



Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

To Whom It May Concern:

We write on behalf of the Center for American Progress (CAP), in response to the Notice of Proposed Rulemaking (proposed rule) of the Departments of Homeland Security (DHS) and Health and Human Services (HHS), to register our concerns with and express strong opposition to the proposed rule to change the regulations relating to the apprehension, processing, care, and custody of children, published in the Federal Register on September 7, 2018.

As the nation's foremost progressive think tank, CAP has a longstanding interest in safeguarding the wellbeing of everyone living in the United States, including immigrants and asylum seekers, children and families, and Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals. Since its founding in 2003, CAP has worked to ensure that America lives up to its commitments to protect the most vulnerable among us.

The proposed rule would have significant and deleterious effects on children and families and would subject LGBT individuals to even greater harm than they currently face in DHS and HHS custody. Nowhere in the proposed rule do DHS and HHS cite any of the literature on the harms to children, families, or LGBT individuals, nor do they account for these effects, ignoring a significant body of scholarship. Contrary to the claims of DHS, there is no data or evidence to suggest that the changes contemplated in the proposed rule would deter children and families from seeking asylum in the U.S., even as it opens these same individuals up to a range of negative outcomes. And in doing so, the proposed rule would cost the government hundreds of millions of dollars--at a minimum--if not over a billion dollars each year--something which the administration failed to even attempt to calculate. For these reasons, as detailed below, this proposed rule is arbitrary and capricious and should not move forward. DHS and HHS should immediately withdraw the proposed rule, which violates both the letter and the spirit of the *Flores* settlement,¹ as well as the Administrative Procedure Act.²

Harms to children

The proposed rule would threaten children's short- and long-term health and wellbeing

¹ The *Flores* settlement agreement can be found at *Jenny Lisette Flores v. Janet Reno*, CV 85-4544 (1997), available at https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf.

² P.L. 79-404 60 Stat. 237 (1946).

DHS acknowledges that the proposed rule “may result in additional or longer detention for certain minors,”³ and yet does not acknowledge or reference any of the vast literature on how such detention would be detrimental to children's mental and physical health. The failure to even consider or discuss this literature renders the proposed rule arbitrary and capricious. Research confirms that spending even weeks in detention is associated with behavioral regression, depression, anxiety, suicidality, recurrent nightmares, frequent crying, loss of appetite, weight loss, and post-traumatic stress disorder (PTSD) among children.⁴ Children's risk of developing these symptoms increases the longer they are detained.⁵ This is because detention is often characterized by emotional abuse, physical or sexual abuse, educational neglect, parental emotional distress, family separation, inadequate supervision, and other stressful and traumatic events known as adverse childhood experiences (ACEs). Exposure to ACEs during early childhood can alter a child's brain chemistry and brain architecture. According to the Harvard Center for the Developing Child, experiencing this type of stress floods children's developing brains with stress hormones, and the “sustained activation of the stress response system can lead to impairments in learning, memory and the ability to regulate certain stress responses.”⁶ The impact of chronic, toxic stress is cumulative and has lifelong repercussions for children,⁷ putting them at increased risk for cognitive impairments and stress-

³ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” *Federal Register* 83 (174) (2018): 45486–45534, pg. 45488, available at <https://www.regulations.gov/document?D=ICEB-2018-0002-0001>.

⁴ Rachel Kronick, Cécile Rousseau, and Janet Cleveland, “Asylum-seeking children's experiences of detention in Canada: A qualitative study,” *American Journal of Orthopsychiatry* 85 (3) (2015): 287–294; Kathryn S. Miller, “The psychological impact of immigration detention on child and adolescent asylum seekers,” *Journal of Child and Adolescent Behavior* (2017); Olga Byrne and Eleanor Acer, “Family Detention: Still Happening, Still Damaging” (New York: Human Rights First, 2015), available at <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

⁵ Wendy Cervantes, “Family Detention: The Harmful Impact on Children” (Washington: First Focus, 2015), available at <https://firstfocus.org/wp-content/uploads/2015/07/Family-Detention.pdf>.

⁶ National Scientific Council on the Developing Child, “Excessive Stress Disrupts the Architecture of the Developing Brain” (Cambridge, MA, 2005), available at https://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf.

⁷ See for example: VJ Felitti and others, “Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: the adverse childhood experiences (ACE) study.” *Am J Prev Med.* 1998;14:245–258, available at <https://www.ncbi.nlm.nih.gov/pubmed/9635069> ; DW Brown and others, “Adverse childhood experiences and the risk of lung cancer.” *BMC Public Health.* 2010;10:20, available at <https://www.ncbi.nlm.nih.gov/pubmed/19188532>; DW Brown and others, “Adverse childhood experiences and the risk of lung cancer.” *BMC Public Health.* 2010;10:20, available at <https://www.ncbi.nlm.nih.gov/pubmed/20085623> ; RF Anda and others, “Adverse childhood experiences and chronic obstructive pulmonary disease in adults.” *Am J Prev Med.* 2008;34(5):396-403, available at <https://www.ncbi.nlm.nih.gov/pubmed/18407006>; R Anda and others, “Adverse childhood experiences and frequent headaches in adults.” *Headache.* 2010;50(9):1473-81, available at <https://www.ncbi.nlm.nih.gov/pubmed/20958295>; PS Corso and others, “Health-related quality of life among adults who experienced maltreatment during childhood.” *Am J Public Health.* 2008;98:1094–1100, available at <https://www.ncbi.nlm.nih.gov/pubmed/18445797>; M Dong and others, “Adverse childhood experiences and self-reported liver disease: new insights into a causal pathway.” *Arch Intern Med.* 2003;163:1949–1956, available at <https://www.ncbi.nlm.nih.gov/pubmed/12963569>; SR Dube and others, “Adverse Childhood Experiences and personal alcohol abuse as an adult.” *Addictive Behaviors.* 2002;27(5):713–725, available at <https://www.ncbi.nlm.nih.gov/pubmed/12201379>; SR Dube and others, “Childhood abuse, neglect and household dysfunction and the risk of illicit drug use: The Adverse

related physical and mental illness later in life, including heart disease, diabetes, substance abuse, and depression.⁸ This can translate into poor academic, social, and economic outcomes as well.

In 2015, U.S. Immigration and Customs Enforcement (ICE) chartered an Advisory Committee on Family Residential Centers. The primary recommendation in the Advisory Committee's 2016 final report recognized "that detention is generally neither appropriate nor necessary for families - and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children."⁹ By failing entirely to address the Advisory Committee's evidence or central recommendation or to explain the administration's basis for discarding the report, the proposed rule is arbitrary and capricious.

Additionally, by prolonging the detention of children through this proposed rule, the administration will knowingly inflict ACEs on an already vulnerable group of children. DHS fails to acknowledge or address the lasting and life-altering harms that it will inflict on children through the proposed rule. In fact, nowhere in the proposed rule does DHS discuss any of the potential negative consequences for children and families in prolonged immigration detention, nor does it cite any of the literature on the subject. DHS must address this critical oversight.

Importantly, the majority of asylum-seeking migrant children and families that will be detained for prolonged periods of time as a result of the proposed rule have fled violence or persecution in their home countries and have likely already been exposed to high rates of trauma before

Childhood Experience Study." *Pediatrics*. 2003;111(3):564–572, available at <https://www.ncbi.nlm.nih.gov/pubmed/12612237>; DF Williamson and others, "Body weight, obesity, and self-reported abuse in childhood." *International Journal of Obesity*. 2002;26:1075–1082, available at <https://www.ncbi.nlm.nih.gov/pubmed/12119573>; RF Anda and others, "Adverse childhood experiences and smoking during adolescence and adulthood." *JAMA*. 1999;282:1652–1658, available at <https://www.ncbi.nlm.nih.gov/pubmed/10553792>; DW Brown and others, "Adverse childhood experiences and childhood autobiographical memory disturbance." *Child Abuse Negl*. 2007;31:961-9, available at <https://www.ncbi.nlm.nih.gov/pubmed/17868865>; RF Anda and others, "Adverse childhood experiences and prescribed psychotropic medications in adults." *Am J Prev Med*. 2007;32(5):389–94, available at <https://www.ncbi.nlm.nih.gov/pubmed/17478264>; DP Chapman and others, "Adverse childhood experiences and the risk of depressive disorders in adulthood." *J. Affect Disord*. 2004;82:217–225, available at <https://www.ncbi.nlm.nih.gov/pubmed/15488250>; RF Anda and others, "The enduring effects of abuse and related adverse experiences in childhood. A convergence of evidence from neurobiology and epidemiology." *Eur Arch Psychiatry Clin Neurosci*. 2006; 56(3):174–86, available at https://www.ncbi.nlm.nih.gov/pubmed/16311898?ordinalpos=9&itool=EntrezSystem2.PEntrez.Pubmed.Pubmed_ResultsPanel.Pubmed_RVDocSum; SD Hillis and others, "The association between adverse childhood experiences and adolescent pregnancy, long-term psychosocial outcomes, and fetal death." *Pediatrics*. 2004; 113(2):320–327, available at <https://www.ncbi.nlm.nih.gov/pubmed/14754944>; DW Brown and others, "Adverse childhood experiences and the risk of premature mortality." *Am J Prev Med*. 2009;37(5):389-396, available at <https://www.ncbi.nlm.nih.gov/pubmed/19840693>; DP Chapman and others, "Adverse childhood experiences and sleep disturbances in adults." *Sleep Med*. 2011;12: 773-79, available at <https://www.ncbi.nlm.nih.gov/pubmed/21704556>

⁸ Ibid.

