No. 19-56326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISSETTE FLORES, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:85-cv-04544-DMG (AGRx)
Hon. Dolly M. Gee, U.S. District Judge

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION AND INTERESTS OF AMICI STATES

For over 20 years, under the *Flores* Settlement Agreement (Agreement or FSA), the Amici States have ensured the safety and well-being of children in immigration custody within their borders.[1] They have done so through the enforcement of state child welfare laws that provide for the protection and care of children in state-licensed residential facilities. The rule, *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (Rule), eliminates the *Flores* Agreement's state-licensing requirement for family detention facilities. This feature of the Rule undermines Amici States' abilities to enforce state law governing the residential care of children within their borders.

In addition, the Rule eliminates key protections in the Agreement requiring release of children from immigration custody. The Rule's intended effect—to detain families who seek entry to the United States until their removal proceedings are completed—will drastically prolong the time children spend in immigration detention, with significant harm to their emotional, mental, and physical well-

[1] For purposes of this brief, "Amici" and "Amici States" refer to the States or Commonwealths of California, Connecticut, Delaware, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

being.[2] The trauma suffered by families detained under this Rule will be costly to the Amici States, who provide needed education and social services to *all* their residents.

Concerned about these predictable outcomes, many of the Amici States opposed the Rule during the notice-and-comment period.[3] Following its publication on August 23, 2019, Amici States filed a lawsuit challenging the Rule as *ultra vires* and a violation of the Administrative Procedure Act, 5 U.S.C. §§ 702-706 (APA) and due process.[4] On August 30, 2019, Amici States filed a motion for a preliminary injunction under the APA.[5] The district court subsequently issued the order that is the subject of this appeal (ER 4-27) and

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[2] *See* Exec. Order No. 13841 § 3(a), 83 Fed. Reg. 20,715 (June 26, 2018) (calling for "custody of alien families during the pendency of any . . . immigration proceedings involving their members").

[3] The Attorneys General of California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and the District of Columbia submitted joint comments opposing the proposed rule on November 6, 2018. Comment submitted by Xavier Becerra, State of California (Multistate Comment Letter) (Nov. 6, 2018), https://www.regulations.gov/document?D=ICEB-2018-0002-75641.

[4] *See* Complaint, *California v. McAleenan*, No. 2:19-cv-07390 (C.D. Cal. Aug. 26, 2019), ECF No. 1.

[5] *See* Mot. for Prelim. Inj., *McAleenan*, No. 2:19-cv-07390 (Aug. 30, 2019), ECF No. 32.

stayed Amici States' lawsuit challenging the Rule.[6] Amici States have a profound interest in ensuring that the injunction in this case is maintained.

ARGUMENT

Amici agree with Plaintiffs-Appellees that there has not been an unanticipated change of circumstances that renders the Agreement inequitable or a change in law that warrants the Rule's departure from the Agreement. Amici submit this brief to highlight ways the Rule fails to effectuate two core provisions of the Agreement: the protections achieved by requiring state licensing of facilities where children are held in federal immigration custody, and the policy favoring release from detention. First, Amici explain the role of state licensing in ensuring that federal immigration custody reflects evolving child welfare standards within the expertise and traditional police power of the states. Amici also explain how the Rule lacks comparable protections for family detention facilities and that Appellants need not have eliminated the state-licensing requirement to achieve their stated goals. Second, Amici describe how the Rule's deviations from the Agreement's release provisions are not supported by Appellants' legal arguments and will result in prolonged detention of children, with serious consequences for their emotional, mental, and physical health.

[6] Order Re Stipulation to Stay Action Pending Further Proceedings in Related Case, *McAleenan*, No. 2:19-cv-07390 (Oct. 7, 2019), ECF No. 95.

As litigants who challenged the Rule under the APA, Amici States also emphasize that, although Appellants repeatedly invoke the APA as a basis for upholding the Rule, the question of the Rule's validity under the APA is not before this Court. The district court did not consider whether the Rule was valid under the APA, and any consideration of that question should be remanded to the district court to resolve in the first instance. *See* ER 19 (Rule's validity under APA is necessary but not sufficient and court "need not consider" APA arguments).

I. STATE LICENSING IS A MATERIAL PROVISION OF THE AGREEMENT

A. State Licensing Is the Means by Which the Parties Established Standards for Care and Custody, and a Mechanism for Enforcement of Those Standards

In order to ensure that children in immigration custody are treated "with dignity, respect and special concern for their vulnerability as minors" and placed in "the least restrictive setting," the Agreement defines "licensed program"—where immigrant children must generally be held while efforts are made to secure their release—as a "program, agency or organization *licensed by a State* to provide residential, group, or foster care services for dependent children." *See* ER 236-37, 239, 241-42 (emphasis added). Both the district court and this Court have affirmed that the state-licensing requirement is a material term of the Agreement. *Flores v. Johnson*, 212 F. Supp. 3d 864, 879-80 (C.D. Cal. 2015), *aff'd in part, rev'd in part sub nom.; Flores v. Lynch*, 828 F.3d 898, 906, 910 (9th Cir. 2016). Moreover,

Appellants explicitly agreed—in both the original termination clause of the Agreement and the 2001 stipulation—that the state-licensing requirement would remain a binding obligation, even upon termination of the Agreement. ER 254, 223. Thus, notwithstanding Appellants' argument that the terms of the Agreement were only intended to be temporary, Appellant's Opening Br. (AOB) at 21, the parties to the Agreement expressly required the state-licensing provision to remain a binding obligation, even upon the promulgation of any implementing regulations.

