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11 *(Additional counsel listed on signature page)*

12  
 13 **IN THE UNITED STATES DISTRICT COURT**  
 14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
 15 **WESTERN DIVISION**

17 **STATE OF CALIFORNIA,**  
 18 **COMMONWEALTH OF**  
 19 **MASSACHUSETTS, STATE OF**  
 20 **CONNECTICUT, STATE OF**  
 21 **DELAWARE, DISTRICT OF**  
 22 **COLUMBIA, STATE OF ILLINOIS,**  
 23 **STATE OF MAINE, STATE OF**  
 24 **MARYLAND, STATE OF MICHIGAN,**  
 25 **STATE OF MINNESOTA, STATE OF**  
 26 **NEVADA, STATE OF NEW JERSEY,**  
 27 **STATE OF NEW MEXICO, STATE OF**  
 28 **NEW YORK, STATE OF OREGON,**  
**COMMONWEALTH OF**  
**PENNSYLVANIA, STATE OF RHODE**  
**ISLAND, STATE OF VERMONT,**  
**COMMONWEALTH OF VIRGINIA, and**  
**STATE OF WASHINGTON,**

Plaintiffs,

v.

Case No. 2:19-cv-07390-JFW (PLAx)

**NOTICE OF MOTION AND**  
**MOTION FOR PRELIMINARY**  
**INJUNCTION; MEMORANDUM**  
**OF POINTS AND AUTHORITIES**  
**IN SUPPORT**

Date: September 30, 2019  
 Time: 1:30 p.m.  
 Dept: Courtroom 7A  
 Judge: Hon. John F. Walter  
 Trial Date: Not set  
 Action Filed: August 26, 2019

1 **KEVIN K. MCALEENAN**, in his  
2 official capacity as Acting Secretary  
3 of Homeland Security; **U.S.**  
4 **DEPARTMENT OF HOMELAND**  
5 **SECURITY; ALEX M. AZAR, II**, in his  
6 official capacity as Secretary of  
7 Health and Human Services; **U.S.**  
8 **DEPARTMENT OF HEALTH AND**  
9 **HUMAN SERVICES; MARK A.**  
10 **MORGAN**, in his official capacity as  
11 Acting Commissioner for U.S.  
12 Customs and Border Protection; **U.S.**  
13 **CUSTOMS AND BORDER**  
14 **PROTECTION; MATTHEW T.**  
15 **ALBENCE**, in his official capacity as  
16 Acting Director for U.S. Immigration  
17 and Customs Enforcement; **U.S.**  
18 **IMMIGRATION AND CUSTOMS**  
19 **ENFORCEMENT; JONATHAN HAYES**,  
20 in his official capacity as Director of  
21 the Office of Refugee Resettlement;  
22 **OFFICE OF REFUGEE**  
23 **RESETTLEMENT,**

24 Defendants.

25 **TO THE DEFENDANTS AND THEIR COUNSELS OF RECORD:**

26 **PLEASE TAKE NOTICE** that on September 30, 2019, at 1:30 p.m., in  
27 Courtroom 7A of the above-entitled court, at 350 West 1st Street, Los Angeles,  
28 California, Plaintiffs the State of California, the Commonwealth of Massachusetts,  
the State of Connecticut, the State of Delaware, the District of Columbia, the State  
of Illinois, the State of Maine, the State of Maryland, the State of Michigan, the  
State of Minnesota, the State of Nevada, the State of New Jersey, the State of New  
Mexico, the State of New York, the State of Oregon, the Commonwealth of  
Pennsylvania, the State of Rhode Island, the State of Vermont, the Commonwealth  
of Virginia, and the State of Washington (collectively, Plaintiff States) will move  
under Local Rule 7-2 for preliminary relief enjoining implementation of the final  
agency action, “Apprehension, Processing, Care, and Custody of Alien Minors and  
Unaccompanied Alien Children,” 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be

1 codified at 8 C.F.R. Parts 212, 236 and 45 C.F.R. Part 410) (the Rule), postponing  
2 its effective date, and maintaining the status quo pending judicial review, pursuant  
3 to 5 U.S.C. § 705.

4 Because the Rule violates the Administrative Procedure Act (APA) and will  
5 cause irreparable harm, and because the equities and public interest weigh in  
6 Plaintiff States' favor, Plaintiff States seek a preliminary injunction enjoining  
7 enforcement and implementation of the Rule by Defendants the U.S. Department of  
8 Homeland Security (DHS), U.S. Department of Health and Human Services (HHS),  
9 U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs  
10 Enforcement (ICE), the Office of Refugee Resettlement (ORR), Acting Secretary of  
11 DHS Kevin McAleenan, Secretary of HHS Alex M. Azar, II, Acting Commissioner  
12 for CBP Mark A. Morgan, Acting Director for ICE Matthew T. Albence, and  
13 Director of ORR Jonathan Hayes (collectively, Defendants), or an order postponing  
14 the effective date of the Rule pending judicial review, pursuant to 5 U.S.C. § 705.

15 This motion is based on this notice, the Memorandum of Points and  
16 Authorities, the Declarations of Patrick Allen, Ross E. Armstrong, Mary M.  
17 Bourque, Sharon C. Boyle, Donna M. Bradbury, Christina A. Brown, Brian S.  
18 Cechnicki, JooYeun Chang, Michael A. Chavez, Jean Chen, Joseph A. Curtatone,  
19 Ted Dallas, Veronica Davis, Benard P. Dreyer, Pia V. Escudero, Lisa Gharthey-  
20 Ogundimu, Bethany L. Hamm, Michael P. Hein, Brad James, Nicole Knight, Daron  
21 Korte, James Lane, Ngoan Le, Catrina Lucero, A. Pender Makin, Josette D.  
22 Manning, Peggy McDonald, Dierk Meierbachtol, Jonathan P. Moore, Bitta Mostofi,  
23 Sarah Neville-Morgan, Trisha A. Olson, Marjean A. Perhot, Sarah K. Peterson,  
24 Alma Poletti, Tara Ragland, Lillian Rainer, Ruben Reeves, Michael Rodriguez,  
25 Brian C. Ross, M. Marcela Ruiz, Kenneth Schatz, Lisa Schilling, Mira E. Signer,  
26 Mary E. Skipper, Felicia Sullivan, Priya Tahiliani, Tom van der Veen, George  
27 Vennikandam, Janet S. Whitten, Michael C. Williams, Luis H. Zayas, Robert W.  
28 Zavoski, Marie Zimmerman, Howard A. Zucker, Plaintiff States' Request for

1 Judicial Notice and the documents attached as exhibits thereto, this Court’s file, and  
2 any matters properly before the Court.

3  
4 Dated: August 30, 2019

Respectfully submitted,

5  
6 XAVIER BECERRA  
7 Attorney General of California  
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*/s/ Julia Harumi Mass* \_\_\_\_\_  
JULIA HARUMI MASS  
Deputy Attorney General  
*Attorneys for Plaintiff State of  
California*

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## INTRODUCTION

1  
2 Defendants U.S. Department of Homeland Security (DHS) and U.S.  
3 Department of Health and Human Services (HHS) (collectively, the Agencies) have  
4 promulgated regulations purporting to codify the *Flores* Agreement for the purpose  
5 of terminating it. *Apprehension, Processing, Care, and Custody of Alien Minors*  
6 *and Unaccompanied Alien Children*, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (Rule).  
7 Because the Rule violates core provisions of the very settlement agreement it  
8 claims to codify, it must be set aside under the Administrative Procedure Act  
9 (APA) as arbitrary, capricious, an abuse of discretion, and contrary to law. The  
10 Rule is also “short of statutory right,” within the meaning of the APA, because it  
11 sets up a federal licensing scheme for the oversight of child welfare standards—a  
12 police power squarely within the traditional purview of the states and which no act  
13 of Congress authorizes. Finally, with respect to the policy decision to subject  
14 families with children to civil detention, the Agencies failed to analyze—much less  
15 justify—the human and financial costs of the Rule as compared to less restrictive  
16 alternatives for ensuring that families appear for their immigration hearings and  
17 comply with any resulting orders. The Rule will cause irreparable harm not only to  
18 countless migrant children and their families, but also to the Plaintiff States.  
19 Moreover, the balance of the equities and the public interest tip decidedly in favor  
20 of enjoining the Rule.

## BACKGROUND

### I. THE *FLORES* SETTLEMENT AGREEMENT

22 In 1984, the Western Region of the U.S. Immigration and Naturalization  
23 Service (INS) adopted a policy prohibiting the release of detained children to  
24 anyone other than “a parent or lawful guardian, except in unusual and extraordinary  
25 cases.” *Reno v. Flores*, 507 U.S. 292, 296 (1993) (internal quotations omitted). The  
26 next year, four immigrant children filed a class action lawsuit in this Court,  
27 challenging the policy and the detention conditions to which they were subjected  
28

1 under the policy. After significant litigation, the parties reached an agreement,  
2 which was approved by the Court in 1997.

3 The *Flores* Agreement (also, FSA) “sets out nationwide policy for the  
4 detention, release, and treatment of minors in [immigration] custody.”<sup>1</sup> It sets forth  
5 detailed procedures to ensure that children in immigration custody are placed in the  
6 “least restrictive setting appropriate to the minor’s age and special needs” consistent  
7 with the government’s enforcement interests. RJN Ex. 50 ¶ 11. The Agreement  
8 requires that Defendants place children in state-licensed facilities no later than five  
9 days after they are taken into custody except under very narrow circumstances. *Id.*  
10 ¶ 12(A). Such facilities must not only be “licensed by an appropriate State agency  
11 to provide residential, group, or foster care services for dependent children,” but  
12 they must also be “non-secure as required under state law” and meet additional  
13 standards laid out in Exhibit 1 of the Agreement. *Id.* ¶ 6.

14 The *Flores* Agreement states a “general policy favoring release.” *Id.* p. 14.  
15 When detention is not required to secure a child’s timely appearance in immigration  
16 proceedings or to ensure the child’s safety or the safety of others, DHS or HHS—  
17 successors to INS for purposes of the *Flores* Agreement—must release the child  
18 from custody “without unnecessary delay” to: a parent, a legal guardian, an adult  
19 relative, an adult individual or entity designated by the parent or legal guardian; a  
20 licensed program willing to accept legal custody; or an adult individual or entity  
21 seeking custody, in the discretion of the agencies, when it appears that there is no  
22 likely alternative to long term detention and family reunification does not appear to  
23 be a reasonable possibility. *Id.*

24 In 2001, the parties to the *Flores* Agreement signed an addendum stipulating  
25 that the agreement would remain in place until 45 days after Defendants’  
26 publication of final regulations implementing the agreement. The addendum

27 \_\_\_\_\_  
28 <sup>1</sup> Stipulated Agreement, *Flores v. Reno*, Case No. CV 85-4544 RJK (Px)  
(C.D. Cal. Jan. 17, 1997); see Request for Judicial Notice (RJN) Ex 50.

