No. 25-6308

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY FLORES, ET AL.,
Plaintiffs-Appellees,
v.
PAMELA BONDI, ATTORNEY GENERAL, ET AL.,
Defendants-Appellants.

On appeal from the
United States District Court for the Central District of California
Case No. 2:85-CV-04544-DMG-AGR

BRIEF OF *AMICI CURIAE* KIDS IN NEED OF DEFENSE, PUBLIC COUNSEL, AND THE YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") serve immigrant and refugee children who are or have been in the custody of the Department of Homeland Security ("DHS"), the Office of Refugee Resettlement ("ORR") of the Department of Health and Human Services ("HHS"), or both. The manner in which DHS and HHS detain, process, treat, and release children profoundly impacts children's safety, health, and well-being; and their access to legal representation, needed social services, and humanitarian protection. Accordingly, *Amici* have a compelling interest in Defendants-Appellants' ("Defendants," "Appellants" or "Government") compliance with the standards set forth in the 1997 *Flores* Settlement Agreement (the "Agreement" or "FSA"). Terminating the Agreement as Appellants request, notwithstanding their failure to implement its terms through regulations and otherwise uphold their obligations, would undermine the protective purposes of the Agreement and other laws and policies designed to safeguard children in federal custody.

Kids in Need of Defense ("KIND") is a leading national nonprofit organization devoted to the protection of unaccompanied and separated children. Since its founding in 2008, KIND and its pro bono partners have provided

[1] *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. *Amici* further state, pursuant to FRAP 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

legal representation to over 14,000 children who came to the United States from 80 different countries. KIND also provides psychosocial support to children and families; works to address the root causes of child migration; and advocates for laws, policies, and practices to improve the protection of unaccompanied children within the U.S. and abroad.

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as amplifying the power of its clients through comprehensive legal advocacy. From representing asylum seekers to preventing family separation, Public Counsel's advocates secure legal status and protections while improving the immigration system. Public Counsel has decades of experience defending the rights of immigrants—including those released from federal custody—and has a strong interest in ensuring that the government treats them with the respect and care they deserve.

The Young Center for Immigrant Children's Rights ("Young Center") is a national nonprofit organization whose mission is to protect and advance the rights and best interests of immigrant children. Since 2004, the Young Center has been appointed by ORR to serve as the independent Child Advocate, akin to a best interests guardian ad litem, for thousands of unaccompanied and separated immigrant children. The Young Center is appointed as Child Advocate pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of

2008 ("TVPRA"), and is the only organization appointed by ORR to serve in this capacity.

INTRODUCTION

Children entitled to protections under the FSA overwhelmingly have fled violence, persecution, abandonment, and other forms of harm. After reaching the United States, immigrant children will face further challenges in navigating the nation's labyrinthine immigration system while healing from a history of trauma. Appellants seek to terminate the landmark Agreement, offering no adequate substitute to ensure consistent compliance with its standards. At the same time, children face prolonged detention and eroding access to protections. The loss of fundamental safeguards would jeopardize children's safety and well-being during their time in government custody and beyond.

ARGUMENT

I. Experience Shows That Strong Safeguards During Detention Are Essential to Children's Well-Being and Legal Rights

Detention exacerbates the harm that many immigrant children have experienced; even brief detention can cause psychological trauma and long-term mental health consequences such as post-traumatic stress disorder, self-harm, and

behavioral problems.[2] Before the advent of basic standards for custody of children, even children of tender years were subjected to prison-like settings, denied meaningful access to family members and attorneys, and even subjected to solitary confinement.[3] For a generation, the FSA has lifted standards of detention for children, but systemic non-compliance persists, and preventable harms still occur.[4] In recent complaints to DHS's Office for Civil Rights and Civil Liberties, hundreds of unaccompanied children have reported verbal and physical abuse and inhumane conditions experienced in U.S. Customs and Border Protection ("CBP") custody.[5]

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[2] Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children*, 139 Pediatrics 1, 6 (2017) (American Academy of Pediatrics statement calling for "limited exposure" to immigration detention).

[3] Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 Chicano-Latino L. Rev. 589, 596 (1998); Hum. Rts. Watch Child.'s Rts. Project, Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service 1, 59–60 n.110 (1997).

[4] Sural Shah & Raul Gutierrez, *Trump's Detention Policies Hurt Kids. We Know, We're Pediatricians*, USA Today (Apr. 15, 2025), https://www.usatoday.com/story/opinion/voices/2025/04/15/trump-immigrant-detention-centers-children-health/83017611007/ (describing detention's psychological and behavioral effects on children).

[5] *See*, *e.g.*, Florence Immigr. & Refugee Rts. Project, *Handcuffed, Pushed, and Afraid: Immigrant Children Share Terrifying Experiences While in Border Patrol Custody* (Sep. 2024), https://firrp.org/wp-content/uploads/2024/09/September-2024_Handcuffed-Pushed-and-Afraid-Immigrant-children-share-terrifying-experiences-while-in-Border-Patrol-custody.pdf; Kids in Need of Defense, Complaint Letter RE: Widespread Infringement of the Civil Rights and Civil Liberties of Unaccompanied Noncitizen Children Held in the Custody of CBP (Apr. 6, 2022), https://supportkind.org/wp-content/uploads/2022/04/2022.04.6-FINAL-Public-CRCL-OIG-Complaint.pdf.

