No. 19-56326

In the United States Court of Appeals for the Ninth Circuit

JENNY LISETTE FLORES, *et al.*,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

Elizabeth B. Wydra*
Brianne J. Gorod
Dayna J. Zolle**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

January 28, 2020

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of the U.S. Senate and House of Representatives, many of whom served when key components of the nation's immigration laws, including provisions pertinent to this case, were drafted, debated, and passed. Based on their experience serving in Congress, *amici* understand that the *Flores* Agreement, a longstanding contract between the federal government and a class of minors subject to detention by U.S. immigration officials, requires the expeditious release of migrant children from government custody and ensures critical state oversight of federal immigration detention facilities. They also understand that the regulations at issue in this case are inconsistent with those mandates. *Amici* further understand that, contrary to the arguments being pressed by the Department of Justice, the Homeland Security Act of 2002, 6 U.S.C. § 111 *et seq.*, and the Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232, do not justify the regulations' deviations from the *Flores* Agreement. Indeed, as *amici* know from experience, Congress enacted those laws to ensure the safety and well-being of migrant children and to set forth specific procedures for the screening, processing, and custody of those children. The regulations, by contrast, deprive children of access to those statutory protections and do not comport with the text and history of

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

those statutes, or with Congress's plan in passing them.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1997, after over a decade of protracted litigation to address mistreatment of immigrant children who were being held in detention by the federal government, the federal government "entered into a settlement with a class of minors subject to detention by U.S. immigration authorities." *Flores v. Barr*, 934 F.3d 910, 911 (9th Cir. 2019); *see* ER 233-70. The resulting *Flores* Settlement Agreement ("the Agreement"), which the district court subsequently issued as a consent decree, *Barr*, 934 F.3d at 911, establishes a "nationwide policy for the detention, release, and treatment of minors in the custody of the [Immigration and Naturalization Service (INS)]," ER 238, ¶ 9. The Agreement, as amended, states that it will terminate upon the "publication of final regulations implementing this Agreement," *id.* at 223 (emphasis omitted), and that such regulations "shall not be inconsistent with the terms of this Agreement," *id.* at 238, ¶ 9.

In August 2019, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) promulgated final regulations ("the Regulations") that purport to satisfy those requirements and terminate the Agreement. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019); ER 34-177. The class of minors, however, challenged the Regulations on the ground that, far

from implementing the Agreement, they in fact circumvent and undermine its key provisions. *See* ER 8. The district court agreed and enjoined enforcement of the Regulations, concluding that they "not only do not implement the *Flores* Agreement, they intentionally subvert it." *Id.* at 20.

This Court should affirm because the challenged Regulations are inconsistent with the plain terms and purpose of the *Flores* Agreement. In particular, the Regulations effectively authorize the indefinite detention of migrant children, despite the Agreement's core mandates that the government "shall expeditiously process" a minor upon apprehension, *id.* at 239, ¶ 12A, and "shall release a minor from its custody without unnecessary delay," *id.* at 242, ¶ 14. The Regulations also substantially alter the licensing requirements for programs that detain unaccompanied children. Notwithstanding the Agreement's clear mandate that children who must remain in custody be placed in a program that the relevant State has licensed to care for children, the Regulations instead allow DHS to indefinitely detain children in its own facilities and to handpick the entities that inspect those facilities for compliance with INS standards. The Regulations thereby eliminate the assurance that the facilities housing these children satisfy state standards, and they deny the independent oversight of federal immigration detention facilities that is critical to maintaining the health and safety standards for migrant children that the Agreement guarantees. Finally, the Regulations do not provide certain legal

protections for minors that the Agreement requires. Accordingly, they are inconsistent with the text and purpose of the Agreement.

Significantly, the Department of Justice (DOJ) admits that certain portions of the Regulations are inconsistent with the Agreement, but it argues that the Homeland Security Act of 2002 (HSA) and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) necessitate those deviations, *see* Appellants' Br. 36, because, in DOJ's view, "these statutes reflect a new legal regime that calls for terminating the agreement," *id.* at 23. This Court's precedents, however, foreclose this argument. *See, e.g.*, *Flores v. Sessions*, 862 F.3d 863, 871, 879 (9th Cir. 2017). As this Court has recognized, the HSA and the TVPRA do not supersede the *Flores* Agreement; to the contrary, Congress passed those statutes to complement and strengthen the Agreement's protections. Thus, the HSA and the TVPRA do not support DOJ's position and in fact undermine it.

