

Comments of Human Rights First

On the Department of Homeland Security and the Department of Health and Human Services' September 7, 2018 Notice of Proposed Rulemaking on the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

DHS Docket No. ICEB-2018-0002

October 31, 2018

On September 7, 2018, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) issued a notice in the Federal Register (83 Fed. Reg. 45486-45534) proposing to amend regulations relating to the apprehension, processing, care, custody, and release of immigrant children and purporting to terminate the 1997 Flores Settlement Agreement (FSA).¹

Human Rights First opposes the adoption of proposed regulations that would eliminate legal safeguards intended to protect children in immigration custody and ensure their prompt release. The proposed regulations seek, among other changes, to allow U.S. Immigration Customs Enforcement (ICE) to expand the detention of children by removing safeguards that limit the time children may be held with their family members in immigration jails, imposing a heightened parole standard, codifying the separation of children from detained parents, and eliminating the mandate on DHS to consider releasing children and their parents together. The proposal effectively eliminates the state-licensing requirement, which is intended to ensure that children are held only in detention centers that meet local child welfare requirements. Instead, the regulation would allow DHS to self-license detention facilities and abandon child safety and welfare standards currently in place.

As detailed in these comments, the incarceration of children with or without their families harms their physical and mental health and threatens their development. Expanding the policy of family detention and formalizing the policy of family separation ignores the warnings of medical professionals, including the American Academy of Pediatrics and the American Psychiatric

¹ *Flores v. Reno*, No. CV 85-4544 RJK (Px) (C.D. Cal. Jan. 17, 1997) (“Flores Settlement Agreement”), available at https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

Association, that “even short periods of detention can cause psychological trauma and long-term mental health risks for children”² and that forced separation “can cause lifelong trauma.”³

Rather than expand detention, DHS should implement proven and cost-effective appearance support initiatives that have successfully ensured that individuals in immigration proceedings attend their court hearings and ICE appointments. Instead of expensive, cruel and unnecessary immigration detention, the government should increase funding for legal representation for immigrants facing deportation. Families and children with legal counsel overwhelmingly appear at immigration court proceedings: 97% of represented mothers and their children attended hearings.⁴ The government should also employ effective and cost-effective case management and appearance support programs. The Family Case Management Plan, which was implemented by ICE between 2016 and 2017, not only provided families with much-needed social and medical support services but also led to 99.3% of families enrolled in the program attending ICE check-ins and appointments and 100% court attendance.⁵

The detention of children for migration-related reasons is neither humane nor necessary. The proposed regulations fail to bring the practices of the United States in line with its obligations under international treaty commitments to protect refugees or to fulfill the terms of the FSA. While the FSA terminates 45 days after the government publishes regulations implementing its terms,⁶ the proposed regulations violate both the spirit and letter of the agreement in an end run around the federal court overseeing the FSA, which has previously rejected the government’s attempts to eliminate the agreement’s safeguards for children.⁷

² American Academy of Pediatrics, *AAP Statement on Executive Order on Family Separation*, June 20, 2018, available at <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Statement-on-Executive-Order-on-Family-Separation.aspx>.

³ American Psychiatric Association, *APA Statement Opposing Separation of Children from Parents at the Border*, May 30, 2018, available at <https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border>.

⁴ This figure represents reflects the percentage of individuals on the immigration court’s adults with children docket with legal representation whose court proceedings began in fiscal year 2014 as of August 2018. See TRAC, “Priority Immigration Court Cases: Women with Children,” available at <http://trac.syr.edu/phptools/immigration/mwc/>.

⁵ Associated Press, *ICE Shuttles Detention Alternative for Asylum-seekers*. VOA News, June 9, 2017, available at <https://www.voanews.com/a/ice-shuttles-detention-alternative-asylum-seekers/3893854.html>. See Eleanor Acer, *Studies: Mass Detention of Migrant Families is Unnecessary, Inefficient*. Just Security, July 5, 2018, available at <https://www.justsecurity.org/58897/studies-show-mass-detention-family-migrants-unnecessary-inefficient/>.

⁶ Stipulation Extending Flores Settlement Agreement at 1, *Flores v. Reno*, No.CV 85- 4544-RJK (Px) (C.D. Cal. Dec. 7, 2001).

⁷ Order Denying Defendants’ *Ex Parte* Application for Limited Relief from Settlement Agreement, *Flores v. Sessions*, No.CV 85- 4544-DMG (AGRx) (C.D. Cal. July 9, 2018) (denying the government’s request to modify the Flores Settlement Agreement to allow detention of children with their parents and to exempt family detention centers from the state agency licensing requirement).

In submitting the following comments, Human Rights First urges the Department of Homeland Security and the Department of Health and Human Services to rescind the proposed regulations and to issue rules that fully implement the FSA.

Human Rights First and its Interest in this Issue

Human Rights First is a non-profit, nonpartisan international human rights organization that challenges the U.S. government to live up to its ideals and serve as a beacon on human rights. With offices in Houston, New York City, Los Angeles and Washington DC, we provide pro bono representation to refugees seeking asylum in the United States, working in partnership with volunteer lawyers from many of the nation's leading law firms. Our experience working directly with refugees seeking protection in the United States serves as the foundation of our research and advocacy to protect asylum-seeking families from incarceration. Human Rights First has conducted extensive research and issued numerous reports on U.S. immigration detention policies, including the detention of families seeking refugee protection and access to parole for asylum-seekers. Our reports on U.S. detention of asylum seeking and migrant families include: *The Effect of Family Detention on Children*,⁸ *Ailing Justice: Texas. Soaring Immigration Detention, Shrinking Due Process*,⁹ *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*,¹⁰ *U.S. Detention of Families Seeking Asylum: A One-Year Update*,¹¹ *Family Detention in Berks County, Pennsylvania*,¹² and *Family Detention: Still Happening, Still Damaging*.¹³ This extensive background in direct services, and research informs the comments that follow below.