The Parties' agreement drew on the existing role states have traditionally played in ensuring the safety of children who need out-of-home care. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 97 (2000) (Kennedy, J., dissenting) ("States have the authority to intervene to prevent harm to children."). Prolonged family detention is fundamentally incompatible with state child welfare licensing schemes and policies because long-term detention is generally not in a child's best interest. By contrast, state child welfare laws prioritize home-based family care over group residential care.[7] Children in state-licensed residential care generally have the right to attend schools; participate in extra-curricular, recreational and cultural activities outside the facility; and engage in other meaningful interactions in the

[7] *See, e.g.*, Cal. Welf. & Inst. Code §§ 16000(a)-(b), 16010.8; Mass. Gen. Laws ch. 119, § 32, 110 Code Mass. Regs. 7.101(2), 7.120(2); N.M. Stat. Ann. § 32A-1-3.

community.[8] States frequently require that children be provided comprehensive individualized service plans, reviewed on a regular basis, to support each child's development.[9] Other state-licensing protections include specifications as to size, maintenance, and inspections of living quarters and residential areas; requirements regarding cleanliness and personal care items; protections for transgender youth; and requirements regarding maintenance and safekeeping of important records and personal effects.[10]

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[8] *See*, *e.g.*, Del. Code Ann. tit. 13, § 2522(a)(13) (right to participate in age-appropriate or developmentally-appropriate activities and experiences); N.J. Stat. Ann. § 30:4C-26(c); N.J. Admin. Code §§ 3A:53-4.5, 55-6.7, 56-6 (group homes, residential facilities and shelters must ensure school-aged children receive educational programming in the local school district or through appropriate home instruction); Wash. Admin. Code §§ 110-145-1730, 110-145-1735 (group care facilities must support children in attending school and develop an "activity program" to integrate children into the community).

[9] *See*, *e.g.*, Cal. Code Regs. tit. 22 §§ 84068.2 – 84068.3; 606 Code Mass. Regs. 3.05(4)-(5) ; Del. Code Ann. tit. 29 § 9003(a)(4)-(5) ; N.Y. Comp. Codes R. & Regs tit. 18, § 430.119(d); 55 Pa. Code §§ 3800.221-3800.230.

[10] *See*, *e.g.*, Cal. Welf. & Inst. Code §§ 16001.9(a)(19), (22)(A), 16006 (right to be placed in out-of-home care according to gender identity and receive gender affirming health care and mental health care); Cal. Code Regs, tit. 22, §§ 84087-84088.3 (indoor and outdoor space and other requirements for group home facilities); 606 Code Mass. Regs. 3.07(4)-(5); 3.08(7)(e) (requirements for clothing, hygiene articles, and living quarters); N.Y. Comp. Codes R. & Regs. tit. 18 §§ 421.3, 423.4, 441.24 (prohibiting discrimination or harassment for protected categories, including gender identity and expression); 55 Pa. Code §§ 3800.21, 3800.241-.245, 3800.102, 3800.98, 3800.99 (confidentiality of records, minimum bedroom size, and indoor activity and recreation space requirements).

States also generally prohibit the use of strip searches and restraints for children in residential care.[11] By contrast, strip searches are allowed in U.S. Immigration and Customs Enforcement (ICE) family detention facilities for any child over 14 and for children age 14 or under with administrator and ICE approval. Facility supervisors can also authorize the use of restraint equipment on children age 13 and older. *See* ICE, Family Residential Standards at 2.6 and 2.10 (last updated Dec. 18, 2019), available at https://www.ice.gov/detention-standards/family-residential.