ARGUMENT

I. The Regulations Are Inconsistent with the *Flores* Agreement.

Contrary to DOJ's suggestion that the twenty-three-year-old *Flores* Agreement is "outdated," Appellants' Br. 35, and that this Court should therefore take a "flexible approach" in terminating it, *id.* at 14 (quoting *Horne v. Flores*, 557 U.S. 433, 450 (2009), and *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 381 (1992)), the Agreement contains crucial protections for children that remain binding

today. Far from excusing the executive branch from its contractual obligations under the Agreement, the "changed circumstances" of increased immigration and the purported "crisis of irregular migration by families and children" that DOJ describes, *id.* at 13, illustrate the continued need to enforce the Agreement to protect the growing number of children in federal custody. Yet the Regulations are inconsistent with the terms and purpose of the Agreement and deny those necessary protections.

A. Length of Detention

The Regulations effectively authorize the federal government's indefinite detention of children, contravening the Agreement's core mandates that the government "shall expeditiously process" a minor upon apprehension, ER 239, ¶ 12A, and "shall release a minor from its custody without unnecessary delay," *id.* at 242, ¶ 14.

The Agreement contains an express "General Policy Favoring Release," which provides that "[w]here the [government] determines that the detention of the minor is not required either to secure his or her timely appearance before . . . the immigration court, or to ensure the minor's safety or that of others, the [government] *shall release a minor from its custody without unnecessary delay*." *Id.* at 241-42, ¶ 14 (emphasis added); *see id.* at 9 n.8 (recognizing that "the clear and unambiguous terms of the *Flores* Agreement eschew indefinite detention except in limited circumstances"). The Agreement also provides an order of preference for persons

and entities to whom such children shall be expeditiously released, beginning with a parent or legal guardian and followed by "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," and finally, "an adult individual or entity seeking custody" when "there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility." *Id.* at 242, ¶ 14. The Agreement further ensures the prompt release of children by requiring DHS or any licensed program in which a minor is placed to "make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor," and by requiring such efforts to "continue so long as the minor is in [government] custody." *Id.* at 244, ¶ 18.

The Regulations, by contrast, effectively authorize DHS to indefinitely detain accompanied children during the pendency of their immigration proceedings, "regardless of whether such detention is necessary to secure their timely appearance before the agency or the immigration court, or to ensure the minors' safety," *id.* at 9, undermining the central tenets of the Agreement. The Regulations do so by allowing federal officials to release children who "present neither a security risk nor a risk of absconding" only to "a parent, legal guardian, or adult relative . . . not in detention" or "with an accompanying parent or legal guardian who is in detention," 8 C.F.R. § 212.5(b), (b)(3)(i)-(ii). *See* ER 167. In other words, the Regulations do

not permit the release of accompanied children to other people or entities who could take custody under the Agreement—namely, "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" when "there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility," *id.* at 242, ¶ 14. As a result, children may be subject to indefinite periods of detention, notwithstanding the Agreement's requirement otherwise.

Likewise, the Regulations allow DHS to indefinitely detain minors involved in expedited removal proceedings in Family Residential Centers (FRCs) "unless there is a medical emergency or law enforcement necessity," terms that are further inconsistent with the Agreement's directive for the timely release of children. *Id.* at 10. The Regulations provide that accompanied minors in expedited removal proceedings are subject to the same parole standard as adults, whereby parole "is solely at the discretion of the Attorney General when 'required to meet a medical emergency or . . . necessary for a legitimate law enforcement objective.'" *Id.* (quoting 8 C.F.R. § 235.3(b)(2)(ii), (b)(4)(ii)). The Regulations are expressly "intended to permit detention in FRCs in lieu of release . . . in order to avoid the need to separate or release families in these circumstances," *id.* at 47 n.13, yet as DHS acknowledges, "this rule may result in longer detention of some minors, and

their accompanying parent or legal guardian in FRCs," *id.* at 141, and DHS admits that it "cannot reliably predict the increased average length of stay for affected minors and their accompanying parents or legal guardians in FRCs," *id.* at 159. Such a rule effectively authorizing the prolonged detention of children cannot reasonably be understood as "*implementing*," *id.* at 223, an agreement that requires the expeditious release of children from such detention.