1 provides that, notwithstanding the termination date, “the INS shall continue to  
2 house the general population of minors in INS custody in facilities that are state-  
3 licensed for the care of dependent minors.” *Id.* p. 49.

4 **II. FEDERAL LEGISLATION IMPACTING IMPLEMENTATION OF THE *FLORES***  
5 **AGREEMENT AND THE RIGHTS OF UNACCOMPANIED IMMIGRANT**  
6 **CHILDREN**

7 In 2002, Congress dissolved the INS and transferred its authority to DHS.  
8 Homeland Security Act of 2002 (HSA), Pub. L. No. 107-26, 116 Stat. 2135; *see*  
9 6 U.S.C. §§ 111, 231, 291. Congress also delegated the care and custody of  
10 unaccompanied immigrant children to the Office of Refugee Resettlement (ORR).  
11 6 U.S.C. § 279. INS’s obligations under the *Flores* Agreement were preserved and  
12 transferred to DHS and ORR through the savings provisions of the HSA. 6 U.S.C.  
13 § 552(a)(1) (incorporated by reference into 6 U.S.C. § 279(f)(2)); *see Flores v.*  
14 *Sessions*, 862 F.3d 863, 871 (9th Cir. 2017)).

15 In 2008, Congress enacted the William Wilberforce Trafficking Victims  
16 Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat.  
17 5044 (principally codified in relevant part at 8 U.S.C. § 1232). It also incorporated  
18 by reference and partially codified the *Flores* Agreement by creating statutory  
19 standards for the treatment of unaccompanied children. The TVPRA did not  
20 diminish the federal government’s obligations under the *Flores* Agreement with  
21 respect to unaccompanied *or* accompanied children. *Flores v. Sessions*, 862 F.3d at  
22 871, 881; *see also Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016).

23 **III. THE USE OF FAMILY DETENTION AND FAMILY SEPARATION AS**  
24 **IMMIGRATION ENFORCEMENT PRACTICES**

25 Prior to 2001, families apprehended for entering the United States without  
26 authorization were most often released, rather than detained. *Flores v. Lynch*, 828  
27 F.3d at 903. However, beginning in 2001, ICE began detaining a limited number of  
28 families in detention facilities (referred to as “Family Residential Centers” by ICE)  
in Pennsylvania, Texas, and New Mexico. *Id.* at 903-04. DHS’s use of these

1 facilities has come under intense criticism for harm caused to children and their  
2 families resulting from detention in “prison-like” conditions. RJN Exs. 25, 28, 31 at  
3 1698-1704. In 2007, ICE Enforcement and Removal Operations approved standards  
4 for family detention facilities (ICE Residential Standards). RJN Exs. 2, 50. To date,  
5 these standards do not include the requirements governing conditions for children  
6 enumerated in Exhibit 1 to the *Flores* Agreement. *Id.* at Ex. 50.

7 In response to controversy over family detention, DHS established the DHS  
8 Advisory Committee on Family Residential Centers in 2015. This committee’s  
9 initial report recommended that “DHS should discontinue the general use of family  
10 detention, reserving it for the rare cases when necessary following an individualized  
11 assessment of the need to detain because of danger or flight risk that cannot be  
12 mitigated by conditions of release.” RJN Ex. 25 at 791.

13 On April 6, 2018, former U.S. Attorney General Jefferson Sessions announced  
14 a new “zero tolerance” policy under which all adult undocumented immigrants  
15 entering the United States without authorization would be subject to criminal  
16 prosecution, with no exceptions for asylum seekers or those accompanied by minor  
17 children. RJN Ex. 53. This zero tolerance policy resulted in thousands of children  
18 being separated from their parents—a consequence that has since been enjoined.  
19 *See Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), *appeal docketed*,  
20 No. 18-56151 (9th Cir. Aug. 27, 2018).<sup>2</sup>

21 Following public outcry over the separation of thousands of families, on June  
22 20, 2018, President Trump signed an Executive Order purporting to suspend the  
23 policy, and ordering DHS to detain immigrant families together during the  
24 pendency of any criminal trial or immigration proceeding to the extent permitted by  
25 law. RJN Ex. 9. As contemplated by the Executive Order, the federal government

26  
27 <sup>2</sup> In a subsequent report, the U.S. Department of Human Services Office of  
28 the Inspector General estimated that thousands more children had been separated  
prior to the announcement of the policy, but that efforts to identify them had been  
hampered by the lack of a system to track separated families. RJN Ex. 3.

1 filed a request to modify the *Flores* Agreement to allow it to detain all families with  
2 children during their immigration proceedings, without any individual  
3 determination of the need for such detention. RJN Ex. 51. The Court denied the  
4 federal government’s application, holding that the relief ordered by the court in *Ms.*  
5 *L* did not support modification of the *Flores* Agreement, and noting that  
6 “[a]bsolutely nothing prevents Defendants from reconsidering their current blanket  
7 policy of family detention and reinstating prosecutorial discretion.” RJN Ex. 52.

8 ICE currently operates three family residential centers, with a combined  
9 capacity of 3,326: the Karnes Residential Center in Karnes City, Texas; the South  
10 Texas Family Residential Center in Dilley, Texas; and the Berks Family Residential  
11 Center in Berks County, Pennsylvania. 84 Fed. Reg. 44,508. Due to release  
12 requirements under the *Flores* Agreement, families are currently detained for up to  
13 approximately 20 days, which is generally the time required for U.S. Citizenship  
14 and Immigration Services (USCIS) to conduct credible fear proceedings. *Id.*

#### 15 **IV. THE IMPACT OF DETENTION ON CHILDREN AND FAMILIES**

16 Being subject to detention for even brief periods causes lasting harm to  
17 children, especially for children with previous trauma. Such harms are compounded  
18 in ICE’s family detention facilities where, as numerous studies have documented,  
19 prison-like and unsafe conditions are paired with inadequate access to health  
20 services, limited mental health services, and a lack of appropriate developmental  
21 and educational opportunities. *See* RJN Exs. 25 at 707; 30; 31 at 1689-1761.

22 Individuals who have worked with children in family detention have  
23 documented the adverse effects. Dr. Luis Zayas, Dean of the School of Social Work  
24 at the University of Texas at Austin, interviewed families in family detention  
25 facilities and found “regressions in children’s behavior; suicidal ideation in  
26 teenagers; nightmares and night terrors; and pathological levels of depression,  
27 anxiety, hopelessness, and despair.” RJN Ex. 39 at 2308. Detained parents have  
28 also reported behavioral changes in their children while in detention, including lack



1 of appetite, weight loss, sleep disturbances, clinginess, bed wetting, withdrawal,  
2 self-harming behavior, suicidal ideation, developmental regressions, and  
3 aggression. RJN Ex. 47. Clinical studies have shown that that the harmful impact of  
4 detention on a child’s physical and mental health is not mitigated by the presence of  
5 a parent. RJN Exs. 20, 30.

6 The Administrative Record for the instant Rule is replete with comments  
7 from subject matter experts warning about the negative physical and mental health  
8 impacts of prolonged detention on children and families. *E.g.*, RJN Exs. 19-21, 23,  
9 25, 29-33. The American Association of Pediatrics warned that “even short periods  
10 of detention can cause psychological trauma and long-term mental health risks for  
11 children” and that “[s]tudies of detained immigrants have shown that children and  
12 parents may suffer negative physical and emotional symptoms from detention,  
13 including anxiety, depression, and posttraumatic stress disorder.” RJN Ex. 25 at  
14 710. Similarly, the American Psychological Association commented that “[s]tudies  
15 of health difficulties of detained children found that most of them reported  
16 symptoms of depression, sleep problems, loss of appetite and somatic complaints,  
17 such as headaches and abdominal pains. Other concerns include inadequate  
18 nutritional provision, restricted meal times, and child weight loss.” RJN Ex. 29 at  
19 1063.

20 DHS’s own Advisory Committee on Family Residential Centers concluded  
21 that “detention [is] never in the best interest of children.” RJN Ex. 25 at 791. The  
22 medical and psychiatric subject matter experts for DHS’s Office of Civil Rights and  
23 Civil Liberties reported “significant compliance issues resulting in harm to  
24 children” to the U.S. Senate Whistleblowing Caucus, based on ten investigations of  
25 family detention facilities in over four years. Their findings included significant  
26 weight loss in children that went largely unnoticed by facility medical staff,  
27 dangerously inadequate medical care, and physically dangerous conditions, among  
28 other concerns. These experts stated that “the fundamental flaw in family detention

1 is not just the risk posed by the conditions of confinement,” but in fact “no amount  
2 of programming that can ameliorate the harms created by the very act of confining  
3 children to detention centers.” RJN Ex. 25 at 986.

#### 4 **V. THE RULE**

5 The Rule, which was published August 23, 2019, purports to implement, and  
6 thereby terminate, the *Flores* Agreement. But contrary to the *Flores* Agreement’s  
7 guiding principles to protect children, every provision of the Rule reduces the  
8 protections for children and increases the Agencies’ authority to detain.  
9 Specifically, the Rule amends regulations concerning eligibility for release on bond  
10 or parole, eliminates the requirement to release children to qualified non-parent  
11 sponsors, and eliminates—for accompanied children—the requirement that they be  
12 placed in state-licensed facilities. The Rule replaces state-licensing for  
13 accompanied children with a shadow licensing scheme created and implemented by  
14 ICE for family detention facilities. The Rule is scheduled to become effective 60  
15 days after its publication, on October 22, 2019.

#### 16 **LEGAL STANDARD**

17 A preliminary injunction may issue when the plaintiffs establish that they are  
18 likely to succeed on the merits, they are likely to suffer irreparable harm in the  
19 absence of preliminary relief, the balance of equities tips in plaintiffs’ favor, and an  
20 injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S.  
21 7, 20 (2008). Under the APA, “the reviewing court [...] may issue all necessary and  
22 appropriate process to postpone the effective date of an agency action.” 5 U.S.C. §  
23 705. This remedy is available “to the extent necessary to prevent irreparable injury”  
24 and to preserve the status quo pending judicial review proceedings. *Id.*; see *Nken v.*  
25 *Holder*, 556 U.S. 418, 425 (2009) (applying preliminary injunction factors to  
26 request for stay pending review).