Similarly, the Rule's alternative approach—which delegates oversight to private contractors—falls short of the protections provided by independent state oversight. The Rule's proposed use of contractors for inspection does not include the robust tools state-licensing authorities use, such as announced and unannounced inspections of facilities and records, interviews with children and staff, procedures for investigating complaints and enforcing standards, and

[11] *See*, *e.g.*, Cal. Welf. & Inst. Code § 16001.9(a)(21); Cal. Code Regs. tit. 22, § 84072(d)(15); 606 Code Mass. Regs. 3.07(&)(j); Wash. Admin. Code § 110-145-1820; 55 Pa. Code §§ 3800.32(i), 3800.210. Use of restraints and other invasive or coercive practices can particularly trigger distress in youth with prior trauma. *See, e.g.*, Christopher Edward Branson, et al., *Trauma Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 Psychol. Trauma: Theory Res. Prac. & Pol'y 635 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5664165/.

background checks on employees.[12] In short, the alternative federal licensing scheme permitted under the Rule defeats the central purpose of the Agreement by removing the core mechanism for ensuring the safety and well-being of children in immigration custody: independent state licensing and oversight. *See*, *e.g.*, *Flores v. Lynch*, 828 F.3d at 906 ("obvious purpose" of state-licensing requirement is to "use the existing apparatus of state licensure to independently review detention conditions").

ICE's inability to enforce its own detention standards compounds the problem. The U.S. Department of Homeland Security (DHS) Office of Inspector General has acknowledged that "ICE's difficulties with monitoring and enforcing compliance with detention standards stretch back many years and continue today," and neither ICE's internal oversight nor inspections performed by its contractor "ensure[] consistent compliance with detention standards or comprehensive

[12] *See*, *e.g.*, Cal. Health & Safety Code § 1533-1534, Cal. Code Regs. tit. 22, § 80044 (authority to inspect without notice, privately interview children and staff, and inspect all facility records); Mass. Gen. Laws. ch. 15D, §§ 6, 7(a), 9, and 16; 102 Code Mass. Regs. 1.06 (background checks, unannounced monitoring visits, and compliance investigations); Ill. Admin. Code tit. 89, §§ 383.25, 383.30, 383.35, 385.30 (background checks, announced and unannounced monitoring visits, and complaint and investigation process); 10-148 Me. Code R. ch. 9, § 5(A)(4)(c); 10-144 Me. Code R. ch. 36, § 4(A)(2), 10-148 Me. Code R. ch. 8, § 6(C) (right to enter and inspect children's residential facilities and shelters and their records); Md. Code Regs. 14.31.05.06 (unannounced and announced site visits, examination of records, and interviews with staff and children).

correction of identified deficiencies."[13] Given DHS's acknowledged shortcomings in overseeing immigrant detention facilities, there is every reason to expect that the federal licensing scheme contemplated by the Rule would fail to afford detained children protections comparable to state licensing.

B. The Rule Interferes with Amici States' Interests in Enforcing State Laws

Appellants characterize the Rule as "*fully defer[ring]* to states in licensing family residential centers." AOB at 47. On the contrary, by exempting family detention centers from state licensing, the Rule undermines Amici States' authority to enforce their laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing states' sovereign interests in their "power to create and enforce a legal code"); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (federal regulatory action that preempts state law creates an injury in fact). The harm to Amici States here is particularly acute

[13] DHS, Office of Inspector General, OIG-18-67, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* 4 (June 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf; *see also* DHS, Office of Inspector General, OIG-19-18, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards* (Jan. 29, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf; DHS, Office of Inspector General, OIG-07-01, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* (Dec. 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf.

because child welfare laws are among the traditional powers reserved for the states. *See, e.g.*, *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000). By taking away their power to enforce their own licensing regimes, the Rule directly and irreparably harms Amici States, not only as to their sovereign interest in enforcing their duly enacted laws and regulations, but also as to their interest in protecting the welfare of children.

Appellants assert that the Rule's creation of a federal licensing scheme in states that do not license family detention facilities is "appropriately deferential to state regulators…while preventing states from attempting to use their control over licensing to effectuate a state ban on federal immigration custody." AOB at 48. This assertion is incorrect in two respects. First, the Rule in no sense defers to state regulators. Instead, the Rule enforces on states a Hobson's choice: either license family detention facilities—a policy choice the Amici States have uniformly rejected—or forego enforcing state standards for children in government custody as provided by the Agreement.[14]

[14] Appellants' invocation of current state oversight of family detention facilities in Pennsylvania and Texas is both misleading and irrelevant. AOB at 48. A Texas court found that licensing the family detention facilities there would require major deviations from the state's protective requirements. *Grassroots Leadership, Inc. v. Texas Dep't of Family and Protective Servs.*, No. D-1-GN-15-004336, 2016 WL

Second, Amici States' decision not to license family detention centers is not, as Appellants assert, AOB at 48, an attempt to control federal immigration custody. Instead, the Amici States have declined to license family detention facilities for reasons unrelated to Appellants' decision to begin detaining immigrant families, and as a legitimate exercise of the Amici States' traditional powers and expertise in the area of child welfare.