During ORR custody, children served by *Amici* have contracted viral infections, engaged in self-harm, or suffered sexual assault. Preventing such harm requires systemic safeguards.

Detention also impedes children from pursuing legal claims in multiple ways, including by curtailing access to evidence, witnesses, and family support. In *Amici's* experience, facility policies place constraints on scheduling attorney visits, and the detained setting may hamper the formation of a trusting attorney-client relationship. Moreover, pursuing release from detention and reunification with loved ones diverts the child's time and focus from their legal case. The prospect of prolonged detention can even induce children to relinquish meritorious claims.[6] The FSA stands for ameliorating these risks in two ways: through its "general policy favoring release," and by mandating service delivery "in a manner which is sensitive to the age, culture, native language and the complex needs of each minor."[7] This mandate supports *Amici* in developing and delivering trauma-informed and developmentally appropriate advisals and services to children during ORR custody and afterward.

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[6] Anna Flagg & Shannon Heffernan, *ICE Threw Thousands of Kids in Detention, Many for Longer Than Court-Prescribed Limit*, Marshall Project (Dec. 17, 2025), https://www.themarshallproject.org/2025/12/17/children-immigration-detention-dilley-ice (prolonged detention increases likelihood of leaving the U.S. despite valid legal claims).

[7] ER-0685; ER-0697. Citations to "ER" are to Defendants-Appellants' Excerpts of Record, Dkt. Nos. 10.1–10.6. Citations to "SER" are to Plaintiffs-Appellees' Supplemental Excerpts of Record, Dkt. Nos. 18.1–18.3.

For children in custody, too much is at stake to risk the erosion of these fundamental standards—particularly because Defendants have not implemented durable equivalent protections.

II. DHS and ORR Have Yet to Promulgate Regulations Sufficient to Guarantee Children the Full Measure of Protection Provided by the FSA

Appellants freely undertook an obligation to promulgate regulations implementing, and "not inconsistent with," the Agreement's "relevant and substantive" terms.[8] In 2020, after HHS and DHS sought termination of the Agreement based on having adopted final regulations[9] (the "Final Rule") purportedly providing "similar" protections, this Court found that "the promulgation of *inconsistent* regulations" was "not a significant change warranting termination of the Agreement."[10] Five years later, the Government again seeks to terminate the Agreement, without having remedied the regulations' deficits.

A. HHS should codify the FSA limitations on restrictive and out-of-network placements

In serving children held in secure or heightened supervision ("staff-secure") facilities, *Amici* have seen how the restrictive conditions of such placements may compound a child's trauma. Prolonged restrictive detention contributes to anxiety,

[8] ER-0683–84 (FSA ¶ 9).
[9] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392–44535 (Aug. 23, 2019).
[10] *Flores v. Rosen*, 984 F.3d 720, 740–41 (9th Cir. 2020).

depression, self-harm, suicidal ideation and other mental effects,[11] and in *Amici's* experience, often impedes progress of a child's immigration case.

Defendants assert that revisions to the ORR Policy Guide in May 2025 ("Policy Guide") justify terminating the Agreement's safeguards governing placements in secure, heightened supervision, and out-of-network facilities.[12] The district court disagreed, noting that the Policy Guide revisions "lack the force of law" and can be "easily and unilaterally" changed.[13] ORR's adoption of these revisions nearly a year after the district court's June 2024 ruling further undermines a showing of substantial compliance.

Moreover, the Policy Guide revisions fall short of the Agreement's requirements. The Policy Guide, like the analogous provisions of the ORR Foundational Rule,[14] fails to meet the Agreement's standard that "disallow[s] isolated or petty offenses to have *any* effect upon ORR's decision to place a child in a heightened supervision or secure facility."[15] In confusingly circular provisions, for

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[11] Disability Rts. Cal., The Detention of Immigrant Children with Disabilities in California: A Snapshot 14–17 (2019), https://www.disabilityrightsca.org/system/files/file-attachments/DRC-ORR-Report.pdf.
[12] Defs.-Appellants' Opening Br. at 70–71, Dkt. No. 9.1 ("Appellants' Br."); *see* ER-0084–88 (Policy Guide §§ 1.2.4, 1.4.6).
[13] ER-0016 (citation modified).
[14] 45 C.F.R. §§ 410.1105(a)(3), (b)(2).
[15] *Flores v. Garland*, No. CV 85-4544, 2024 WL 3467715, at *6 (C.D. Cal. June 28, 2024).

secure placements, the Policy Guide permits consideration of petty offenses that are "considered grounds for a stricter means of detention," while allowing heightened supervision placements based on "a non-violent criminal or delinquent history not warranting placement in a secure facility."[16] And while the Agreement holds out-of-network placements to the same standards as in-network placements,[17] the Policy Guide states that children in out-of-network facilities "will *generally* receive" like services.[18]

Defendants call these concerns "speculative hypotheticals,"[19] but *Amici* have witnessed the harm and ongoing risk to children from ORR's failure to substantially comply with these FSA standards. In the case of one unaccompanied child placed in an out-of-network facility in 2025, the facility failed to provide the child with the minimum amount of phone contact with family that in-network providers are required to provide children in custody. An appointed Child Advocate advocated with ORR repeatedly for several weeks until the child finally received the required amount of phone contact with family. The facility denied the same child basic educational instruction required by the FSA, following a move to a different housing unit. The Child Advocate raised the issue with the facility, but the facility restored

[16] ER-0086–8 (Policy Guide § 1.2.4)
[17] *Garland*, 2024 WL 3467715, at *6.
[18] ER-0101 (Policy Guide § 1.4.6) (emphasis added).
[19] Appellants' Br. at 70.

the child's access to educational instruction only when it moved the child back to his original housing unit.