## ARGUMENT

### I. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ADMINISTRATIVE PROCEDURE ACT CLAIM

“Federal administrative agencies are required to engage in ‘reasoned decisionmaking.’” *Michigan v. EPA*, \_\_ U.S. \_\_, 135 S.Ct. 2699, 2706 (2015) (internal citations omitted). Under the APA, courts must “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” “contrary to constitutional right;” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2). In this case, the Agencies’ actions meet *each* of these bases for judicial reversal.

First, the Rule’s overall goal of replacing the *Flores* Agreement’s protections with a federal family detention system that limits children’s rights to release from custody is directly at odds with its stated intention of implementing the *Flores* Agreement through regulations. This fundamental inconsistency, along with DHS’s shifting justifications and failure to address “important aspect[s] of the problem,” render the Rule arbitrary and capricious under the APA. *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (“EPA’s actions must also be consistent; an internally inconsistent analysis is arbitrary and capricious.”) (internal citations omitted).

Second, the Agencies seek to justify the Rule’s specific regulatory changes with erroneous legal positions or with no reasons at all. “[I]t is black letter law that where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside, regardless of whether the action *could* have been justified as an exercise of discretion.” *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 505 (9th Cir. 2018) (emphasis in original); *see also Mass. v. EPA*, 549 U.S.

1 497, 532 (2007); *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94 (1943) (“[A]n  
2 order may not stand if the agency has misconceived the law.”); *Safe Air for*  
3 *Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007); *Phillips Petroleum Co. v.*  
4 *FERC*, 792 F.2d 1165, 1170–71 (D.C. Cir. 1986) (rejecting agency interpretation of  
5 statute where agency’s position “was based solely on its erroneous reading” of  
6 precedent and agency “believed itself bound by” that case). For these reasons, the  
7 States are likely to prevail on the merits of their APA claim.

8 **A. The Rule’s Stated Purpose Directly Conflicts with its Actual**  
9 **Effect of Eliminating Key Protections of the Agreement**

10 The Rule at issue here may be unique in the history of agency action for the  
11 degree to which the justifications put forth by the Agencies conflict with the reality  
12 of the agency action taken. This fundamental inconsistency renders it arbitrary and  
13 capricious under the APA. *See Nat’l Parks Conservation Ass’n*, 788 F.3d at 1141.

14 The Rule characterizes its “primary purpose” as “codifying the purposes of  
15 the FSA in regulations” and “accordingly implements the FSA.” 84 Fed. Reg.  
16 44,393. It also characterizes its action as adopting “regulatory measures that are  
17 materially parallel to the FSA standards and protections” while responding to  
18 “changed factual and operational circumstances.” 84 Fed. Reg. 44,397. Indeed,  
19 implementation of the *Flores* Agreement is the only permissible purpose for a  
20 regulation intended to meet the termination clause of the *Flores* Agreement. RJN  
21 Ex. 50 at 2600. Yet, it is clear that the true goal of the Agencies was to *override*  
22 fundamental protections of the *Flores* Agreement and Agency obligations that stem  
23 from it. RJN Exs. 8, 15-18, 49 at 2545 (listing “OVERRIDE FLORES  
24 AGREEMENT” as one of the White House’s three “solutions”).

25 The Rule seeks to achieve this goal by eliminating key protections of the  
26 Agreement. Specifically, as described below, the Rule contravenes the Agreement  
27 by allowing longer detentions of children in immigration custody and routine use of  
28 facilities that are not state-licensed in accordance with the *Flores* Agreement. The

1 Agencies justify these changes by admitting that they are broadening the authority  
2 to detain children beyond what is allowed under the Agreement:

3 [B]y modifying the literal text of the FSA (to the extent it has been  
4 interpreted to apply to accompanied minors) in limited cases to reflect  
5 and respond to intervening statutory and operational changes, DHS  
6 ensures that it *retains discretion to detain families . . .* to meet its  
7 enforcement needs, while still providing protections to minors that the  
8 FSA intended.

9 84 Fed. Reg. 44,398 (emphasis added). Having inherited obligations from the  
10 federal agency that entered into the *Flores* Agreement, the Agencies cannot simply  
11 “modify the literal text” of the Agreement “to reflect and respond to intervening  
12 statutory and operational changes.” *Cf.* 84 Fed. Reg. 44,398; *see Hook v. State of*  
13 *Ariz., Dep’t of Corr.*, 972 F.2d 1012, 1016-17 (9th Cir. 1992) (finding that even if  
14 underlying law fails to support a consent decree, an agency must seek to vacate the  
15 decree rather than “promulgate new regulations which directly violate the consent  
16 decree”). Yet, this is exactly what the Agencies have done here. Because the stated  
17 purpose is directly contrary to the obvious impact—and true purpose—of the Rule,  
18 it should be set aside as arbitrary and capricious agency action.

19 **B. DHS’s Action to Promote Family Detention Relies on**  
20 **Unsupported and Unlawful Justifications and Fails to Consider**  
21 **Its Impacts**

22 The Agencies’ adoption of a Rule that promotes family detention without the  
23 protections of the *Flores* Agreement is also arbitrary, capricious, and contrary to  
24 law because the offered explanations “run[] counter to the evidence before the  
25 agenc[ies],” are not supported by the required substantial evidence, and “entirely  
26 fail[] to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43,  
27 44. Specifically, the Agencies relied on internally inconsistent positions to respond  
28 to serious public concerns, dismissed readily available alternatives that would  
achieve the government’s interests, and failed to address significant human and  
financial costs. *See State Farm*, 463 U.S. at 52 (agencies are required to “look at the  
costs as well as the benefits” of their actions, or to properly consider readily

1 available alternatives).

2 **1. DHS’s Justifications Are Unsupported by the Record**  
3 **before the Agency and Contrary to Law**

4 DHS attempted to justify its adoption of a family detention system in three  
5 ways, none of which withstand scrutiny under the APA. First, DHS reasoned that  
6 family detention will “maintain[] family unity during immigration proceedings,”  
7 with advantages such as “the child being under the care of the parent, immigration  
8 proceedings occurring together and any removal or release occurring at the same  
9 time.” 84 Fed. Reg. 44,403. As these advantages are equally present when families  
10 are released pending immigration proceedings, it is clear that DHS’s purported  
11 interest in family unity is not a rational justification for expanding family detention.

12 Second, DHS implied that family detention will have an important deterrent  
13 effect on migration. Specifically, the Agency cited an increase in the volume of  
14 children and families seeking entry to the United States to support its speculation  
15 that release pending immigration proceedings “may incentivize [the] risky practices  
16 [of traveling to and seeking to cross the border with children].” 84 Fed. Reg.  
17 44,403-404. Many commenters challenged this inference by presenting statistical  
18 analyses of migration trends, how migrants’ misapprehend U.S. immigration  
19 enforcement policies and practices, and the home country conditions many migrants  
20 seek to escape, but DHS’s response did not address the points presented. *See, e.g.*,  
21 RJN Exs. 24 at 684-88; 31 at 1131-1167. Instead, it stated, “. . . the primary  
22 objective of the rule is to implement the FSA; it is not to utilize detention as a  
23 deterrent to migration.” 84 Fed. Reg. 44,484.

24 Notably, this response conflicts with Defendants’ 2018 application for relief  
25 from the *Flores* Agreement, which argued that a deterrence theory justified  
26 modifying the Agreement. *See* RJN Ex. 51 at 2622 (“detaining these individuals  
27 dispels such expectations, and deters others from unlawfully coming to the United  
28 States”); *see also* RJN Ex. 17 and 18. The Agencies’ position on deterrence is



1 unclear at best. What is clear is that a deterrence theory cannot serve as justification  
2 for the Rule, both because it is not supported by substantial evidence, and because it  
3 is an improper basis for civil detention. *See State Farm*, 463 U.S. at 36, 43-44  
4 (agency findings should be supported by “substantial evidence”); *R.I.L.-R v.*  
5 *Johnson*, 80 F. Supp. 3d. 164, 188-89 (D.D.C. 2015) (“civil detention may not  
6 ‘become a mechanism for retribution or *general deterrence*’—functions properly  
7 those of criminal law, not civil commitment”) (quoting *Kansas v. Crane*, 534 U.S.  
8 407, 412 (2002) (internal citation omitted)).

9 Third, DHS justified its decision to detain rather than release families based  
10 on the Agency’s interest in ensuring that children and their parents appear for their  
11 immigration proceedings and do not evade removal. In support of family detention,  
12 DHS cited data regarding *in absentia* removal orders, *i.e.* the closure of  
13 immigration cases due to respondents failing to appear. 84 Fed. Reg. 44,405-07.  
14 DHS did not explain or address the fact that *in absentia* removal orders are issued  
15 upon a single instance of a respondent failing to appear in court. *See* 8 U.S.C. §  
16 1229a(b)(5)(C) (*in absentia* removal order automatic for failure to appear if  
17 government presents evidence that notice was given). DHS also failed to consider  
18 the many reasons respondents do not appear, such as ICE’s failure to provide  
19 hearing notices in languages that respondents understand. *See* RJN Ex. 11 at 605,  
20 610 (87.9% of released respondents in study who spoke neither English nor Spanish  
21 received Notices to Appear in Spanish). DHS failed to analyze reasons for *in*  
22 *absentia* orders, simply assuming that all such orders represent intentional efforts to  
23 avoid immigration proceedings.

24 Moreover, DHS was presented with comments regarding alternatives to  
25 detention (ATD) that have proven effective at securing families’ participation in  
26 their immigration cases at a lower cost than detention. 84 Fed. Reg. 44,487 (ATD  
27 costs \$4 per person, per day; \$36 per family per day compared to approximately  
28 \$319 per person per day in detention); *see* RJN Exs. 25 at 996, 999; 31 at 1168-

1 1221, 1481-1493, 1584-1602, 1603-1606. DHS responded to the comments about  
2 ATD by stating:

3 DHS agrees with the commentators that ATD has an important role to  
4 play as an effective compliance tool for some aliens. . . . But ATD is  
5 only a partial solution, not a complete answer. Congress has  
6 authorized, and in some cases required, immigration detention as a  
7 tool for fulfilling ICE’s mission.