As a general matter, Amici States have a strong preference for placement of children in least-restrictive settings in the community, rather than in a group residential care setting. *See, e.g.*, Mass. Gen. Laws ch. 119, § 32; Md. Code Ann., Hum. Servs. § 8-102; Nev. Rev. Stat. § 432B.390. Indeed, many states have moved to reduce the use of group care facilities, independent of Appellants' determination to detain immigrant families. *See, e.g.*, Cal. Assem. Bill 403 (2015-2016 Leg. Sess.); Children's Bureau, U.S. Dep't of Health & Hum. Servs., *A*

9234059, at *3 (Tex. Dist. Dec. 16, 2016), *rev'd on other grounds, Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *2 (Tx. Ct. App. Nov. 28, 2018). In Pennsylvania, the Berks facility's certificate of compliance was revoked, and Berks currently operates under the terms of its expired certificate pending the resolution of its administrative appeal. *See* Exhibit A (Pennsylvania Department of Public Welfare rescission of Certificate of Compliance), *McAleenan*, No. 2:19-cv-07390 (Sept. 25, 2019), ECF No. 84-2. The fact that DHS presently operates these facilities says nothing about the Rule's deference, or lack thereof, to state-licensing regimes, and nothing in the Rule requires DHS to allow state oversight of unlicensed family detention facilities.

National Look at the Use of Congregate Care in Child Welfare 5, 15-18 (2015) (detailing states' efforts to reduce the use of group care), https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf.

Amici States have determined not to license family detention facilities due to the serious harms detention inflicts on children—harms that make family detention fundamentally incompatible with Amici States' child welfare policies.[15] *See, e.g.*, Cal. Welf. & Inst. Code § 300.2; Mass. Gen. Laws ch. 18B, § 3; N.J. Admin. Code § 3A:10-1.4. Amici States did not license such facilities prior to the Appellants' implementation of family detention, and Appellants' speculation that states might begin licensing such facilities were the Rule to come into effect is based on a misconception of the basis of many states' legitimate policy determination that family detention—whether of families in federal immigration detention or of parents with children in state custody—is incompatible with states' interests in safeguarding child welfare.

Appellants' discussion of *United States v. California*, 921 F.3d 865 (9th Cir. 2019) is inapposite. In that case, this Court distinguished cases in which states had engaged in "active frustration of the federal government's ability to discharge its operations." *Id.* at 885 (California law at issue did not require federal immigration

[15] However, some states do license other types of facilities that house families. *See infra* Section I.C.

detention or removal to conform to state law). Similarly, here, states have not enacted any laws requiring Appellants to house immigrant children in state-licensed facilities. Rather, the Appellants themselves agreed to this requirement by entering into the Agreement. Having done so, they should not now be heard to complain about precisely the state policy choices to which they agreed to be bound.

Finally, this Court should not be misled by Appellants' suggestion that the federal government's agreement to house children in state-licensed facilities somehow compels states to license the precise type of facility Appellants wish to employ. On the contrary, the Agreement's state-licensing requirement serves the parties' purpose of ensuring that children in federal custody are held in conditions independently determined and overseen by states exercising their traditional police power over child safety and welfare. Appellants' arguments to the contrary are nothing more than an attempt to avoid their obligation under Agreement—to ensure, through state licensure, the safety and welfare of detained immigrant children.

C. Appellants' Stated Policy Interest in Family Unity Can Be Addressed Through Alternatives that Comply with the Agreement

Appellants repeatedly assert that their decision to depart from the Agreement's state-licensing requirement and to rely on family detention facilities

was animated by a concern for family unity. AOB at 43-44, 50. Whether this concern truly underlies the Rule is doubtful, given the federal government's affirmative policy decision to separate families as a deterrent to unauthorized migration and its practice of separating families seeking asylum in 2018. *See Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1136 n.1, 1137, 1149 (S.D. Cal. 2018) (discussing the federal government's "zero tolerance policy" including family separation, and issuing preliminary injunction). Regardless, Appellants' current professed solicitude for family unity cannot justify the Rule's material departures from the requirements of the Agreement, as a number of alternatives would also vindicate that interest.

First, Appellants' purported concern with family unity could be addressed by releasing both the parent and the child from custody. Although Appellants erroneously contend that the Agreement did not contemplate what should occur if a child can remain in custody with a parent, *see infra* Section II.A., nothing in the Agreement bars Appellants from releasing parents and children together. *See Reno v. Flores*, 507 U.S. 292, 295 (1993) (noting that government's concern that immigrant children be cared for is "easily" addressed "when the juvenile's parents have also been detained and the family can be released together").

If Appellants are concerned that releasing families from detention would create a risk of flight, Appellants have at their disposal a number of alternatives to

detention (ATD) that have proven effective in securing families' participation in their immigration cases—at a lower cost than detention. In 2018, DHS reported, "[h]istorically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings . . . [and the] program has enhanced ICE's operational effectiveness."[16] In 2014, the Government Accountability Office's study of ATD program effectiveness found an appearance rate of over 99% for individuals enrolled in ATD, and an appearance rate of over 95% for scheduled final hearings.[17] Moreover, the GAO determined that the costs of ATD were lower than detention, even accounting for longer case processing times for nondetained individuals. *Id*. at 18-19.

