No. 19-56326

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY FLORES, ET AL.,
Plaintiffs-Appellees,
v.
WILLIAM BARR, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the Central District of California
No. 2:85-CV-04544-DMG-AGR
Hon. Dolly M. Gee

BRIEF OF *AMICI CURIAE* KIDS IN NEED OF DEFENSE ET AL. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that that none of the *Amici Curiae* have a parent corporation or shares or securities that are publicly traded.

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STATEMENT OF *AMICI CURIAE*'S IDENTITY AND INTEREST[1]

The *Amici Curiae* ("*Amici*") serve immigrant and refugee children who are or have been in the custody of the Department of Homeland Security ("DHS"), the Department of Health and Human Services ("HHS"), or both. The manner in which DHS and HHS detain, process, treat, and release minors has a profound impact on children's abilities to access needed social services, legal representation, and humanitarian protection. Accordingly, *Amici* have a compelling interest in ensuring that the 1997 Settlement Agreement in this litigation (the "Agreement") remains in effect until it is fully and faithfully implemented by regulations. The rules finalized by Appellants not only fail to implement the Agreement, but actively undermine its purposes and those of other protective federal laws and policies pertaining to children in the U.S. immigration system.

The Capital Area Immigrants' Rights Coalition

The Capital Area Immigrants' Rights ("CAIR") Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights

[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 Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

presentations, impact and advocacy work, and the training of attorneys representing immigrants.

Catholic Legal Immigration Network, Inc.

Catholic Legal Immigration Network, Inc. ("CLINIC") is a national nonprofit organization that advocates for the protection of unaccompanied and separated immigrant children through litigation, comments to proposed regulations, and the provision of technical assistance, mentorship, practice advisories, webinars, and in-person trainings to the children's legal representatives.

The Florence Immigrant and Refugee Rights Project

The Florence Immigrant & Refugee Rights Project (the "Florence Project") provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona.

The Immigrant Children Advocates' Relief Efforts

The Immigrant Children Advocates' Relief Efforts ("ICARE") is a coalition of non-profit agencies in New York City dedicated to providing advice, direct legal representation, and social services to New York City's children and families in removal proceedings. Our members include The Legal Aid Society, The Door, Catholic Charities Community Services of the Archdiocese of New York, Central American Legal Assistance, The Safe Passage Project, Human Rights First, and Kids in Need of Defense.

The International Rescue Committee

The International Rescue Committee ("IRC") is an international humanitarian organization at work in over 40 countries and 25 US cities helping people whose lives have been shattered by conflict or disaster rebuild their lives. In the US, this work includes providing case management, post-release services, and legal representation to unaccompanied children, as well as a range of social services to asylum-seeking families.

Kids in Need of Defense

Kids In Need of Defense ("KIND") is a national nonprofit organization dedicated to providing free legal representation and protection to immigrant and refugee children in the United States who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court.

Legal Services for Children

Legal Services for Children ("LSC") is one of the first non-profit law firms in the country dedicated to advancing the rights of youth and provides free representation to children and youth who require legal assistance to stabilize their lives and realize their full potential.

The National Immigrant Justice Center

The National Immigrant Justice Center ("NIJC"), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit

organization that provides legal representation and consultation to low-income immigrants, refugees and asylum seekers.

The Northwest Immigrant Rights Project

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status.

Public Counsel

Public Counsel, based in Los Angeles, California, is the largest pro bono law firm in the nation and its Immigrants' Rights Project provides pro bono placement and direct representation to individuals and families—including accompanied and unaccompanied children—before California state courts, the Los Angeles Immigration Court, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Ninth Circuit.

The Young Center for Immigrant Children's Rights

The Young Center for Immigrant Children's Rights (the "Young Center") is the federal appointed independent Child Advocate for unaccompanied and separated immigrant children in eight locations in the U.S., and advocates with federal agencies to consider children's best interests in every decision.

INTRODUCTION

The regulations that Defendants-Appellants (the "Government" or "Appellants") finalized in August 2019 (the "New Regulations") create holes in the safety net of basic minimum standards established by the Agreement to protect children in federal immigration custody. Predominantly, such children have fled violence, persecution, abandonment, and other forms of harm, and after arrival in the U.S., they continue to face challenges including healing from a history of trauma while navigating the U.S. immigration system. Protections that recognize the profound vulnerability and distinct needs of children, particularly unaccompanied children, are embodied in the Agreement, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (the "TVPRA"),[2] the Homeland Security Act of 2002 (the "HSA"),[3] regulations, longstanding agency policies, and the principle of the best interests of the child, which is enshrined in state child welfare law.