8 84 Fed. Reg. 44,487. DHS noted that alternatives to detention “do not provide a  
9 means to effectively remove those who are illegally present and have a final order  
10 of removal,” and that “family units on ATD tend to abscond at a higher rate than  
11 non-family units.” 84 Fed. Reg. 44,487-488. It reasoned, without providing relative  
12 rates, that the cost savings per day using ATD is offset by non-detained cases  
13 taking more time in immigration court. *Id.*

14 DHS’s position that alternatives to detention do not work in every case falls  
15 short of justifying its dramatic departure from the *Flores* Agreement’s requirements  
16 that children be held in the least restrictive setting appropriate to their ages and  
17 special needs; that care and oversight be provided through state-licensed facilities;  
18 and that DHS release children “without unnecessary delay” to adult relatives or  
19 other qualified sponsors. DHS’s stated concern about *in absentia* removal orders is  
20 too thin a reed to bear the human and financial costs of the Rule. *See State Farm*,  
21 463 U.S. at 52 (agencies are required to “look at the costs as well as the benefits” of  
22 their actions and to properly consider readily available alternatives).

## 23 **2. The Agencies Failed to Meet Their Burden to Analyze the 24 Impacts of this Financially Significant Rule**

25 As DHS concedes, the Rule involves potential costs over \$100 million. 84  
26 Fed. Reg. 44,496. They were, therefore, specifically required to provide analysis  
27 and assessments of its costs and benefits, as well as the “costs and benefits of  
28 potentially effective and reasonably feasible alternatives[.]” Exec. Order No. 12866,  
58 Fed. Reg. 51,735; *see also Michigan v. EPA*, 135 S. Ct. at 2715 (noting that for  
“all rules with an annual economic effect of at least \$100 million,” the agency



1 proposing the rule “must systematically assess the regulation’s costs and benefits”).  
2 The Agencies failed to consider significant costs of the Rule, including its financial  
3 impact, the significant constitutional concerns it poses, and costs to individual and  
4 public health.

5 **a. The Agencies Improperly Refuse to Estimate the**  
6 **Financial Impact of the Rule**

7 The Agencies’ conclusion that they are “unable to determine if this rule  
8 would result in additional bed space” to detain family units is not only patently  
9 unconvincing; it also illustrates the Agencies’ refusal to estimate the financial  
10 impact of the Rule. Two days after the President’s June 20, 2018 Executive Order  
11 mandating, *inter alia*, that DHS “maintain custody of alien families during the  
12 pendency of any...immigration proceedings,” ICE issued a Request for Information  
13 soliciting interest from potential facilities to accommodate up to 15,000 family  
14 detention beds. 83 Fed. Reg. 29,435; RJN Exs. 9, 10. Also in June 2018, the  
15 Pentagon issued a statement stating that DHS asked it to provide 12,000 beds to  
16 detain families. RJN, Ex. 13. Then, on November 18, 2018, the President tweeted  
17 “Catch and Release is an obsolete term. It is now Catch and Detain...” RJN Ex.16.

18 Faced with comments regarding the financial significance of the Rule,  
19 Defendants attempted to avoid their obligation to analyze its impact by minimizing  
20 the anticipated need for family detention space. For example, the record includes  
21 analyses estimating that the Rule will cost between ***\$201 million and \$1.3 billion***  
22 ***per year*** for increased detention capacity based on historic length of stay data. RJN  
23 Ex. 24 at 688-698. DHS responded it could not look at historic average length of  
24 stays to estimate costs and that not all those apprehended will be detained for  
25 prolonged times. 84 Fed. Reg. 44,497. Yet, on the day the Rule was issued Acting  
26 ICE Director Albence stated that the “agency was preparing for the average stay for  
27 families to increase from 10 days to up to 50 days.” RJN Ex. 14 at 623-624.

28 The Agencies simultaneously embrace contradictory lines of reasoning to

1 avoid facts inconvenient to their preferred policy outcome. Having justified all  
2 departures from the *Flores* Agreement’s protections based on the need to increase  
3 detention for enforcement purposes, they minimize the likelihood of using their  
4 increased detention authority under the Rule. Such internal inconsistencies are a  
5 hallmark of arbitrary and capricious rulemaking. *See Gen. Chem. Corp. v. United*  
6 *States*, 817 F.2d 844, 854 (D.C. Cir.1987) (agency cannot “have it both ways”).<sup>3</sup> Of  
7 course, the Agency’s refusal to estimate costs based on plans to expand detention  
8 also fails to meet the standard of reasoned decisionmaking. *See State Farm*, 463  
9 U.S. at 43, 44 (agency action is arbitrary and capricious if it “runs counter to the  
10 evidence before the agency” or “is so implausible that it could not be ascribed to a  
11 difference in view or the product of agency expertise”).

12 **b. The Agencies Failed to Analyze Due Process Concerns**

13 “[F]reedom from physical restraint has always been at the core of the liberty  
14 protected by the Due Process Clause from arbitrary governmental action.”  
15 *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (internal quotations  
16 omitted). Prolonged detention of children by immigration authorities thus raises  
17 serious due process concerns. These concerns are heightened because of the  
18 particular care that must be exercised in safeguarding their welfare and  
19 constitutional rights. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011)  
20 (*Miranda* custody analysis is different for children); *Roper v. Simmons*, 543 U.S.  
21 551, 578 (2005) (the Eighth and Fourteenth Amendments prohibit the death penalty  
22 for juvenile offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988)  
23 (recognizing “there are differences which must be accommodated in determining  
24 the rights” of children compared to those of adults) (internal quotations omitted).

25 The Agencies failed to consider these concerns in permitting—and in some

26  
27 <sup>3</sup> *See also* 84 Fed. Reg. 44,486 (“current limitations on bed space . . . will  
28 likely mean that, as a practical matter, unless the amount of bed space is  
significantly expanded . . . families that have established credible fear and who are  
not a flight risk or danger will often be released from detention”).

1 cases requiring—the detention of accompanied children with their parents during  
2 the pendency of immigration proceedings, despite the likelihood such detention  
3 may last for months, and even years, due to prolonged immigration proceedings.  
4 *See, e.g.*, 84 Fed. Reg. at 44,517; RJN Ex. 31 at 1125-1130, 1222-1270. This is  
5 particularly true for families seeking asylum, who comprise a large portion of  
6 families subject to detention under the Rule. *See Jennings v. Rodriguez*, \_\_ U.S. \_\_,  
7 138 S.Ct. 830, 860 (2018) (Breyer, J., dissenting) (“The record shows that the  
8 Government detained some asylum seekers for 831 days (nearly 2 & half years),  
9 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before  
10 they won their cases and received asylum.”).

11 Importantly, recent court decisions recognize due process limits on detention  
12 of children in removal proceedings. In June 2017, for example, the administration  
13 was enjoined from carrying out its policy and practice of arresting and detaining  
14 previously released unaccompanied children based on allegations of gang  
15 membership without notice of the evidence against them or an opportunity to rebut  
16 that evidence before a neutral magistrate. *Saravia v. Sessions*, 905 F.3d 1137, 1141  
17 (9th Cir. 2018). Despite the serious constitutional concerns at issue, here, DHS  
18 failed to consider whether the Rule might result in a deprivation of liberty interests  
19 in violation of the due process rights of children detained pursuant to the Rule.

20 **c. The Agencies Failed to Analyze the Rule’s Impact on**  
21 **Individual and Public Health**

22 Disclaiming any certainty that family detention will be expanded, Defendants  
23 declined to consider the physical and mental health effects of detention on children  
24 and families, or the costs to communities who will welcome them upon their  
25 release. As discussed in Section IV, above, family detention is deeply harmful, and  
26 the record before the Agencies was full of medical, mental health, and child  
27 development expertise condemning the use of family detention and providing  
28 examples of terrible neglect and egregious outcomes. *See, e.g.*, RJN Exs. 19-21, 23,

1 24, 25, 29-33, 34 at 2074. “In one case, an 18-month old toddler died of respiratory  
2 failure after she and her mother were released from the Dilley detention center  
3 where she was provided inadequate treatment despite a consistently high fever and  
4 progressively worsening symptoms.” RJN Ex. 35 at 2084. Notably, both state child  
5 welfare policy and federal policy promote family-based care over institutionalized  
6 care for children. *See* Family First Prevention Services Act, Pub. L. No. 115-123,  
7 132 Stat. 246 (enacted February 9, 2018) (limiting federal payments for out-of-  
8 home placements that are not foster homes).

9 The impact of agency action on family well-being is clearly a relevant factor  
10 for a rule creating a family detention system. *State Farm*, 463 U.S. at 43. Yet the  
11 Agencies failed to engage meaningfully with the many public comments about the  
12 adverse impacts of family detention. And while commenters drew comparisons and  
13 warned of dangers similar to those inflicted on the Japanese Americans civilly  
14 incarcerated during World War II, the Agencies did not offer any response or  
15 analysis of the similarity. RJN Exs. 31 at 1762-1976, 36; 84 Fed. Reg. 44,486 and  
16 44,462.

17 The potential due process, human, and economic harms resulting from the  
18 Rule are too many to justify the Agencies’ adoption of the Rule, particularly when  
19 considered in light of the effectiveness of alternatives to detention, discussed above.

20 **C. The Agencies Failed to Consider the Value of State Licensing or**  
21 **the Rule’s Impact on State Sovereign Interests**

22 **1. Federal “Licensing” of Family Detention Facilities Violates**  
23 **the *Flores* Agreement and Is Unsupported by Reasoned**  
24 **Explanation**

25 To ensure adequate care and independent oversight, the *Flores* Agreement  
26 requires that children be placed in state-licensed facilities. RJN Ex. 50 ¶ 14. The  
27 Rule departs from the Agreement by substituting a federal licensing scheme for  
28 facilities that would violate state law. 84 Fed. Reg. 44,526 (to be codified at 8  
C.F.R. § 236.3(b)(9)). The Rule’s attempt to authorize federal licensing is arbitrary

1 and capricious, contrary to law, and short of statutory right. 5 U.S.C. § 706(2)(C).

2 First, DHS's avoidance of the *Flores* Agreement's state licensing requirement  
3 is contrary to law. The *Flores* court has found, and the Ninth Circuit has affirmed,  
4 that the state-licensing requirement is a material term in the *Flores* Agreement to  
5 which Defendants are bound. *Flores v. Johnson*, 212 F. Supp. 3d 864, 879-80 (C.D.  
6 Cal. 2015), *aff'd in part, rev'd in part sub nom. Flores v. Lynch*, 828 F.3d at 906,  
7 910. The Agencies cannot issue regulations to avoid obligations under the consent  
8 decree that they find inconvenient. *See Hook*, 972 F.2d at 1016-17.