⁹ Advisory Committee on Family Residential Centers, "Final Report" (2016), pg. 2, available at <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

even entering the United States.¹⁰ Forcing immigrant children to endure further stressors in indefinite detention will only compound preexisting trauma. Despite the gravity of these consequences, the proposed rule does not acknowledge nor address the cumulative and lasting harms that children are subjected to in the confines of indefinite detention.

The proposed rule fails to explain how DHS plans to address the additional health care needs of immigrant children that result from spending prolonged time in detention. This includes necessary services for children while they are in detention, as well as the costs to immigrant families and to taxpayers of treating and managing the longer-term conditions mentioned above. For example, a comprehensive study of common and costly hospitalizations for pediatric mental health disorders found that the average charge per visit for a child with depression is \$13,200 and the average cost per visit for a child with anxiety disorder is \$16,106.¹¹ Another study found that the costs of prescription drugs, emergency care, and office visits were approximately two times higher for children with a mental disorder than for children without a mental disorder.¹² Given that the administration will subject tens of thousands of immigrant children to psychological harms under the proposed rule, the administration must address how it plans to manage costs of this magnitude. What's more, the Government Accountability Office in 2016 criticized the ICE Health Service Corps--which is responsible for providing direct patient care to approximately 13,500 detainees each day, including thousands in family detention facilities--for not being able to provide a reliable account of the cost of providing medical services, making the omission of a valid cost estimate for medical services in the proposed rule even more concerning.¹³

The proposed rule would put children at greater risk of abuse

The proposed rule would also put children at greater risk of abuse: In the proposed rule, DHS acknowledges that the rule may result in the prolonged detention of children,¹⁴ but DHS does not acknowledge the evidence that prolonged detention exposes immigrant children to increased risk of assault and abuse, again making the proposed rule arbitrary and capricious. One study found that the longer children remain in juvenile justice facilities, the more likely they are to experience violence—including theft, robbery, physical assault and sexual assault--while

¹⁰ U.N. High Commissioner for Refugees Regional Office for the United States and the Caribbean, “Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection” (2014), available at <http://www.unhcr.org/56fc266f4.html>; U.N. High Commissioner for Refugees, “Women on the Run” (2015), available at <http://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html>

¹¹ Naomi S. Bardach and others, “Common and Costly Hospitalizations for Pediatric Mental Health Disorders.” *Pediatrics* 133.4 (2014): 602–609. PMC. Web. 15 Oct. 2018. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3966505/>

¹² Manasi S. Suryavanshi and Yi Yang, “Clinical and Economic Burden of Mental Disorders Among Children With Chronic Physical Conditions, United States, 2008–2013,” *Prev. Chronic Dis.* 2016; 13:150535, available at https://www.cdc.gov/pccd/issues/2016/15_0535.htm

¹³ U.S. Government Accountability Office, “Immigration Detention, Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care” (2016) available at <https://www.gao.gov/assets/680/675484.pdf>

¹⁴ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45488.

in custody.¹⁵ Even Office of Refugee Resettlement (ORR) shelters--facilities that are currently subject to state licensing standards for housing immigrant children--have seen widespread abuse and neglect, including severe physical and psychological abuse at the hands of guards, dangerous health code violations, and even the forcible drugging of immigrant children.¹⁶ By rolling back standards for DHS' family residential centers, which are already not licensed by any state agency charged with ensuring compliance with all applicable child welfare laws and regulations, and as such do not meet the same standards as ORR facilities, the proposed rule will put children at great risk of harm and abuse.

In fact, ICE's facilities currently endanger children through inappropriate architectural design, under-trained and insufficient personnel for mental health and education services, inadequate medical care, inability to provide trauma-informed care, and inadequate language services for detainees.¹⁷ Further weakening licensing standards and protections for immigrant children will lead to more dangerous conditions for children (as discussed below, regarding the proposed regulations' failure to satisfy the FSA's sunset requirement.) DHS must address how it plans to protect children from gross abuses of this nature under the proposed rule; and, as discussed above, must provide reasonable cost modeling of the extensive mitigation measures that would be needed.

The proposed rule would weaken the parent-child relationship

Using the Family Policymaking Assessment, agencies must assess if a policy or regulation will strengthen or erode various aspects of family well-being.¹⁸ Research does not support DHS' outrageous claim that "the proposed rule may in some respects strengthen the stability of the family and the authority and rights of parents in the education, nurture, and supervision of their children, within the immigration detention context."¹⁹ Rather, detaining parents with their children for prolonged periods of time erodes the authority and the rights of parents. Parents in detention lack the fundamental autonomy and resources they need to parent freely and be fully responsive to their child's needs. For example, in family detention centers, parents do not have the ability to make independent decisions about their child's diet,²⁰ schedule, sleeping

¹⁵ Andrea J. Sedlak, Karla S. McPherson, and Monica Basena, "Nature and Risk of Victimization" (Washington: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2013), available at <https://www.ojjdp.gov/pubs/240703.pdf>

¹⁶ Allie Morris, "Texas has found 150 health violations at migrant children shelters," *San Antonio Express-News*, June 8, 2018, available at <https://www.expressnews.com/news/local/politics/article/Texas-has-found-150-health-violations-at-migrant-12979471.php>; PBS News Hour, "Immigrant teens placed in Virginia detention facility say they were beaten while restrained, isolated for days" available at <https://www.pbs.org/newshour/show/immigrant-teens-placed-in-virginia-detention-facility-say-they-were-beaten-while-restrained-isolated-for-days>.

¹⁷ Letter from Dr. Scott Allen and Dr. Pamela McPherson to Sen. Chuck Grassley (R-IA) and Sen. Ron Wyden (D-OR) of the Senate Whistleblowing Caucus, July 17, 2018, available at <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf>.

¹⁸ § 654 of the Treasury General Appropriations Act, P.L. 105-277 (1998), pgs. 529-531, available at <https://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

¹⁹ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pg. 45524.

²⁰ U.S. Immigration and Customs Enforcement, Family Residential Standards, Standard 4.1: Food Service, available at <https://www.ice.gov/detention-standards/family-residential> ("Residents are provided

arrangements,²¹ discipline,²² medical care provider,²³ educational activities, and more.²⁴ By nature, a detention facility is not a humane nor suitable place for a parent to be a parent.

The Family Policymaking Assessment also requires that agencies assess whether “the action strengthens or erodes the stability or safety of the family,”²⁵ and the proposed rule would clearly erode family stability and safety. In family detention, parental authority is challenged by the presence of other disciplinary figures who hold ultimate authority, and who, under ICE’s Family Residential Standards, maintain order through a behavior management program that is not under the parent’s control.²⁶ Complaints about family detention undermining parental authority date back more than a decade to a lawsuit to end family detention in the T. Don Hutto detention center, where guards allegedly disciplined children by threatening to separate them from their parents.²⁷ Children look to their parents for comfort and protection, particularly in stressful and unfamiliar situations, and a parent’s ability to be a source of safety for children translates into a critical attachment relationship.²⁸ However, the presence of conflicting authority figures, such as guards, in family detention undermines this relationship and may confuse children and undermine a parents’ ability to comfort and soothe them. This exacerbates the immense distress that children already experience in family detention and can compromise the mental health of parents as well.²⁹

a nutritionally balanced diet that is prepared and presented by a sanitary and hygienic food service operation,” with items neither chosen nor prepared by parents). Since family detention was expanded in 2014, observers and detainees have identified chronic problems with food service at the family residential facilities, with presentation of unfamiliar foods leading to health problems for some children. See, e.g., Eleni Bakst, “Immigration Detention is Making Kids Sick,” Human Rights First, November 22, 2017, available at <https://www.humanrightsfirst.org/blog/immigration-detention-making-kids-sick>.

²¹ Advisory Committee on Family Residential Centers, Final Report, at pp. 37, 42 n.98.

²² Family Residential Standard 3.1: Order.

²³ Family Residential Standard 4.3: Medical Care; Standard 4.4: Personal Hygiene; and Standard 4.5: Suicide Prevention and Intervention.

²⁴ Family Residential Standard 5.2 Education Policy; Standard 5.3: Escorted Trips for Non-Medical Emergencies; Standard 5.5: Recreation; Standard 5.6: Religious Practices. See generally Zachary Steel and others, “Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia,” *Australian and New Zealand Journal of Public Health* 28 (6) (2004): 527–536.

²⁵ § 654 of the Treasury General Appropriations Act, P.L. 105-277 (1998), pgs. 529-531, available at <https://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

²⁶ Family Residential Standard 3.1: Discipline and Behavior Management.