The Agreement calls for the promulgation of final regulations that implement its "relevant and substantive" terms and are "not inconsistent" with its terms.[4] The Government contends the Agreement should be terminated in favor of

[2] William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. 110-457 122 Stat. 5044 (2008).
[3] Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002).
[4] ER 238-239 ¶ 9. Citations to "ER" are to the Excerpts of Record filed by Appellants.

New Regulations that they have described as providing "similar" substantive protections and satisfying the Agreement's "basic purpose."[5] Yet the Government has also asserted that departures from the Agreement's provisions are justified, and DHS has referred to the Agreement as a "loophole" that needs to be "closed."[6]

Against this backdrop, the District Court properly found that the New Regulations fall far short of providing children with the protections required by the Agreement. In fact, the New Regulations also roll back protections enshrined in the TVPRA and other substantive policies. *Amici* will discuss several components of the New Regulations that depart from the Agreement's language and expose children to harm, including standards under which children are held and transferred; procedures for bond redetermination hearings; and repeated redeterminations of whether a child is entitled to protections for "unaccompanied alien children" ("UACs"). In these areas, among others, the drafters of the New Regulations unilaterally substitute their judgment for that reflected in the Agreement.

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[5] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44392-44535 (Aug. 23, 2019), codified at 8 C.F.R. §§ 212, 236; 45 C.F.R. § 410) (the "New Regulations").

[6] U.S. Department of Homeland Security, Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement (Aug. 21, 2019), available at https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

ARGUMENT

The District Court correctly held that the Agreement is not terminated, and enjoined the New Regulations. In the discussion that follows, *Amici* first provide additional context for the District Court's findings of multiple deficiencies in the New Regulations. Second, *Amici* discuss additional problematic provisions in the New Regulations that further demonstrate why the injunction ordered by the District Court is warranted.

I. The District Court Properly Enjoined the New Regulations Based on Demonstrable Failures to Codify Substantive Terms of the Agreement.

The District Court agreed with Plaintiffs that several provisions of the New Regulations are inconsistent with the Flores Agreement,[7] with the result that the New Regulations neither require nor justify termination of the Agreement.[8] Although Appellants now contend that the New Regulations "codify[] a lasting care regime and release standards suited to minors in immigration custody that largely mirror the Agreement,"[9] the District Court correctly found multiple deficiencies in the New Regulations with respect to custody and release of

[7] ER 8.
[8] ER 6.
[9] Appellants' Br. at 30.

children.

A. The District Court Correctly Held that Bond Redetermination Hearings Before HHS Are Not Consistent With the Fundamental Protections Provided by the Agreement.

The District Court correctly held that the New Regulations are substantively inconsistent with the Agreement's requirement that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing *before an immigration judge* in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."[10] In contrast, under § 410.810 of the New Regulations, a UAC must request a bond redetermination hearing, which is to be conducted not by an immigration judge within the Department of Justice but by "an independent hearing officer employed by HHS."[11] As the District Court recognized, both of these shifts are substantive changes from the Agreement's requirements, and deprive children of fundamental protections provided by the Agreement.[12]

1. HHS's "Agency Expertise" Does Not Eliminate the Risk of Prolonged Detention of UACs in HHS Custody.

The District Court found that the provision shifting bond determinations from immigration judges to HHS hearing officers "strips class members of a

[10] ER 246 ¶ 24A (emphasis added).
[11] *See* 45 C.F.R. § 410.810(a).
[12] ER 16.

'fundamental protection.'"[13] The Government counters that the District Court failed to consider the rationale, set forth in "pages of preamble language," for allocating the hearings to HHS "as an agency focused on public welfare" and "responsible for the custody and placement of UACs."[14] The rationale set forth in the preamble – that HHS has responsibility for the custody of UACs, and that the Department of Justice "has concluded that it no longer has statutory authority to conduct" bond redetermination hearings[15] – does not overcome the District Court's concern, particularly as this Court has already held that "neither the HSA nor the TVPRA superseded the [Agreement's] bond-hearing provision."[16] Indeed, in allocating responsibility for the care and custody of UACs to HHS, the HSA did not purport to undermine paragraph 24A of the Agreement, nor impinge on the statutory jurisdiction of immigration judges over bond proceedings.[17] And the District Court soundly relied not only on the Agreement's unambiguous guarantee, but also on this Court's assessment of the importance of independent DOJ review