B. Even if DHS were to finalize its 2019 regulations, they are insufficient to replace the FSA, as this Court found in 2020

DHS has mischaracterized the FSA as "[o]ne of the most significant impediments to the fair and effective enforcement of our immigration laws for family units and UACs."[20] Unsurprisingly, the 2019 DHS rules offer downgraded levels of protection.[21] As the following examples show, even if the Court were to allow the 2019 regulations to take effect in their entirety, terminating the FSA would leave a serious void.

1. Congressionally mandated protections must not be negated through redeterminations under the unaccompanied child definition

In adopting a legal definition of "unaccompanied alien child"[22] ("UC"), Congress laid a foundation for basic safeguards for a population universally

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[20] *The Implications of the Reinterpretation of the Flores Settlement Agreement for Boder Security and Illegal Immigration Incentives: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affs.*, 115 Cong. 7–8 (2018) (Testimony of Matthew T. Albence, Executive Associate Director, U.S. Immigration and Customs Enforcement, DHS).

[21] *See, e.g., Rosen*, 984 F.3d at 720–21 (affirming in part the ruling that some 2019 DHS regulations are inconsistent with the Agreement).

[22] An "unaccompanied alien child" is under 18 years of age, lacks lawful U.S. immigration status, and lacks an available parent or legal guardian in the U.S. to provide care and physical custody. 6 U.S.C. § 279(g)(2).

recognized as uniquely vulnerable.[23] Specifically, unaccompanied children require protection because of the harms or threats that prompted their migration and marked their journeys, and because they lack full adult capacities.

Responding to these needs, a unanimous Congress adopted protective measures in the TVPRA.[24] A determination by DHS that a young person is a UC[25] triggers safeguards including the right to removal proceedings before an immigration judge instead of an "expedited removal" process,[26] access to counsel "to the greatest extent practicable,"[27] safety assessments by ORR before release from federal custody,[28] availability of independent child advocates to "advocate for the best interest of the child,"[29] and voluntary departure at no cost to the child.[30]

Yet in 2018, both HHS and DHS proposed regulations stating that upon reaching age 18 or joining a parent or legal guardian in the United States, "[a]n alien

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[23] *See, e.g.*, 148 Cong. Rec. S8180 (2002), available at https://www.congress.gov/107/crec/2002/09/04/CREC-2002-09-04-pt1-PgS8155-2.pdf (Letter from Senators Sam Brownback and Edward M. Kennedy) ("Unaccompanied minors deserve special treatment under our immigration laws and policies. Many of these children have been abandoned, are fleeing persecution, or are escaping abusive situations at home. These children are either sent here by adults or forced by their circumstances, and the decision to come to our country is seldom their own.").
[24] Pub. L. No. 110-457, 122 Stat. 5044 (2008).
[25] 8 U.S.C. §§ 1232(b)(2), (3).
[26] *See id.* § 1232(a)(5)(D).
[27] *Id.* § 1232(c)(5).
[28] *Id.* § 1232(c)(3).
[29] *Id.* § 1232(c)(6).
[30] *Id.* § 1232(a)(5)(D).

who is no longer a UAC is not eligible to receive legal protections limited to UACs under the relevant sections of the Act,"[31] a standard simultaneously unclear and shortsighted. This formulation offers no theory as to *which* existing legal protections are supposedly "limited to UACs." Imposing such a limit by regulation would be both counterproductive and *ultra vires* to the statute, for several reasons.

First, while charging all federal agencies with the duty to rapidly identify any person who is or *may be* a UC, Congress did not confer any express authority to rescind or re-examine that determination. Second, the well-documented protective purposes of the TVPRA[32] do not support an inference that Congress intended to automatically truncate the protections it conferred. In adopting both the TVPRA and the Homeland Security Act of 2002[33] ("HSA"), Congress presumably was aware that children in time reach the age of 18 and may reunite with parents or legal guardians. But those circumstances do not retrospectively alter the fact that the child entered the immigration system in a state of unique vulnerability. Nor do those milestones mark a bright line where children automatically attain adult capacities and stop

[31] 8 C.F.R. § 236.3(d)(2); *see* 45 C.F.R. § 410.101.
[32] *See*, *e.g.*, 154 Cong. Rec. S10886 (2008), available at https://www.congress.gov/110/crec/2008/12/10/CREC-2008-12-10.pdf (The TVPRA protections were adopted "to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life-threatening circumstances" and to fulfill "a special obligation to ensure that these children are treated humanely and fairly.").
[33] Pub. L. No. 107-296, 116 Stat. 2135 (2002).

meriting solicitude.[34] To the contrary, *Amici* continuously observe how young migrants continue to recover from traumatic events, adjust to their new circumstances, and face uncertainty over their futures through the years-long trajectory of an immigration case.[35]

Third, certain TVPRA protections would be of no value if interrupted prematurely when the child turns 18 or joins a parent or legal guardian. For example, an exemption for UCs from the one-year deadline to apply for asylum[36] would be meaningless if a later determination that the child is "no longer a UAC" could result in re-imposing the deadline—perhaps when the one-year time limit is about to expire, or even afterwards. Similarly, the guarantee of removal proceedings before

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[34] *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18."); Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 450 (2013) (noting the adolescent brain's structural and functional development continues well into the mid-20s); Alexa Mousley et al., *Topological Turning Points Across the Human Lifespan*, 16 Nature Commc'ns 1, 9 (2025) (finding neural network topology changes in multiple developmental phases rather than in a single step at a fixed age).