²⁷ American Civil Liberties Union, “Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas,” August 27, 2007, available at <https://www.aclu.org/news/landmark-settlement-announced-federal-lawsuit-challenging-conditions-immigrant-detention-center>

²⁸ Tedra A. Walden and Tamra A. Ogan, “The Development of Social Referencing,” *Child Development* 59 (5) (1988).

²⁹ Derrick Silove, Patricia Austin, and Zachary Steel, “No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia,” *Transcultural Psychiatry* 44.3 (2007): 359-393; Harvard University Center on the Developing Child, “Maternal Depression Can Undermine the Development of Young Children” Working Paper 8 (2009), available at <http://developingchild.harvard.edu/wp-content/uploads/2009/05/Maternal-Depression-Can-Undermine-Development.pdf>

The proposed rule does not address how it will meet the mental health needs of immigrant parents that result from prolonged periods of detention with their children. Immigrant parents in detention are under significant stress and face many mental health challenges. Like their children, most parents have already experienced some form of trauma, and this trauma can be exacerbated in detention, where parents endure harsh conditions and struggle to navigate complex legal processes. One study found that after a median detention period of 18 days, more than three-quarters of adult asylum seekers--who did not have to cope with the simultaneous detention of a child--were clinically depressed, two-thirds were clinically anxious, and a third had symptoms of PTSD.³⁰ Research has consistently shown that a child's mental health and well-being is closely tied to their caregiver's emotional well-being.³¹ However, parents in detention may not be able to adequately care for and comfort their children because they are coping with their own trauma. Therefore, undermining parental mental health in family detention poses a direct threat to children's mental health as well. Not addressing these issues renders the proposed rule arbitrary and capricious.

The proposed rule could restrict families' access to fair legal representation

The proposed rule could undermine families' access to fair legal representation and thereby compromise their claims for asylum.³² Lack of adequate child care in family detention often requires mothers to meet with their legal representation while their child is present. Mothers must give detailed accounts of their trauma and abuse in front of their children to make their case for asylum.³³ In testimony submitted in support of a 2016 motion to enforce the *Flores* settlement, an attorney representing families at the South Texas Family Residential Center recounted:

*Many of these mothers, and sometimes the children too, are disclosing, for the very first time, traumatic events, including rape, sexual assault, incest, domestic violence, threats, and extortion. In my experience, mothers and older children are often reluctant and sometimes totally unable to articulate the fears that they have and the horrors they have endured with younger children or siblings present in the room. However, this is precisely the kind of information that these mothers and children must be ready to share at their credible or reasonable fear interview before the Asylum Office.*³⁴

³⁰ Janet Cleveland, Cécile Rousseau, and Rachel Kronick, "The impact of detention and temporary status on asylum seekers' mental health" (Geneva, Switzerland: Global Detention Project, 2012), available at https://www.globaldetentionproject.org/wp-content/uploads/2016/06/Canada_cleveland.pdf.

³¹ Harvard University Center on the Developing Child, "Maternal Depression Can Undermine the Development of Young Children."

³² This comment uses the widely used term "asylum" to encompass any of the forms of relief from removal that a child or family detainee may be seeking, including without limitation asylum, withholding of removal, protection under the Convention Against Torture, or designation under special immigrant juvenile status.

³³ Lutheran Immigration & Refugee Service and the Women's Refugee Commission, "Locking Up Family Values, Again" available at <https://innovationlawlab.org/wp-content/uploads/2015/01/Fam-Detention-Again-Full-Report.pdf>; Advisory Committee on Family Residential Centers, *Final Report* at p. 46.

³⁴ *Jenny Lisette Flores v. Jeh Johnson*, CV 85-4544, "Plaintiff's Exhibits in Support of Motion to Enforce Settlement and for Appointment of Special Master [Part 1: Exhibits 1–13]" (June 17, 2016), available at <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0020.pdf>.

Indeed, immigrants in detention are the least likely to obtain representation, and immigrants without counsel are less likely to win their cases.³⁵ Creating additional obstacles to accessing fair legal representation in family detention will further undermine immigrant families' asylum cases. The proposed rule does not address how DHS will ensure that there is adequate child care and supports within family detention centers so that immigrant families can access critical legal representation to pursue their asylum cases.

Because it would harm children, the proposed rule is inconsistent with the Flores settlement agreement's (FSA) sunset provision

The history of performance under the FSA demonstrates that, without court oversight, the Government struggles to comply with even its basic protections--a history that the agencies lay out at length in the proposed rule.³⁶ Were the Government able to effectively and consistently provide care to minors at the level required by the FSA, it seems doubtful that multiple enforcement orders and the appointment of a court monitor would have been required.

Notwithstanding this course of nonperformance of its obligations, the Government proposes to provide "materially identical [regulatory] protections as under the FSA itself" and thereby to displace the FSA, pursuant to a provision in the FSA that contemplates termination of the agreement upon "publication of final regulations implementing" the FSA.³⁷ In light of its history of nonperformance, the burden is on the Government to explain how, by substituting its own standards for state licensure and court monitoring, it can meet the FSA's requirement that the final implementing regulation is not "inconsistent with the terms of" the FSA.³⁸ Proposing a rule that is legally insufficient to displace the FSA is arbitrary and capricious.

The proposed rule fails to meet that burden in at least three ways. First, the proposed rule critically departs from the FSA's requirement that children only be held in state-licensed facilities. What the departments propose in lieu of licensing is not licensing at all, but simply adherence to standards published by ICE, as judged by a contractor selected, overseen, and funded by ICE. ICE produces detention standards following no known public deliberative process, and this administration closed the office inside ICE that held its expertise on developing detention standards.³⁹ A recent report by the Department of Homeland Security's Office of Inspector General found that ICE's current use of outside auditors to ensure compliance with those detention standards does not "ensure consistent compliance with

³⁵ Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court" (Washington: American Immigration Council, 2016) available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

³⁶ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pp. 45491-45492.

³⁷ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pp. 45488, 45491.

³⁸ *Flores* settlement agreement, at 6.

³⁹ Caitlin Dickerson, "Trump Plan Would Curtail Protections for Detained Immigrants," *N.Y. Times* (April 13, 2017), available at <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html>.

detention standards, nor do they promote comprehensive deficiency corrections.”⁴⁰ Replacing state- (or county-) promulgated standards overseen by independent child welfare experts, with standards developed in-house by ICE with monitoring by a private auditor accountable to no outside body and dependent on pleasing ICE to maintain its contract revenue, endangers children and is plainly inconsistent with the FSA.

Second, it is clear that widespread, automatic detention of children for prolonged periods of time will be inappropriate for their age and needs. While the proposed regulations repeat in boilerplate the core FSA requirements that children be treated with “dignity, respect[,] and special concern for their status as minors” and to “place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs,”⁴¹ the social science literature set forth in the prior pages of this comment make clear that extended, mandatory detention is almost never appropriate to the needs of children. And indeed the FSA itself brought a heavy presumption that children should not be detained at all (manifested, in part, in the more generous sponsorship and release provisions that were superseded by the Trafficking Victims Protection Reauthorization Act (TVPRA)).⁴² By replacing that heavy presumption of non-detention--supplemented where necessary by individualized placement in the least restrictive institutional setting--with an expectation of institutionalization in a facility without outside licensure or inspection, the proposed rules would fall far short of the FSA’s requirements.⁴³

Finally, in the decades that the departments have struggled to comply with the FSA, they have instituted a series of policies and procedures amplifying the FSA’s obligations in greater detail. In some cases, these policies, such as Customs and Border Protection’s 2015 “National Standards on Transport, Escort, Detention, and Search,” provide greater, or at least more finely specified, protections than the FSA language that the departments now propose to turn into regulatory text.⁴⁴ The proposal argues that because these additional policies are “consistent with” the FSA and with the regulatory text, they would not need to be changed.⁴⁵ While that assertion is true, it begs the question whether, once freed from court supervision, the departments would keep them in place. In evaluating whether the proposed regulations satisfy

⁴⁰ Office of Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systematic Improvements,” (U.S. Department of Homeland Security, 2018), pg. 2, available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

⁴¹ *Compare Flores* settlement agreement, at 7, with proposed 8 CFR 236.3(a) and proposed 45 CFR 410.102, 410.201, 410.400.

⁴² *Flores* Settlement Agreement, paragraph 14; see generally U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pp. 45499-500 (discussing interaction of TVPRA, 8 U.S.C. 1232, and release language in FSA).

⁴³ See Advisory Committee on Family Residential Centers, “Final Report” at pg.2 (“If necessary to mitigate individualized flight risk or danger, every effort should be made to place families in community-based case-management programs that offer medical, mental health, legal, social, and other services and supports, so that families may live together within a community.”).

⁴⁴ U.S. Customs and Border Protection, “National Standards on Transport, Escort, Detention, and Search” (2015), available at <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf>.

⁴⁵ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45494.

the FSA's termination requirements, we see no commitment from the departments to maintain even those standards.

