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U.S. Department of Homeland Security
500 12th St. N.W.
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DHS Docket Number ICEB-2018-0002: Public Comment of the Immigration Reform Law Institute Regarding Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children

Dear Director Seguin:

The Immigration Reform Law Institute (IRLI) submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the Agency's notice of proposed rulemaking (NPR), as published in the Federal Register. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018).

IRLI is a non-profit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI's longstanding concerns about the collapse on the southern border of the congressionally mandated system to control humanitarian entries were reaffirmed when nine IRLI attorneys and investigators visited the Rio Grande Valley Sector of the U.S. border with Mexico on October 16-19, 2018. To understand better the impact of such entries on both alien

migrants and citizens in south Texas, we visited U.S. Customs and Border Patrol (CBP) and other federal facilities, toured field patrol areas, and met with Catholic Charities (McAllen, Texas) and the Texas Border Volunteers (Falfurrias, Texas).

We learned how proficient the (CBP), through its diligent, dedicated agents, has become in catching illegal entrants. We also learned, however, that both the United States government, forced by current law to hold humanitarian entrants for a short time before releasing them into the United States, and Catholic Charities, by housing the entrants and helping them travel to their desired destinations deep in the interior of the United States, are completing the human smuggling process, and in some cases probably completing (inadvertently) the sex trafficking process, begun by the Mexican cartels. We were also told by high-ranking Border Patrol officials, in no uncertain terms, that if illegal-entrant families could be housed together in humane conditions before their deportation (or permission to stay on some basis) the flow of such entrants would be radically reduced.

We were made viscerally aware of some of the terrible human costs of the current situation. On a ranch in Falfurrias, Texas, we learned that the Texas Border Volunteers find an average of 40 bodies of illegal entrants, in various stages of decomposition, every year on the ranches they patrol, and we were shown gruesome photographs of many of these corpses. These individuals had been left for dead by the cartels, and sometimes raped first. Almost all illegal entrants, we were told, pay thousands or tens of thousands to the cartels to cross the border, often obtaining the money to do so by working as virtual indentured servants in the U.S. Agents of U.S. Immigration and Customs Enforcement ("ICE") also told us that many of the flourishing-looking businesses we saw in McAllen actually were money-laundering operations. The overall impression we gained is that this sector of the border, at least, is overshadowed and pervaded by a vast and deadly criminal enterprise—the cartels.

IRLI supports the proposals of the Departments of Homeland Security and Health and Human Services (HHS) to replace the *Flores* Settlement Agreement (FSA) with updated regulations that reflect the profound changes in the illegal migration of unaccompanied alien children (UACs) and family units since the 1990s. Much of the dysfunctionality of the current crisis stems from this binding settlement agreement between the federal government and a class of alien minors that the U.S. District Court for the Central District of California entered in 1993. *Flores v. Sessions*. 862 F.3d 863, 869, 874 (9th Cir. 2017).

This public comment first provides a summary of legal constraints upon the NPR. IRLI then addresses six major technical topics in the proposed regulations. With one significant exception—the proposed creation of an HHS hearing and appeals tribunal—IRLI has concluded that the NPR

would provide legally permissible and very valuable substantive reforms for the transition from a failed judicially-managed settlement regime to a sustainable judicially-monitored regulatory system, a transition contemplated by the FSA itself. FSA ¶ 40.

Whatever the humanitarian intent behind the 1993 settlement and the ongoing oversight of the District Court, the actual consequence has been a horrific metastasis in violence, trafficking, exploitation, and organized crime at every point in the migrant networks from the "Northern Triangle" states of El Salvador, Honduras, and Guatemala into the United States. The current judicially-mandated agglomeration of catch and release practices has effectively exposed or subjected tens of thousands of minors, both unaccompanied and in family units, to every conceivable type of human cruelty, exploitation, and criminal abuse.

IRLI is aware of the cruel dilemmas facing the Administration as it seeks to suppress this historically evil phenomenon. We concluded decades ago that general protective detention of undocumented alien minors apprehended along our southern border while their claims for relief from expedited removal are adjudicated is truly the only regulatory policy that can roll back and deter mass migration of minors and family units from the Northern Triangle.

The history of the past decade tragically demonstrates that when government practices are liberalized to expedite the release of UACs and family units into the interior, the incidence of violence, trafficking, and exploitation expands exponentially, fueled by the enormous disparity between living standards in the sending nations and the United States. As a practical matter, the demand from increasingly young populations to migrate through Mexico will remain unlimited for the foreseeable future.

