRM specifically “seek[s] comment on how these costs might be reasonably estimated, given the uncertainties.” *Id.* at 45514. In turn, HHS states that it does not anticipate any significant increased costs; at most, it anticipates it will incur “some costs” (without providing a number) resulting from its assumption of jurisdiction over UAC hearings from DOJ. *Id.*

This cost analysis is woefully inadequate. The Departments possess data on how many families and UACs are apprehended at the border every year, the number of families in

detention, the number of children ORR transfers to state-run facilities, and the average time that children remain in such facilities. *See* NPRM at 45510-14. DHS has calculated the number of both adult and minor intakes at family detention centers, as well as the costs for maintaining these detention centers, between 2015 through 2017. *Id.* And it has already estimated the cost of one family detention bed at \$318.79 for fiscal year 2019. *See* DHS, U.S. Immigration and Customs Enforcement, Operations and Support, Fiscal Year 2019 Congressional Budget Justification, at 111.¹⁴ There is no reason DHS cannot make reasonable projections of the increased costs based on this historical data. In fact, just last month, ICE signed a new contract with Dilley, Texas, agreeing to pay about \$13 million each month for the cost of detaining immigrants at a family detention center, run by a third-party contractor, that currently houses approximately 1,975 detainees. *See* “ICE Reaches Lucrative Deal to Keep Texas Immigrant Detention Facility Open,” October 17, 2018 Talking Points Memo.¹⁵

The failure to provide a reasoned estimate of the additional costs is careless at best, and intentionally designed to hide the massive costs of family detention at worst. In fact, despite a 2018 congressional warning to ICE not to exceed its budgeted detention capacity, the agency has been detaining an average of 2,359 people over its appropriated level. *See* MPI: Trump Administration’s New Indefinite Family Detention Policy: Deterrence Not Guaranteed, September 26, 2018.¹⁶ To cover its additional costs, DHS “circumvented the appropriations process by transferring \$200 million from various other DHS agencies, including nearly \$10 million from FEMA.” *Id.* Similarly, two months ago, HHS announced its intention to triple the size of a temporary “tent city” detention center in Tornillo, Texas, to house up to 3,800 children. Approximately \$266 million to fund this operation will come from other HHS programs, including Head Start, HIV prevention programs, and the Centers for Disease Control and Prevention. *Id.* Given the Departments’ history of underestimating or hiding the true costs of family detention, the cost-benefit analysis in the NPRM is seriously flawed and arbitrary.

Finally, DHS and HHS fail to take into account the costs of detention incurred by the signatories and immigrants themselves. As discussed *supra*, Part III, these costs include the trauma and other mental health issues suffered by immigrant children as well as the investments the signatories must make to ensure that the children successfully integrate into their communities and can access legal assistance and representation in their immigrant proceedings.

B. The Rules Violate Due Process.

The Due Process Clause of the Fifth Amendment prohibits the federal government from depriving individuals of life, liberty, or property without due process of law. *See Zadvydas*, 533 U.S. at 693. The Due Process Clause applies “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* The Supreme Court has repeatedly recognized that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the

¹⁴ Available at

<https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>

¹⁵ Available at <https://talkingpointsmemo.com/news/ice-lucrative-south-texas-immigrant-detention-center-deal>

¹⁶ Available at <https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy>

liberty” that the Fifth Amendment protects. *Id.* In short, children are entitled to basic due process protections regardless of their immigration status.

The fundamental features of procedural due process are fair notice and a meaningful opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). If adopted, the Rules would significantly impair the due process rights of immigrant children seeking refuge, asylum, or other legal protection in the United States. As discussed above, the Rules strip away many procedural protections afforded to minors under the FSA, such as the right to bond redetermination hearings before an immigration judge and the right to challenge their placement in secure rather than non-secure facilities. Additionally, the Rules undermine children’s due process protections in at least two other ways.

First, the Rules impede the rights of UACs to be heard if they are re-detained. Proposed Rule 8 CFR § 236.3(n) allows DHS to take released minors back into custody “if there is a material change in circumstances showing the child is an escape risk, danger to the community, or has a final order of removal.” The Rules provide that any re-detained minors “may” request a custody redetermination, but notably do not set a time frame for such a redetermination or place any burden of proof on DHS to justify their re-detention decisions. *See generally id.* Such “procedures” for detention do not withstand constitutional scrutiny.