Comments on the Proposed Regulations

The proposed regulations aim to jail children indefinitely with their families in detention centers

To implement the FSA's objective to promote the expeditious release of children from detention and placement in the least restrictive setting possible, the agreement requires that DHS release

⁸ Human Rights First, *The Effect of Family Detention on Children*, August 2018, available at https://www.humanrightsfirst.org/sites/default/files/Effects_Children.pdf.

⁹ Human Rights First, *Ailing Justice: Texas. Soaring Immigration Detention, Shrinking Due Process*, June 2018, available at <https://www.humanrightsfirst.org/resource/ailing-justice-texas-soaring-immigration-detention-shrinking-due-process>.

¹⁰ Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*, August 2016, available at <https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>.

¹¹ Human Rights First, *U.S. Detention of Families Seeking Asylum: A One-Year Update*, June 2015, available at <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.

¹² Human Rights First, *Family Detention in Berks County, Pennsylvania*, August 2015, available at <https://www.humanrightsfirst.org/resource/family-detention-berks-county-pennsylvania>.

¹³ Human Rights First, *Family Detention: Still Happening, Still Damaging*, October 2015, available at <https://www.humanrightsfirst.org/resource/family-detention-still-happening-still-damaging>.

children to an appropriate adult or transfer them to a non-secure, licensed facility within three to five days of apprehension.¹⁴ Under certain extenuating circumstances where the government faces an “emergency” or “influx” of minors, a *de minimis* extension of the transfer period – up to 20 days – may not violate this requirement where the government acts in good faith and with due diligence to screen the family for release.¹⁵

However, the proposal explicitly seeks to overturn the FSA’s limits on the length of time that children may be detained and seek to permit indefinite detention of children.¹⁶ DHS’s acknowledgment that, “the proposed rule may result in extending detention of some minors and their accompanying parent or legal guardian in [family detention centers, or ‘family residential centers’] beyond 20 days,”¹⁷ understates the likely impact of the proposed regulations. Prior to the 2015 district court order in the Flores litigation establishing the 20-day limitation on detention, children were held on average for 46.7 days in family detention centers during fiscal year 2014.¹⁸ Human Rights First and other organizations have documented numerous examples of mothers and children held in family detention centers for between six and ten months as part of ICE’s “aggressive deterrence strategy” that began in 2014.¹⁹ The federal court monitoring the FSA found in 2017 that the government was violating the FSA by incarcerating families in immigration detention for months²⁰ and in 2018 appointed an independent monitor to oversee compliance in the face of “persistent problems.”²¹

Given the administration’s stated goal of detaining children and their families during the adjudication of their cases, even if they meet criteria for release,²² the proposed regulations are

¹⁴ *Flores v. Lynch*, No. CV 85-04544 DMG (Ex) (C.D. Cal. Aug. 21, 2015) at *9, available at <https://www.aila.org/File/Related/14111359p.pdf>.

¹⁵ *Id.* at *10.

¹⁶ See 83 FR 45493.

¹⁷ See 83 FR 45518.

¹⁸ 83 FR 45512. A recent report revealed that even with the Flores 20-day safeguards in place, the average stay for families in the Berks County family detention center was 58 days in 2017. Emily Kassie, *Inside Family Detention, Trump’s Big Solution*. The Marshall Project, June 22, 2018, available at <https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution>.

¹⁹ Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania*, August 2016, available at <https://www.humanrightsfirst.org/resources/long-term-detention-mothers-and-children-pennsylvania>; Human Rights Watch, *US: Trauma in Family Immigration Detention. Release Asylum-seeking Mothers, Children*, May 15, 2015, available at <https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0>.

²⁰ Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor, *Flores v. Sessions*, No. CV 85-04544 DMG (AGRx) (C.D. Cal. June 27, 2017).

²¹ Status Conference and Plaintiffs’ Motion to Enforce Settlement, *Flores v. Sessions*, No. CV 85-04544 DMG (AGRx) (C.D. Cal. July 27, 2018).

²² See E.O. 13767 sec. 6, 82 FR 8793 (Jan. 30, 2017) (calling on Secretary of Homeland Security to “take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law” until their immigration cases are resolved); E.O. 13841 sec. 3, 83 FR 29435 (Jan. 20, 2018) (directing Secretary of Homeland Security to “maintain custody of alien families during the pendency of any [...] immigration proceedings”).

likely to result in the detention of children and their parents for many months or even years, in contravention of the FSA and district court's orders, as their cases proceed through the immigration courts and on appeal.

Human Rights First opposes the proposed regulation's attempt to overturn safeguards limiting the detention of children with their families. These changes threaten the health and development of children, violate U.S. treaty commitments and the Flores agreement, and waste government resources by increasing costly immigration detention instead of employing detention alternatives that are less costly, more humane, and have proven effective in ensuring court appearance. DHS regulations should prohibit, rather than expand, the detention of children with their parents. Indeed, DHS's own advisory committee on family detention found that "detention is generally neither appropriate nor necessary for families" for purposes of immigration enforcement or management, that "detention is never in the best interest of children," and that "DHS should discontinue the general use of family detention."²³

Pediatricians and other health professionals confirm that even a few days in detention harm children. The American Academy of Pediatrics, an organization comprised of over 60,000 leading pediatricians from the United States, has stated that, "even short periods of detention can cause psychological trauma and long-term mental health risks for children" and warned that detention is "no place for a child, even if they are accompanied by their families."²⁴ The country's leading medical associations agree that extensive emotional harm results from detention, including: depression and anxiety, self-harm, suicidal ideation, developmental and behavioral regressions, post-traumatic stress disorder, lack of appetite, weight loss, and frequent infections and gastrointestinal symptoms.²⁵ Other concerning physical manifestations of trauma in detained children include bed-wetting, insomnia, and regression in speech patterns to the point that a child is no longer able to speak.²⁶ A 2015 report by Juan Mendez, the Special Rapporteur

²³ DHS Advisory Committee on Family Residential Centers, *Report of the DHS Advisory Committee on Family Residential Centers*, Sep. 30, 2016, at 2, available at <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

²⁴ Devin Miller, *Pediatricians speak out: Detention is not the answer to family separation*, AAP News, July 24, 2018, available at <http://www.aappublications.org/news/2018/07/24/washington072418>.