The NPR implicitly recognizes the gridlock in Congress, with working majorities in both the House and Senate prepared to maintain the status quo for perceived political advantage. Various bills are pending which seek to reform the failed mandates favoring release pending adjudication. But illegal mass migration across the southern land and sea borders is predominately an organized criminal enterprise controlled by Mexican cartels, tightly integrated with the trafficking in controlled substances, which the U.S. and Mexican governments have shown only a limited ability to deter or suppress.

It is within the context of this triad—pervasive judicial intervention, legislative gridlock, and the glaring indicia of failed-state criminality on both sides of our southern border—that the NPR must be assessed.

I. Legal and geopolitical background.

In an executive order issued on June 20, 2018, President Trump directed DHS "to the extent permitted by law and subject to the availability of appropriations, [to] maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435, 29435 (June 25, 2018). By issuing this NPR, the Administration has exercised its option to meet its obligations under the FSA through promulgation of "final regulations implementing th[e] Agreement" that will terminate and supersede the agreement. *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

Without the NPR, recent federal court decisions regarding the ongoing and future implementation of the FSA have left the Administration with a practice of "catch and release" of family units together as the only judicially acceptable option under the FSA. *See Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1142-49 (S.D. Cal. 2018); Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, *Flores v. Sessions*, No. 2:85-CV-04544, at 5 (C.D. Cal. July 9, 2018).

The legality and advisability of the NPR should be assessed against the appropriate legal and geopolitical background. To begin with, aliens encountered near the border without valid entry documents are generally subject to expedited removal under the Immigration and Nationality Act (INA). 8 U.S.C. § 1225(b). While family units, including children arriving with their families, are subject to expedited removal, UACs are not eligible or screened for expedited removal. 8 U.S.C. § 1232(a)(5)(D).

The Supreme Court held this year that INA statutes permit DHS to detain, pending the outcome of an asylum proceeding, an arriving or apprehended alien ("applicant for admission") who, after showing a credible fear of persecution, has been referred to that asylum proceeding from expedited removal proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018) ("U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2)…."). Apprehended minors remain subject to DHS custody and detention unless and until they are deemed "unaccompanied." 6 U.S.C. § 279(a), (b); 8 U.S.C. § 1232(b)(1).

As a prelude to the FSA, the Supreme Court held that detained alien minors had no constitutional right to be released from government custody into the custody of a "willing-and-able private custodian" when a parent, legal guardian, or close relative is unavailable. *Reno v. Flores*, 507 U.S. 292, 302-303 (1993). Congress has enacted statutes, mainly the Homeland Security Act ("HSA") and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the latter codified at 8 U.S.C. § 1232, regulating the care and custody of UACs and

providing protections that to some extent have displaced the FSA as controlling law. *See, e.g., Flores v. Sessions*, 862 F.3d at 870. But Congress has enacted no comparable laws addressing *accompanied* alien minors or alien family units.

Foreign nationals from El Salvador, Guatemala, Honduras, and Mexico accounted for almost all UAC cases during the past decade, but since the influx of FY 2014, the predominance of Mexicans during the initial years has largely reversed, so that today entrants from the three Northern Triangle countries are the majority of UACs. Kandel, *Unaccompanied Alien Children: An Overview*, CRS 7-5700 (Jan. 18, 2017).

The TVPRA, whose mandates the Administration must enforce, is a disturbing example of the consequences of deviance from a sustainable code of protective detention in the face of a limitless demand to migrate. The screening provision of TVPRA requires DHS to determine within 48 hours whether each unaccompanied child from a contiguous country has been, *inter alia*, "a victim of a severe form of trafficking in persons, and that there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality…." 8 U.S.C. § 1232(a)(2)(A)(i). But there has been little to no evidence that catch and release practices under the FSA or placement and release policies under the TVPRA have done anything to reduce the incidence of trafficking and sexual abuse among minor illegal migrants, especially those from Mexico and the Northern Triangle.

On the contrary, the United Nations has repeatedly reported that the illegal migration process exposes a very high percentage of migrants to violence, sexual abuse, trafficking, and extortion *en route* to the United States. *See, e.g.,* Fleury, Anjali, *Women Migrating to Mexico for Safety: The Need for Improved Protections and Rights*, United Nations University Institute on Globalization, Culture and Mobility (UNU-GCM), Policy Report No. 03/08 at 4-9 (2016).