9 Second, DHS failed to consider the importance and purpose of state licensing,  
10 or to analyze the many ways in which federal "licensing" under the Rule falls short  
11 of what was intended and effectuated through the state-licensing requirement of the  
12 *Flores* Agreement. *State Farm*, 463 U.S. at 43 (failure to consider important aspect  
13 of the problem). In the Plaintiff States, as elsewhere, family detention facilities for  
14 migrant children are fundamentally incompatible with state licensing schemes and  
15 child welfare policy because the long-term detention of children is generally not in  
16 the best interests of children and is understood to be harmful to their safety and  
17 well-being.

18 Third, the Family Residential Standards contemplated by the Rule lack  
19 numerous important protections frequently afforded by state licensing schemes in  
20 order to provide for the best interests of children including: the provision of  
21 individualized plans to support each child's development; the allowance of  
22 independence and access to the community, as appropriate; specifications as to size,  
23 maintenance, and inspections of living quarters and residential areas; requirements  
24 regarding cleanliness and personal care items; protections for transgender youth to  
25 be housed according to their gender identities; and allowances for participation in  
26 extra-curricular, recreational, and cultural activities outside the facility.<sup>4</sup>

27 <sup>4</sup> Appendix ("App"). Ex. A ¶¶ 16-19; Ex. K ¶¶ 10, 15; Ex. M ¶¶ 9, 16-17; Ex.  
28 Q ¶ 6; Ex. T ¶¶ 7, 10; Ex. U ¶ 14; Ex. V ¶ 7; Ex. Y ¶ 6; Ex. BB ¶ ; Ex. EE ¶¶

1 Furthermore, the value of state-licensing includes robust independent  
 2 oversight and enforcement. *See, e.g., Flores v. Lynch*, 828 F.3d at 906 (“obvious  
 3 purpose” of requiring placement of unaccompanied immigrant children in state  
 4 licensed facilities is to “use the existing apparatus of state licensure to  
 5 independently review detention conditions”). By contrast, “ICE’s difficulties with  
 6 monitoring and enforcing compliance with detention standards stretch back many  
 7 years and continue today.” RJN Ex. 5 at 446; 6 at 492; 7 at 559-560. Neither ICE’s  
 8 internal oversight nor inspections performed by its contractor “ensure[] consistent  
 9 compliance with detention standards or comprehensive correction of identified  
 10 deficiencies.” *Id.*<sup>5</sup> To suggest that the federal scheme could take the place of state  
 11 child welfare standards, licensing, and enforcement protections is “so implausible  
 12 that it could not be ascribed to a difference in view or the product of agency  
 13 expertise.” *State Farm*, 463 U.S. at 43. The Rule’s creation of a federal licensing  
 14 process for family detention facilities should be set aside.

## 15 2. The Rule Confers Federal Licensing Powers Beyond What 16 Congress Has Authorized

17 It is well established that promoting and protecting health, safety, and  
 18 welfare—particularly of children—is a traditional police power vested in the states.  
 19 *See Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Wisconsin v. Yoder*, 406  
 20 U.S. 205, 220 (1972); *Troxel v. Granville*, 530 U.S. 57, 97 (2000) (Kennedy, J.,  
 21 dissenting) (“States have the authority to intervene to prevent harm to children.”)  
 22 (citations omitted); *Moore v. Sims*, 442 U.S. 415, 429-30 (1992). Although DHS  
 23 has authority over the enforcement of immigration laws, it has no authority to  
 24 develop and enforce child welfare standards generally, or residential licensing

25 5, 12; Ex. II ¶¶ 25, 35, 42, 56-57, 62; Ex. MM ¶ 11; Ex. OO ¶¶ 3-6; Ex. RR ¶¶ 8-9;  
 26 Ex. XX ¶ 16; Ex. YY ¶¶ 7, 9-10, 12, 16; Ex. ZZ ¶¶ 7-11; D.C. Code §§ 4-  
 1303.01a, 7-2105, 7-2108; D.C. Mun. Regs. tit. 29, §§ 6201, et seq. & 6301, et seq;  
 27 Minn. R. 2960.0080, subp. 2, 5; 55 Pa. Code § 3800, et seq.

28 <sup>5</sup> This lack of oversight no doubt contributes to the extensive record of  
 dangers and abuses encountered by immigrants in ICE custody. *See supra*  
 Background Part IV (describing harms to immigrants in family detention).



1 schemes specifically, both of which are squarely within the States’ police power.  
2 Congress must be “explicit” if it wants to “readjust the balance of state and national  
3 authority.” *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *BFP v.*  
4 *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). Through the Rule, DHS  
5 arrogates to itself a licensing power not in any statute. Particularly in light of the  
6 states’ traditional role over this area, the Rule’s delegation of child care licensing to  
7 DHS must be set aside as “in excess of statutory jurisdiction, authority, or  
8 limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

9 **D. The Rule’s Specific Regulatory Changes Conflict with the *Flores***  
10 **Agreements and Violate the APA**

11 As discussed above, Defendants cannot escape their obligations under the  
12 *Flores* Agreement by promulgating conflicting regulations, even if they believe the  
13 consent decree’s requirements to be unlawful. *See Hook*, 972 F.2d at 1016-17.  
14 Attempting nevertheless to achieve this impermissible purpose, Defendants rely on  
15 false legal premises, fail to explain the bases of their decisions, and fail to consider  
16 important aspects of the problem at issue. *See State Farm*, 463 U.S. at 43.

17 **1. The Rule Relies on False Legal Premises**

18 Defendants attempt to justify two material departures from the *Flores*  
19 Agreement—limiting release on parole for children in expedited removal  
20 proceedings and eliminating the right of unaccompanied children and certain  
21 accompanied children to bond redetermination hearings—by arguing that the  
22 departures are required by statute and existing regulation. However, the legal  
23 premises upon which Defendants rely have been rejected repeatedly by the *Flores*  
24 Court and by the Ninth Circuit. The Agencies’ reliance on erroneous interpretations  
25 of federal law cannot justify any agency action. *See, e.g., Regents of the Univ. of*  
26 *Cal.*, 908 F.3d at 505 (agency action must be set aside if based on incorrect premise  
27 that action is required).  
28

1                                    **a.    The Rule Would Significantly Curtail the Release of**  
 2                                    **Children in Expedited Removal Proceedings**

3                                    The general policy favoring release is a cornerstone of the *Flores* Agreement.  
 4                                    RJN Ex. 50 p. 9. Currently, children who are detained while subject to expedited  
 5                                    removal proceedings may be paroled on the basis of urgent humanitarian need.  
 6                                    8 C.F.R. § 212.5(b). The Rule eliminates this basis for parole for children in  
 7                                    expedited removal proceedings, limiting parole for such children to situations  
 8                                    involving “medical emergency” or “a legitimate law enforcement objective.”  
 9                                    8 C.F.R. § 235.3(b)(2)(iii). DHS acknowledges that this change “may result in  
 10                                    additional or longer detention” of children. 84 Fed. Reg. 44,397.

11                                    DHS claims this change is required to “codify its longstanding understanding  
 12                                    of how certain provisions in § 235.3(b)’s provisions relating to parole of aliens in  
 13                                    expedited removal proceedings . . . apply to both adults and minors” and to  
 14                                    “eliminate an existing tension with the text of the relevant statutory provision.”  
 15                                    84 Fed. Reg. 44,409.<sup>6</sup>

16                                    However, the Ninth Circuit has already ruled that DHS’s “longstanding  
 17                                    understanding” is incorrect. *Flores v. Barr*, \_\_ F.3d \_\_, 2019 WL 3820265, at \*6  
 18                                    (9th Cir. Aug. 15, 2019). In response to the same argument, the court held that the  
 19                                    *Flores* Agreement’s presumption in favor of releasing minors “is fully consistent  
 20                                    with the [Immigration and Nationality Act’s] expedited removal provisions,” as  
 21                                    “the government’s own regulations contemplate that minors in expedited removal  
 22                                    proceedings may be considered for release, just as the Agreement requires.” *Id.*

23                                    Similarly, Defendants’ concern that current section 212.5(b)(3) “is in tension  
 24                                    with the text of the relevant statutory provisions [sic] at 8 U.S.C.  
 25                                    1225(b)(1)(B)(iii)(IV),” does not justify precluding parole based on humanitarian

26                                    <sup>6</sup> Defendants note that the *Flores* Agreement “does not specifically mention  
 27                                    parole, much less require parole for urgent humanitarian reasons or significant  
 28                                    public benefit.” 84 Fed. Reg. 44,411. This is for the simple reason that the *Flores*  
 Agreement sets out a general policy favoring release of children, rather than an  
 exhaustive list of the forms release might take.



1 need for children in expedited removal. 84 Fed. Reg. 44,411. This is because  
2 another section of the INA permits the Attorney General to “in his discretion parole  
3 into the United States temporarily...for urgent humanitarian reasons or significant  
4 public benefit . . . any alien applying for admission to the United States,” including  
5 noncitizens in expedited removal proceedings. 8 U.S.C. § 1182(d)(5)(A); *see also*  
6 *Flores v. Barr*, \_\_ F.3d \_\_, 2019 WL 3820265, at \*6.

7 And there is yet another avenue for resolving the tension between the  
8 expedited removal statute and the *Flores* Agreement that this purportedly creates:  
9 Defendants can decline to place children in expedited removal proceedings. *See*  
10 *Flores v. Barr*, \_\_ F.3d \_\_, 2019 WL 3820265, at \*6. However, Defendants failed  
11 to address this possibility in their rulemaking.

12 Because 8 C.F.R. § 212.5(b) explicitly permits the prompt release of  
13 immigrant children that Defendants seek to prevent, and which the *Flores*  
14 Agreement requires, Defendants seek to amend the regulation. But Defendants’  
15 erroneous statutory interpretation cannot justify this material departure from the  
16 *Flores* Agreement, and Defendants offer no other reasoned basis for it.

17 **b. The Rule Eliminates Bond Redetermination Hearings**  
18 **for Two Categories of Children**

19 The *Flores* Agreement guarantees that every “minor in deportation  
20 proceedings shall be afforded a bond redetermination hearing before an  
21 immigration judge in every case.” RJN Ex. 50 ¶ 24A. This bond hearing is “a  
22 fundamental protection guaranteed to . . . minors under the *Flores* Settlement” that  
23 “provide[s] minors with meaningful rights and practical benefits.” *Flores v.*  
24 *Sessions*, 862 F.3d at 867. Relying on repeatedly discredited legal arguments, the  
25 Rule rescinds access to bond redetermination hearings from two sets of children in  
26 immigration custody.