²⁵ American College of Pediatrics, *Joint Letter to the House Judiciary, Energy, and Commerce, Homeland Security, and Appropriations Committees*, July 24, 2018, available at https://www.acponline.org/acp_policy/letters/letter_house_oversight_request_on_child_detention_centers_2018.pdf.

This joint letter to Congress was signed by the country's leading medical associations, including: Academic Pediatric Association, American Academy of Pediatrics, American Association of Child & Adolescent Psychiatry, American College of Physicians, American Medical Association, American Nurses Association, American Pediatric Society, American Psychiatric Association, American Psychological Association, Association of Medical School Pediatric Department Chairs, National Association of Pediatric Nurse Practitioners, Pediatric Policy Council, Society for Adolescent Health and Medicine, and Society for Pediatric Research.

²⁶ Christopher Greely, M.D., et al., *Technical Research Report: Policies, Practices, and Structures Impacting the Health and Care Access of Migrant Children*, Prepared for the Texas Medical Center Health Policy Institute, January 2017, available at

on torture and other cruel, inhuman or degrading treatment or punishment, drew upon this medical research in noting that even a few days in detention “compromise[] cognitive development” and present dangers to the physical and mental well-being of children given the “unique vulnerability” of their youth.²⁷

Doctors familiar with the family detention centers currently in operation in Berks, Pennsylvania and Dilley and Karnes, Texas, have similarly voiced concerns about the health of children jailed in these facilities. One group of twenty-two doctors, psychologists, nurses, and social workers urged the Pennsylvania Bureau of Hearings and Appeals to reject relicensing of the Berks County Residential Center as a childcare facility, pointing out that “[a]fter just a few weeks in detention some children at the Berks family detention center exhibit ‘symptoms of behavioral regression,’ including ‘oppositional-defiant disorder, depression, anxiety, and increased aggression.’”²⁸ The president of the Texas Pediatric Society concluded after several visits to family detention centers in Texas that “[e]ven short stays in detention centers like the ones in Karnes City and Dilley can harm children’s physical and mental health, at a time when they have already undergone significant trauma.”²⁹

Prolonged detention exacerbates negative impacts for children’s mental and physical health.

A comprehensive study by Physicians for Human Rights and the Bellevue-NYU Program for Survivors of Torture found that asylum seekers held in immigration detention suffer high levels of PTSD, depression, and anxiety and that these conditions worsen in severity as detention

https://www.researchgate.net/publication/316110708_Policies_Practices_and_Structures_Impacting_the_Health_and_Care_Access_of_Migrant_Children; Julie M. Linton, M.D., et al., *Detention of Immigration Children*, 139 PEDIATRICS 4, April 2017, available at <http://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>; John Burnett, *The U.S. Has a Long, Troubled History of Detaining Families Together*, NPR, June 29, 2018, available at <https://www.npr.org/2018/06/29/624789871/president-trumps-new-plan-isnt-to-separate-migrant-families-but-to-lock-them-up>.

²⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/28/68, Mar. 5, 2015, available at <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx> (citing Anthony Lake and Margaret Chan, *Putting science into practice for early child development*, UNICEF, New York and WHO Geneva, Sep. 20, 2014; Michael D. De Bellis et al., *Developmental Traumatology Part II: Brain Development*, 14 (10) BIOLOGICAL PSYCHIATRY, May 15, 1999, at 1271–84).

²⁸ Brief of Amici Curiae in Support of the Pennsylvania Department of Human Services, January 4, 2017, available at <http://www.humanrightsfirst.org/sites/default/files/hrf-berks-amicus-brief-psychologists.pdf>.

²⁹ American Academy of Pediatrics, *Texas Pediatric Society and the American Academy of Pediatrics Oppose Bill That Would License Detention Centers as Child Care Facilities*, May 15, 2017, available at <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Texas-Pediatric-Society-and-the-American-Academy-of-Pediatrics-Oppose-Bill-That-Would-License-Detention-Centers.aspx> (quoting Joyce Mauk, MD, FAAP, president of the Texas Pediatric Society Texas Pediatric Society and the American Academy of Pediatrics).

becomes prolonged.³⁰ In studying the effects of long-term immigration detention on children in Australia, who had been held for two years on average, the Human Rights and Equal Opportunity Commission found that “the longer children are in detention the more likely it is that they will suffer mental harm,” including “anxiety, distress, bed-wetting, suicidal ideation and self-destructive behavior including attempted and actual self-harm[,] . . . depression and PTSD.”³¹ The inquiry found that “[t]he longer children were detained the more likely it was that they displayed one or more of these problems.”³²

Negative health outcomes of long-term detention are long-lasting. The American Medical Association has found that even after release from immigration detention, “the physical and psychological distress of detention can continue, particularly for children.”³³ Those psychological stresses often stem from uncertainty about the future, the intensely regimented nature of life in detention, lack of choice, and fear of being separated from parents.³⁴ According to Steve Lee, professor of psychology at the University of California Los Angeles and president of the Society of Clinical Childhood and Adolescent Psychology, the long-term consequences of this stress can include “difficulty regulating emotions and forming healthy relationships, anxiety, depression and an impaired sense of self or self-efficacy.”³⁵

The proposed expansion in the detention of children in asylum-seeking families would violate the United States’ international treaty obligations. As a party to several treaties relevant to the detention of children and asylum seekers, including the Refugee Protocol, the International Covenant for Civil and Political Rights (“ICCPR”) and the Convention Against Torture, the United States must ensure that the use of immigration detention does not violate its legal obligations under international law.