Migrants routinely pay high fees to *coyotes* (smugglers) to facilitate the migration process. The main offenders are criminal gangs, linked to corrupt authorities through cartel networks. Extortion is common. Fleury, at 4. According to the UN, one study found that of 52 percent of migrants had been robbed and 33 percent experienced extortion during their migration process. In a second 2013 study, 43 percent of detained migrant women interviewed were victims of extortion in Mexico, while the majority of Northern Triangle-origin migrants had experienced extortion. Mexican criminal gangs kidnap more than 20,000 migrants each year. *Id.* The UN study reports that female and child migrants are also vulnerable to sexual and gender-based violence, including rape and sexual assault, particularly near the southern and northern Mexican borders. According to a 2010 Amnesty International report, 60 percent of migrant women and girls are raped while migrating, with other studies cited by the UN indicating that 80 percent of women experience rape and sexual

assault during the migration process. The hesitance of migrants to report sexual violence, abuse, and sexually transmitted diseases contracted *en route* to the United States is well-established. The UN notes that data is difficult to collect, but that all available studies suggest that migrant women and children controlled by criminal groups are at high risk of being sold into prostitution and human trafficking. *Id.*

A successful regulatory regime must recognize that there is no legal impediment to the processing of Central American humanitarian claims in Mexico. The problem is purely one of resources available to Mexico. Mexico enacted a new immigration law in 2011 to address migration to, from, or returning to Mexico, and regulate migration in transit through Mexico. *Ley de Migración* (May 25, 2011) (available in English translation at https://www.albany.edu/~rk289758/documents/Ley_de_Migracion_en_Ingles.pdf); *see also* Castilla Juárez, K.A.. *Ley de Migración mexicana: Algunas de sus inconstitucionalidades*. Migración y desarrollo, 12 (23) 151-183 (2014).

The 2011 law provides many relevant protections, including special attention to vulnerable groups, including minors, women, indigenous peoples, adolescents, seniors, and victims of crime. The 2011 law also provides specifications for detention, including facility conditions and services, such as three meals a day, medical, psychological, and legal services, the separation of criminal detainees from non-criminal detainees, and the separation of men and women. *Id.* Detainees must be informed of the basis for their detention and location, and have the rights to apply for asylum, consular protection, an interpreter or translator, and legal representation, as well as visits from family members. Fleury, at 8-9. Under the 2011 law, only the INM may conduct immigration control and supervision of foreigners. *Id.*

Evidence cited by the UN of Mexico's robust foreign affairs regime for protection of migrant women and children under international law includes its own 2011 refugee law as well as ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Optional Protocol to CEDAW, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). *Ley Sobre Refugiados, Protección Complementaria y Asilo Político* (ultima reforma DOF 30-10-2014); *see also* Luna, K., *Mexico's Refugee Law*, CIS (June 24, 2018) (available at https://cis.org/Luna/Mexicos-Refugee-Law).

Under Article 27(1) of the Refugee Convention, Mexico qualifies as a "country of first asylum," that is, it may be the first country reached by a person seeking asylum status that (a) has offered the person refugee status, and (b) also offers sufficient protection from the conditions causing the refugee to seek asylum. *Id.*

II. Technical Comments on Proposed Regulations.

A. In General

IRLI agrees with the joint position of the agencies that the FSA envisions and permits a transition from a judicially-managed settlement regime to an updated regulatory scheme. The proposed regulations appear to adhere in good faith to all requirements of the FSA, except where they have been superseded by legislation.

B. Definitions of "emergency" and "influx."

IRLI supports the proposed modifications to the definition of "emergency" in 8 C.F.R. § 236.3(b). The proposed definition appears to remain in conformity with the definition used in FSA ¶ 12(B), but adapted to cover delays in compliance due to externalities, resulting in a more comprehensive range of the protections and standards in the FSA. Similarly, IRLI agrees with the similar standard in proposed 45 C.F.R. § 410.209 that, in an emergency, the Office of Refugee Resettlement (ORR) at HHS will be required to place UACs in a licensed program "as expeditiously as possible," as discussed at 83 Fed. Reg. 45507.

IRLI understands the agencies' concerns related to its proposal to retain the legacy meaning of "influx" from FSA P 19, under which there is an influx if DHS has at any time more than 130 eligible minors awaiting placement in a licensed program. Under this standard, even with the changes created by transfers to ORR under the TVPRA, the agency is effectively operating in a permanent state of influx. IRLI thus supports the option, discussed at 83 Fed. Reg. 45496, of including in the alternative a more flexible standard, under which there is an influx if so many minors or UACs are awaiting transfer after immediate apprehension that existing facilities lack the capacity, beyond just bed space, to accommodate them.