27 First, for unaccompanied children in the ORR custody, the Rule replaces the  
28 bond redetermination hearing before an immigration judge with a so-called “810

1 hearing” conducted by an HHS hearing officer, who has no authority to alter the  
2 child’s placement or order her release. 84 Fed. Reg. 44,535 (to be codified at 45  
3 C.F.R. § 410.810(a)). Defendants assert that the 810 hearings provide “substantially  
4 the same substantive protections” as bond redetermination hearings. Not so. As the  
5 Ninth Circuit has repeatedly recognized, bond redetermination hearings “were  
6 designed to consider ORR’s . . . determination under the TVPRA that a minor  
7 should be detained in a secure facility.” *Saravia*, 905 F.3d at 1144; *see also Flores*  
8 *v. Sessions*, 862 F.3d at 876-77 (noting that ORR does not have sole authority to  
9 “assess whether a child should remain detained or in a particular placement”). A  
10 finding that a child does not pose a danger precludes the child’s continued  
11 placement in a secure facility, and for children who have a parent or other qualified  
12 sponsor, a favorable bond hearing outcome means freedom from government  
13 custody. *Flores v. Sessions*, 862 F.3d at 878. By contrast, an 810 hearing, “may not  
14 be invoked to determine the UAC’s placement while in HHS custody” or “to  
15 determine level of custody for the UAC.” 84 Fed. Reg. 44,535 (to be codified at  
16 45 C.F.R. § 410.810(h)). Through this change, Defendants have discarded a  
17 mechanism required by the *Flores* Agreement for children to challenge their  
18 detention in a secure or staff secure facility.<sup>7</sup>

19 HHS attempts to justify the Rule’s elimination of children’s right to bond  
20 redetermination hearings noting that the TVPRA does not require one. 84 Fed. Reg.  
21 44,476. The Ninth Circuit has already rejected this argument, finding that “the  
22 authority granted to ORR does not prevent the government from continuing to fully  
23 implement Paragraph 24A” and refusing to find that “Congress’s failure to  
24 explicitly provide for bond hearings under the HSA or TVPRA demonstrates that it

25 \_\_\_\_\_  
26 <sup>7</sup> The 810 hearing also provides less due process than called for by the *Flores*  
27 Agreement, as it replaces the immigration judge—a neutral decisionmaker with  
28 expertise in the standards for bond and release—with an HHS hearing officer and  
replaces appeal to the Board of Immigration Appeals with appeal to the Assistant  
Secretary of the Administration for Children and Families. 84 Fed. Reg. 44,535 (to  
be codified at 45 C.F.R. § 410.810(a), (e)).

1 did not intend for unaccompanied minors to receive them.” *Flores v. Sessions*,  
2 862 F.3d at 879, 874-75. This decision—affirming the right of children in ORR  
3 custody to bond redetermination hearings—remains binding upon the Agencies.

4 Second, the Rule adds a regulatory provision that deems children in DHS  
5 custody “who are not in section 240 proceedings . . . ineligible to seek review by an  
6 immigration judge of their DHS custody determinations.” 84 Fed. Reg. 44,529 (to  
7 be codified at § 236.3(m)). As recently as 2017, Defendants did not contest that  
8 accompanied children remained entitled to bond hearings. *Flores v. Sessions*, 862  
9 F.3d at n. 20. Now, without any change in the underlying statute or regulations,  
10 Defendants assert that certain accompanied minors are not, in fact, entitled to bond  
11 redetermination hearings. But, just like the right a bond hearing that does not exist  
12 in the TVPRA, children in expedited removal proceedings have a right to a bond  
13 hearing that is not explicitly set forth in the applicable statute. This right derives the  
14 *Flores* Agreement. It has been enforced for children in expedited removal  
15 proceeding until now, and the Agencies provide no reasoned explanation for their  
16 change in position as to its ongoing binding effect.

## 17 **2. Defendants Fail to Explain the Bases of Their Decisions**

18 It is a “simple but fundamental rule of administrative law” that “a reviewing  
19 court . . . must judge the propriety of [agency] action solely by the grounds invoked  
20 by the agency,” and not post hoc grounds articulated during litigation. *SEC v.*  
21 *Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947). Accordingly, an agency  
22 action must be set aside unless its basis is “set forth with such clarity as to be  
23 understandable.” *Id.* In several instances, Defendant make fundamental changes to  
24 the provisions of the *Flores* Agreement without even noting that they have done  
25 so—let alone explaining the grounds for their decision.

### 26 **a. The Rule Restricts Release Options**

27 The Rule newly restricts, without explanation, the options for release from  
28 detention for accompanied children. Whereas the *Flores* Agreement required

1 immigration authorities to release children to a parent, legal guardian, adult relative,  
 2 or other adult seeking custody—and to “make prompt and continuous efforts” to do  
 3 so, RJN Ex. 50 ¶ 18—the Rule only requires DHS to make efforts towards release  
 4 only to a parent or legal guardian. 84 Fed. Reg. 44,529 (to be codified at 8 C.F.R.  
 5 § 236.3(j)(5)(i)). If a parent or legal guardian is not available, the Rule permits, but  
 6 does not require DHS to facilitate release to a sibling, uncle, aunt, or grandparent.  
 7 The Rule eliminates, for accompanied children, the option provided in the *Flores*  
 8 Agreement to be released to an adult other than a sibling, uncle, aunt, or  
 9 grandparent. *Compare* RJN Ex. 50 ¶ 14 *with* 84 Fed. Reg. 44,529 (to be codified at  
 10 8 C.F.R. § 236.3(j)(5)(i)). *Id.* Despite the significant impact for children without  
 11 parents or legal guardians able to act as sponsors, the Agencies failed to  
 12 acknowledge that the Rule departs from the *Flores* Agreement in this respect or  
 13 provide any reasoned basis for the departure. *See id.*

14 **b. The Rule Increases Use of Unlicensed Facilities**

15 Although the *Flores* Agreement permits children to be placed in unlicensed  
 16 facilities temporarily upon initial detention if there is no licensed facility  
 17 immediately available, it requires children to be moved to a licensed placement  
 18 within five days in the absence of an emergency or influx. RJN Ex. 50 ¶ 12A. After  
 19 temporary initial placement, children are required to be placed in a licensed  
 20 program absent an emergency. *Id.* ¶ 19. The Rule departs from that requirement by  
 21 allowing ORR to hold unaccompanied children indefinitely in unlicensed and/or  
 22 secure facilities if “no appropriate licensed program [is] immediately available,”  
 23 and requiring only that ORR make “all reasonable efforts to place each UAC in a  
 24 licensed program as expeditiously as possible.” 84 Fed. Reg. 44,531 (to be codified  
 25 at 45 C.F.R. § 410.201(e)).<sup>8</sup> In addition, the Rule permits ORR to hold children in

26 <sup>8</sup> Defendants state that a clause referring to “a State or county juvenile  
 27 facility” was stricken from proposed section 410.202(e). 84 Fed. Reg. 44,457.  
 28 However, the clause remains in the Rule, suggesting that the Rule permits the  
 detention of unaccompanied children in secure facilities based solely on a lack of  
 availability of a licensed placement. 84 Fed. Reg. 44,531 (to be codified at  
 45 C.F.R. § 410.201(e)).

1 unlicensed facilities, beyond temporary initial custody, due to an influx, which is  
 2 not contemplated by the *Flores* Agreement. 84 Fed. Reg. 44,531 (to be codified at  
 3 45 C.F.R. § 410.202(c)). Defendants neither acknowledge nor provide any basis for  
 4 this departure from the requirements of the *Flores* Agreement. *See* 84 Fed. Reg.  
 5 44,457.

6 **c. The Rule Uses Descriptive Rather than Mandatory**  
 7 **Language**

8 Throughout the Rule, language that is mandatory in the *Flores* Agreement has  
 9 been replaced with descriptive or permissive language. For example, the *Flores*  
 10 Agreement states Defendants “shall place each detained minor in the least  
 11 restrictive setting,” RJN Ex. 50 ¶ 11, while the corresponding language in the Rule  
 12 merely states “ORR places each UAC in the least restrictive setting.” 84 Fed. Reg.  
 13 44,531 (to be codified at 45 C.F.R. § 410.201).<sup>9</sup> *See Sacks v. Office of Foreign*  
 14 *Control*, 466 F.3d 764, 778 (9th Cir. 2006) (terms such as “may” and “shall”  
 15 determine whether function is discretionary). Defendants fail entirely to address or  
 16 explain the near-wholesale conversion of the *Flores* Agreement’s mandatory  
 17 language to the Rule’s descriptive language with respect to ORR’s obligations. *See*  
 18 84 Fed. Reg. 44,485-486, 44,493.

19 **d. The Rule Adds Terms to Release Agreements**

20 The Rule creates obstacles to release of unaccompanied children by adding  
 21 onerous terms to the custodial release agreement that a sponsor must sign before  
 22 obtaining custody of a child. 84 Fed. Reg. 44,533 (to be codified at 45 C.F.R.  
 23 § 410.302(e)(3), (8)).

24  
 25 <sup>9</sup> Additional examples include: 84 Fed. Reg. 44,531 (to be codified at  
 26 45 C.F.R. § 410.202) (“ORR places...”); 84 Fed. Reg. 44,532 (to be codified at  
 27 § 410.204) (“ORR considers...”); 84 Fed. Reg. 44,532 (to be codified at § 410.206)  
 28 (“ORR provides...”); 84 Fed. Reg. 44,532 (to be codified at § 410.208) (“ORR  
 assesses...”); 84 Fed. Reg. 44,532 (to be codified at § 410.301) (“ORR  
 releases...”); 84 Fed. Reg. 44,534 (to be codified at § 410.403) (“ORR  
 monitors...”).

1           However, Defendants do not even mention these changes, let alone provide  
2 any reasoned basis for them. Defendants fail to acknowledge or respond to  
3 comments made in the rulemaking process addressing these departures from the  
4 *Flores* Agreement, their potential effects on the timely release of children from  
5 ORR custody, and their impermissible intrusion on parental rights. *See* RJN Ex. 37  
6 at 2127-28, Ex. 45 at 2458-59.