[13] ER 16, citing *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017).
[14] Appellants' Br. at 38.
[15] Appellants' Br. at 38.
[16] *Flores*, 862 F.3d at 881.
[17] *See* 6 U.S.C § 279(a), (b); Immigration and Nationality Act ("INA") § 236, 8 U.S.C. § 1226.

of another agency's detention decisions.[18]

The Government's contention (before the District Court and this Court, as well as in the rulemaking process) that HHS is suited to the task of bond hearings by reason of its child welfare expertise is belied by past findings of the District Court. In 2018, the District Court found that certain HHS practices prolonged children's detention in staff-secure and secure placements and violated the Agreement.[19] Those practices included, for example, making more restrictive placements for reasons not permitted by the Agreement; failure to provide written notice of the reasons for such a placement; failure to comply with state child welfare laws regarding the administration of psychotropic medications; and failure to make and record prompt and continuous efforts to release children found not to present a danger or flight risk.[20] Thus, in practice, HHS' being "responsible for the custody and placement of UAC, including consideration of dangerousness and

[18] ER 16.

[19] *See Flores v. Sessions*, No. 85-cv-4544, 2018 WL 10162328, at * 20 (C.D. Cal. July 30, 2018). As contemplated in the New Regulations, § 410.810 will apply primarily to children held in more restrictive secure or "medium-secure" settings, who have been found to present a flight risk or danger to self or others. *See* 84 Fed. Reg. 44477; 45 C.F.R. § 410.810.

[20] *See Flores v. Sessions*, 2018 WL 10162328.

flight risk" does not in itself mitigate the risk that children in HHS custody may be subject to prolonged detention in violation of the Agreement.[21]

Amici regularly provide legal services to UACs who are or have been held in restrictive placements including staff-secure or secure facilities, in some cases for many months or over a year. They witness first-hand the deleterious effects on children of restrictive placement for *any* period of time – which worsen when custody is prolonged. For many children in secure and staff-secure detention, past trauma is compounded by the conditions of restrictive custody. Detention fatigue can negatively impact functions like memory and decision-making, which in turn can impede the progression of a child's immigration case, and ultimately may even influence a child to relinquish a meritorious defense and accede to entry of a removal order. The New Regulations only increase the possibility that children will experience these negative effects due to prolonged detention.

2. By Fundamentally Altering the Agreement's Bond Redetermination Process, the New Regulations Dilute its Due Process Protections.

During the rulemaking process, the Government asserted that hearings before an independent HHS hearing officer rather than an immigration judge would provide "substantively the same functions as bond hearings under paragraph

[21] Appellants' Br. at 38.

24A of the Agreement."[22] Appellants now characterize this shift as "not substantive."[23] Relatedly, the District Court found that the New Regulations "transform the bond redetermination hearing into an opt-in rather than opt-out right."[24] In response, Appellants contend that "there is no practical difference between opting in and opting out."[25] The District Court correctly determined that in both respects, the New Regulations represent a departure from provisions in the Agreement that protect due process for children seeking custody redeterminations.

First, although termed "independent," an HHS hearing officer is not a neutral arbiter, and thus the New Regulations fail to mitigate the concerns that arise when the same agency that has denied release based on a finding that a child presents a danger to the community or is a flight risk is the agency charged with reviewing that decision. The District Court rightly recognized that replacing children's right to a bond hearing before an immigration judge with an internal agency hearing process provides HHS undue latitude as both the decision-maker and adjudicator.[26]

Replacing bond hearings with an internal HHS hearing process will also likely limit UACs' access to counsel in those proceedings. Under the current

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[22] *See* 84 Fed. Reg. 44478.
[23] Appellants' Br. at 38.
[24] ER 16.
[25] Appellants' Br. at 39.
[26] *See* ER 16.

framework of legal services for UACs in HHS custody, HHS funds legal service providers for representation of children before the Department of Justice. But representation by HHS-funded legal service providers in internal HHS proceedings may present inherent conflicts of interest and thus interfere with children's ability to obtain counsel.

Another complication of the HHS hearing officer scheme is that it significantly hinders UACs' access to appellate review of adverse agency decisions. Under § 410.810, a UAC may seek judicial review of an adverse hearing decision only after exhausting HHS' internal administrative appeals process,[27] but no time period is specified for the agency's final decision. A wait of many weeks or even months for a decision would further extend a child's stay in restrictive custody before he or she is able to seek judicial review.[28]

Second, the New Regulations offer children an opportunity to request a bond hearing instead of unequivocally guaranteeing the right. The Government's rationale for this switch to an "opt-in" procedure is that "many minors prefer *not* to have a custody hearing given that such a hearing can make placement more

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[27] The New Regulations allow a UAC to lodge an appeal within 30 days to the Assistant Secretary of the Administration for Children and Families. *See* 45 C.F.R. § 410.810(e).