As a signatory to the 1967 U.N. Protocol Relating to the Status of Refugees,³⁶ the United States is bound by articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees

³⁰ Allen Keller, M.D., *From Persecution to Prison*, Physicians for Human Rights, June 2003, at 63, 73–75, available at <https://phr.org/resources/from-persecution-to-prison/>.

³¹ Human Rights and Equal Opportunity Commission, *A Last Resort: National Inquiry into Children in Immigration Detention*, April 2004, at 429–30, available at https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf.

³² *Id.* at 430.

³³ American Medical Association, *AMA Adopts New Policies to Improve Health of Immigrants and Refugees*, June 12, 2017, available at <https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees>.

³⁴ Jamie Ducharme, *Separating Kids from Parents Can Cause Psychological Harm. But Experts Say Detaining Them Together Isn’t Much Better*, TIME, June 21, 2018, available at <http://time.com/5317762/psychological-effects-detaining-immigrant-families/>.

³⁵ *Id.*

³⁶ Protocol Relating to the Status of Refugees, Jan. 13, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, entry into force by the United States (by accession) on Nov. 1, 1968.

(“Refugee Convention”).³⁷ Under Article 31 of the Refugee Convention, a state may not penalize a refugee on account of his or her “illegal entry or presence” in the country.³⁸ Article 31 also prohibits states from placing more restrictions on the movement of refugees than “necessary” in the individual case.³⁹

The Executive Committee of the United Nations High Commission for Refugees (UNHCR), of which the United States is a member, concluded that detention should “normally be avoided.”⁴⁰ In its 2012 guidelines on the detention of asylum seekers, UNHCR stressed that the use of detention as a deterrence for asylum seekers is, “generally unlawful” under international human rights norms.⁴¹ The guidelines—noting the right to seek asylum under Article 14 of the Universal Declaration of Human Rights—specifically confirm the general principle that the “detention of asylum seekers should . . . be a measure of last resort.”⁴²

Article 9 of the ICCPR, which the United States has ratified, provides that “[e]veryone has the right to liberty and security of person,” and “[n]o one shall be subjected to arbitrary arrest or detention.”⁴³ Detention is arbitrary when it is not reasonable or necessary in the circumstances of a particular individual’s case, or not proportional to the end sought.⁴⁴ This determination must be made through an individualized assessment of these factors, subject to prompt review by an independent court. Detention that is automatic or “mandatory,” or imposed as part of a plan to deter others from migrating, runs afoul of U.S. human rights commitments.

³⁷ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. Congress enacted the Refugee Act of 1980 to bring domestic law into conformance with the 1967 Protocol. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Moreover, the Refugee Convention and 1967 Protocol may be considered part of United States immigration law pursuant to 8 U.S.C. §1101(a)(17) (defining “immigration laws” to include “all treaties and conventions of the United States relating to immigration”).

³⁸ Article 31(1) of the Refugee Convention provides that “[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” The provisions of Article 31 apply to asylum-seekers who are awaiting determination of their status as well as to those who have already been determined to be refugees. Office of the United Nations High Commissioner of Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, para. 3, (February 10, 1999).

³⁹ *Id.*

⁴⁰ United Nations High Commission for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) at 6, available at <http://www.unhcr.org/505b10ee9.html>.

⁴¹ *Id.* at 7.

⁴² *Id.* at 6.

⁴³ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States on June 8, 1992.

⁴⁴ Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* (October 2001) available at <http://www.unhcr.org/3bcfdf164.pdf>; Eleanor Acer and Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers and Refugees in Immigration Detention*, 24 Geo. Imm. L. J. 2001 507 (2010).

As a member of the Organization of American States,⁴⁵ the United States falls under the jurisdiction of the Inter-American Commission on Human Rights, which has specifically indicated that, including in the immigration context, “pre-trial detention is an exceptional measure,”⁴⁶ and that alternatives to detention should always be considered.⁴⁷ With respect to family detention the Commission expressed its concern that “the practice of detaining immigrant families continues with no extraordinary reason to justify it” and that “every effort must be made to ensure that the period of detention is as brief as possible.”⁴⁸

The United States has also ratified the Convention Against Torture.⁴⁹ In a March 2015 report, Special Rapporteur Mendez called on states to “expeditiously and completely, cease the detention of children, with or without their parents, on the basis of immigration status.”⁵⁰ Mendez concluded that, “the deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity,” and “becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”⁵¹

Moreover, the detention of children for immigration purposes is a clear violation of the rights enshrined in the U.N. Convention on the Rights of the Child (“CRC”). The Committee on the Rights of the Child stated in 2012 that “regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children’s rights, is never in their best interests and is not justifiable.”⁵² The Committee further stressed the child’s right to family unity and emphasized that “family unity was not a justification for detaining children and alternative measures should be found for the whole family.” Both Somalia and South Sudan ratified the CRC in 2015, making the United States the only country that has not

⁴⁵ Organization of American States, Charter of the Organisation of American States, April 30, 1948, available at <http://www.refworld.org/docid/3ae6b3624.html>, ratified by the United States on June 15, 1951.

⁴⁶ See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II.Doc.78/10, ¶34 (2010).

⁴⁷ *Id.* at ¶41.

⁴⁸ *Id.* at ¶368.

⁴⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, ratified by the United States on Oct. 21, 1994.

⁵⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) (by Juan Mendez) at 17.