### 7                           **3. Defendants Fail to Consider Important Aspects of the** 8                           **Problem at Issue**

9           In several instances, Defendants failed to adequately respond to comments that  
10 the Proposed Rule contravened the *Flores* Agreement or otherwise failed to protect  
11 the well-being of children. While an agency need not respond to every individual  
12 comment, it must “respond in a reasoned manner to explain how the agency  
13 resolved any significant problems raised by the comments, and to show how that  
14 resolution led the agency to the ultimate rule.” *Int’l Ladies’ Garment Workers’*  
15 *Union v. Donovan*, 722 F.2d 795, 818 (D.C. Cir. 1983) (internal quotations and  
16 citations omitted).

#### 17                           **a. The Rule Newly Requires Redetermination of UAC** 18                           **Status**

19           The Rule codifies and expands USCIS’s recent change in policy and practice  
20 regarding the re-evaluation of a child’s status as accompanied or unaccompanied.  
21 *See* RJN Ex. 4. Once a child has been determined to be unaccompanied, he or she is  
22 entitled to certain protections under the TVPRA, including, for example, an  
23 exemption from the one-year filing deadline for an asylum claim. 8 U.S.C.  
24 § 1158(a)(2)(E). Removing those protections disadvantages children in their  
25 removal or asylum hearing processes. Under the Rule, a child who arrived  
26 unaccompanied will lose that status based on the availability of a parent or guardian  
27 to provide care and physical custody or reaching the age of 18. 84 Fed. Reg. 44,531  
28 (to be codified at 45 C.F.R. § 410.101).



1 Defendants attempt to justify this change by asserting that it is required by the  
 2 plain language of 6 U.S.C. § 279(g)(2). 84 Fed. Reg. 44,427. However, that statute  
 3 merely provides a definition of “unaccompanied alien child”—it does not specify  
 4 when, how, how often, or whether Defendant Agencies may reassess that status.  
 5 Moreover, Defendants failed to consider the significant reliance interests such  
 6 children have—reliance interests that were raised in public comments regarding this  
 7 provision of the Rule.<sup>10</sup> As the Supreme Court has recognized, “when [a] prior  
 8 policy has engendered serious reliance interests that must be taken into account . . .  
 9 [i]t would be arbitrary and capricious to ignore such matters.” *FCC v. Fox*  
 10 *Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In such situations, “a reasoned  
 11 explanation is needed for disregarding facts and circumstances that . . . were  
 12 engendered by the prior policy.” *Id.* at 516. Defendants’ complete failure to provide  
 13 such an explanation here renders the Rule arbitrary and capricious.

14 **b. The Rule Removes Critical Oversight Provisions**

15 The *Flores* Agreement provides for robust oversight of conditions by counsel  
 16 for *Flores* plaintiffs, including through access to facilities and monthly data reports.  
 17 RJN Ex. 50 ¶¶ 28A, 29, 33. Despite the fact that this oversight has been crucial to  
 18 holding Defendants to the requirements of the *Flores* Agreement, the Rule provides  
 19 no similar mechanism for oversight by an outside body. In particular, the Rule  
 20 makes no provision for continuing external oversight of CBP’s compliance with the  
 21 requirement to hold children in facilities that are safe, sanitary, and consistent with  
 22 their particular vulnerability, despite CBP’s well-documented failures in this area.  
 23 See 84 Fed. Reg. 44,450 (describing external oversight for ICE, but not CBP,  
 24 facilities); *Flores v. Barr*, \_\_\_ F.3d \_\_\_, 2019 WL 3820265, at \*2 (describing findings  
 25 that minors were detained in unsafe and unsanitary conditions in CBP facilities).  
 26 Given the significant concerns expressed by commenters regarding conditions in

27 <sup>10</sup> For example, Defendants do not address the impact on a child who relied  
 28 on the exemption from the one-year bar to filing an asylum claim before being  
 reunited with a parent. See RJN Ex. 38 at 2148; see also RJN Ex. 39 at 2264-2269.



1 CBP facilities, the failure to explain why the Rule eschews external oversight is  
2 arbitrary and capricious. *See* RJN Ex. 48 at 2535, Ex. 45 at 2432; *see also* RJN  
3 Ex. 37 at 2114-15.

4 **c. The Rule Expands the Definition of Emergency**

5 The Rule redefines “emergency” to include “an act or event [. . . that] impacts  
6 other conditions provided by this section.” 84 Fed. Reg. 44,526 (to be codified at 8  
7 C.F.R. § 236.3(b)(5)). The Rule indicates that this change was made to permit the  
8 Agencies to “delay compliance” or “excuse noncompliance” with provisions of the  
9 Rule—including basic health and safety requirements, such as the requirements to  
10 provide children with food, drinking water, and adequate temperature control. 84  
11 Fed. Reg. 44,412; 44,451. It could also permit DHS to house unaccompanied  
12 children with unrelated adults for more than 24 hours, which is explicitly prohibited  
13 by the *Flores* Agreement. Defendants assert that the change “does not depart from  
14 how the [*Flores* Agreement] defines an emergency act or event” but merely  
15 “recognizes that...an emergency may arise...that impacts more than just the  
16 transfer” of children from one facility to another. *Id.* But the *Flores* Agreement  
17 defines emergency explicitly—and exclusively—in terms of impacts on the ability  
18 to transfer children. RJN Ex. 50 ¶ 12B. Defendants failed meaningfully to engage  
19 this significant issue, which was raised by multiple comments. *See* RJN Exs. 41 at  
20 2365-66, Ex. 43 at 2396, Ex. 44 at 2400.

21 **d. The Rule Declines to Update the Influx Definition**

22 The *Flores* Agreement defines “influx” as “those circumstances where the INS  
23 has, at any given time, more than 130 minors eligible for placement in a licensed  
24 program...including those who have been so placed or are awaiting such  
25 placement” and provides that in the event of an influx the requirement to place  
26 minors in a licensed facility within five days is relaxed. RJN Ex. 50 ¶ 12A, 12B. In  
27 the Notice of Proposed Rulemaking, DHS “welcome[d] public comment on  
28 whether it would be appropriate to revise the definition of influx to better reflect

1 current operational realities” and suggested an alternative definition. 83 Fed. Reg.  
2 45,496.

3 In the Rule, the Agencies acknowledged that “the definition of influx in the  
4 Flores Agreement . . . .renders the agency in an ongoing state of influx which has  
5 been the status quo for several years,” but nevertheless chose to maintain the *Flores*  
6 Agreement’s definition of influx with respect to both DHS and HHS. 84 Fed. Reg.  
7 44,422-23; 84 Fed. Reg. 44,526 (to be codified as 8 C.F.R. § 236.3(b)(10)); 84 Fed.  
8 Reg. 44,530 (to be codified as 45 C.F.R. § 410.101). This is one of many examples  
9 of the Agencies trying to “have it both ways.” *Gen. Chem. Corp. v. United States*,  
10 817 F.2d at 854. While invoking “operational reality” to justify significant  
11 departures from the *Flores* Agreement, such realities are deemed unimportant for  
12 triggering additional care. *Compare, e.g.*, 84 Fed. Reg. 44,403-407 (relying on  
13 increased numbers of children and family crossing the border to justify family  
14 detention impermissible under the *Flores* Agreement) *with* 84 Fed Reg. 44,423 (20  
15 year old measure of “‘influx’ as it was written in the FSA remains relevant to  
16 current operational realities”). The Agencies cannot—consistent with reasoned  
17 decisionmaking—both rely on a changed “operational environment” to justify new  
18 restrictions on the rights of children while disclaiming its relevance as to the  
19 Agencies’ own obligations. *Nat’l Parks Conservation Ass’n*, 788 F.3d at 1141  
20 (inconsistency is arbitrary and capricious).

## 21 **II. THE STATES SATISFY THE REMAINING REQUIREMENTS FOR INJUNCTIVE** 22 **RELIEF**

### 23 **A. The States Face Irreparable Harm**

#### 24 **1. The Rule Will Cause Irreparable Harm to the States’** 25 **Sovereign Interests in Regulating Child Welfare, an Area** 26 **Within the States’ Historic Purview**

27 The States have comprehensive and long-standing legal codes for the welfare  
28 of children who require care outside the home. These codes include licensing and  
related oversight to ensure that residential facilities for children protect and nurture

1 their residents. App. Ex. A ¶¶ 8, 13; Ex. M ¶ 14; Ex. Q ¶ 3; Ex. T ¶¶ 5, 10; Ex. H  
2 ¶ 10; Ex. K ¶¶ 9-10, 16; Ex. U ¶ 8; Ex. V ¶ 3; Ex. Y ¶ 4; Ex. BB ¶ 9; Ex. EE ¶¶ 4,  
3 13-14; Ex. II ¶¶ 4-5, 26, 31; Ex. MM ¶ 4; Ex. RR ¶ 4; Ex. OO ¶ 3; Ex. XX ¶ 8;  
4 Ex. YY ¶ 7; Ex. ZZ ¶ 8. In addition to mandating detailed requirements for and  
5 oversight of state-licensed facilities, many States’ laws specifically prohibit the  
6 operation of unlicensed residential facilities within their jurisdictions and violation  
7 of these prohibitions can lead to fines and imprisonment. *See, e.g.*, Mass. Gen.  
8 Laws ch. 15D, §§ 6, 15A; Cal. Health & Safety Code § 1508; Cal. Code Regs.  
9 tit. 22, § 80006(c); App. Ex. Q ¶ 5; Ex. T ¶¶ 4-5; Ex. K ¶ 13; Ex. V ¶ 4; Ex. Y ¶ 7;  
10 Ex. OO ¶ 8; Ex. YY ¶ 8. The *Flores* Agreement expressly incorporates these state  
11 licensing regimes, properly recognizing the States’ power, authority, and long  
12 history of operating child welfare systems as part of their *parens patriae*  
13 responsibility for children who reside in their jurisdictions. By exempting family  
14 detention centers from state licensing, the Rule effectively guts this aspect of the  
15 *Flores* agreement and partially preempts the States’ authority to enforce their laws.

16 The Rule thus irreparably harms the States’ sovereign interest in their “power  
17 to create and enforce a legal code.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex*  
18 *rel. Barez*, 458 U.S. 592, 601 (1982); *see Wyoming ex rel. Crank v. United States*,  
19 539 F.3d 1236, 1242 (10th Cir. 2008) (Federal regulatory action that preempts state  
20 law creates an injury in fact). Any time a state is so prevented “from effectuating  
21 statutes enacted by representatives of its people, it suffers a form of irreparable  
22 injury.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351  
23 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1301  
24 (2012) (Roberts, C.J., in chambers) (state’s inability to “employ a duly enacted  
25 statute ... constitutes irreparable harm”).