[35] *See, e.g., Alexandra's Journey from Trauma to Triumph Through Legal Protection*, Kids in Need of Defense (July 29, 2025), https://supportkind.org/stories/clients/alexandras-journey-from-trauma-to-triumph-through-legal-protection (narrative of unaccompanied child who fled sexual abuse and trafficking at age 15, and experienced fear and trauma in immigration custody and court during the asylum process); *see generally Voices of Unaccompanied Immigrant and Refugee Children*, Kids in Need of Defense, https://supportkind.org/voices-of-unaccompanied-immigrant-and-refugee-children (last visited Jan. 28, 2026).

[36] 8 U.S.C. § 1158(a)(2)(b).

an immigration judge must outlast the child's turning 18 or joining a parent to be meaningful. To read these protections as time-bounded or temporary would mean construing a statute in a way that renders the terms ineffective, an impermissible result.[37]

Finally, if the enjoined DHS regulation takes effect, it would result in serial fluctuations in a child's legal rights. For instance, if a UC is released to a parent who later becomes unavailable, the child would become a UC once again. Fluctuations in legal rights would in turn burden the child's ability to understand and make decisions in their legal proceedings, impairing fundamental fairness. It would also complicate the work of the child's advocates and the state and federal agencies that interact with the child, and by applying different rules to children who face similar hardships, it would lead to inconsistent and unjust outcomes.[38]

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[37] *See United States v. Powers*, 307 U.S. 214, 217 (1939) ("There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.") (citation omitted); 73 Am.Jur.2d *Statutes* § 148 (updated Nov. 2025) ("A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective.").

[38] In the asylum context, soon after the TVPRA took effect in 2009, DHS adopted a policy of limiting asylum office jurisdiction based on repeat redeterminations under the UC definition. That approach undermined efficiency, uniformity, and predictability, and forced asylum officers to make assessments outside their expertise. The agency reversed the practice after four years. *See* Citizenship and Immigr. Servs. Ombudsman, *Ensuring a Fair and Effective Asylum Process for Unaccompanied Children*, U.S. Dep't of Homeland Sec. 6–8 (Sep. 20, 2012), https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac_from_web.pdf.

As explained in 2012 by the Citizenship and Immigration Services Ombudsman, the "TVPRA's procedural and substantive protections were designed to remain available to UACs throughout removal proceedings, housing placement, and the pursuit of any available relief."[39] Allowing multiple redeterminations of UC status would be administratively burdensome, as well as contrary to the goals of the TVPRA, the Agreement, and principles of child protection which prioritize stability and permanency.[40]

2. DHS regulations created expansive exceptions to custody and transfer requirements

With limited exceptions, the Agreement mandates the transfer of all minors from initial custody to a "licensed program" within three to five days of apprehension.[41] In the event of an "emergency" or an "influx of minors," the Agreement requires the transfer to occur "as expeditiously as possible."[42] For children who are not UCs,[43] the DHS regulations retained the Agreement's timing requirements, but curtailed their effectiveness through expansive exceptions for

[39] *Id.* at 4.
[40] *See, e.g.*, Child Welfare Info. Gateway, *Permanency*, Child.'s Bureau, https://www.childwelfare.gov/topics/permanency/?top=116 (noting connections among child safety, permanency and overall well-being); ER-0684–87 (FSA ¶ 12.A.3).
[41] ER-0684–85.
[42] ER-0684–85.
[43] DHS must transfer UCs to HHS custody under required statutory timelines.

"emergency" and "influx."[44]

Defined in the FSA as "any act or event that prevents the [timely] placement of minors" in a licensed program,[45] "emergency" under the regulations encompasses any act or event "that prevents *timely transport or* placement of minors, or *impacts other conditions provided by this section*."[46] This broader and vaguer regulatory definition significantly expands an exception that allows DHS to relax the timeline for transfer to a licensed program.

The DHS regulations also retained the outdated threshold for "influx" set forth in the Agreement: "more than 130 minors eligible for placement in a licensed program";[47] in contrast, in its Foundational Rule, HHS adopted a percentage-based definition.[48] As Defendants admit, "the influx exception has been almost continually met for decades."[49] By applying its 1997 yardstick, DHS granted itself a perpetual exception to the otherwise mandatory timelines for transferring children who are not UCs to licensed facilities.

Operating together, the exceptions triggered by an "emergency" or "influx," as defined in the regulations, are so broad that they threaten to swallow the rule.

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[44] 8 C.F.R. §§ 236.3(b)(5), (b)(10), (e).
[45] ER-0685.
[46] 8 C.F.R. § 236.3(b)(5) (emphasis added).
[47] ER-0685 (FSA ¶¶ 12 B–C)
[48] 45 C.F.R. § 410.1001.
[49] Appellants' Br. at 58.