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[16] DHS, *U.S. Immigration and Customs Enforcement Budget Overview Fiscal Year 2018 Congressional Justification* 179 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf. *See also* DHS, Office of Inspector Gen., *U.S. Immigrations and Customs Enforcement's Award of the Family Case Management Program (Redacted)* 5 (2017) ("According to ICE, overall program compliance…is an average of 99 percent for ICE check-ins and appointments, as well as 100 percent attendance at court hearings. Since the inception of FCMP, 23 out of 954 participants (2 percent) were reported as absconders."), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf; 84 Fed. Reg. 44,487 (ATD costs $4 per person, per day; $36 per family per day compared to approximately $319 per person per day in detention).

[17] U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analysis Needed to Better Assess Program Effectiveness* 30 (2014), https://www.gao.gov/assets/670/666911.pdf.

Second, although Amici States do not license family detention centers, some states do license non-secure facilities that house parents and children together. For example, Amicus State of New York has licensing and oversight systems for shelters that house victims of domestic violence in which children remain in the custody of their parents and foster care environments where minor parents care for their children. N.Y. Comp. Codes R. & Regs. tit. 18, §§ 442, 449, 452. Appellants could have consulted with state-licensing agencies to arrive at solutions for housing families in such state-licensed facilities, which would have allowed Appellants to promote family unity while also maintaining compliance with the Agreement.[18]

Third, on occasions where Appellants have justifiable reason to detain parents, Appellants can present parents with the option to release their children to an appropriate custodian or, in the alternative, to waive their children's rights under the Agreement to be released. Such a manner of proceeding would place this decision in the hands of parents, where it belongs.[19]

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[18] In their APA challenge to the Rule, Amici States argued this failure to consult with states and localities regarding federalism concerns violated Executive Order 13132. *See* Reply in Support of Mot. for Prelim. Inj. at *20, *McAleenan*, No. 2:19-cv-07390 (Aug. 30, 2019), ECF No. 84.

[19] States have long recognized that parents are best suited to make decisions on behalf of their children and have sought to limit state intrusion into family decision-making. *See, e.g.*, Cal. Welf. & Inst. Code § 300, Mass. Gen. Laws ch.

The availability of a number of alternatives that both preserve the important protections of the Agreement's state-licensing requirement and respond to Appellants' professed concern for family unity undermines the credibility of Appellants' stated goal. It also refutes Appellants' arguments that the Rule's promulgation through the APA process itself justifies material departures from the Agreement, and that the Agreement itself contemplates such material departures. *See* AOB at 25, 53-55. Instead, the Agreement, as a judicial act that has been repeatedly held to be binding on Appellants, appropriately constrains Appellants' rulemaking. *See, e.g.*, *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1125, 1130 (D.C. Cir. 1983) (consent decree did not impermissibly infringe on agency's discretion in promulgating regulations); *Ferrell v. Pierce*, 560 F. Supp. 1344, 1371-72 (N.D. Ill. 1983) (agency could not implement regulations that were inconsistent with amended stipulation to consent decree), *aff'd*, 743 F.2d 454 (7th

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119, § 1; *see also Troxel*, 530 U.S. at 66 (recognizing the "fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *In re Isayah C.*, 118 Cal. App. 4th 684, 696 (2004) (if incarcerated parent can make suitable arrangements for a child's care during his incarceration, juvenile court has no jurisdiction to intervene). *See also* Exhibit F (Decl. of Luis H. Zayas) at ¶¶ 47-50, *McAleenan*, No. 2:19-cv-07390 (Aug. 30, 2019), ECF No. 32-2 ("[D]ecisions about removal or separation . . . should be made by adults, principally parents, on behalf of children" as doing so enhances children's confidence in decisions, benefits the family's structural integrity, and allows parents to make developmentally appropriate choices depending on family's specific circumstances).

Cir. 1984); *Flores v. Lynch*, 828 F.3d at 904, 910; *Flores v. Lynch*, 392 F. Supp. 3d 1144, 1150 (C.D. Cal. 2017); *Flores v. Sessions*, 862 F.3d 863, 880 (9th Cir. 2017). Within the constraints imposed by the Agreement, Appellants are free to implement any number of reasonable alternatives, such as those suggested above, to comply with its material provisions—including that children be placed in state-licensed facilities.

Appellants' contention that, had they previously adopted implementing regulations, "nothing would prohibit the agencies from amending those regulations to take account of changed circumstances now," AOB at 25-26, vastly overstates the discretion federal agencies have to change policy positions. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy"). Were Appellants to have amended regulations, they would have been subject to the APA requirement that agencies consider alternatives and weigh the costs and benefits of their proposed rules. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (agencies are required to properly consider readily available alternatives); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (reasonable regulation requires paying attention to advantages *and* disadvantages of agency actions).