⁵¹ *Id.*

⁵² UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, Sept. 28, 2012, available at <http://www.refworld.org/docid/51efb6fa4.html>.

rati ed the preeminent legal instrument on child rights. However, as a signatory, the U.S. is bound to avoid actions that would “defeat the object and purpose” of the CRC.⁵³

The indefinite detention of children and families in detention centers will be hugely expensive.

Family detention is already costly. According to ICE, the agency spends \$320 per person, per day to detain an individual in a family detention center.⁵⁴ At this rate, detaining a family of three in a family detention costs the government approximately \$28,800 per month or \$345,600 over the course of a year.

Detaining families during the entirety of their immigration proceedings, which could last for several months or even years, would likely cause these costs to skyrocket. DHS acknowledges that longer detention “may result” from the proposed regulations, which in turn “may increase” what ICE pays to private contractors responsible for operating family detention centers.⁵⁵ These cost increases are already apparent. DHS reportedly plans to build an additional family detention center at the U.S. Army Post at Fort Bliss⁵⁶ and has solicited offers from private contractors to expand family detention capacity.⁵⁷ The administration also redirected significant federal agency funds to ICE in the summer of 2018, with over \$93 million specifically added for immigration detention, bringing ICE’s total detention and transportation budget to \$3.6 billion.⁵⁸ The Center

⁵³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 18; see *Roper v. Simmons*, 543 U.S. 551 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty,” including the direct prohibition in Article 37 of the United Nations Convention on the Rights of the Child).

⁵⁴ Department of Homeland Security U.S. Immigration and Customs Enforcement, *Budget Overview: FY 2018 Congressional Justification*, available at https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

⁵⁵ 83 FR 45518. DHS notes that the expansion of detention depends on several factors, including “the number of minors and their accompanying adults who arrive in a facility on a given day; the timing and outcome of immigration court proceedings before an immigration judge; whether an individual is eligible for parole or bond; issuance of travel documents by foreign governments; transportation schedule and availability; the availability of bed space in an [family detention centers]; and other laws . . .” *Id.*

⁵⁶ Associated Press, *Latest: US Official: Fort Bliss to House Detained Families*. U.S. News, June 26, 2018, available at <https://www.usnews.com/news/us/articles/2018-06-25/politician-cant-meet-with-detainees-due-to-pox-outbreak>. In June 2018, DHS asked the Defense Department to provide resources to detain an “alien family population” of up to 12,000 people. See also Joel Rose and Tom Bowman, *Military Bases to Start Building Tents After July 4 To House Migrant Families*, NPR, June 28, 2018, available at <https://www.npr.org/2018/06/28/624294618/military-bases-to-start-building-tents-after-july-4-to-house-migrant-families>.

⁵⁷ DHS sent a Request for Information seeking input and market research in relation to the building of new facilities for families detained by ICE, “to accommodate up to 15,000 beds” from the current 3,300 bed capacity. Department of Homeland Security, *Solicitation Number: RFI_FamilyResidentialServices2018, Federal Business Opportunities*, June 22, 2018, available at <https://www.fbo.gov/index?s=opportunity&mode=form&id=d2f0c2388851d8697ae60523b4c09f38&tab=core&view=1>.

⁵⁸ Tal Kopan, *It’s not just FEMA: ICE quietly got an extra \$200 million*, CNN, Sep. 12, 2018, available at <https://www.cnn.com/2018/09/12/politics/ice-more-money-fema-dhs/index.html>.

for American Progress has estimated, based on the government’s data, that “over a decade, the proposed [Flores] rule would cost DHS slightly more than \$2 billion at the low end, and as much as \$12.9 billion at the high end.”⁵⁹

Detention of children is unnecessary to ensure their appearance in court. Detention is not necessary to ensure that families attend their immigration court hearings. Families with legal counsel overwhelmingly appear in immigration court: 97% of represented mothers and children whose cases were initiated in fiscal year 2014 complied with immigration court hearing obligations.⁶⁰ Similarly, over 97% of unaccompanied children whose cases began in fiscal year 2014 and who were represented by legal counsel were in full compliance with court appearance obligations as of August 2018.⁶¹

ICE should use family case management programs rather than detention for families who are assessed to be in need of appearance support. For instance, the family case management program (FCMP) – before ICE abruptly terminated it in 2017 – had resulted in high appearance rates.⁶² The program provided families with individualized case management services including referrals to social and medical services, education, and a legal orientation. Operated by a private contractor, the FCMP required families to check in with case managers. The contractor reported that 99.3% of families enrolled in the program attended ICE check-ins and appointments, and 100% attended court hearings.⁶³ The FCMP was also highly cost-effective, costing about \$12 per person, per day - less than 4% of the cost of a bed in a family detention center. Other appearance support or “alternative to detention” programs, such as community management programs, have also demonstrated high appearance rates and much lower costs than detention.

The proposed regulations allow DHS to evade the requirement that state child welfare authorities license facilities detaining children with their families and eliminate important safety and welfare standards for detained children

To protect the physical and psychological wellbeing of migrant children in government custody, the FSA requires that the government transfer children not released from custody to non-secure,

⁵⁹ Phil Wolgin, *The High Costs of the Flores Regulations*, Center for American Progress, Oct. 19, 2018, available at <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/>.

⁶⁰ See *supra* note 4.

⁶¹ Transaction Records Access Clearinghouse TRAC Immigration, *Juveniles — Immigration Court Deportation Proceedings* (Oct. 30, 2018, 12:10 PM) <http://trac.syr.edu/phptools/immigration/juvenile/>.

⁶² Women’s Refugee Commission, *Backgrounder: Family Case Management Program*, July 20, 2018, available at <https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program>.

⁶³ Associated Press, *ICE Shuttles Detention Alternative for Asylum-seekers*, VOA News, June 9, 2017, available at <https://www.voanews.com/a/ice-shuttles-detention-alternative-asylum-seekers/3893854.html>. See *Studies: Mass Detention of Migrant Families is Unnecessary, Inefficient*, note 7, *supra*.

state-licensed facilities that comply with applicable state child welfare laws. The proposed regulations evade this requirement and the protections that flow from it.