3. DHS regulations eliminate independent third-party oversight of agency action

In another material departure from the Agreement, DHS's 2019 regulations dispensed with the Agreement's independent monitoring and oversight provisions.[50] But the trajectory of this litigation shows the ongoing need for independent monitoring. Agency conduct has necessitated repeated motions to enforce compliance with the Agreement as well as appointment of an independent monitor to oversee compliance with the district court's orders. In moving to terminate the Agreement in 2019, the Government attributed disputes over DHS's performance to "crisis conditions at the border" and "enormous pressure,"[51] echoed in the Government's current invocation of the need to respond to "unpredictable changes in migration patterns."[52] These assertions reflect the need for oversight to maintain standards notwithstanding mounting pressures and changing conditions.

In evaluating a licensing definition in the Agreement, the district court recognized the value of "the essential protection of regular and comprehensive oversight by an *independent*" entity.[53] By relying solely on internal DHS monitoring, the regulations would put unrepresented children who are in DHS custody in the

[50] 84 Fed. Reg. 44449 (Aug. 23, 2019).
[51] SER-333.
[52] Appellants' Br. at 28.
[53] *Flores v. Barr*, 407 F. Supp. 3d 909, 919 (C.D. Cal. 2019), *aff'd in part, rev'd in part sub nom*. *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020).

untenable position of raising concerns about their treatment to the very authorities detaining them. Moreover, during the past year, DHS has taken steps to close or reduce staffing at internal oversight offices.[54]

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As shown in the above examples and additional defects discussed *infra*, reinstating the enjoined 2019 regulations would not compensate for the protections lost in terminating the Agreement. As this Court recognized in 2020, replacing the Agreement with the 2019 regulations or their equivalent would be a significant downgrade in safeguards for children.

III. The Government's Resistance to Public Input During the 2018–19 Rulemaking Contravenes Their Claim that the FSA Inhibits Rulemaking Under the APA

Having failed for decades to promulgate regulations in compliance with the FSA, the Government now resorts to characterizing the district court's continued enforcement as "impermissibly mandat[ing] the result of agency rulemaking."[55] This argument should be rejected. Both the district court's and this Court's orders are entirely compatible with notice and comment procedures.[56] Enforcing the

[54] Angélica Franganillo Díaz, *Cuts to DHS Watchdogs Spark More Questions as Deportation Efforts Increase*, CNN (July 8, 2025), https://www.cnn.com/2025/07/08/politics/homeland-security-watchdog-cuts.
[55] Appellants' Br. at 48.
[56] *Barr*, 407 F. Supp. 3d at 924; *Rosen*, 984 F.3d at 728 (recounting past rulemaking efforts).

Agreement, which the Government freely entered into, does not contravene the APA.[57]

The APA requires "that agency decisions be made only after affording interested persons notice and an opportunity to comment."[58] In 2019, Defendants received input from thousands of commenters on the *Proposed Rule re: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*[59] ("Proposed Rule"). While portraying the district court's adherence to the Agreement's standards as overreach, it is Defendants themselves who chose to "close their eyes to alternatives" and issue final regulations "without regard to any comments received."[60] The Final Rule retained numerous inconsistencies with the FSA, flouting detailed recommendations from commenters with extensive firsthand experience supporting children as they navigate agency processes. What follows is a small sampling of public comments Defendants rejected.

- Multiple comments stated that the proposed parole standard for accompanied children in expedited removal proceedings[61] violated the

[57] *See Housatonic River Initiative v. EPA*, 75 F.4th 248 (1st Cir. 2023); *Berger v. Heckler*, 771 F.2d 1556, 1579 (2d Cir. 1985) (no error to require HHS Secretary "to redraft her regulations to bring them into conformity with a court order to which she has consented").
[58] *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).
[59] 83 Fed. Reg. 45486 (Sep. 7, 2018).
[60] *See* Appellants' Br. at 50–51.
[61] 83 Fed. Reg. 45524 (to be codified at 8 C.F.R. § 212.5(b)).

FSA,[62] yet DHS was "not persuaded that [its] legal interpretation [was] erroneous."[63] This Court reached the same conclusion as the commenters, finding that the "new parole standard undermines the Agreement's release mandate."[64]

- In the face of warnings that denying bond hearings to accompanied children in expedited removal proceedings stood "in direct contradiction with the Supreme Court's holding in *Reno v. Flores*,"[65] DHS declined to "amend[] regulatory provisions regarding the bond provisions for minors

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[62] *See, e.g.,* Kids in Need of Defense, Comment Letter on Proposed Rule 26–27 (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-21391 ("[T]he Government's asserted need to align its parole standards by subjecting minors to a higher, narrower standard runs directly counter to the FSA's presumption of release."); Refugee and Immigrant Center for Educ. and Legal Servs., Comment Letter on Proposed Rule 24 (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-75753 ("RAICES Comment") ("This framework contradicts the requirement of the FSA to release minors from custody without unnecessary delay."); A.B.A., Comment Letter on Proposed Rule 2 (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-21946 (proposal contradicts FSA's mandate to place children in the least restrictive setting).

[63] 84 Fed. Reg. 44411 (Aug. 23, 2019).

[64] *Rosen*, 984 F.3d at 738.