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE RULE MATERIALLY DEPARTS FROM THE AGREEMENT'S POLICY FAVORING RELEASE

As the district court correctly found, Appellants have "promulgat[ed] regulations that abrogate the [Agreement's] most basic tenets." ER 27. Among these material departures are the Rule's provisions regarding the "parole of class members," which the district court held "would allow [DHS] to detain class members indefinitely." ER 9, 14. This substantial and material departure from the Agreement would result in significant human costs—costs that would ultimately be borne, in part, by Amici States.

A. The Rule Does Not Require—and in Some Cases, Does Not Permit—Release as Guaranteed by the Agreement

The "general policy favoring release" is a cornerstone of the Agreement. *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017) (citing FSA ¶ 14). Appellants attempt to minimize the changes the Rule would effect to this general policy, asserting that the Rule "adopts the general release provision in paragraph 14, subject to federal statutes mandating detention during expedited removal." AOB at 10. Appellants' characterization is misleading. Far from adopting the Agreement's general policy favoring release, the Rule systematically narrows channels to release and facilitates prolonged detention of children.

First, the Rule eliminates the Agreement's right to release for children in expedited removal proceedings. 84 Fed. Reg. 44,410-412 (describing changes to 8

C.F.R. § 212.5 to deny humanitarian parole to children in expedited removal who have not received a credible fear determination); 84 Fed. Reg. 44,525 (to be codified at 8 C.F.R. § 212.5(b)). Appellants claim the Rule merely "clarif[ies]" that children placed in expedited removal proceedings will be mandatorily detained pending a credible fear determination, arguing that such detention is legally required. AOB at 23, 50. However, as this Court has previously held, the Agreement's presumption in favor of releasing minors "is fully consistent with the [Immigration and Nationality Act's] expedited removal provisions." *Flores v. Barr*, 934 F.3d 910, 916-17 (9th Cir. 2019) (citing discretion to grant parole under 8 U.S.C. § 1182(d)(5)(A)). Appellants' erroneous statutory interpretation cannot justify this material departure from the Agreement.

Second, the Rule makes it significantly more difficult for a child to be released to a relative. Rather than stating that DHS "shall release" a child to an adult relative "without unnecessary delay" and make and record prompt and continuous efforts to do so as required by the Agreement, the Rule merely *permits* DHS, in its "unreviewable discretion," to release a child to a relative. *Compare* ER 241-44 *with* 84 Fed. Reg. 44,529 (to be codified at 8 C.F.R. § 236.3(j)(5)(i)). In addition to eliminating the right to release, the Rule places no obligation on DHS to inform families about the possibility of release to a relative, explain how release

of a child might be obtained, or provide reasons for a decision not to release a child. *Id.*

Appellants claim the Rule is in accord with the Agreement because it "allows release of a minor" and that the district court quibbled only with the Rule's failure to permit release to a nonrelative. AOB at 50. But the Agreement does not merely "allow" release—it requires it. The Rule thus effects a fundamental shift in children's rights: from mandatory release under the Agreement to discretionary release under the Rule. The district court's order correctly identified this shift as one of many ways in which the Rule fails to implement the Agreement. ER 9-10.

Third, as the district court correctly found, the Rule removes the option to release children to an adult designated by a parent or guardian. Appellants attempt to justify this change by arguing that, because the first release priority is to the parent or legal guardian, the Agreement did not contemplate what should occur where a child "can remain in custody with the parent." AOB at 49. Appellants argue that there is "nothing improper about DHS addressing a problem the parties did not contemplate in this manner." AOB at 51. This argument is baffling, as the parties clearly did contemplate what should occur when a child cannot be released to a parent or other relative: in that case, the Agreement requires release to: "an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being;" "a licensed program willing to accept

legal custody;" or "an adult individual or entity seeking custody." ER 241-42; 8 C.F.R. § 236.3(b)(3). Moreover, nothing in the Agreement states that a child may be detained simply because his or her parent is detained. Of course, nothing prohibits parents and children from waiving the right to release under *Flores* should the parent determine it is in the child's best interest to remain detained.[20] The Agreement places this decision squarely in the hands of parents, where it belongs, while the Rule removes the option for release that is mandated by the Agreement.

Fourth, the Rule does not require an individualized determination of an accompanied child's flight risk when considering parole of a child who has established a credible fear, instead permitting consideration of "aggregate and historical data, officer experience, statistical information, or any other probative information." 84 Fed. Reg. 44,529 (to be codified at 8 C.F.R. § 236.3(j)(4)). Although Appellants assert that the parole standard for children who have established a credible fear is taken from the Agreement, this provision of the Rule is directly contrary to the Agreement's general policy favoring release. Given Appellants' belief that "the most effective means" of removal is by detention and that alternatives to detention are appropriate only for a "small segment" of

[20] *See supra* n. 19.