B. Licensing for Detention Facilities

The Regulations also substantially alter the licensing requirements for the programs or facilities where unaccompanied children are detained and effectively eliminate state oversight of those programs. They do so despite the Agreement's clear mandate that children who must remain in custody be placed only with a program licensed by the State. The Agreement requires that when DHS must retain custody over a child, "such minor shall be placed temporarily in a licensed program until such time as release can be effected . . . or until the minor's immigration proceedings are concluded, whichever occurs earlier." ER 244, ¶ 19. It defines a "licensed program" as "any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors." *Id.* at 236, ¶ 6.

The Regulations, by contrast, allow the federal government to detain such

children in a "licensed facility," defined as an Immigration and Customs Enforcement (ICE) "detention facility that is licensed by the state, county, or municipality in which it is located, *if such a licensing process exists*." *Id.* at 168 (emphasis added). Notably, the Regulations specify that "[i]f a licensing process for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE." *Id.* This caveat is important because, as DHS has acknowledged, "most States do not offer a licensing program for family unit detention," *id.* at 36, so the Regulations effectively permit DHS to place children in ICE detention facilities that are not subject to state oversight but are instead audited by entities that DHS itself selects and that apply ICE's own standards, eliminating state involvement. The Regulations' licensing provision is therefore wholly inconsistent with the Agreement's requirement that minors who must remain in custody be detained temporarily in a "program, agency or organization that is licensed by an appropriate State agency," *id.* at 236, ¶ 6, because it allows the federal government to set its own standards and employ third-party vendors handpicked by the executive branch to assess compliance with those standards.

This change effectively eliminates much-needed state oversight of the federal

detention of children. The Agreement's state-licensing requirement is intended to protect children who are detained on a longer-term basis by establishing and monitoring appropriate standards for the children's care, education, and well-being—as determined by a third-party entity with expertise in child welfare and with no financial interest or other connection to DHS's law enforcement functions. *See id.* at 236-37, ¶ 6. The scheme put in place by the Regulations, by contrast, is the functional equivalent of having no licensing requirement at all; it essentially entrusts the fox to guard the henhouse.

Indeed, DHS has a demonstrated history of organizing seemingly ineffective inspections of its immigration detention facilities by third-party vendors. Just as DHS inspections of its own facilities are "very, very, very difficult to fail," Dep't of Homeland Sec., Office of the Inspector Gen., OIG-18-67, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* 7 n.12 (June 26, 2018), inspections by DHS-selected third-party vendors have yielded similarly dubious results. For example, since May 2015, DHS has contracted with Danya International to inspect its family detention centers for compliance with the standards ICE set. Decl. of Jon Gurule at 2, *Flores v. Holder*, No. 2:85-cv-4544 (C.D. Cal. June 3, 2016) (Dkt. No. 217-1). Although an ICE official has declared that "Danya has generally found the FRCs to be compliant with a majority" of the controlling standards, and "[w]here Danya observed

individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process," *id.* at 3, these vague descriptions provide little information about which standards the facilities violated or how severe or prolonged those violations were. ICE has also denied requests by DHS's own Advisory Committee on Family Residential Centers to provide access to the other Danya International inspection reports. *Report of the DHS Advisory Committee on Family Residential Centers* 93 (Oct. 7, 2016), https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf.

Moreover, DHS's own Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, and these inspections contradict those conducted by third-party vendors. These DHS reports are likewise unavailable to the public, but two medical doctors who served as experts on family detention centers for DHS's Office of Civil Rights and Civil Liberties reported to Congress in 2018 that their investigations "frequently revealed serious compliance issues resulting in harm to children." Letter from Dr. Scott Allen & Dr. Pamela McPherson, Dep't of Homeland Sec. Office of Civil Rights & Civil Liberties, to Sen. Charles E. Grassley, Chairman, & Sen. Ron Wyden, Vice Chairman, Sen. Whistleblowing Caucus 1 (July 17, 2018), https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20S

WC.pdf. The doctors stated that family detention centers "still have significant deficiencies that violate federal detention standards," including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and they gave detailed examples of cases where children have been harmed because they received inadequate care. *Id.* at 4; *see* Dep't of Homeland Sec., Office of the Inspector Gen., OIG-19-51, *Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted)* 1 (July 2, 2019) [hereinafter 2019 OIG Rio Grande Management Alert] (calling on DHS "to take immediate steps to alleviate dangerous overcrowding and prolonged detention of children and adults in the Rio Grande Valley"); 2019 OIG Rio Grande Management Alert at 8 (reporting that a senior manager at one immigration detention facility called the facility's security concerns a "ticking time bomb"). These reports highlight the vital need for independent oversight of the federal government's detention of children and demonstrate that the Regulations that enable the federal government to set its own standards and handpick the third-party vendors that inspect its facilities are inconsistent with the Agreement's requirement that children who must be detained be placed in state-licensed facilities.