[65] RAICES Comment at 23–24; *see also* Nat'l Ctr. Youth L., Comment Letter on Proposed Rule 37 (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-32097 (failure of the Proposed Rule to universally guarantee bond hearings for minors violates FSA); All. for Child.'s Rts., Comment Letter on Proposed Rule 29–30 (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-20332 ("Alliance for Children's Rights Comment") (same).

based on public comments."[66] This Court found that the regulations were "inconsistent with the Agreement."[67]

- Multiple commenters provided input that HHS's proposed standards for placing an unaccompanied child in a secure facility contravened the Agreement's presumption in favor of release,[68] but HHS declined to adopt those comments.[69] This Court found that the regulations "broaden the circumstances in which a minor may be placed in a secure facility and are therefore inconsistent with the Agreement."[70]
- In adopting regulations on licensed facilities, DHS again failed to avail itself of input from commenters.[71] Finding that "the regulations expressly

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[66] 84 Fed. Reg. 44395 (Aug. 23, 2019).
[67] *Rosen*, 984 F.3d at 739.
[68] Immigrant Legal Res. Ctr., Comment Letter on Proposed Rule 7 (Nov. 5, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-21207; ("Proposed 45 CFR § 410.203 through its catchall provision swallows up other enumerated criteria to give HHS unfettered discretion to jail children."); Alliance for Children's Rights Comment at 50 (same).
[69] 84 Fed. Reg. 44532 (Aug. 23, 2019) (discussing catchall provision allowing secure placement where a child is "otherwise a danger to self or others"); *id.* at 44492 (acknowledging a comment asserting that this provision violated the FSA).
[70] *Rosen*, 984 F.3d at 733.
[71] Young Ctr. for Immigrant Child's Rts., Comment Letter on Proposed Rule 8, (Nov. 6, 2018), https://www.regulations.gov/comment/ICEB-2018-0002-22235 (Proposed 8 C.F.R. § 236.3(b)(9) would "eliminat[e] the Agreement's critical limitation on the detention of children in unlicensed facilities."); NYCL Comment at 39 ("As written, the Proposed Rule would permit the detention of minors who are not UACs in FRCs that would be classified as secure under the FSA[.]"); Attys. Gen., Comment Letter on Proposed Rule 24 (Nov. 6, 2018),

> define a licensed facility as a 'detention facility,' as opposed to the group homes contemplated by the Agreement," this Court agreed with commenters that the provisions were inconsistent with the Agreement.[72]

In these ways and others, Defendants squandered an opportunity in the 2018–19 rulemaking to "maintain minds open" to insights generated by public comments. Defendants may not now contend that rulemaking under the agreement would curtail their ability to respond to public comments as contemplated by the APA.

IV. Persistent Threats to Children's Rights and Safety Refute Appellants' Contention That Changed Circumstances Warrant Termination of the FSA

A. Changes in Facts, Laws, or Policy Do Not Support Termination of the FSA

Defendants ask to be released from the Agreement on the ground that its application "is no longer equitable."[73] Of particular concern to *Amici,* Defendants contend that changed legal and factual circumstances require termination of the Agreement.[74] Although Defendants invoke *Horne vs. Flores*[75] for the proposition that "changes in the nature of the underlying problem, changes in governing law or

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https://www.regulations.gov/comment/ICEB-2018-0002-75641 (same); Cities Comment at 8 ("If implemented, the Rules would permit DHS to hold children and their families in detention-like settings indefinitely[.]").

[72] 84 Fed. Reg. 44526 (Aug. 23, 2019); *Rosen*, 984 F.3d at 739.

[73] Appellants' Br. at 33.

[74] *Id.* at 57.

[75] *Horne v. Flores*, 557 U.S. 433, 448 (2009).

its interpretation by the courts, and new policy insights [may] warrant reexamination of the original judgment,"[76] Defendants fail to find a footing on any of those three bases, because they misapprehend the conditions facing unaccompanied children in federal custody today.

First, although Defendants discuss several changes in the factual landscape since 1997, these do not establish "changes in the nature of the underlying problem"[77]: children in immigration custody remain vulnerable to harm from unsuitable detention conditions, unnecessarily prolonged detention, and curtailed access to due process protections.[78]

Defendants assert that changed conditions of custody warrant termination of the FSA, declaring that "[i]t is undeniable that conditions have drastically improved."[79] Around the time the final regulations appeared, an HHS Inspector General report found significant variations in access to medical and mental health

[76] Appellants' Br. at 31–32 (citing *Horne*, 557 U.S. at 447–48).
[77] *Id.*
[78] Linton et al., *supra* note 2, at 4, 6 ("Although data are limited regarding the effects of a short detention time on the health of children, there is no evidence indicating that any time in detention is safe for children.").
[79] Appellants' Br. at 58–59.

care,[80] and this trend persists as "less visible" health needs often go unaddressed.[81] In *Amici*'s experience, conditions of ORR custody are variable; access to outdoor recreation, educational opportunities, religious accommodations, and culturally or linguistically appropriate supports vary considerably between sites.[82] That these disparities appear to be driven by "ambiguous policy guidance, variance in the interpretation of ORR policy, and limited supervision of facilities by ORR and state child-welfare licensing bodies" favors reinforcing the FSA rather than terminating it.[83] And the effects of unfavorable detention conditions will be amplified as recent changes in policy and practice tend to prolong children's time in detention, as discussed *infra.*

Second, Defendants do not establish a significant change in governing law that makes continued application inequitable, as *Horne* contemplates. Defendants argue that the FSA undermines the January 2025 Laken Riley Act, which expanded mandatory detention of inadmissible noncitizens to include individuals who are

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[80] *See* Acting Inspector General Joanne M. Chiedi, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, U.S. Dep't of Health and Hum. Servs. 9 (Sep. 2019), https://oig.hhs.gov/documents/evaluation/3153/OEI-09-18-00431-Complete%20Report.pdf.