No data to support deterrence arguments

The data do not support DHS' assertion that the expansion of family detention in 2014 acted as a deterrent to family migration

In the proposed rule, DHS argues that the start of widespread family detention in 2014--as a response to the uptick in the number of Central American children and families arriving in the United States--"correlated with a significant drop in family migration" between FY 2014, when 68,445 people in family units were apprehended, and FY 2015, when 39,838 were apprehended. Put another way, DHS argues that the use of family detention acts as a deterrent stopping Central American families from journeying to the U.S.⁴⁶

While DHS is not claiming a *causal* link between family detention and a drop in family migration numbers, just a correlation, the data do not support even a correlative linkage. Using interrupted time series analysis (ITSA),⁴⁷ Professor Tom K. Wong of the University of California, San Diego--a Center for American Progress Senior Fellow--examined the relationship between the expansion of family detention and the monthly U.S. Border Patrol apprehensions of families. The data illustrate that there is no statistically significant decrease in apprehensions of families after the expansion of family detention in July 2014 (when the Karnes County Residential Center became a family residential center). Additional models run with pseudo-interventions that vary the start dates for the expanded use of family detention (including starting the analysis in August, September, October, November, and December 2014, and in January, February, and March 2015) also find no statistically significant decrease in the number of families being apprehended at the southern border.⁴⁸

Table 1 presents the results of the ITSA analysis. Model 1 estimates the relationship between the expanded use of family detention—measured by the conversion of the Karnes facility in July 2014 (β_2) and each subsequent month thereafter (β_3)—and the monthly number of U.S. Border Patrol apprehensions of families at the southwest border.

⁴⁶ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pg. 45493.

⁴⁷ ITSA is a quasi-experimental research design that is used to evaluate trends before, immediately following, and during the period after an intervention such as a policy change. ITSA estimates three main parameters: β_1 is the slope or trajectory of the outcome variable before the start of the intervention; β_2 is the change in the level of the outcome variable in the period immediately following the start of the intervention; and β_3 is the treatment effect of the intervention over time. An autoregressive model AR(1) was specified and Newey-West standard errors was used to address autocorrelation. See Tom K. Wong, "Do Family Separation and Detention Deter Immigration?" Center for American Progress, July 24, 2018, available at <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>.

⁴⁸ Ibid.

Table 1	
Family detention and U.S. Border Patrol apprehensions of family units at the Southwest border	
Policy intervention time frame	Model 1
β_1 Pre-July 2014	227.9** (-88.24)
β_2 July 2014	-2,774.90 (-1999.2)
β_3 Post-July 2014	-136.12 (-96.51)
β_0 Constant	-1,179.10 (-1036.09)
Observations	81
<p>Note: Eight additional models were run specifying eight different pseudo-interventions. The models produce qualitatively similar results: *significant at the .05 level; **significant at the .01 level; ***significant at .001 level; standard errors in parentheses.</p> <p>Sources: Data for Fiscal Year 2012 are available at (last accessed June 28, 2018): https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016. Data for Fiscal Year 2013 to Fiscal Year 2017 are available at (last accessed June 28, 2018): https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY17.pdf. Data for Fiscal Year 2018 are available at (last accessed July 6, 2018): https://www.cbp.gov/newsroom/stats/sw-border-migration.</p>	

These results remained steady even when taking into account the seasonal trends of border apprehensions, using autoregressive integrated moving average (ARIMA) ITSA (see Table 2 below).

Table 2	
ARIMA ITSA results	
Policy intervention time frame	Model 3
	ARIMA (1,1,0)
July 2014	-0.135
	(-0.133)
Observations	80

Note: The ARIMA (1,1,0) model indicates one lag and the first order difference of the detrended dependent variable. Standard errors are in parentheses.

Sources: Data for Fiscal Year 2012 are available at (last accessed June 28, 2018): <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>. Data for Fiscal Year 2013 to Fiscal Year 2017 are available at (last accessed June 28, 2018): <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY17.pdf>. Data for Fiscal Year 2018 are available at (last accessed July 6, 2018): <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

In sum, contrary to DHS' claims in the proposed rule, family detention is not statistically significantly related to a decrease in family unit apprehensions. This failure to support DHS' claims of deterrence renders the proposed rule arbitrary and capricious.

The data do not support DHS' assertion that the July 2015 federal court ruling confirming that the *Flores* settlement protections applied to accompanied children caused an uptick in family migration.

In addition to claiming a correlation between the expansion of family detention in 2014 and a decline in family apprehensions in FY 2015, DHS also asserts that the July 2015 federal court ruling--which found DHS to be in breach of the *Flores* settlement and rejected the government's request to amend the settlement to allow it detain children indefinitely in unlicensed, secure family detention facilities⁴⁹--had an impact on apprehensions. The proposed rule continues: "DHS's assessment is that the link is real, as those limitations"--in particular the court's interpretation that the *Flores* settlement did not allow DHS to hold children in unlicensed, secure facilities for more than 20 days⁵⁰--"correlated with a sharp increase in family migration" between FY 2015 and FY 2016.⁵¹

⁴⁹ *Jenny L. Flores v. Jeh Johnson*, CV 84-4544 (2015), available at <https://www.aila.org/infonet/district-court-finds-dhs-breach-flores-agreement>.

⁵⁰ *Jenny Lisette Flores v. Loretta E. Lynch*, CV 85-04544 (2015), available at <https://www.aila.org/File/Related/14111359p.pdf>.

⁵¹ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45493-45494. Quote on pg. 45494.

Here too, the data tell a different story. Using ITSA, Professor Wong examined the relationship between the July 2015 court ruling and the monthly number of U.S. Border Patrol apprehensions of families at the southwest border. His analysis finds no statistically significant increase in the apprehension of families at the border after the ruling.⁵² Professor Wong also ran a series of pseudo-interventions, varying the start dates for when a potential effect on family apprehensions might happen (including August, September, October, November, and December 2015, and January 2016,) and here too, the model finds no statistically significant increase in apprehensions of families (see *Table 3 below*). Taking seasonal trends into consideration with ARIMA ITSA (see *Table 4 below*) confirms these findings.⁵³

Table 3	
The 2015 Flores ruling and the U.S. Border Patrol apprehensions of family units at the Southwest border	
<i>Flores</i> ruling time frame	Model 1
β_1 Pre-July 2015	106.2**
	34.18
β_2 July 2015	579.7
	1,647.54
β_3 Post-July 2015	-44.72
	52.81
β_0 Constant	315.48
	345.51
Observations	83
Note: Six additional models were run specifying eight different pseudo-interventions. The models produce qualitatively similar results: *significant at the .05 level; **significant at the .01 level; ***significant at .001 level; standard errors in parentheses.	
Sources: Data for Fiscal Year 2012 are available at (last accessed October 1, 2018): https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016 . Data for Fiscal Year 2013 to Fiscal Year 2017 are available at (last accessed October 1, 2018): https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY17.pdf . Data for Fiscal Year 2018 are available at (last accessed October 1, 2018): https://www.cbp.gov/newsroom/stats/sw-border-migration .	

⁵² For a full description of the methodology, see Tom K. Wong, “Did a 2015 *Flores* Court Ruling Increase the Number of Families Arriving at the Southwest Border?” Center for American Progress, October 16, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>.

⁵³ *Ibid.*

Table 4	
ARIMA ITSA results	
<i>Flores</i> ruling time frame	Model 2
	ARIMA (1,1,0)
July 2015	0.034
	0.069
Observations	83
<p>Note: The ARIMA (1,1,0) model indicates one lag and the first order difference of the detrended dependent variable. Standard errors are in parentheses.</p> <p>Sources: Data for Fiscal Year 2012 are available at (last accessed October 1, 2018): https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016. Data for Fiscal Year 2013 to Fiscal Year 2017 are available at (last accessed October 1, 2018): https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%20FY13-FY17.pdf. Data for Fiscal Year 2018 are available at (last accessed October 1, 2018): https://www.cbp.gov/newsroom/stats/sw-border-migration.</p>	

As with family detention in general, this analysis illustrates that there is no evidence that the July 2015 court ruling led to an increase in the number of families coming to the southern border. Extrapolating from these results, it is unlikely that dissolving the *Flores* settlement and allowing DHS--through its alternative licensing scheme--to get around the 20-day limitation of holding children in unlicensed secure facilities under the *Flores* settlement (as interpreted by the courts,)⁵⁴ will lead to a decrease in family arrivals. DHS' failure to back up their claims of deterrence with data renders the proposed rule arbitrary and capricious.

High costs

DHS' failure to reasonably estimate its potential costs renders the proposed rule arbitrary and capricious⁵⁵

In the proposed rule, in justifying the lack of a cost estimate, DHS admits that

⁵⁴ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45487-45488.

⁵⁵ A full description of the methodology for these cost estimates, can be found in Philip E. Wolgin, "The High Costs of the Proposed *Flores* Regulation" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/>.

The proposed alternative license for [family residential centers] FRCs and changes to parole determination practices may result in additional or longer detention for certain minors,” but argues that it “is unable to estimate the costs of this to the Government or to the individuals being detained because we are not sure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider.