The Regulations also undermine the fundamental purposes of the Agreement, which are to secure the expedited release of children, *see* ER 239, ¶ 12A; *id.* at 242,

¶ 14, and to ensure that the federal government holds any minors in its custody "in facilities that are safe and sanitary," *id.* at 239, ¶ 12A, and treats "minors in its custody with dignity, respect, and special concern for their particular vulnerability as minors," *id.* ¶ 11. The Agreement guarantees those protections because by the time the Agreement was reached, it was well documented that "[w]hile conditions for children in [federal] detention vary greatly, they are typically extremely poor." Human Rights Watch, Children's Rights Project, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* 1 (April 1997), https://www.hrw.org/sites/default/files/reports/us974.pdf. And over twenty years later, such troubling conditions continue to persist. *See* Letter from Sen. Charles E. Schumer et al. to Kevin K. McAleenan, Acting Sec'y, U.S. Dep't of Homeland Sec., & Mark Morgan, Acting Comm'r, U.S. Customs & Border Protection 2-3 (July 25, 2019), https://www.democrats.senate.gov/imo/media/doc/Letter%20from%20Senate%20Democrats%20to%20Acting%20Secty%20McAleenan_Acting%20Commsr%20Morgan%2007-25-19.pdf (noting that "[m]igrant children continue to report not getting enough food to eat," poor water quality, and a lack of child care or child welfare professionals at certain detention centers, subjecting those children to "increased risk of post-traumatic stress disorder (PTSD), anxiety, depression, suicidal ideation, or other behavioral problems").

Indeed, last June, the DHS Office of the Inspector General inspected several

federal detention facilities and found "significant health and safety risks, including nooses in detainee cells, improper and overly restrictive segregation, and inadequate detainee medical care." Dep't of Homeland Sec., Office of the Inspector Gen., OIG-19-47, *Concerns About ICE Detainee Treatment and Care at Four Detention Facilities* 3 (June 3, 2019). The Inspector General also released damning reports about dangerous overcrowding at the Rio Grande Valley and El Paso Border Patrol Stations. 2019 OIG Rio Grande Management Alert; Dep't of Homeland Sec., Office of the Inspector Gen., OIG-19-46, *Management Alert—DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center (Redacted)* (May 30, 2019) [hereinafter 2019 OIG El Paso Management Alert]. The Inspector General found that the conditions in both facilities posed "an immediate risk to the health and safety" of detainees and DHS employees and asked DHS to take immediate action to alleviate the dangerous conditions. 2019 OIG Rio Grande Management Alert at 7; 2019 OIG El Paso Management Alert at 6.[2] Thus,

[2] *See The Unaccompanied Alien Child Protection Act: Hearing Before Subcomm. on Immigration of the S. Judiciary Comm.*, 107th Cong. 30-31 (2002) (statement of Edwin Larios Munoz) ("[U.S. Border Patrol officers] held me four days locked up and alone in a cell. They gave me very little and bad food and did not let me outdoors. They did not explain anything to me about what was happening that I could understand. I did not get to make any phone call or speak with a lawyer. . . . I lost weight and was usually sick at this jail since I could not eat the horrible food and the jail constantly smelled like urine. I frequently had nightmares at the jail that the guards and other boys were going to kill me."); Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away*

independent oversight of federal detention centers is critical, and the Agreement's state-licensing requirement guarantees precisely that. The Regulations eliminate that oversight.

C. Protections for Children in Detention

The Agreement also guarantees certain protections for minors that the Regulations eschew. For instance, the Agreement requires that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." ER 246, ¶ 24A. Indeed, this Court has recognized that "[t]he bond hearing under Paragraph 24A is a fundamental protection guaranteed to unaccompanied minors under the *Flores* Settlement." *Sessions*, 862 F.3d at 867. Yet the Regulations merely allow an unaccompanied child to "*request* that an independent hearing officer employed by HHS determine, through a written decision, whether the [child] would present a risk of danger to the community or risk of flight if released." ER 177 (emphasis added). The Regulations therefore turn this safeguard on its head by requiring an unaccompanied child (who may not know her rights or even speak English) to

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Her Rights, The New Yorker (Oct. 11, 2018), https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights (describing how officials in 2018 "helped" a five-year-old girl withdraw her request for a bond redetermination hearing).

affirmatively request a hearing that the Agreement states "*shall* be afforded," *id.* at 246, ¶ 24A (emphasis added).