[28] In cases involving children who are close to aging out of HHS custody, judicial review of an HHS determination that a child presents a danger to the community or is a flight risk is time-sensitive because it generally impacts consideration by DHS of a child's eligibility for release on recognizance upon turning 18.

difficult."[29] The Government does not elaborate, and fails to consider that ORR could defuse this ostensible difficulty by responsively working around the bond hearing process. In any case, this rationale does not justify an impediment to accessing the process for children in need of such a hearing, who, as noted above, are frequently those held in a restrictive setting. In view of minors' inherent capacity limitations, an "opt-in" procedure exacerbates the imbalance of power between minors and the agency holding them.

In sum, the District Court appropriately found § 410.810 inconsistent with a material substantive provision of the Agreement, depriving children of the critical protection of a bond hearing before an immigration judge as guaranteed by the Agreement.[30] The stated justification of HHS's welfare expertise will not adequately safeguard against the risk that UACs in restrictive placements will be subject to prolonged detention.

B. The District Court Correctly Found that the Newly Defined Term "Licensed Facility" Circumvents the Agreement's Licensing Requirements.

As the District Court found, the "new regulatory definition of 'licensed facility' would effectively authorize DHS to place class members in ICE detention facilities that are not monitored by state authorities," a substantive departure from

[29] Appellants' Br. at 39.
[30] ER 17.

the terms of the Agreement.[31] Characterizing their approach to licensing requirements for family residential centers, the Government states that the New Regulations "address this issue not contemplated in 1997 [in the Agreement] in a reasonable way,"[32] taking the general dearth of state licensing for family facilities as an invitation to invent a new category of licensing that bypasses "regular and comprehensive oversight by an *independent* child welfare agency,"[33] as guaranteed by the Agreement.

C. The District Court Correctly Found that Provisions in the New Regulations that Remove Mandatory Language Suggest the Government Does Not Intend to be Bound by the Agreement's Substantive Terms.

The Government contends that the District Court "believed that some of the HHS regulatory provisions were not mandatory because they did not use the term 'shall' but instead used the present tense to describe HHS obligations."[34] The Government's characterization misses the heart of the District Court's concern about language in the New Regulations that, instead of stating a mandatory standard, purports to describe an existing practice, *e.g.*, "ORR *places* each [class member] in the least restrictive setting" and "ORR *releases* a[n unaccompanied

[31] ER 11-12.
[32] Appellants' Br. at 47.
[33] *Flores v. Johnson*, 212 F. Supp. 3d 864, 879 (C.D. Cal. 2015) (emphasis added).
[34] Appellants' Br. at 39.

alien child] to an approved sponsor without unnecessary delay."[35] The Government's response, that these provisions are mandatory because agencies have to abide by their regulations, does not address the fact that such present-tense assertions do not unambiguously state that the described practice is a mandatory standard that is binding on the agencies. Thus, especially in the context of the Government's past non-compliance, the District Court's finding, that "[m]odifications of this sort are hardly inconsequential"[36] and are not consistent with the terms of the Agreement, was properly made.

II. Additional Provisions That Roll Back Standards and Enforcement Mechanisms Further Justify the Injunction Against the New Regulations.

The Government characterizes the District Court's critiques of the New Regulations as few and non-substantive, minimizing the significant concerns recognized by the District Court.[37] However, the reasons for enjoining the regulations are not limited to those analyzed by the District Court and amplified by *Amici*, *supra*. Other concerns raised by the public during the rulemaking process and by *Amici* addressing the District Court show additional grounds for enjoining

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[35] 45 C.F.R. § 410.201(a) (emphasis added); 45 C.F.R. § 410.301 (emphasis added).
[36] ER 18.
[37] *See, e.g.,* Appellants' Br. at 11 (describing the district court's findings as focusing on "four aspects of the rule"), 38 (change to bond provisions was "not substantive"); 40 (District Court had not "quibbled with the vast majority of the provisions").

the New Regulations and maintaining the Agreement in force. The discussion below highlights three of these: repeated redeterminations under the "unaccompanied alien child" definition, extensive exceptions to the requirements for transferring children to licensed programs, and elimination of third-party independent monitoring for compliance with required standards and protections.