26 The harm to the States here is particularly acute because child welfare laws are  
27 among the traditional powers reserved for the states. *See, e.g., Moore v. Sims*, 442  
28 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”);

1 *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000). Indeed, states  
 2 have not only the power but also the responsibility to “play [their] part as *parens*  
 3 *patriae*” where “parental control falters....” *Schall v. Martin*, 467 U.S. 253, 265  
 4 (1984).<sup>11</sup> In taking away their power to enforce their own licensing regimes, the  
 5 Rule directly and irreparably harms the States, not only in their general sovereign  
 6 interest of enforcing their duly-enacted laws and regulations, but also in their  
 7 compelling interest of protecting the welfare of children.<sup>12</sup>

## 8 **2. The States’ Economic Interests Are Impacted by Harms** 9 **Suffered by Children and Families in Federal Family** 10 **Detention Centers**

11 As Defendants acknowledge, “children who are detained are at a  
 12 significantly higher rate of psychological distress.” 84 Fed. Reg. 44,504. Children  
 13 who are detained in immigration facilities experience increased rates of self-harm  
 14 and suicidal behavior, severe depression, anxiety, and Post-Traumatic Stress  
 15 Disorder (PTSD), as well as significant developmental regression, including bed  
 16 wetting, language regression, and social withdrawal. App. Ex. B ¶ 14; Ex. F ¶¶ 20,  
 17 23-24, 28, 35, 42; Ex. CC ¶ 25; Ex. FF ¶¶ 9-10. Where children have experienced  
 18 trauma in their countries of origin or on the journey to the United States, detention  
 19 adds to and exacerbates the effects of that trauma. App. Ex. B ¶ 11; Ex. F ¶¶ 20, 37,  
 20 40, 51; Ex. G ¶ 8; Ex. I ¶ 10; Ex. J ¶¶ 11, 15; Ex. S ¶ 3; Ex. FF ¶ 13; Ex. KK ¶ 17,

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21 <sup>11</sup> States accordingly have a long history of enacting child welfare laws which  
 22 allow for the care and protection of minor children who cannot remain safely at  
 23 home. Massachusetts passed such a law in 1866. *See An Act Concerning the Care*  
 24 *and Education of Neglected Children*, 1866 Mass. Acts ch. 283; *see also* Mass.  
 25 *Gen. Laws ch. 119, § 1.*

26 <sup>12</sup> The States’ interest in protecting children is unquestionably of the highest  
 27 order. *See, e.g., Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596,  
 28 607 (1982) (holding that a State’s “interest” in “safeguarding the physical and  
 psychological well-being of a minor ... is a compelling one”); *Ginsberg v. New*  
*York*, 390 U.S. 629, 640 (1968) (noting that a State “has an independent interest in  
 the well-being of its youth,” and recognizing ““society’s transcendent interest in  
 protecting the welfare of children”” (citation omitted)).

1 19; Ex. AAA ¶¶ 9, 12. In fact, studies of asylum seekers—who in most cases have  
2 experience significant trauma prior to detention—suggest that detained children’s  
3 PTSD symptoms and self-harming behavior is often directly tied to their  
4 experiences in detention. App. Ex. F ¶ 35. The ongoing stress, uncertainty, and  
5 despair caused by detention can have life-long impacts on children’s psychological  
6 and physical health that will require significant services to alleviate. App. Ex. B  
7 ¶¶ 8, 11-12; Ex. D ¶ 15; Ex. F ¶¶ 37, 52; Ex. N ¶ 8-9; Ex. G ¶ 5, 9; Ex. H ¶ 16; Ex. I  
8 ¶ 6; Ex. HH ¶¶ 7, 15; Ex. LL ¶¶ 54-56; Ex. AAA ¶¶ 10, 12.

9 As DHS’s own experts declared, “there is no amount of programming that  
10 can ameliorate the harms created by the very act of confining children to detention  
11 centers.” RJN Ex. 25 at 986. “Visits to family detention centers by pediatricians  
12 reveal discrepancies between the standards outlined by ICE and the actual services  
13 provided, including inadequate or inappropriate immunizations, delayed medical  
14 care, inadequate education services, and limited mental health services.” RJN Ex.  
15 25 at 705. The harms of detaining children and families, at ICE’s family detention  
16 centers are well-documented. *See, supra*, at IV. These emotional and psychological  
17 injuries constitute irreparable harm. *See, e.g., Chalk v. U.S. Dist. Ct. Cent. Dist. of*  
18 *Cal.*, 840 F.2d 701, 710 (9th Cir. 1988); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164,  
19 1193 (N.D. Cal. 2015).

20 Many families detained at family detention facilities and children released  
21 from ORR are and will eventually be released into the States. RJN Exs. 12;  
22 31 at 1108-10; App. Ex. CC ¶ 46. The harm to children and parents from their  
23 detention experiences will impact their ability to thrive in their new communities,  
24 leading them to require mental health and healthcare at greater rates. App. Ex. B  
25 ¶ 15; Ex. C ¶¶ 22-23; Ex. G ¶¶ 5, 9; Ex. I ¶ 17; Ex. J ¶ 13; Ex. CC ¶¶ 47, 50-51; Ex.  
26 FF ¶¶ 15-17; Ex. HH ¶¶ 7, 13-14, 16; Ex. KK ¶¶ 5, 7, 9, 19; Ex. LL ¶ 79; Ex. OO  
27 ¶ 13; Ex. QQ ¶ 9; Ex. SS ¶ 9; RJN Exs. 56, 57. Children—who are entitled to free  
28

1 education in all the States—will require special educational and school-based  
 2 mental health resources to cope with trauma caused by federal immigration  
 3 detention under the Rule. App. Ex. B ¶ 4; Ex. C ¶¶ 8, 10-15, 22; Ex. D ¶ 5, 15;  
 4 Ex. G ¶¶ 5, 10, 12-13, 17; Ex. I ¶¶ 11, 13-14, 17; Ex. J ¶ 21; Ex. L ¶ 7-8, 10-11;  
 5 Ex. N ¶¶ 3, 8; Ex. P ¶ 2; Ex. S ¶ 4-5; Ex. W ¶ 4; Ex. Z ¶ 5; Ex. AA ¶¶ 3, 12; Ex. BB  
 6 ¶ 15; Ex. GG ¶ 4; Ex. QQ ¶ 9; Ex. NN ¶¶ 3, 7; Ex. UU ¶¶ 4-5; RJN Ex. 55. Any  
 7 additional and unnecessary injury to the States’ future residents harms the States, as  
 8 state funded resources will ultimately be called upon to respond to the  
 9 consequences of those injuries. App. App. Ex. C ¶¶ 16, 19; Ex. G ¶¶ 8-9, 11, 13,  
 10 17; Ex. H ¶¶ 17-21; Ex. I ¶¶ 10-12, 14, 17; Ex. J ¶¶ 6-9, 11-17; Ex. L ¶¶ 9-10; Ex. E  
 11 ¶¶ 5-11; Ex. M ¶ 8; Ex. O ¶¶ 4-7; Ex. R ¶ 9; Ex. S ¶¶ 5-6; Ex. W ¶ 6; Ex. X ¶¶ 4, 8;  
 12 Ex. Z ¶¶ 6-7; Ex. AA ¶¶ 5, 11; Ex. CC ¶ 49; Ex. DD ¶¶ 5-6, 11; Ex. FF ¶¶ 4, 16,  
 13 20-21; Ex. GG ¶ 4; Ex. II ¶ 68; Ex. JJ ¶¶ 6, 17, 24-25; Ex. LL ¶¶ 23, 34; Ex. NN  
 14 ¶¶ 6-7; Ex. PP ¶ 6; Ex. QQ ¶¶ 6-7; Ex. SS ¶ 9; Ex. TT ¶¶ 4-7; Ex. UU ¶ 8; Ex. VV  
 15 ¶¶ 3, 15, 17-20; Ex. AAA ¶¶ 7, 14; RJN Ex. 54, 58.

16 The Rule cannot take effect. Every day that prolongs a child’s and her  
 17 family’s detention is a day too long. The harms from prolonged detention in ICE  
 18 constitute irreparable harm. *See Rodriguez*, 715 F.3d at 1144 (affirming preliminary  
 19 injunction in favor of detainees in ICE custody facing prolonged detention).

20 **B. The Balance of Equities and the Public Interest Weigh Heavily**  
 21 **in Favor of Provisional Relief**

22 The final two factors for a preliminary injunction, the balance of the equities  
 23 and the public interest, merge when the government is a party. *Nken*, 556 U.S.  
 24 at 435; *League of Wilderness Defs./Blue Mountains Biodiversity Project v.*  
 25 *Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). In assessing these factors, courts  
 26 consider the impacts of the injunction on nonparties as well. *Id.* at 766. The greatest  
 27 impact the Rule will have is on children and their families. As future members of  
 28 our communities, the States have a *parens patriae* responsibility to protect them.



1 The public has also expressed overwhelming opposition to prolonged family  
2 detention—among the more than 100,000 comments submitted in response to the  
3 NPRM, “most commenters on this topic expressed general opposition to the  
4 detention of family units.” 84 Fed. Reg. 44,433. The Rule will also impair the  
5 States’ sovereign interest in licensing facilities that house children.

6 By contrast, there is no harm to Defendants by maintaining the status quo. If  
7 Plaintiffs prevail on the merits, the Defendants have no interest in enforcing  
8 unlawful or unconstitutional decisions. *Rodriguez*, 715 F.3d at 1145 (“in light of the  
9 major hardship posed by needless prolonged detention, we conclude that the  
10 balance of the equities favors” the detained immigrants); *Ariz. Dream Act Coal. v.*  
11 *Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (“[I]t is clear that it would not be  
12 equitable or in the public’s interest to allow the state to violate the requirements of  
13 federal law, especially when there are no adequate remedies available.” (quoting  
14 *Valle del Sol v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013))). “While ICE is  
15 entitled to carry out its duty to enforce the mandates of Congress, it must do so in a  
16 manner consistent with our constitutional values.” *Rodriguez*, 715 F.3d at 1146.

17 **CONCLUSION**

18 For the foregoing reasons, this Court should enjoin the Rule from taking  
19 effect, postpone the effective date of the Rule, and preserve the effective status of  
20 the *Flores* Agreement pending adjudication on the merits of this case.

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Respectfully submitted,

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