Under the proposal, where state and local laws do not authorize licensing of family detention centers, DHS may establish its own alternative licensing scheme and select an entity to ensure compliance with family detention standards issued by ICE, which are not legally enforceable.⁶⁴

Human Rights First opposes the proposed regulation's attempt to sidestep the state-licensing requirement. State licensing authorities and courts, as well as medical and child welfare experts, agree that family detention centers are not safe or appropriate places to house children and should not be licensed as childcare facilities. Nor should DHS be entrusted to police the standards of the family detention facilities it operates particularly given its history of negligent oversight. By allowing DHS to effectively self-license family detention centers, rather than abandoning the use of these unlicensed, trauma-inducing jails, children and families will continue to be incarcerated in violation of the FSA.

DHS seeks to create this licensing loophole because state authorities and courts have blocked or revoked licenses of family detention facilities. Detaining children in these facilities violates state law and runs counter to the purpose of licensing schemes: to protect children from harm. The Pennsylvania Department of Human Services refused to renew the license of the Berks County Residential Center as a child residential facility because it was, in fact, operating “for the detention of immigrant families, including adults” in violation of the terms of its license.⁶⁵ Further, Pennsylvania state law prohibits the detention of children under the age of nine in a secure facility⁶⁶ and allows detention of a child over the age of nine in a secure facility only if the child is alleged or adjudicated delinquent and court-ordered to a secure facility.⁶⁷ In Texas, a state judge invalidated a license issued to the Karnes County Residential Center and blocked the issuance of a license to the South Texas Family Residential Center in Dilley, Texas,⁶⁸ finding that licensing these facilities violated Texas law governing standards for child residential programs⁶⁹ and contravened the law's purpose: “to protect the health, safety, and well-being of the children of the state who reside in child-care facilities.”⁷⁰

⁶⁴ 83 FR 45525 (proposed 8 C.F.R. § 236.3(a)(9) (defining “Licensed Facility”).

⁶⁵ Letter to Diane Edwards, Executive Director, Berks County Commissioners, RE: Berks County Residential Center, signed by Matthew J. Jones, Director, Bureau of Human Services Licensing, Pennsylvania Department of Human Services, January 27, 2016. After the license expired in February 2016, Berks County appealed, and the case remains pending on appeal before the commonwealth courts.

⁶⁶ 55 Pa. Code § 3800.283(7).

⁶⁷ 55 Pa. Code § 3800.271.

⁶⁸ *Grassroots Leadership, et al. v. Texas Dep't of Family and Protective Serv's, et al.*, No. D-1-GN-15-004336 (Travis Co. Dist. Ct. Dec. 2, 2016), available at

https://grassrootsleadership.org/sites/default/files/uploads/gli_v._dfps_final_judgment.pdf.

⁶⁹ Tex. H.R. Code § 42.002(4).

⁷⁰ See Tex. H.R. Code § 42.001.

Medical and child welfare experts agree that the family detention center do not meet state licensing requirements because they fail to provide adequate care, traumatize children by subjecting them to incarceration, and are not intended to be licensed as childcare facilities. For years, the American Academy of Pediatrics has argued that family detention facilities are not capable of providing generally recognized standards of medical and mental health for children⁷¹ and as a result has taken the position that “children in the custody of their parents should never be detained.”⁷² The Texas Pediatric Society opposed proposed exemptions to state law to allow the licensure of family detention in Texas because doing so “would enable the centers to house children in traumatic, prison-like conditions for extended periods of time.”⁷³ Similarly, a group of doctors, psychologists, nurses, and social workers in Pennsylvania defended the Department of Human Services’ decision to decline to relicense the Berks facility “as it operates in violation of Pennsylvania’s minimum licensing requirements by failing to protect the health and well-being of children.”⁷⁴ As the Texas chapter of the National Association of Social Workers has noted, the “child welfare system was not designed to license family detention centers.”⁷⁵

Detention facilities should be subject to oversight by independent public monitoring bodies. DHS should not be permitted to avoid licensing requirements for family detention centers by setting its own standards and hiring its own inspectors. This self-licensing and self-monitoring regime is particularly dangerous given the department’s poor track record in inspecting and ensuring the safety of its detention facilities generally. A June 2018 report the Office of the Inspector General (OIG) found that ICE’s self-monitoring process for detention centers carried out by an independent evaluator was deficient. Inspectors contracted by ICE consistently failed to “fully examine actual conditions or identify all compliance deficiencies.”⁷⁶ ICE personnel described inspections by the Nakamoto Group, the inspector ICE most frequently hires, as “very, very, very difficult to fail” and “useless.”⁷⁷ OIG’s inspectors did not observe Nakamoto employees conducting interviews in private or in any language other than English, as required

⁷¹ Letter from the American Academy of Pediatrics to the Secretary of DHS Jeh Johnson, July 24, 2015, *available at* <https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf>.

⁷² Julie M. Linton, Marsha Griffin, Alan J. Shapiro, *Detention of Immigrant Children*, 139 *Pediatrics* 5 (March 2017) *available at* <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

⁷³ *Texas Pediatric Society and the American Academy of Pediatrics Oppose Bill That Would License Detention Centers as Child Care Facilities*, note 29, *supra*.

⁷⁴ Brief of Amici Curiae in Support of the Pennsylvania Department of Human Services, note 28, *supra*.

⁷⁵ Grassroots Leadership, *Private prison companies’ scheme to license baby jails fails as Texas legislative session ends*, May 29, 2017, <https://grassrootsleadership.org/releases/2017/05/private-prison-companies-scheme-license-baby-jails-fails-texas-legislative-session>.