A. Congressionally Mandated Protections for Unaccompanied Children Must Not Be Negated Through Repeated Redeterminations Under the "UAC" Definition

In the rulemaking process, the Government acknowledged that "the HSA and the TVPRA specifically define [the term] UAC[] and impose certain requirements related only to UACs."[38] More specifically, the HSA supplied a definition of "unaccompanied alien child,"[39] and the TVPRA mandated a set of basic safeguards relating to children's apprehension, screening, custody, processing, adjudication, and services during and after federal custody – all tied to the statutory UAC definition. Through the New Regulations, both HHS and DHS adopt a policy of multiple redeterminations of a child's status as a UAC.[40] During the rulemaking process, both agencies opined that "[UAC] status could change if

[38] *See* 84 Fed. Reg. 44412.
[39] 6 U.S.C. § 279(g)(2).
[40] *See* 8 C.F.R. § 236.3(d)(1) (DHS determines status "at the time of encounter or apprehension and prior to the detention or release of such alien"); 84 Fed. Reg. 44455 (explaining that under the New Regulations "HHS will continuously evaluate whether an individual is a UAC").

an individual turns 18…or is placed with a legal guardian,"[41] yet neither circumstance would change the fact of having arrived in the U.S. at a given time in a vulnerable status. Apparently operating on the assumption that Congress intended for the TVPRA's protections to be time-bounded, both agencies adopted rules that "[a]n alien who is no longer a UAC is not eligible to receive legal protections *limited* to UACs."[42] But within the well-documented protective purposes of the TVPRA,[43] there is ample reason to infer that changes in status should not lead to interruption of the protections Congress conferred on UACs.

Fundamental to the provisions for UAC in the TVPRA, Congress charged DHS (and every other federal agency) with the duty to determine whether a child it encounters is or *may be* a UAC, but did not specify any authority to rescind such a determination. The consequences of this determination are significant, including the right to removal proceedings under INA § 240 (8 U.S.C. § 1229a) instead of processing for "expedited removal,"[44] access to counsel "to the greatest extent

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[41] *See* 84 Fed. Reg. 44491.
[42] *See* 8 C.F.R. § 236.3(d)(2), 45 C.F.R. § 410.101 (emphasis added).
[43] *See, e.g.,* Letter from Sen. Sam Brownback and Edward M. Kennedy (September 4, 2002), available at https://www.congress.gov/congressional-record/2002/09/04/senate-section/article/S8155-2 (responsibility for unaccompanied children was appropriately given not to DHS but to ORR, with its experience and specialized programming for unaccompanied refugee children).
[44] *See* TVPRA § 235(a)(5)(D), 8 U.S.C. § 1232(a)(5)(D). This allows children who may otherwise be subject to expedited removal to pursue relief from removal before an immigration judge.

practicable,"[45] safety assessments by ORR before UACs are released from federal custody,[46] availability of child advocates,[47] and voluntary departure at no cost to the UAC.[48]

Amici regularly provide legal services to UACs following their release from ORR custody. Regardless of whether the caregiver following release is a parent or other caregiver, children may continue to experience significant trauma as a result of harm suffered in their countries of origin and on the journey to the United States. After release, children's living circumstances may change, with potential for a child to shift from outside to inside the statutory UAC definition one or more times. This makes legal decision-making more challenging for a child, and complicates the work of advising the child of his or her legal rights. As demonstrated by past experience, fluid UAC determinations can lead to confusion for both the child and the administrative agencies that interact with the child.[49] Having a stable framework within which a child can make decisions related to their immigration case is a matter of fundamental fairness and due process. The New

[45] *Id.* § 235(c)(5), 8 U.S.C. § 1232(c)(5).
[46] *Id.* § 235(c)(3), 8 U.S.C. § 1232(c)(3).
[47] *Id.* § 235(c)(6), 8 U.S.C. § 1232(c)(6).
[48] *Id.* § 235(a)(5), 8 U.S.C. § 1232(a)(5).
[49] *See* Office of the Citizenship and Immigration Services Ombudsman, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sept. 20, 2012), available at https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf, at 6-8.

Regulations increase the possibility that children will experience unjust outcomes if a policy of multiple redeterminations under the UAC definition is used to abrogate the protections designed by Congress.