Last month, the Ninth Circuit affirmed a preliminary injunction finding that such procedures for re-detention likely violated UACs’ procedural due process rights. In *Saravia v. Sessions*, the district court considered whether the re-detention of UACs who had previously been released by ORR to a sponsor violated their Fifth Amendment due process rights. ---F.3d-- --, 2018 WL 4689978, at *2-3 (9th Cir. Oct. 1, 2018). The district court granted a preliminary injunction, ordering that the government provide “a ‘prompt hearing’ before a neutral decisionmaker, ‘in which the government must show that . . . changed circumstances’ justified the minors’ detention.” *Id.* at *3; *see also Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1197, 1205-06 (N.D. Cal. 2017). The district court further ordered that the UAC and their sponsor “must receive notice of the basis for the rearrest,” and that the hearing must occur within seven days of arrest. *Saravia*, 2018 WL 4689978, at *3 (citing *Saravia*, 280 F. Supp. 3d at 1197, 1205-06). On appeal, the Ninth Circuit affirmed. *Id.* at *5-7. The court reasoned that the procedures contemplated by the district court’s order were consistent with the TVPRA and the FSA. *Id.* at *5. It also rejected the government’s argument that the bond hearings required under the FSA provided sufficient procedural protections for UACs in the case of re-detention, explaining that the bond hearings were only concerned with the initial determinations of release and thus did not bear on the appropriateness of DHS’ decision to re-detain a previously-released minor. *Id.* at *6-7.

In short, as *Saravia* makes clear, the Fifth Amendment requires a “prompt hearing” regarding DHS’ decision to re-detain UACs after they have been released to their sponsors, and only after notice is provided to the UAC and their sponsor about the basis for the rearrest. The Rules, though, make no provision for such procedural protections. Instead, it appears that the Departments will intend to rely on the initial bond hearing contemplated by the FSA. As *Saravia* makes clear, though, the Fifth Amendment requires more.

Second, under the Rules, even after an initial UAC determination is made, immigration officers will be required to re-determine whether someone is an UAC each time they encounter the minor. *See* Proposed Rule, 8 CFR § 236.3(d). This means that in cases where minors are “re-determined” to be 18 years or older, they would lose protections they were previously granted. *Id.* (The “legal protections previously afforded only to UACs under the law cease to apply.”). These protections include an exception to the one-year filing deadline for asylum and the opportunity for a non-adversarial asylum adjudication. *See* 8 U.S.C. § 1158(a)(2)(E). Thus, meaningful protections given to children by virtue of their having arrived as a UAC could be stripped away at any time.

Compounding this issue is that the Rules adopt an ambiguous and unscientific standard for age determinations that could easily be misused by immigration officials. Proposed Rule 8 CFR 236.3(c) provides that DHS may treat a person as an adult if a “reasonable” person would conclude that the person is an adult. The officer is permitted, but not required, to seek a medical or dental examination. The Rules do not specify when medical and dental examinations will be used, and provides no guidance as to who will be making the determinations, nor the level of training or expertise needed to conduct such examinations. Likewise, the Rules do not take into account factors that heavily affect an outward appearance of age, such as differences in race, ethnicity, gender, and nutritional standards or poverty across many populations. As a result, the age determination process is highly susceptible to mistake or arbitrary decision-making.

V. CONCLUSION

The Rules impermissibly conflict with the express terms and underlying purpose of the FSA—to protect the health and well-being of immigrant children. They allow the Departments to hold immigrant children in substandard, detention-like facilities for prolonged periods of time, without any oversight or accountability. The Rules strip away procedural protections, thereby interfering with the signatories’ ability to protect the health and welfare of these children and to provide them with access to legal counsel. Such a state of affairs is intolerable and provides reason enough to reject the Rules. Separately, the Rules as proposed are likely to be found unlawful, and thus should not be adopted. The Departments have failed to justify the Rules’ departure from the FSA’s binding terms or to address any of the costs likely to result from implementation of the Rules, rendering the Rules arbitrary and capricious in violation of the APA. Moreover, because the Rules eliminate key procedural protections for children in the Departments’ custody, the Rules, if implemented, will almost certainly face a constitutional challenge. For all of these reasons, the signatories urge the Departments to withdraw the Rules.

Sincerely,

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