Nevertheless, they state that “[t]he Departments seek comment on how these costs might be reasonably estimated.”⁵⁶

We believe that DHS’ own data provide a way to reasonably estimate the additional number of people who will likely be detained in FRCs under the rule, as well as the number of new FRCs it will need to acquire. The failure of the department to undertake this analysis renders the proposed rule arbitrary and capricious.

DHS presents data in the proposed rule from FY 2014 and FY 2015,⁵⁷ before a federal court confirmed that the 20-day limit on holding children in unlicensed secure facilities applied to accompanied children in FRCs.⁵⁸ These data present a picture of what family detention would most likely look like in the absence of the *Flores* settlement. Additionally, given that dissolving the *Flores* rule would not lead to a decrease in family arrivals, as DHS claims (see above), there is every reason to believe that past trends in the numbers of family apprehensions can serve as a proxy for future flows.⁵⁹

So while there are likely factors outside of the proposed rule that affect which families get sent to FRCs and which do not,⁶⁰ DHS has failed to estimate what the cost of the proposed rule might be even if--as is entirely possible--the average lengths of stay for people in FRCs simply revert to what they were before 20-day limit was applied. In FY 2014, the average length of stay was 47.4 days, which dropped to 14.2 days in FY 2017.⁶¹

As the following sections lay out, even a conservative estimate of the potential changes under the proposed rule would translate into high costs for DHS. The department must do more to provide a full accounting of its potential costs before publishing a final rule. To fail to do so would render the proposal arbitrary and capricious on its face. (*All cost estimates below come from Philip E. Wolgin, “The High Costs of the Proposed Flores Regulation” (Washington: Center for American Progress, 2018.*⁶²))

⁵⁶ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”

⁵⁷ *Ibid.*, pgs. 45511-45512 and 45518-45519.

⁵⁸ *Jenny Lisette Flores v. Loretta E. Lynch*.

⁵⁹ See, for example, U.S. Customs and Border Protection, “Southwest Border Migration FY2018,” available at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed October 2018).

⁶⁰ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”

⁶¹ *Ibid.*, Table 5, pg. 45512.

⁶² Note that CBP released its final FY 2018 border apprehension numbers after the publication of the “High Costs of the Proposed *Flores* Regulation.” This comment uses the final FY 2018 figures, and as such, all calculations using FY 2018 apprehension data have been updated from the “High Costs” to

DHS will require far more family detention beds under the proposed rule, at high cost

Under the proposed rule ICE could incur higher costs relating to detaining families in FRCs in two ways: By detaining families for *longer* than they are currently held, and by detaining *more* families than are currently being held. At the lowest end, these costs would run to \$194 million, annually. At the highest end, to \$1.24 billion, annually.

The following analysis provides two possible scenarios for estimating the potential number of detention beds that ICE will need to pay for under the proposed rule:

Scenario 1

In this scenario, we keep the number of family units referred to FRCs largely the same as in FY 2017, but increase their length of stay in detention. **Overall, under this scenario, DHS would require 1,669 new family detention beds (above their current maximum FRC bed capacity), at an annual cost of \$194 million.**

The formula for calculating the additional bed needs under this first scenario is as follows:

New ADP = FY 2017 ADP + Total Additional ADP A + Total Additional ADP B – Current FRC Capacity

$$1,669 = 1,472 + 3,441 + 82 - 3,326^{63}$$

Breaking this formula down:

FY 2017 ADP refers to the average daily population in family residential centers in 2017. In the proposed rule DHS reports that in FY 2017, 37,825 people were referred to family units, at an average length of stay of 14.2 days.⁶⁴ Thus:

$$FY\ 2017\ ADP = 1,472 = (37,825 \times 14.2\ days) / 365\ days$$

Total Additional ADP A: We assume that the same number of people of people, 37,825, are booked into FRCs, but that their average lengths of stay are increased from 14.2 days (as of FY 2017) to 47.4 days (the FY 2014 length of stay.)⁶⁵ Thus:

$$Additional\ ADP\ A = 3,441 = (37,825 \times (47.4 - 14.2) / 365\ days$$

match the final figures. See U.S. Customs and Border Protection, “Southwest Border Migration FY2018,” available at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed October 2018).

⁶³ Numbers here and below are rounded. Unrounded figures on file with authors.

⁶⁴ *Ibid.*, pg. 45512.

⁶⁵ *Ibid.*, pg. 45512. Note that we are purposefully using the FY 2014 average length of stay (ALOS) of 47.4 days, rather than the slightly lower FY 2015 ALOS of 43.5 days. Since the federal court ruling came late in FY 2015, it is reasonable to assume that the FY 2015 ALOS is lower, on an annualized basis, than it would have been without the ruling. Thus, the FY 2014 numbers are likely the most accurate indication of what lengths of stay would be without the 20-day limit.

Total Additional ADP B: We assume that the four groups of children who DHS estimates in the proposed rule would have had their lengths of stay increased had the proposed rule been in place in FY 2017--2,787 children in total⁶⁶--estimating that their average length of stay would increase to 25 days.⁶⁷ Thus:

$$\text{Additional ADP B} = 82 = (2,787 \times (25 - 14.2)) / 365 \text{ days}$$

Current FRC Capacity: At present, ICE has 3,326 family detention beds across three FRCs--the South Texas Family Residential Center (Dilley), the Karnes County Residential Center, and the Berks County Residential Center. Because these facilities operate on fixed-cost contracts, meaning that the costs remain the same regardless of whether the facilities are full or not,⁶⁸ these calculations assume that new bed costs only begin once ICE reaches its maximum capacity.⁶⁹ Thus we are subtracting the current total capacity in the *New ADP* calculation above to ensure that we provide the most conservative estimates.

To calculate the annual costs from these additional beds, we assume that the current cost per family detention bed--\$318.79⁷⁰--remains the same. Thus:

⁶⁶ The 2,787 children include: 131 “who were not paroled or released on order of their own recognizance,” 349 “who had negative credible fear determinations,” 1,465 “administratively closed cases,” and 842 “who were released and either had final orders of removals at the time of their release or subsequently received final orders following their release.” *Ibid.*, pgs., 455181-45519.

⁶⁷ There is reason to believe that children with, for example, negative credible fear findings or orders of removal will be kept for longer than the current (FY 2017) average length of stay of 14.2 days (so that they can be processed for deportation,) but still for less time than FY 2014’s 47.4 day lengths of stay. Twenty-five days roughly splits the difference between these two figures, and is in line with anecdotal evidence. See, for example, Ana’s story in Guillermo Cantor and Tory Johnson, “Detained, Deceived, and Deported: Experiences of Recently Deported Central American Families” (Washington, DC: American Immigration Council, 2016), pg. 21, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/detained_deceived_deported_experiences_of_recently_deported_central_american_families.pdf.

⁶⁸ Note that Karnes and Berks do have additional, variable educational costs per person, and Berks has a small additional per person cost. Nevertheless, because these costs are included in the average \$318.79 cost per bed provided by DHS, we have chosen not to include additional per person costs for these facilities in our estimates. U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45513 and 45519 and Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Budget Overview, Fiscal Year 2019, Congressional Justification,” available at <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>, pg. 13.

⁶⁹ Note that DHS points out that these facilities can be considered at capacity even below 3,326 beds, given the different makeup of family units. So, for example, if a family comprising three people is placed in a room with four beds, that fourth bed cannot be filled. Nonetheless, with no way to calculate an average maximum capacity based on the changing makeup of families incarcerated in FRCs, we are using the most conservative estimates possible, and calculating additional bed needs over the 3,326 current maximum capacity. Notice of Proposed Rulemaking, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45512.

⁷⁰ Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Budget Overview, Fiscal Year 2019, Congressional Justification.”

Scenario 1 Annual Costs = \$194,100,000 = 1,669 X \$318.79 X 365 days

Scenario 2

The first scenario can be thought of as a conservative estimate of what the costs to DHS for additional detention beds might be if only the lengths of stay increase. But what if the administration uses the alternate licensing provisions to not simply lengthen the *amount of time* that people spend in FRCs, but to also increase the *number* of families sent to FRCs?

In FY 2017, half of all people in family units that were apprehended--37,825 out of 75,622 apprehensions--were referred to FRCs.⁷¹ But far more people in family units were apprehended in FY 2018--107,212--than in FY 2017.⁷²

If every person in a family unit who arrives is sent to an FRC, at FY 2014 average lengths of stay, **DHS will require 10,679 new family detention beds, above their current maximum, at an annual cost of \$1.24 billion.**

The formula for calculating the additional bed needs under this second scenario is as follows:

$$\begin{aligned} \text{New ADP} &= \text{FY 2018 ADP} + \text{Total Additional ADP B} - \text{Current FRC Capacity} \\ 10,679 &= 13,923 + 82 - 3,326 \end{aligned}$$

Breaking this formula down:

FY 2018 ADP: In FY 2018, U.S. Customs and Border Protection apprehended 107,212 people in family units.⁷³ As in the first Scenario, this estimate assumes that their average length of stay is increased to 47.4 days. Thus:

$$\text{FY 2018 ADP} = 13,923 = (107,212 \times 47.4 \text{ days}) / 365 \text{ days}$$

Total Additional ADP B and Current FRC Capacity are calculated as in Scenario 1.