[81] *See* Lauren Heidbrink & Sarah Diaz, *Kids in Care: Unaccompanied Children in Federal Government Custody*, Ctr. for the Hum. Rts. of Child. at Loyola Univ. Chi. 43–44 (2024), https://ecommons.luc.edu/chrc/36/.

[82] *See id.* at 4.

[83] *See id.*

arrested for, charged with, convicted of, or admit having committed certain crimes, including minor theft-related crimes such as shoplifting.[84] Because the Act does not exempt children from its mandatory detention provisions, children who are criminally charged with shoplifting or another enumerated offense but never convicted of the offense have been subject to mandatory detention. As the district court found, Defendants fail to explain how the Act impairs the government's ability to comply with the FSA.[85] Instead, the expansion of mandatory detention under the Act supports the need to retain FSA safeguards to ensure that minimum standards are met for children in federal immigration custody. Moreover, children subject to mandatory detention under the Act are more likely to be placed in heightened supervision or secure facilities, which are frequently out-of-network. The Agreement's protections and oversight over ORR restrictive and out-of-network placements are even more critical for children subject to mandatory detention under the Laken Riley Act.

Third, Defendants do not show that "new policy insights" warrant termination under *Horne*. As a former Acting Secretary of DHS explained in announcing the 2019 rule, "care in custody of children and families is not a policy decision, and

[84] 8 U.S.C. § 1226(c)(1)(E).
[85] ER-0016.

should not be subject to the ebbs and flows of state and local politics."[86]

B. Defendants' Assertion of Improved Conditions Is Refuted by Recent Policies That Prolong Custody and Impair Children's Rights

Defendants posit that "there is now a detailed custodial system to protect minors in custody," and that "[c]onditions for detained minors have never been better."[87] But *Amici's* recent experience in serving children during and after federal custody shows otherwise, largely due to dramatic swings in federal policy and practice that that detrimentally affect children's experiences in custody, often by prioritizing the federal government's immigration enforcement objectives. These new practices show the urgency of keeping the FSA safeguards in place at least until the agencies establish a record of performance that consistently meets minimum standards for the care and protection of children placed in federal custody.

First and particularly problematic is a series of new requirements for sponsors that ORR has implemented since January 2025—changes that significantly delay or even block the release of children to appropriate caregivers, without appreciably increasing child safety. After ORR revised its policies in March and April 2025 to

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[86] Press Release, Kevin K. McAleenan, Dep't of Homeland Sec., *Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement* (Aug. 21, 2019), https://www.dhs.gov/archive/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

[87] Appellants' Br. at 5.

mandate proof of income and DNA testing, even from potential sponsors who are the child's parents,[88] *Amici* have observed children experiencing months-long delays in reunifying children with parents.[89] Yet ORR has not shown that either the required proof of income or parental DNA testing correlates to child safety to justify this rupture with past practice. In March 2025, ORR adopted an interim final rule ("IFR") that rescinded, with immediate effect, previous prohibitions against disqualifying potential sponsors based solely on their immigration status, and collecting and sharing data on potential sponsors' immigration status for law enforcement or immigration enforcement purposes.[90] The IFR thus represented a sharp reversal from ORR's acknowledgment, in promulgating the Foundational Rule, that "[t]he HSA and the TVPRA do not make any mention of a sponsor's potential immigration status as a prerequisite to receive an unaccompanied child into their custody and do not imbue ORR with the authority to inquire into immigration status as a condition for sponsorship."[91] Individually and cumulatively, these new policies have delayed or

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[88] Off. of Refugee Resettlement, *ORR Unaccompanied Alien Children Bureau Policy Guide: Section 2*, U.S. Dep't of Health & Hum. Servs. (Jan. 6, 2026), https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2#2.2.4.

[89] *See also* Rachel Uranga, *New Trump Era Vetting Process Keeps Migrant Children in Federal Custody Longer, Advocates Say*, L.A. Times (Apr. 25, 2025), https://www.latimes.com/california/story/2025-04-25/trump-administration-toughens-restrictions-on-families-trying-to-reunite-with-migrant-children.

[90] Foundational Rule, 90 Fed. Reg. 13554 (Mar. 25, 2025); *see* 45 C.F.R. § 410.1201(b).

[91] 89 Fed. Reg. 34442 (Apr. 30, 2024).

foreclosed children's release to caregivers, contributing to prolonged custody at public expense, and more importantly, to children's detriment.[92] Contravening the FSA and TVPRA requirement to release children to appropriate caregivers without unnecessary delay,[93] the IFR heralded a drop in releases from ORR to sponsors,[94] resulting in children spending more time in congregate settings not designed to meet their developmental, emotional, and physical needs—even when suitable, loving relatives are available to care for them.[95] Whereas the average length of custody for children in ORR custody for FY 2024 was 30 days, that figure skyrocketed to 117 days for FY 2025.[96]

As *Amici* have long observed in their work serving children during and after federal custody, any period of custody and separation from parents and family, and