⁷⁶ Office of the Inspector General, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, June 26, 2018, at 4, *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

⁷⁷ *Id.* at 7, n. 12.

under the inspection contract, and “would not characterize [these discussions] as interviews.”⁷⁸ Even when inspectors identified problems, ICE allowed these violations to go “unaddressed for years” because of inadequate oversight. The report concluded that ICE’s inspect process “do[es] not ensure adequate oversight or systemic improvements in detention conditions.”⁷⁹

DHS has restricted access to inspection reports on the family detention centers. Although the inspector hired by DHS to monitor compliance with ICE’s standards for family detention centers has conducted monthly inspections since 2015, ICE has publicly released only one report on each of the centers.⁸⁰ ICE denied requests by DHS’s own Advisory Committee on Family Residential Centers for access to the other inspection reports.⁸¹ The Office of Civil Rights and Civil Liberties within DHS has conducted more in-depth inspections and investigations of family detention centers, but those reports are not available to the public. Two medical doctors who served as subject matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations “frequently revealed serious compliance issues resulting in harm to children.”⁸² They reported that family detention centers “still have significant deficiencies that violate federal detention standards,” including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and gave detailed examples of cases when children have been harmed by inadequate medical care.⁸³

Further, the proposed regulations seek to weaken the standards for non-secure, licensed facilities and thereby violate the terms of the FSA.⁸⁴ The proposed regulations do not mandate facilities to, among other provisions: (1) comply with applicable state child welfare laws and general state health and safety codes;⁸⁵ (2) provide children with needed non-English language educational materials and instruction;⁸⁶ (3) provide “assistance in obtaining legal guardianship when necessary for the release of the minor;”⁸⁷ (4) deliver services appropriate to the age, culture and

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 4.

⁸⁰ Declaration of Jon Gurule, ¶6, *Flores v. Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016), Exhs. 1–3, available at <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf>

⁸¹ *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, at 93, available at <https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf>.

⁸² Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus (July 17, 2018), available at <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf>.

⁸³ *Id.*

⁸⁴ See 83 FR 45527 (proposed 8 C.F.R. § 236.3(i)(4)).

⁸⁵ Flores Settlement Agreement, note 1, *supra*, at Exh. 1, □A.

⁸⁶ *Id.* at Ex. 1, □A4 (“The educational program shall include instruction and educational and other reading materials in such languages as needed.”)

⁸⁷ *Id.* at Exh. 1, □A13.

language of the child,⁸⁸ (5) prohibit “corporal punishment, humiliation, mental abuse or punitive interference . . . with eating or sleeping.”⁸⁹ These proposals are particularly concerning given histories of abuse and service failure at the family detention centers. For instance, in 2007, Lutheran Immigration and Refugee Services and the Women’s Refugee Commission reported a range of problems at Berks, including prohibiting children from speaking as a form of punishment.⁹⁰ Human Rights First has also documented the lack of age and language appropriate education for children at Berks.⁹¹ Eliminating these standards and protections would place the health and safety of detained children at further risk, particularly as detention becomes more prolonged.

The proposed regulations seek to limit parole for accompanied children and adults in expedited removal

The proposed regulations impose heightened parole standards for detained individuals – both accompanied children and adults – in expedited removal proceedings. The current parole regulations allow detained individuals in expedited removal proceedings to be paroled for “urgent humanitarian reasons” or “significant public benefit” under 8 CFR § 212.5(b). In 2017, a federal district court overseeing the Flores litigation found that under that provision DHS had discretion to release detained children on a case-by-case basis, including those in the expedited removal process.⁹² The proposed regulations, however, limit the release from detention of children and adults in expedited removal proceedings who have not yet passed a credible or reasonable fear interview to parole under the much narrower circumstances of a medical emergency or for law enforcement purposes.⁹³

Given the already limited use of parole in general, the proposed regulation would further reduce the release of children from detention who pose no flight or security risk. Under this regulation children with urgent humanitarian needs including, pregnant young women as well as children with physical disabilities, cognitive impairments and chronic medical conditions may no longer qualify for parole under the exacting medical emergency standard.

⁸⁸ *Id.* at Exh. 1, □B.

⁸⁹ *Id.* at Exh. 1, □C.

⁹⁰ Lutheran Immigration and Refugee Service and the Women’s Commission for Refugee Women and Children, *Locking Up Family Values: The Detention of Immigrant Families*, Feb. 21, 2010, available at <https://www.womensrefugeecommission.org/resources/document/150-locking-up-family-values-the-detention-of-immigrant-families>.

⁹¹ *Family Detention in Berks County, Pennsylvania*, note 12, *supra*; *Long-Term Detention of Mothers and Children in Pennsylvania*, note 19, *supra*.

⁹² Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor, note 20, *supra*, at 23.

⁹³ See 8 CFR § 235.3(b)(2)(iii), (4)(ii).

The proposed regulations eliminate the requirement that DHS evaluate simultaneous release of a detained parent, legal guardian, or adult relative when releasing children from DHS custody

Currently, the regulations provide that, when a minor in DHS custody is authorized for release on bond, parole, or recognizance, and there is no suitable sponsor available, DHS shall evaluate, on a “discretionary case-by-case basis,” the simultaneous release of a “parent, legal guardian, or adult relative in [U.S. Customs and Border Protection (CBP) or ICE] detention.”⁹⁴ The proposed regulations eliminate this provision entirely. Without the requirement to consider simultaneous release for parents along with their children, more children may be denied liberty as they are left in family detention for longer or separated from their parents and placed in the custody of the Office of Refugee Resettlement (ORR).