To calculate the annual costs from these additional beds, we assume, as in the first scenario, that the current cost per family detention bed--\$318.79⁷⁴--remains the same. Thus:

$$\text{Scenario 2 Annual Costs} = \$1,242,600,000 = 10,679 \times \$318.79 \times 365 \text{ days}$$

⁷¹ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pg. 45512 and U.S. Customs and Border Protection, "Southwest Border Migration FY2017," available at <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (last accessed October 2018).

⁷² U.S. Customs and Border Protection, "Southwest Border Migration FY2018."

⁷³ See: U.S. Customs and Border Protection, "Southwest Border Migration FY2018."

⁷⁴ Department of Homeland Security, U.S. Immigration and Customs Enforcement, "Budget Overview, Fiscal Year 2019, Congressional Justification."

DHS will need to acquire new family residential centers under the proposed rule, at high cost

In the proposed rule, the administration states that “[a]t this time, ICE is unable to determine how the number of FRCs may change due to this proposed rule,” claiming that there are “many factors...some of which are outside the scope of this proposed regulation,” including “the population of aliens crossing the border, anticipated capacity, projected average daily population, and projected costs.”⁷⁵ Here too, using DHS’s own data, it is possible to estimate the start-up costs to acquire the new facilities needed to meet the additional family detention bed capacity needs; and here too, the failure of the department to estimate these costs renders the proposed rule arbitrary and capricious.

In estimating the potential start-up costs to ICE to acquire new FRCs, this analysis uses the two scenarios laid out above on the number of additional detention beds ICE would require under the proposed rule. It then calculates how many new facilities ICE would need based on the two most likely routes it could take: First, acquiring new facilities the size of the Karnes County Residential Center, which has 830 beds, or second, acquiring facilities the size of the South Texas Family Residential Center (Dilley), which has 2,400 beds.⁷⁶

When the Karnes facility was converted to an FRC, it cost \$36 million,⁷⁷ while the Dilley facility cost \$104 million.⁷⁸ **At the low end then, to acquire the number of facilities ICE would need to meet the demands of additional family detention beds under the proposed rule would require one-time start-up costs of at least \$72 million, and at the high end, as much as \$520 million.**

Scenario 1 FRC Needs

Under Scenario 1 above, where the number of people incarcerated in FRCs stays largely the same as in FY 2017, but their average lengths of stay increase--ICE would need to acquire

⁷⁵ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45519.

⁷⁶ Ibid., pgs. 45511-45512.

⁷⁷ The Karnes facility was first opened in 2010 as a civil detention facility for adults, before being converted into an FRC starting at the end of 2014. The \$36-million figure represents the GEO Group’s costs to expand and convert it to a larger family facility. See The GEO Group, “The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas,” Press release, December 19, 2014, available at <https://www.businesswire.com/news/home/20141219005408/en/GEO-Group-Announces-626-Bed-Expansion-Karnes-County>; Grassroots Leadership, “GEO Group tells shareholders everything is fine in Karnes family detention center,” Press release, August 5, 2015, available at <https://grassrootsleadership.org/releases/2015/08/geo-group-tells-shareholders-everything-fine-karnes-family-detention-center>.

⁷⁸ This start-up cost is extrapolated from the original contracted yearly cost for Dilley—\$260 million per year—and the current operating costs of \$156 million per year. The delta between these two numbers is \$104 million. Guillermo Contreras, “Inside the country’s largest immigrant family detention center,” *San Antonio Express-News*, August 12, 2018, available at <https://www.expressnews.com/news/local/article/Inside-the-country-s-largest-immigrant-family-13149672.php>.

1,669 new family detention beds annually, above its current maximum capacity. (see Scenario 1 New ADP above)

If ICE builds facilities the size of Karnes to house these additional detention beds, it would require two new FRCs, at a total start-up cost of \$72 million.

$$\text{Number of facilities needed} = 2.01 = 1,669 \text{ Beds} / 830 \text{ Bed Capacity}$$

$$\text{Cost} = \$72 \text{ million} = 2 \times \$36,000,000$$

If ICE instead builds facilities the size of Dilley, it would require one new FRC, at a total start-up cost of \$104 million.

$$\text{Number of facilities needed} = .70 = 1,669 \text{ Beds} / 2,400 \text{ Bed Capacity}$$

$$\text{Cost} = \$104 \text{ million} = 1 \times \$104,000,000^{79}$$

Scenario 2

Under Scenario 2 above, where ICE detains every person apprehended in a family unit, and detains them for longer, ICE would need to acquire 10,679 new family detention beds, annually, on top of its current maximum capacity. (see Scenario 2 New ADP above)

If ICE builds facilities the size of Karnes to house these additional detention beds, it would require 13 new FRCs, at a total start-up cost of \$468 million.

$$\text{Number of facilities needed} = 12.87 = 10,679 \text{ Beds} / 830 \text{ Bed Capacity}$$

$$\text{Cost} = \$468 \text{ million} = 13 \times \$36,000,000^{80}$$

If ICE instead builds facilities the size of Dilley, it would require five new FRCs, at a total start-up cost of \$520 million.

$$\text{Number of facilities needed} = 4.45 = 10,679 \text{ Beds} / 2,400 \text{ Bed Capacity}$$

$$\text{Cost} = \$520 \text{ million} = 5 \times \$104,000,000^{81}$$

Even a conservative estimate illustrates that the proposed rule meets the \$100 million threshold to be considered economically significant and a major rule.

⁷⁹ Note: The facility need here is rounded to one full facility since one cannot build only 70 percent of a building.

⁸⁰ Note: The facility needs here are rounded to 13 full facilities since one cannot build only 87 percent of a building.

⁸¹ Note: The facility needs here are rounded to 5 full facilities since one cannot build only 45 percent of a building.

Even as DHS and HHS decline to estimate their potential costs under the proposed rule, the departments argue that “[t]his rule does not exceed the \$100 million expenditure threshold in any 1 year when adjusted for inflation.”⁸² Additionally, the proposed rule states that:

*The Office of Information and Regulatory Affairs has determined that this rulemaking is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Public Law 104–121, sec. 251, 110 Stat. 868, 873 (codified at 5 U.S.C. 804). This rulemaking would not result in an annual effect on the economy of \$100 million or more.*⁸³

We believe that both the departments and OIRA are incorrect about the potential for annual costs over \$100 million, and believe that DHS and OIRA have done an insufficient analysis of these costs. A plain reading of the potential costs, as laid out above, illustrates that this rule should be classified as an economically significant under the terms of Executive Order 12866,⁸⁴ and a major rule under the terms of the Congressional Review Act.⁸⁵

Using the cost estimates above, at the lowest end—including annual additional detention bed costs of \$194 million, and a one-time start-up cost of \$72 million to acquire new family residential centers—the proposed rule will cost DHS just over \$2 billion over a decade, at an annualized rate of \$201 million per year.

$$\begin{aligned} \text{Low End 10 Year Costs} &= \$2,013,500,000 \\ &= (\$194,100,000 \times 10) + \$72,000,000 \end{aligned}$$

$$\text{Low End Annualized Costs} = \$201,300,000 = \$2,013,500,000 / 10$$

At the highest end—including annual additional detention bed costs of \$1.24 billion and a one-time start-up cost of \$520 million to acquire new family residential centers—the proposed rule will cost DHS \$12.9 billion over a decade, at an annualized rate of \$1.3 billion.

$$\begin{aligned} \text{High End 10 Year Costs} &= \$12,946,300,000 \\ &= (\$1,242,600,000 \times 10) + \$520,000,000 \end{aligned}$$

$$\text{High End Annualized Costs} = \$1,294,600,000 = \$12,946,300,000 / 10$$

In either scenario, the annual costs to DHS alone easily exceed the \$100 million threshold.⁸⁶

⁸² U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45522.

⁸³ *Ibid.*, pg. 45522.

⁸⁴ Executive Order no. 12866, “Regulatory Planning and Review” (1993), available at https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

⁸⁵ 5 U.S. Code § 804, available at <https://www.law.cornell.edu/uscode/text/5/804>.