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[92] Kids in Need of Defense, Comment Letter on Unaccompanied Children Program Foundational Rule 6–7, 14–15 (May 27, 2025), https://www.regulations.gov/comment/ACF-2025-0004-0294.
[93] *See* ER-686–87 (FSA ¶¶ 14, 18); 8 U.S.C. § 1232(c)(2)(A).
[94] *Data*, Off. of Refugee Resettlement (June 20, 2025), https://web.archive.org/web/20250703213516/https://acf.gov/orr/about/ucs/facts-and-data#book_content_1 (captured July 3, 2025) (select "Average Monthly Data" from menu) (average length of care for those discharged increased from 49 days in February 2025 to 112 days in March 2025 to 217 days in April 2025).
[95] Kids in Need of Defense, *supra* note 92, at 6–7; Keith Mizuguchi, *The Trump Admin Has All But Stopped Reuniting Detained Migrant Children With Their Families*, KQED (Dec. 18, 2025), https://www.kqed.org/news/12067389/the-trump-admin-has-all-but-stopped-reuniting-detained-migrant-children-with-their-families.
[96] *Data*, Off. of Refugee Resettlement, https://acf.gov/orr/about/ucs/facts-and-data (last visited Jan. 27, 2026) (select "Average Length of Care" from menu).

prolonged periods in particular, pose significant risks to child welfare and development, exacerbating stress, anxiety, and fear many children already experience when they enter CBP or ORR custody.[97] *Amici* have observed children facing prolonged or indefinite custody express feelings of frustration, sadness, and despair, which are frequently associated with "detention fatigue."[98] In some cases, children suffering from detention fatigue have in turn exhibited behavioral issues, resulting in ORR facilities transferring these children to more restrictive placements, including heightened supervision and secure facilities.

Second, *Amici* have encountered unprecedented examples of children previously released from ORR custody to an approved sponsor, then returned to ORR custody despite the absence of any substantiated safety risk. This separation from parents, family, or other loved ones undermines the child's stability, family ties, education, and community life. Worse still, the sponsor requirements discussed above delay release, with detention fatigue contributing to the child's mental distress.

A third example that belies Defendants' claim that "[c]onditions for detained

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[97] *See, e.g.,* M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC Psych. 1, 11–12 (2018), https://link.springer.com/article/10.1186/s12888-018-1945-y (finding longer detention correlating with greater severity of mental health problems).
[98] *See* Heidbrink & Diaz, *supra* note 81; Linton et al., *supra* note 2 (policy statement raising concerns about the harmful effects of government custody on children).

minors have never been better" is ORR's recent increase in the use of secure placements, the most restrictive type of placement and often jail-like settings. Since October 2025, ORR has placed between 5 and 8 youth in a juvenile prison in Pennsylvania "with a long and publicly documented history of staff physically and sexually abusing juvenile offenders in its care."[99] ORR contracts with this juvenile prison for out-of-network secure placements, and the Government recently issued notice of ORR's intent to contract with another facility in Texas for 30 additional secure placements.[100] Any increase in placements in secure and/or out-of-network facilities must be scrutinized under the FSA and the TVPRA's mandates for placement in the least restrictive placement setting that is in the child's best interest, and signals the need for FSA safeguards around secure and out-of-network placements to remain in place.

Fourth, recent months have seen the advent of novel policies and practices used to pressure unaccompanied children to give up claims for relief and depart the United States without the opportunity to explore protection. In November 2025,

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[99] Douglas MacMillan, *Trump Administration Jails Migrant Teens in Facility Known for Child Abuse*, Wash. Post (Jan. 8, 2026), https://www.washingtonpost.com/business/2025/12/24/migrant-teens-facility-child-abuse-trump/.

[100] SAM.gov, *Sources Sought Notice: Licensed Secure Care Beds-Texas*, U.S. Gen. Servs. Admin. (Nov. 19, 2025), https://sam.gov/workspace/contract/opp/d2269d52d74e49808ac4006b2a7fe482/view.

some unaccompanied children taken into CBP custody received a document titled "UAC Processing Pathway Advisal," which states in part:

> You have the option to voluntarily return to your country of origin . . . . If you choose to voluntarily return to your country, there will be no administrative consequence . . . .
>
> If you choose to seek a hearing with an immigration judge or indicate a fear of return to your country, you can expect the following:
>
> - You will be detained in the custody of the United States Government, for a prolonged period of time.
> - If your sponsor in the United States does not have legal immigration status, they will be subject to arrest and removal from the United States. The sponsor may be subject to criminal prosecution for aiding your illegal entry.[101]

Conveying this document or similar oral or written proposals to children in federal custody raises significant due process and safety concerns. Unaccompanied children generally lack access to counsel during CBP custody and do not have the opportunity to speak with an attorney until they are transferred to ORR custody; even then, they may receive only limited legal assistance and not full legal representation while in custody. This heightens the risk that children—many of whom have suffered recent traumatic harms and are not equipped with information on their rights under U.S. immigration law—may give up meritorious claims for protection and return under duress to danger or harm in their country of origin.

[101] Decl. of Marie Silver, Ex. A, *Garcia Ramirez v. U.S. Immigr. & Customs Enf't*, No. 1:18-cv-00508-RC (D.D.C. Nov. 13, 2025), Dkt. No. 426-1.

These and other recent shifts in policy and practice risk worsening outcomes for children as safeguards for their rights and welfare yield to enforcement-driven priorities. In the face of these changes, preserving the *Flores* standards is imperative.

CONCLUSION

Amici urge the Court to reject Appellants' most recent effort to terminate the protections of the *Flores* Settlement Agreement, and affirm the decision below.

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