The Regulations likewise replace other mandatory protections guaranteed in the *Flores* Agreement with discretionary practices. For instance, as discussed above, the Agreement provides that the government "*shall* release a minor from its custody without unnecessary delay" to certain individuals or entities, *id.* at 242, ¶ 14 (emphasis added), while the new regulations state that "[m]inors *may be* released" to (or alongside) certain individuals, *id.* at 167 (emphasis added). In other words, in addition to limiting the categories of adults to whom minors may be released, the Regulations—unlike the Agreement—do not *require* that the government release children from detention at all, instead merely providing that if the government *chooses* to release them, it may do so only to a "parent, legal guardian, or adult relative." *See id.* This change from mandatory to discretionary language renders the Regulations inconsistent with one of the central tenets of the Agreement.

II. The Homeland Security Act and the Trafficking Victims Protection Reauthorization Act Do Not Justify the Regulations' Deviations from the *Flores* Agreement.

Significantly, DOJ acknowledges that certain portions of the Regulations are inconsistent with the Agreement, but it argues that the HSA and the TVPRA necessitate those deviations. *See* Appellants' Br. 36 (conceding that there are "limited distinctions" between the Regulations and the Agreement and that there are

"minimal exceptions" to the Regulations' consistency with the Agreement); *id.* at 55 (admitting that there are "limited" changes between the Regulations and the Agreement with respect to treatment of accompanied minors). According to DOJ, "these statutes reflect a new legal regime that calls for terminating the agreement." *Id.* at 23. This Court's precedents, however, foreclose these arguments. *See, e.g.*, *Sessions*, 862 F.3d at 871, 879. As this Court has recognized, the HSA and the TVPRA do not supersede the *Flores* Agreement—to the contrary, and as *amici* well know, Congress passed those statutes in part to complement the Agreement's protections.

Congress was aware of the *Flores* Agreement when it passed the HSA and the TVPRA, and it chose to preserve and reinforce the Agreement through those statutes. *Cf. Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *accord EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 751 (9th Cir. 2003) (en banc). Indeed, this Court has recognized that Congress chose to include "savings clauses" in both the HSA and the TVPRA, *see* 6 U.S.C. § 552(a); 8 U.S.C. § 1232(b)(1), that specifically preserve prior administrative agreements, including the *Flores* Agreement. *Sessions*, 862 F.3d at 870-71. The HSA states that "[c]ompleted administrative actions of an agency shall not be affected by the enactment of this chapter . . . but shall continue in effect according to their terms until amended,

modified, superseded, terminated, set aside, or revoked," 6 U.S.C. § 552(a)(1), and it specifically defines a "completed administrative action" to include an "agreement[]," *id.* § 552(a)(2). This Court has recognized that the HSA's "savings clause . . . preserves those administrative actions to which the INS was a party" and that "[t]he *Flores* Settlement thus remains in effect as an 'agreement' preceding the passage of the HSA." *Sessions*, 862 F.3d at 870 (quoting 6 U.S.C. § 552(a)). Likewise, Congress wrote the TVPRA to provide that HHS must exercise the "care and custody of all unaccompanied alien children, including responsibility for their detention" in a manner "[c]onsistent with section 279 of Title 6"—the HSA's savings clause. 8 U.S.C. § 1232(b)(1). Accordingly, this Court has recognized that the TVPRA "incorporates by reference the savings clause included in the HSA" and "also preserves the *Flores* Settlement." *Sessions*, 862 F.3d at 871.

Thus, this Court has held that "'there is no reason why [the] bureaucratic reorganization' enacted by the HSA and TVPRA 'should prohibit the government from adhering to the [*Flores*] Settlement.'" *Id.* at 879 (alterations in original) (quoting *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016)). This Court's precedents therefore foreclose DOJ's argument that the HSA and the TVPRA supersede the Agreement, or that "the TVPRA . . . plainly alter[s] the legal landscape," Appellants' Br. 35, in a manner that would justify the Agreement's termination. *Cf. Sessions*, 862 F.3d at 867 ("We hold that in enacting the HSA and

TVPRA, Congress did not terminate Paragraph 24A of the *Flores* Settlement with respect to unaccompanied minors.").