Instead of releasing children with their parents from detention, the proposed regulations codify procedures to separate children from their parents

Under the proposed regulations, when a detained parent or legal guardian is not released with a child who receives parole from DHS custody and no parent or guardian is available to take custody of the child, DHS may treat the child as an unaccompanied alien child (UAC), separate the child from the detained parent/guardian, and transfer the child to ORR custody to begin the process of locating a sponsor.⁹⁵ The transfer of accompanied children to ORR custody to secure their release is not required by law. DHS should instead release detained children and parents together to avoid inflicting further unnecessary trauma on children.

The American Psychiatric Association has concluded that forced separation “is highly stressful for children and can cause lifelong trauma, as well as an increased risk of other mental illnesses, such as depression, anxiety, and posttraumatic stress disorder (PTSD).”⁹⁶ Beyond the physical and mental health concerns that arise when parents are separated from their children, codifying the practice delays release and prolongs institutionalization, contrary to the regulation’s purported intention to maintain family unity, and swells an already overburdened ORR shelter system. Further, separating parents and children and placing them in separate immigration proceedings creates due process concerns around their ability to collect evidence and present testimony crucial to their claims for asylum and other forms of relief.

⁹⁴ 8 C.F.R. § 236.3(b)(2).

⁹⁵ 83 FR 45528 (proposed 8 CFR § 236.3(j)(2)).

⁹⁶ *APA Statement Opposing Separation of Children from Parents at the Border*, note 5, *supra*.

The regulations rely on undefined and overly broad emergency provisions that could effectively eliminate the government’s obligation to timely transfer children out of detention

The FSA requires DHS to transfer children out of its custody to a licensed program within three to five days except in cases of “emergency” or “influx.” Under the FSA, emergency is defined as an act or event that “prevents the placement” of children within this timeframe, while an influx is defined as more than 130 minors eligible for placement; during an emergency or influx children must be transferred “as expeditiously as possible.”⁹⁷ The proposed regulations seek to expand the definition of emergency, fail to update the definition of “influx” to reflect current realities, and rely on other undefined emergency provisions to justify exceptions to the timely and secure transfer of children to licensed child-care facilities.

Under the proposed rules, the existence of an “emergency” relaxes the requirement to timely place detained children in a licensed facility,⁹⁸ as the FSA also provides. However, the regulations adopt a broader definition for “emergency,” expanding its scope from events, such as natural disasters, that “prevent the placement” of children to also include an event that “prevents timely transport or placement of minors, or impacts other conditions provided by this section.”⁹⁹ As an initial matter, expanding “emergency” to encompass an event that impacts conditions “other” than those affecting the transport or placement of children in a licensed facility is nonsensical and does not justify delay in placement. DHS appears to have adopted this definition in an attempt to waive standards of care beyond the transfer of children. Specifically, the agency asserts that the expanded emergency definition allows the agency to forgo, for instance, the provision of regular meals during an emergency.¹⁰⁰ However, the proposed DHS regulations do not authorize waiver of any provisions other than those relating to the placement and housing of children in the event of an “emergency.” Troublingly through the proposed rules do allow ICE to hold unaccompanied children with unrelated adults for more than twenty-four hours during emergencies,¹⁰¹ which places children at increased risk of abuse by unrelated adults when government officials are likely to be distracted by the emergency at hand.

The proposed regulations continue to rely on the definition of “influx,”¹⁰² as adopted by the FSA in 1997, which similarly relaxes the requirement to place detained children in a licensed

⁹⁷ Flores Settlement Agreement, note 1, *supra*, at ¶¶12, 19.

⁹⁸ 83 FR 45526 (proposed 8 C.F.R. § 236.3(e) (regulating transfer of minors who are not UACs from one facility to another)).

⁹⁹ 83 FR 45525 (proposed 8 C.F.R. § 236.3(b)(5) (defining “emergency”).

¹⁰⁰ *See* 83 FR 45496 (“The proposed definition of emergency largely tracks the existing text of the FSA, except that it reflects DHS’s recognition that emergencies may not only delay placement of minors, but could also delay compliance with other provisions of this proposed rule, or excuse noncompliance on a temporary basis.”).

¹⁰¹ 83 FR 45526 (proposed 8 C.F.R. § 236.3(g)(2)(i)).

¹⁰² 83 FR 45525 (proposed 8 C.F.R. § 236.3(b)(10) (defining “influx”).

facility.¹⁰³ This definition fails to reflect current realities of the average number of children who arrive to the United States each year nor the government’s capacity to transport, place and house migrant children, which has grown significantly since 1997. Adopting this definition will likely allow DHS to permanently operate under the “influx” provision and effectively eliminate the time limits on transfer of children to licensed facilities – a provision intended to ensure that children are held under restrictive conditions for the least amount of time necessary.

Further, the proposed regulations leave undefined other emergency provisions that waive requirements for the swift and safe transfer of unaccompanied minors. For instance, the regulations provide that in “exceptional circumstances” DHS is not required to timely transfer unaccompanied minors to ORR custody.¹⁰⁴ In addition, ICE is permitted to hold unaccompanied children with unrelated adults for more than twenty-four hours under “exigent circumstances.”¹⁰⁵ The regulations fail to define either term.¹⁰⁶ Adopting these undefined emergency provisions could allow DHS to ignore these important provisions meant to safeguard the safety of vulnerable unaccompanied children.

Taken together these proposed emergency provisions could effectively undo the FSA’s time limitations on transferring children out of DHS custody and result in the prolonged detention of children in unlicensed detention centers.

¹⁰³ 83 FR 45526 (proposed 8 C.F.R. § 236.3(e) (regulating transfer of minors who are not UACs from one facility to another)).

¹⁰⁴ 83 FR 45526 (proposed 8 C.F.R. § 236.3(f)(3)).

¹⁰⁵ 83 FR 45526 (proposed 8 C.F.R. § 236.3(g)(2)(i)).

¹⁰⁶ *See* 83 FR 45525 (proposed 8 C.F.R. § 236.3(b) (definitions)).