families, 84 Fed. Reg. 44,493, 44,494, these factors will likely operate to deny release to a significant number of families for the pendency of their immigration proceedings.[21] Moreover, the Rule provides DHS unreviewable discretion grant or deny parole to children who have been determined to have a credible fear. 84 Fed. Reg. 44,529 (to be codified at 8 C.F.R. § 236.3(j)(4)). This is a far cry from the right to release that children presenting neither flight nor safety risk enjoy under the Agreement. ER 241-42.[22]

Finally, Amici agree with Appellees that the district court correctly found that the provisions of the Rule replacing bond hearings before an immigration judge with discretionary administrative review and substituting the mandatory language outlining the duties of HHS with descriptive language are materially inconsistent with the Agreement. ER 17-18.[23] *See* Appellee's Answering Br. at

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[21] *See* M. Shear and Z. Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. Times (Aug. 22, 2019), https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html (White House message to families through Rule terminating Agreement: "Come here and we will lock you up.").

[22] In addition, due to a recent Attorney General decision, children or parents who have been determined to have a credible fear and been placed in full removal proceedings are no longer eligible for release on bond, making release to a trusted non-parent a critical option to avoid prolonged detention. *See* Matter of M-S-, Resp't, 27 I. & N. Dec. 509 (A.G. 2019).

[23] The Rule's infirmities extend to provisions governing the Department of Health and Human Services (HHS), and the district court was correct to enjoin the Rule in its entirety. *Cf.* AOB at 29. *See also* Mot. for Prelim. Inj., *supra* note 5, at 22-30 (challenging HHS provisions of Rule).

22-27. With respect to the latter issue, the Rule's use of descriptive, rather than mandatory, language raises significant concerns that the Rule renders ORR's mandatory duties under the Agreement merely aspirational. *See United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) ("To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must…prescribe substantive rules – not…general statements of policy or rules of agency organization, procedure, or practice[.]") (internal quotation omitted). This concern is particularly pressing here, as the Rule states that it "governs those aspects of the care, custody, and placement of unaccompanied alien children" agreed to in the Agreement. 84 Fed. Reg. 44,530 (to be codified at 45 C.F.R. § 410.100); *see Fifty-Three (53) Eclectus Parrots*, 685 F.2d at 1136 (to be binding, an agency pronouncement "must have been promulgated pursuant to a specific statutory grant of authority"). Appellants' citation to *Sameena v. U.S. Air Force*, 147 F.3d 1148 (9th Cir. 1998), is inapposite as it does not address the issue of mandatory as opposed to discretionary language.

Taken together, these significant departures from the requirements of the Agreement have the effect of permitting indefinite and prolonged detention of accompanied children. Indeed, Appellants' brief strongly suggests that such prolonged detention—and its presumed deterrent effect on the migration of family units—is the true purpose of the Rule. *See, e.g.*, AOB at 26 (arguing that the

Agreement should be terminated to permit "new approaches to addressing this unprecedented surge of family migration"); AOB at 46-47 (stating that a purpose of the rule is to "reduc[e] the scope of" the problem of "irregular family migration"). But as the district court correctly held, these changes are "irreconcilable" with the protections of the Agreement and "cannot reasonably characterized as" implementing the Agreement. Order at 11.

B. Prolonged Family Detention Has Costly Consequences for Children, their Families, and Amici States

Increased detention of children under the Rule will cause physical, mental, and emotional harm to children and their families, as well as costs to the states that welcome them upon the successful resolution of their immigration proceedings. The administrative record before the rulemaking agencies included many comments from medical and mental health experts explaining the grave harms that would result from prolonged periods of family detention under the Rule. Pediatric associations, including the American Academy of Pediatrics, warned that "even short periods of detention can cause psychological trauma and long-term mental health risks for children." [24] "Studies of detained immigrants have shown that

[24] Comment submitted by American Academy of Pediatrics, at 7 (Nov. 5, 2018), https://www.regulations.gov/document?D=ICEB-2018-0002-73758; Comment Submitted by Texas Pediatric Society, at 2 (Nov. 6, 2018),

children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression, and posttraumatic stress disorder."[25] The American Psychological Association commented that "[s]tudies of health difficulties of detained children found that most of them reported symptoms of depression, sleep problems, loss of appetite and somatic complaints, such as headaches and abdominal pains."[26] An expert child psychologist who interviewed families in family detention facilities found "regressions in children's behavior; suicidal ideation in teenagers; nightmares and night terrors; and pathological levels of depression, anxiety, hopelessness, and despair."[27]

Clinical studies demonstrate that "parental presence does not negate the damaging impact of detention on the physical and mental health of children."[28] Appellants incorrectly claim that parents are able to "provide care to, and exercise custody and control over, their children…." AOB at 45. In family detention

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https://www.regulations.gov/contentStreamer?documentId=ICEB-2018-0002-30282&attachmentNumber=6&contentType=pdf.

[25] Comment submitted by American Academy of Pediatrics, *supra* note 24, at 7.