⁸⁶ Note: The proposed rule cites CBP statistics as to the number of family units *apprehended* at the southwest border. For this reason, the high-end cost estimates above are based on the 107,212 individuals in family units that were apprehended at the southwest border in FY 2018. But in addition to those apprehended, CBP also captures the statistics of family units deemed inadmissible at ports of

HHS must do more to estimate its costs under the rule

Even while declining to estimate any potential costs, DHS at least admits to the possibility of such costs, stating that “[a] primary source of new costs for the proposed rule would be as a result of the proposed alternative licensing process,”⁸⁷ which would likely allow it to detain more families for longer. By contrast, HHS argues that it “does not expect this proposed rule to impose any additional costs,”⁸⁸ other than those relating to a shift from the Department of Justice to HHS of where hearings about release from custody are held.⁸⁹

But a plain reading of the proposed rule points to the likelihood of higher *custody* costs to HHS--specifically to the Office of Refugee Resettlement, which runs the Unaccompanied Alien Children program. In two sections of the proposed rule, for example, HHS makes changes to when unaccompanied children (UACs) can be sent to secure facilities, which operate more like juvenile jails than regular shelters:

- In Proposed 45 CFR 410.203 of the proposed rule, HHS codifies the criteria for placing children in secure facilities, and notes that in doing so, the department is seeking to include two new criteria: “if a UAC engages in unacceptably disruptive behavior that interferes with the normal functioning of a ‘staff secure’⁹⁰ shelter,” as well as adding “to

entry, 53,901 in total for FY 2018. Individuals who present themselves at a port of entry--even if deemed inadmissible--cannot be prosecuted under 8 U.S.C. 1325, but they may still be detained and, pursuant to the new licensing authority contained in the proposed rule, could be detained for prolonged periods of time in an FRC.

In that case, the total population sent to detention would equal 161,113 people, which, at the FY 2014 ALOS of 47.4 days, would lead to an *FY 2018 ADP* of 20,923, and a *New ADP* of 17,679 (= FY 2018 ADP (20,923) + Total Additional B (82) - Current FRC Capacity (3,326)). On an annual basis, this *New ADP* will cost DHS \$2.06 billion per year.

To house these new individuals, ICE would need to acquire 22 facilities the size of Karnes (at a one-time start-up cost of \$792 million,) or eight facilities the size of Dilley (at a one-time start-up cost of \$832 million.)

In total, adding the annual \$2.06 billion costs and the high end one-time cost of \$832 sums to a 10-year cost of \$21.4 billion, at an annualized rate of \$2.14 billion.

See U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45493 and U.S. Customs and Border Protection, “Southwest Border Migration FY2018.”

⁸⁷ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” pg. 45518.

⁸⁸ *Ibid.*, pg. 45519. (Rule)

⁸⁹ See § 410.810 Hearings in *Ibid.*, pg. 45533-45534.

⁹⁰ Defined in the proposed rule as a “facility [that] is designated for a UAC who requires close supervision but does not need placement in a secure facility. It provides 24-hour awake supervision, custody, care, and treatment...A staff secure facility may have a secure perimeter but it is not equipped internally with

the list of behaviors which may be considered unacceptably disruptive...‘displays sexual predatory behavior.’”⁹¹

- In Proposed 8 CFR 236.3(n) the proposed rule sets out new criteria for “reassuming custody of previously released minors if they become an escape-risk, become a danger to the community, or are issued a final order of removal after being released.”⁹² It is no stretch to think that UACs who are deemed an escape-risk or a danger to the community will be placed in secure shelter care.

Placing a UAC in secure custody comes with a high cost: Bed space in the Yolo County Juvenile Detention Center in California, for example, costs \$651 per secure shelter bed, per day,⁹³ which is more than 2.5 times the cost of a regular shelter bed.⁹⁴ And on average, children in secure custody spend nearly four times as long in secure facilities as in regular shelter care.⁹⁵ **In total, it costs nearly \$150,000 to hold one child in secure care, nearly 10 times more than the cost for regular shelter care.**

$$\text{Cost of Regular Shelter Care} = \$15,045 = \$255 \times 59 \text{ Day Average Length of Stay}^{96}$$

major restraining construction or procedures typically associated with correctional facilities.” Ibid., pg. 45529.

⁹¹ Ibid., pgs. 45505-45506. Quotes on pg. 45506.

⁹² Ibid. pg. 45504. While this part of the regulation technically pertains to DHS, UACs who are re-apprehended would be sent to HHS care.

⁹³ Yolo County facility costs are calculated by dividing the \$5.7 million annual contract by the 24 beds available in the facility. See Anne Ternus-Bellamy, “County to decide fate of ORR contract on refugee minors,” *Davis Enterprise*, June 22, 2018, available at <https://www.davisenterprise.com/local-news/county-to-decide-fate-of-orr-contract-on-refugee-minors/>.

⁹⁴ Average cost per shelter bed, per night for ORR shelter care--at \$255--is extrapolated from the HHS FY 2019 budget justification. In it, HHS requests \$1.048 billion for the UAC program, and estimates that 80 percent of this budget is for bed capacity (not including “other services for children, such as medical care, background checks, and family reunification services,”) to “support a peak census level of 9,000 UAC,” or an average daily population of 9,000. Calculating this figure is thus: $\$255 = (\$1.048 \text{ billion} \times 80\%) / 9,000 \text{ beds} / 365 \text{ days}$. U.S. Department of Health and Human Services, “Fiscal Year 2019: Administration for Children and Families, Justification of Estimates for Appropriations Committees” (2018), pgs. 67-69, available at https://www.acf.hhs.gov/sites/default/files/olab/acf_master_cj_acf_final_3_19_0.pdf. The \$651 cost for the Yolo County facility is thus 2.55 times more expensive than the \$255 average cost of a shelter bed.

⁹⁵ According to findings in the *L.V.M. vs. Scott Lloyd* case, the average length of stay in a secure ORR facility is currently seven to eight months. Taking the midline of 7.5 months, and assuming that each month has 30.42 days, results in an average length of stay of just over 228 days for secure facilities, which is 3.9 times longer than the overall current average of 59 days in ORR shelter care. *L.V.M. v. Scott Lloyd*, 18 Civ. 1453 (2018), available at <https://assets.documentcloud.org/documents/4563809/20180627-LVM-v-Lloyd-Order.pdf>.

⁹⁶ Over the past few months, the number of children in ORR care has risen significantly, from 2,400 as of May 2017 to nearly 13,000 as of September 2018. As the number of children has risen, their lengths of stay have risen from 48 days in FY 2017 to 59 days currently. See Tal Kopan, “The simple reason more immigrant kids are in custody than ever before,” CNN, September 14, 2018, available at <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>; Caitlin Dickerson, “Detention of Migrant Children Has Skyrocketed to Highest Levels Ever,” *The New York Times*,

Cost of Secure Shelter Care = \$148,428 = \$651 X 228 Day Average Length of Stay

HHS has not provided enough information on how many children might be sent to secure facilities under the proposed rule, but given these high costs, it is imperative that the department estimate the number of children who may be affected before finalizing the proposed rule.

Negative impacts on LGBT immigrants

The proposed rule would result in the prolonged detention of LGBT people in facilities where they do not have basic protections from abuse or access to necessary medical care

The proposal to make family detention facilities licensed facilities for holding children in §236.3 (b)(9) and (h) would lead to the prolonged detention of LGBT immigrants and their families.⁹⁷ Because DHS does not take into account any of the literature which demonstrates that immigration detention is extremely unsafe for LGBT immigrants, the proposed rule is arbitrary and capricious. Numerous studies demonstrate that LGBT people in detention are at heightened risk of verbal and physical abuse, harassment, sexual violence, and inadequate access to necessary medical care.⁹⁸ Although LGBT people make up less than one percent of people in immigration detention each year, they account for 12 percent of reported victims of sexual abuse and assault in ICE detention.⁹⁹

For years, LGBT people in ICE custody have been placed in solitary confinement to protect them from abuse, despite the fact that this is inappropriate and causes further harm. Prolonged solitary confinement is demonstrated to cause irreparable psychological harm and the United

September 12, 2018, available at <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

⁹⁷ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45496-45497 and 45500-45501.

⁹⁸ Sharita Gruberg, "Dignity Denied: LGBT Immigrants in U.S. Immigration Detention" (Washington: Center for American Progress, 2013), available at <https://www.americanprogress.org/issues/immigration/reports/2013/11/25/79987/dignity-denied-lgbt-immigrants-in-u-s-immigration-detention/>; Shana Tabak and Rachel Levitan, "LGBTI Migrants in Immigration Detention: A Global Perspective," *Harv. J.L. & Gender* 1 (2014), available at <http://harvardjlg.com/wp-content/uploads/2012/01/2014.1.pdf>; Lauren Zitsch, "Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigration Detention Facilities," *22 Wm. & Mary J. Women & L.* 105 (2015-2016), available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1416&context=wmjowl>.

⁹⁹ Letter from Representative Kathleen Rice to the Department of Homeland Security Secretary Kristjen Nielsen, (May 30, 2018).

Nations Special Rapporteur on Torture has reported on ICE's use of solitary confinement for LGBT immigrants in detention as a violation of U.S. treaty obligations.¹⁰⁰

The withholding of necessary medical care as well as provision of inadequate medical care for LGBT immigrants in detention also is well-documented. The worst reported result of this was the recent death of transgender asylum seeker Roxana Hernandez from complications related to HIV after being detained by ICE. LGBT people living with HIV face delays in receiving the life-saving treatment they rely on.¹⁰¹

Rather than taking steps to ensure LGBT people are not arbitrarily subjected to threats to their safety and health, the proposed rule does exactly the opposite. Under the proposed rule, ICE would be able to detain LGBT people and their families for prolonged periods of time and, by lengthening the time they are detained and exposed to risks to their safety, increasing their risk of abuse.¹⁰²

The proposed rule would allow the government to detain LGBT people and their families for prolonged periods of time in facilities that are inappropriate for housing children.