It is evident in multiple ways that these and other TVPRA protections must attach when a child is determined to be a UAC, and must persist even after a change in that status.[50] Among the factors that demonstrate this:

- Several TVPRA protections for UAC were enacted and/or codified under the heading "Permanent protection for certain at-risk children."[51]

- Some UAC protections would be of little or no value if interrupted prematurely – for instance, an exemption from the one-year time limit for applying for asylum.[52] It is impermissible to construe a statute in a way that renders any of its terms ineffective.[53]

- Other TVPRA provisions protect children over a period of time that may extend past release to a parent or the child's eighteenth birthday.[54]

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[50] *Amici* provided further detail on this topic in their brief to the District Court, *see* Brief of *Amici Curiae*, *Flores v. Barr*, No. 85-4544 DMG (AGRx) (C.D. Cal. Sept. 4, 2019) ECF No. 662 at 5-8.

[51] TVPRA § 235(d), 8 U.S.C. § 1232(d). *See also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (recognizing that although statutory "headings are not commanding," they may provide important "cues" about congressional intent).

[52] TVPRA § 235(d)(7), 8 U.S.C. § 1158(a)(2)(E).

[53] *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); *First Charter Fin. Corp. v. United States*, 669 F.2d 1342, 1350 (9th Cir. 1982) ("Construction which gives effect to all of the words of a statute or regulation is preferred over an interpretation which renders some of the statute or regulation ineffective."); 73 Am. Jur. 2d Statutes § 156 ("A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective.").

[54] TVPRA § 235(c)(3)(B), 8 U.S.C. § 1232(c)(3)(B).

- 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…"[55]

The vulnerabilities that the TVPRA sought to shield do not automatically end when a child turns 18 or rejoins a parent, and may persist through the long trajectory of an immigration case. Allowing multiple redeterminations of UAC status is contrary to the goals of the TVPRA, the Agreement, and principles of child protection which prioritize stability and permanency.[56]

B. The New Regulations Expand the Exceptions for Influxes and Emergencies, Which Impact Custody Standards.

With limited exceptions, the Agreement mandates the transfer of all minors from initial custody to a "licensed program" within three to five days of

[55] Office of the Citizenship and Immigration Services Ombudsman, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sept. 20, 2012), available at https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf.

[56] *See, e.g.,* Children's Bureau, Admin. for Children & Families, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Concept and History of Permanency in U.S. Child Welfare*, available at https://www.childwelfare.gov/topics/permanency/overview/history/ (noting that "issues related to permanency" were explicitly included in federal legislation for the first time in the 1997 Adoption and Safe Families Act, which "connected safety and permanency by demonstrating how each factor was necessary in achieving overall child well-being").

apprehension.[57] Among those limited exceptions are an "emergency" and an "influx of minors into the United States," defined in 1997 as circumstances of "more than 130 minors eligible for placement in a licensed program."[58] Under such exceptions, the time limits are relaxed, and children must be transferred to a licensed program "as expeditiously as possible."[59] As to certain "unaccompanied alien children," the TVPRA added a requirement of transfer within 72 hours, barring "exceptional circumstances," from initial custody to HHS, and HHS must then "promptly" place the unaccompanied child "in the least restrictive setting that is in the best interest of the child."[60] The New Regulations incorporate these transfer timelines,[61] but the emergency and influx exceptions are defined so broadly that the Agreement's time limits will almost never apply.

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[57] This transfer must be made within three days if a licensed program is available in the district in which the child was apprehended, and within five days, if not. ER 239-241 ¶ 12.
[58] ER 239-241 ¶¶ A, B.
[59] ER 239-241 ¶ 12A(3).
[60] Prompt transfer to HHS custody is required for all UAC from countries not contiguous to the U.S., and certain UAC from contiguous countries. 8 U.S.C. § 1232(a)(2), (b)(3), (c)(2)(A).
[61] 8 C.F.R. § 236.3(e), (f); 45 C.F.R. § 410.202(c).

1. The New Regulations' Outdated Definition of "Influx" Defeats Protective Standards, Even as the Government Argues that Surging Numbers of Arrivals Show the Influx Standard Is Obsolete

First, the New Regulations retain the Agreement's definition of "influx": "more than 130 minors eligible for placement in a licensed program . . . including those who have been so placed or are awaiting such placement."[62] This low threshold for "influx" means that an exception to the specified time periods will virtually always apply, effectively devolving the standard to the more flexible "as expeditiously as possible," indefinitely.[63] This is likely designed to delay the transfer of children from DHS to licensed facilities better suited to providing appropriate care, and permits HHS greater flexibility to hold children for longer periods in influx facilities rather than licensed shelters. The Government's aspirational statements that "CBP makes efforts to transfer all individuals, especially minors, out of CBP facilities as expeditiously as possible, and generally within 72 hours"[64] lack binding force, and are undermined by evidence such as Appellees' counsel's documentation of children spending weeks in CBP custody in