Indeed, far from justifying a departure from the terms of the Agreement, the HSA and the TVPRA were passed by Congress to strengthen and reinforce the Agreement's protections for migrant children. As *amici* well know, and as this Court has explained, "[t]he overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less." *Id.* at 880; *see id.* at 867 ("These statutes sought to protect a uniquely vulnerable population: unaccompanied children. In enacting the HSA and the TVPRA, Congress desired to *better* provide for unaccompanied minors."); *see also id.* at 867 (recognizing, for example, that "[d]epriving these children of their existing right to a bond hearing"—a deprivation the Regulations would allow—"is incompatible with [the HSA and the TVPRA's] aim" of better providing for unaccompanied minors).

To achieve that end, Congress passed the HSA in 2002 to transfer authority over the care and placement of unaccompanied minors to HHS's Office of Refugee Resettlement (ORR). In doing so, it required ORR to "ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child." 6 U.S.C. § 279(b)(1)(B). These requirements are consistent with the Agreement's requirement that the INS treat "all minors in its custody with dignity, respect and special concern for their particular vulnerability as

minors" and "place each detained minor in the least restrictive setting . . . to protect the minor's well-being and that of others." ER 239, ¶ 11.

Similarly, in enacting the TVPRA in 2008, Congress ensured that federal law would "parallel[] certain aspects of the *Flores* Settlement and affirmed ORR's responsibility for the care and custody of unaccompanied minors." *Sessions*, 862 F.3d at 867. For example, just as the Agreement requires the expedient release of migrant children in federal custody, the TVPRA requires DHS to transfer an unaccompanied minor to the custody of the HHS Secretary "within 72 hours of determining that the minor is unaccompanied, absent 'exceptional circumstances.'" *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1140 (9th Cir. 2018) (quoting 8 U.S.C. § 1232(b)(3)). The statute then provides that the minor "shall be promptly placed in the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), mirroring the Agreement's requirement that "[t]he INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs . . . and to protect the minor's well-being and that of others," ER 239, ¶ 11. Moreover, the TVPRA states that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." 8 U.S.C. § 1232(c)(2)(A). This parallels the Agreement's requirement that "[a]ll homes and facilities operated by licensed programs . . . shall be non-secure as required under state law." ER 237,

¶ 6. Accordingly, contrary to DOJ's assertions, the HSA and the TVPRA do not warrant deviations from the *Flores* Agreement; rather, they reinforce the terms of the Agreement and demonstrate its continued importance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Dated: January 28, 2020

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra*
Brianne J. Gorod
Dayna J. Zolle**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae
* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

APPENDIX:
LIST OF *AMICI*

U.S. SENATE

Merkley, Jeffrey A.
Senator of Oregon

Feinstein, Dianne
Senator of California

Durbin, Richard J.
Senator of Illinois

Schumer, Charles E.
Senator of New York

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Senator of Colorado

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Senator of New Jersey

Brown, Sherrod
Senator of Ohio

Cardin, Benjamin L.
Senator of Maryland

Casey, Robert P., Jr.
Senator of Pennsylvania

Coons, Christopher A.
Senator of Delaware

LIST OF *AMICI* – cont'd

Cortez Masto, Catherine
Senator of Nevada

Duckworth, Tammy
Senator of Illinois

Gillibrand, Kirsten
Senator of New York

Harris, Kamala D.
Senator of California

Hirono, Mazie K.
Senator of Hawai‘i

Klobuchar, Amy
Senator of Minnesota

Leahy, Patrick J.
Senator of Vermont

Markey, Edward J.
Senator of Massachusetts

Menendez, Robert
Senator of New Jersey

Reed, Jack
Senator of Rhode Island

Rosen, Jacky
Senator of Nevada

Sanders, Bernard
Senator of Vermont

Smith, Tina
Senator of Minnesota

LIST OF *AMICI* – cont'd

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Senator of Maryland

Warren, Elizabeth
Senator of Massachusetts

Whitehouse, Sheldon
Senator of Rhode Island

Wyden, Ron
Senator of Oregon

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FOR THE NINTH CIRCUIT

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