[26] Comment submitted by American Psychological Association, at 2 (Nov. 6, 2018), https://www.regulations.gov/document?D=ICEB-2018-0002-30400.

[27] Comment submitted by Los Angeles Center for Law and Justice, at 96 (Nov. 6, 2018), https://www.regulations.gov/document?D=ICEB-2018-0002-30287.

[28] Comment submitted by Nat'l. Assoc. of Cty. and City Health Officials (Nov. 6, 2018), https://www.regulations.gov/document?D=ICEB-2018-0002-20145.

facilities, guards and ICE—*not the parents*—determine: when children wake up, what and when children eat, when children can play or go outside, what happens when children misbehave, and the type of medical treatment offered to a child.[29] Detained parents have reported behavioral changes in their children while in detention, including lack of appetite, weight loss, sleep disturbances, clinginess, bed wetting, withdrawal, self-harming behavior, suicidal ideation, developmental regressions, and aggression.[30] Parents in family detention centers exhibit "depression, anxiety, loss of locus of control, and a sense of powerlessness and hopelessness," face "difficulty parenting their children," and experience "strained parent-child relationships."[31] These harms are compounded by ICE's prison-like

[29] Decl. of Bridget Cambria at ¶¶ 27-28, *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019) (No. 634-1]); Decl. of Andrea Mesa at ¶¶ 5, 16-20, *Flores*, 934 F.3d 910 (No. 634-1) ("All aspects of movement within the facility are controlled and monitored by GEO guards."). The experience of Japanese Americans civilly detained during World War II illustrates the harm family detention has on familial roles and parental authority. *See* Multistate Comment Letter and authorities cited therein, *supra* note 3 at 29-31.

[30] Human Rights First, *Family Detention: Still Happening, Still Damaging* 9 (2015), https://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf.

[31] Julie M. Linton et al., *Detention of Immigrant Children*, Pediatrics, May 2017, at 6, https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf.

facilities, with unsafe conditions, inadequate access to health services, and a lack of appropriate developmental and educational opportunities.[32]

Indeed, Appellants themselves recognize the harms caused by family detention. In the Rule, they concede that "[t]he research on child detention states that children who are detained are at a significantly higher rate of psychological distress." 84 Fed. Reg. 44,503, 44,504. DHS's own Advisory Committee on Family Residential Centers concluded in 2016 that "detention [is] never in the best interest of children."[33] The medical and psychiatric subject matter experts for DHS's Office of Civil Rights and Civil Liberties reported "significant compliance issues resulting in harm to children" to the U.S. Senate Whistleblowing Caucus, based on ten investigations of family detention facilities in over four years.[34] Their findings confirmed what advocates have long reported: significant weight loss in children that went largely unnoticed by facility medical staff, dangerously

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[32] Comment submitted by American Academy of Pediatrics, *supra* note 24, at 2, 4; Comment submitted by Nat'l. Assoc. of Cty. and City Health Officials, *supra* note 28.

[33] Report, DHS Advisory Comm. on Family Residential Ctrs. 2 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

[34] Letter from Scott Allen, MD and Pamela McPherson, MD to Chairman Grassley and Vice Chairman Wyden, Senate Whistleblowing Caucus 2 (July 17, 2018), https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf; *see also* Exhibit F (Decl. of Luis H. Zayas), *supra* note 19.

inadequate medical care, and physically dangerous conditions, among other concerns. These experts stated that "the fundamental flaw of family detention is not just the risk posed by the conditions of confinement," but that "there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers."[35]

Amici States have an interest in preventing the long-lasting harms of prolonged detention to their future residents, including the children and families who will be harmed by the Rule. In the last federal fiscal year 49.8% of children released from ORR care went to sponsors in Amici States.[36] The harm to children and families from their detention experiences will impact their ability to thrive in their new communities, leading them to require mental health and healthcare services from Amici States at greater rates.

Amici States dedicate significant resources to offer services for the well-being of children and families. These programs offer medical and mental health services and other forms of assistance to help newcomers succeed. As more individuals who experienced trauma associated with indefinite and prolonged

[35] *Id*.

[36] *See* U.S. Dep't of Health and Human Services, Office of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors By State* (Sept. 27, 2019), https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state.

detention settle in Amici States following their release, the need for these services will increase, as will their overall cost. Children—who are entitled to free public education in Amici States—will require special educational and school-based mental health resources to cope with trauma caused by increased detention under the Rule. In addition, delaying release into the community will result in children entering school later, affecting their ability to catch up and delaying access to services. Amici States' medical, mental health, and education systems, among others, will be called upon to address these well-documented harms.

CONCLUSION

Amici States urge this Court to affirm the Order below.

Dated: January 28, 2020

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STATEMENT OF RELATED CASES

Amici Curiae are not aware of any related cases, as defined by Ninth Circuit Rule 28-2, that are currently pending in this Court and are not already consolidated here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that on January 28, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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