The *Flores* settlement agreement requires facilities housing children to be licensed by the state the facility is in. Section 236.3(b)(9) of the proposed rule seeks to bypass this basic child welfare requirement by establishing what it purports to be the equivalent.¹⁰³ Despite the proposed rule's attempt to establish a comparison, the licensing regime it proposes is in no way comparable to the rigorous licensing standards state child welfare agencies use, and the failure to address this point renders the proposed rule arbitrary and capricious. In 2016, the Pennsylvania Department of Human Services revoked the Berks Family Residential Center's certificate of compliance because it was determined not to be operating a child residential center.¹⁰⁴ A cursory checklist inspection of whether a facility is in compliance with the inadequate standards that already in theory govern family detention facilities does not fulfill the letter, or even the spirit, of the *Flores* Agreement.¹⁰⁵

The proposed rule's "emergency influx" definition would lead to the prolonged detention of vulnerable LGBT youth in extremely unsafe CBP hold facilities.

¹⁰⁰ U.N. General Assembly, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, addendum observations on communications transmitted to Governments and replies received," 178 U.N. Doc. A/HRC/22/53/Add.4, March 12, 2013.

¹⁰¹ John Washington, "An HIV-Positive Gay Asylum Seeker Staged a 7-Day Hunger Strike in an ICE Detention Facility," *The Nation*, December 12, 2017, available at <https://www.thenation.com/article/an-hiv-positive-gay-asylum-seeker-staged-a-seven-day-hunger-strike-in-an-ice-detention-facility/>; Tabak and Levitan, "LGBTI Migrants in Immigration Detention: A Global Perspective."

¹⁰² National Prison Rape Elimination Commission, "Report" (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

¹⁰³ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45496-45497.

¹⁰⁴ Letter from Matthew J. Jones of the Pennsylvania Department of Human Services to Diane Edwards of the Berks County Commissioners, January 26, 2016, available at http://services.dpw.state.pa.us/Resources/Documents/Pdf/ViolationReports/20160128_14386.pdf.

¹⁰⁵ *Jenny Lisette Flores v. Janet Reno*.

The *Flores* settlement requires that all children be transferred to an appropriate licensed program within 3-5 days, except for limited circumstances including an emergency or influx.¹⁰⁶ The rule proposes codifying the *Flores* settlement's definition of "influx" to mean just 130 minors in custody eligible for placement, without regard to actual capacity or need for emergency protocols.¹⁰⁷ In fact, DHS even acknowledges that it "regularly has more than 130 minors and UACs in custody who are eligible for placement in a licensed program" and that under the *Flores* definition it is operating "under an 'influx' as a steady state."¹⁰⁸ While that might have constituted an influx 20 years ago when the INS operated a total of 131 juvenile shelter beds, by proceeding with its definition of an influx in a climate that is very different and where the old definition no longer logically applies, the proposed rule allows DHS to bend and even ignore basic child welfare provisions necessary to keep minors safe.¹⁰⁹ Even under the current law, which requires that no unaccompanied child be held in CBP custody for longer than 72 hours, children are vulnerable to abuse. A 2016 report from CBP on sexual abuse in its facilities found that children accounted for 60 percent of reported victims of sexual abuse.¹¹⁰ These facilities are entirely inappropriate for holding children and the time children are held in these facilities should be limited, not expanded.

The proposed rule would put LGBT youth in harm's way by subjecting them to more restrictive custody settings, increasing their vulnerability to abuse.

Proposed sections 8 CFR 236.3(c), 8 CFR 236.3(d), and 8 CFR 236.3(e)¹¹¹ would cause minors to lose the protections of the Trafficking Victims Protection Reauthorization Act and subject them to the harms LGBT people face in ICE detention facilities. We are also concerned with the proposed rule's inclusion of "chargeable" offenses as a reason to place non-UAC minors (proposed 8 CFR 236.3(i)(1)) and UACs (proposed 45 CFR 410.203) in state or county juvenile detention facilities or other secure facilities.¹¹² Unlike in the FSA, which includes exceptions for isolated offenses that did not involve violence and petty offenses, the proposed rule's enumeration of vague offenses could provide DHS with an excuse to subject LGBT immigrant youth and immigrant youth living with HIV to placement in secure facilities.¹¹³ Due to negative stereotypes about LGBT people as being more likely to engage in coercive sexual conduct, LGBT youth are more likely than their straight and cisgender counterparts to face criminal

¹⁰⁶ *Flores* Settlement Agreement at 4.

¹⁰⁷ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pg. 45496.

¹⁰⁸ *Ibid.*

¹⁰⁹ Office of the Inspector General, "Unaccompanied Juveniles in INS Custody" (U.S. Department of Justice, 2001,) available at <https://oig.justice.gov/reports/INS/e0109/exec.htm>.

¹¹⁰ U.S. Customs and Border Protection, "Annual Report on Sexual Abuse and Sexual Assault by CBP Employees" (U.S. Department of Homeland Security, 2016,) available at <https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20-%20Sexual%20Abuse%20and%20Sexual%20Assault%20Annual%20Report%20-%20FY%202016.pdf>.

¹¹¹ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45497-45498.

¹¹² *Ibid.*, pgs. 45501-45502 and 45505-45506.

¹¹³ National Prison Rape Elimination Commission, "Report."

consequences for consensual sexual activity and in the juvenile justice system LGBT youth are sometimes even classified as sex offenders at intake.¹¹⁴ We are concerned that the proposed rule's inclusion of "chargeable" offenses will subject LGBT youth to placement in secure facilities where they are unsafe.

Including "engagement in unacceptably disruptive behavior that interferes with the normal functioning" of the shelter as a chargeable offense that would allow for placement in a secure facility and adding "displays sexual predatory behavior" to the list of behaviors that may be considered unacceptably disruptive is also concerning.¹¹⁵ Given what we know of discrimination against LGBT youth and assumptions of their sexual orientation and gender identity as being predatory, we are very concerned that this provision could be used to funnel LGBT youth in more secure placements where they are subjected to higher risks of abuse. According to the Bureau of Justice Statistics, youth who identified as lesbian, gay, bisexual, or "other" reported a rate of sexual victimization by other youth in juvenile detention facilities at a rate of nearly 7 times higher than straight youth.¹¹⁶ Preventing LGBT youth from being moved to more secure facilities is an important factor in protecting them from sexual violence. We are concerned that the proposed rule would instead put LGBT youth in more restrictive settings, increasing their vulnerability to abuse, and that the failure to address the particular vulnerabilities of LGBT young people renders the proposed rule arbitrary and capricious.

The proposed rule would endanger LGBT immigrants and their families by arbitrarily putting them at a disadvantage for winning their immigration cases.

Immigrants are less likely to win their immigration cases when they are detained.¹¹⁷ Not being detained improves an asylum applicants' ability to gather evidence and document the persecution they escaped and secure counsel to help them win their cases.¹¹⁸ For LGBT people, who face criminalization and persecution in much of the world, losing their case could mean death. The impact of detaining LGBT asylum seekers for longer periods of time is too dangerous to disregard. A study from the Center for American Progress found that, controlling for all other factors, being detained made LGBT asylum seekers with excellent legal counsel

¹¹⁴ Katayoon Majd, Jody Marksamer, and Carolyn Reyes, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts" (San Francisco: National Juvenile Defender Center, National Center for Lesbian Rights, and Legal Services for Children, 2009), available at https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf.

¹¹⁵ U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," pgs. 45505-45506.

¹¹⁶ Bureau of Justice Statistics, "Sexual Victimization in Juvenile Facilities Reported by Youth, 2012" (U.S. Department of Justice, Office of Justice Programs, 2012), available at <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.

¹¹⁷ Stacy Caplow and others, "Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report," 33 Cardozo L. Rev. 357 (2011-2012), available at <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1551&context=faculty>; Eagly and Shafer, "Access to Counsel in Immigration Court."

¹¹⁸ Anneliese Hermann, "Asylum in the Trump Era" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/>.

over 10 percent less likely to win their cases than their counterparts who were not detained.¹¹⁹ In other words, detaining LGBT asylum seekers makes them less likely to win, regardless of the strength of their asylum case.

Given that freedom from detention is so critical to winning an asylum case, the proposed rule's expansion of the time families spend in detention as well as the increased ease of the proposed rule's movement of unaccompanied children to adult detention facilities unnecessarily puts the lives of LGBT asylum seekers in jeopardy.

Conclusion

DHS and HHS have neither addressed nor taken into account the harms and high costs detailed above. For these reasons the departments should immediately withdraw their proposed rule and not move forward with the proposal.

Sincerely,

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¹¹⁹ Sharita Gruberg and Rachel West, "Humanitarian Diplomacy" (Washington: Center for American Progress, 2015), available at <https://www.americanprogress.org/issues/lgbt/reports/2015/06/18/115370/humanitarian-diplomacy/>.