[62] *See* ER 240-241 ¶ 12 B; *see also* 8 C.F.R. § 236.3(b)(10); 45 C.F.R. §§ 410.101, 410.202(a)(3), 410.202.
[63] 8 C.F.R. § 236.3(e)(2).
[64] 84 Fed. Reg. 44464.

unsanitary conditions, without access to adequate food, water, toothbrushes, and soap.[65]

DHS justified this choice in the rulemaking process in part by offering statistics that "show that CBP *regularly* has more than 130 minors and UAC in custody eligible for placement in a licensed facility."[66] Concomitantly, HHS stated that "ORR maintains the ability to rapidly set-up, expand, or contract influx infrastructure and services as needed."[67] This exemplifies that since 1997 when the "influx" term was defined, not only the volume of arrivals but also the capacities of DHS and HHS have expanded significantly.[68] Yet the Government rejected the logic that it is inappropriate to excuse compliance with a mandate by

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[65] *See generally* Plaintiffs' Memorandum of Points & Authorities in Support of Plaintiffs' *Ex Parte* Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue, *Flores v. Barr*, No. 85-4544 DMG (AGRx), (C.D. Cal. June 26, 2019), ECF No. 572-1.

[66] 84 Fed. Reg. 44423 (emphasis added).

[67] 84 Fed. Reg. 44453.

[68] *See, e.g.*, William J. Krouse, Cong. Research Serv., 98-269 EPW, Immigration and Naturalization Service's FY1999 Budget (1998) at CRS-2, available at https://www.hsdl.org/?abstract&did=485598 (showing Immigration and Naturalization Service ("INS") budget as $3.8 billion in 1999) and Congressional Research Service, R45972, Comparing DHS Component Funding, FY 2020: In Brief (2019) at 4, available at https://www.hsdl.org/?abstract&did=830570 (showing DHS's budget for Customs and Border Protection and Immigration and Customs Enforcement as $26.5 billion for FY 2019).

invoking an "exception" that is no longer exceptional[69], instead declaring it "obvious that DHS has been in a state of influx . . . for some period of time."[70]

The choice to retain the 1997 influx definition despite a changed "operational reality"[71] appears selective in the context of the Government's arguments elsewhere for *departing* from terms of the agreement: for instance, that "changes to the operational environment since 1997" (along with ensuing enactments) "have rendered some of the substantive terms of the FSA outdated or unsuited to current conditions at the border."[72] DHS offered this further justification: "by modifying the literal text of the Agreement (to the extent it has been interpreted to apply to accompanied minors) in limited cases to reflect and respond to intervening statutory and operational changes, DHS ensures that it retains discretion to detain families, as appropriate and pursuant to its statutory and regulatory authorities, to meet its enforcement needs, while still providing protections to minors that the FSA [Flores Agreement] intended."[73]

The Government's litigation position on the significance of a "dramatically different operational environment" (*see, e.g.*, Appellants' Br. at 28) clashes with its

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[69] 84 Fed. Reg. 44422-23, 44452-53.
[70] 84 Fed. Reg. 44423.
[71] 84 Fed. Reg. 44423; *see also* Appellants' Br. at 55.
[72] 84 Fed. Reg. 44393; *see also id.* (the "final rule . . . takes into account changes in the factual circumstances since the time the FSA was approved in 1997"); 44397 (the final rule "respond[s] to changed factual and operational circumstances").
[73] 84 Fed. Reg. 44398.

conflicting stances during the rulemaking process. Having asserted that it "ma[de] sense" to retain the "influx" definition on grounds that it "remains relevant to current operational realities,"[74] Appellants now protest that "the [1997] 'influx' provision contemplates only 130 minors awaiting placement, whereas [in 2019] 80,000 unaccompanied children arrived at the border, 10,000 unaccompanied children were at various times in HHS custody, and 500,000 members of family units arrived at our borders without documentation."[75] This series of contradictory positions cannot support the Government's choice to retain the prior "influx" definition, which is likely to lead to an increase in the amount of time that children are held in locations other than licensed facilities.

2. The New Regulations' Broad Definition of "Emergency" Provides Undue Discretion to Relax the Agreement's Standards.

The expansive definition of "emergency" in the New Regulations is another provision that belies the Government's contention that the "vast majority of the provisions" are unchanged from the Agreement.[76] The New Regulations broaden the Agreement's definition of "emergency" from an act or event that prevents placement in a licensed program within the requisite time period[77] to encompass an

[74] 84 Fed. Reg. 44423.
[75] Appellants' Br. at 28.
[76] Appellants' Br. at 40.
[77] ER 240-241 ¶ 12B

act or event "that prevents timely transport . . . of minors or *impacts other conditions provided by this part*" of the New Regulations.[78] In the rulemaking phase, DHS contended that its definition "does not depart from how the Agreement defines an emergency act or event," but "recognizes that, in rare circumstances, an emergency may arise, *generally unanticipated*, that affects more than just the transfer of a minor from one facility to another."[79] Yet the modified exception provides little clarity about the circumstances that might trigger a departure from the Agreement's requirements and the ways in which conditions for children may be affected,[80] concededly reaching provisions other than the transfer timeline.[81]

As with the exception for influx, the Government provides itself great latitude to depart from the Agreement's minimum standards.[82] In so doing, it prioritizes operational efficiency above the safety of children, which is in direct contravention of the spirit and text of the Agreement.

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[78] *See* 8 C.F.R. § 236.3(b)(5); 45 C.F.R. § 410.101 (emphasis added).
[79] 84 Fed. Reg. 44413 (emphasis added).
[80] DHS provided as examples an electrical failure, during which air conditioning may break and temperature might temporarily be affected, or a medical emergency, during which meals for minors may be temporarily delayed while urgent medical care is provided to a child. *See* 84 Fed. Reg. 44413-14.
[81] 84 Fed. Reg. 44512.
[82] For example, the Government explained in the rulemaking process that CBP records any emergency situations requiring the temporary suspension of the Agreement's requirements in its electronic systems of records and "[t]o the extent it is able, CBP also maintains a sufficient stockpile of supplies, such as snacks, at its facilities to ensure that there are sufficient supplies available in an emergency situation." 84 Fed. Reg. 44414.

C. The New Regulations Eliminate Independent Third-Party Oversight Over Agency Action and Compliance with Agreement Standards.

In another material departure from the Agreement, the New Regulations dispense with the Agreement's third-party monitoring and oversight provisions on the grounds that "they were included to guide the operation of the Agreement itself and, as such, are not relevant or substantive terms of the Agreement."[83]

The Agreement's monitoring provisions are central to the Agreement, as evidenced by the history of this case. Appellees' repeated motions to enforce compliance with the Agreement, and the recent appointment of an Independent Monitor to oversee compliance with the District Court's orders, show that the monitoring provisions are of enduring relevance and importance. The Government's contention that "DHS has tackled crisis conditions at the border in good faith and in the face of enormous pressure"[84] is a tacit recognition that the Government's performance under the Agreement may be affected by changes in migration patterns, yet the New Regulations eliminate significant independent oversight of its compliance. The omission of these important safeguards in the

[83] 84 Fed. Reg. 44449. Although the New Regulations provide for third-party auditing of DHS' family detention facilities where state licensing is unavailable, audits would be limited to an evaluation of DHS' compliance with its own standards, and DHS would select and employ the auditor evaluating the agency's compliance.

[84] Appellants' Br. at 32.

New Regulations is fatal to termination of the Agreement, which the District Court properly denied.

As the District Court recognized with respect to another section of the New Regulations[85], there is a difference between review by the same agency responsible for certain actions and decisions, and review by an independent arbiter. The same logic applies here. Internal monitoring, as provided by the New Regulations, is wholly inadequate to ensure compliance with the Agreement's terms, and moreover, fails to acknowledge the natural difficulty children would face in expressing concerns to a government official – while detained and without counsel – about their treatment by the very authorities detaining them. Faithful implementation of the Agreement's terms, as required to terminate the Agreement, demands that the Agreement's third-party monitoring provisions be given full effect. The New Regulations dispense with independent oversight entirely.

CONCLUSION

For all the reasons identified by the District Court, and for additional reasons offered herein, the New Regulations fail to implement the Agreement. The Agreement, with its core focus on ensuring all minors in government custody are treated with "dignity, respect and special concern for their particular vulnerability

[85] ER 16-17.

as minors," demands far more.[86] Because the New Regulations are inconsistent with the terms and principles of the Agreement, *Amici* respectfully ask the Court to affirm the District Court's ruling.

Dated: January 28, 2020

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[86] *See* ER 239 ¶ 11.

RULE 32(A) CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 6,470 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 28, 2020.

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