In addition, the agencies may want to include a third alternative criterion for designation of influx conditions that would track the meaning of influx in the INA. The INA recognizes the threat posed to national security where the Secretary of Homeland Security "determines that an actual or imminent influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate federal response…." 8 U.S.C. § 1103(a)(10). IRLI urges the agencies to consider a regulation that would define "urgent circumstances" to include the release without bond of a significant percentage of such minors, with or without a parent or legal guardian, in close proximity to the relevant Coast Guard or Border Patrol sector.

Having separate criteria for designating the existence of influx conditions—the legacy FSA criterion, an alternative criterion that takes into account the problems created by lack of resources other than bed space, and a third criterion that aligns influx designations for minors with designations of influx conditions applicable to humanitarian entry in general—would provide this and future administrations with the flexibility to respond effectively to migrant crises of foreign origin that involve minor aliens in unpredictably dangerous ways.

C. Licensed, non-secure, and secure facilities.

IRLI strongly agrees with the agencies that one of the most important changes in proposed 8 C.F.R. §§ 236.3(b) is the reform of the facility licensing requirement. The President (and agency experience since 1996) have made it clear that a viable policy must allow decisions regarding detention of family members to be made for families together, as a unit. But it is an unavoidable fact that most states have no legal provision for licensing detention programs at Family Residential Centers (FRCs), the facilities that DHS uses to house alien minors together with their parents or legal guardians.

Given the very high rates of failure to appear at removal or asylum proceedings, it is inexcusable that the non-existence of state FSA-compatible licensing programs for family units should compel the release of inadmissible applicants for admission into the interior. This administrative sinkhole is an obstacle to both the compelling national interest in the prevention of illegal immigration and the protective detention of family units.

The proposed 8 C.F.R. §§ 236.3(b) alternative licensing program does not appear to compromise the quality of life standards for residential units developed under the FSA. IRLI supports the proposed use of an outside inspector with regulatory authority to monitor and ensure that licensed facilities housing both minor and parent detainees in family units mirror analogous state licensing requirements for third party oversight of detention centers housing citizen juvenile offenders. IRLI also concurs with the adoption of a definition of non-secure facility to track state or locality definitions, where available, and that as a default the regulation should use the Pennsylvania state definitions of secure and non-secure care, which currently apply to the oldest DHS minor detention facility, in Berks, Pennsylvania.

IRLI generally concurs with the proposed HHS regulations regarding placement of UACs in a secure facility. There is an ongoing concern regarding UACs with gang affiliation or prior involvement in criminal activity, especially among older teenagers who by custom would be treated as emancipated adults in their home countries. IRLI concurs that the definition of secure

ORR facility at 45 C.F.R. § 410.101 recognizes that the FSA did not require secure facilities to meet the licensed facility provision that would apply to other ORR shelter.

IRLI accepts that proposed 45 C.F.R. § 410.202 would remove the FSA risk factor, and only consider the TVPRA criteria barring placement in a secure facility absent a determination that the child poses a danger to self or others or has been charged with committing a criminal offense. 8 U.S.C. § 1232(c)(2)(A). IRLI supports the decision not to provide a list of behavior or offenses meriting secure facility placement, but with the caveats that elsewhere the proposed NPR recognizes that a minor who escapes from ORR custody reverts to non-UAC minor legal status, under DHS jurisdiction, and that creating a rigid list would add legal uncertainty to the case-by-case determinations of risk and safety by ORR personnel.

D. Age determinations for detained alien minors and UACs.

IRLI supports the proposed age determination rules, 8 C.F.R. § 236.3(c) for DHS, and 45 C.F.R. §§ 410.700 and 410.701 for HHS. The problem of fraudulent claims that an apprehended alien is a minor is a serious threat to the viability of the U.S. humanitarian entry regime. The essential components of forensic age estimation are the history, physical examination, X-rays of the hands, panorama dental films of the jaws, and, in difficult cases, thin-slice CAT scans of the medial clavicular epiphyses. *See* Schmeling A, Dettmeyer R, Rudolf E, Vieth V, Geserick G: *Forensic age estimation—methods, certainty, and the law,* 113 Deutsches Ärzteblatt International 44–50 (2016).

The regulations should direct that personnel in both agencies have the flexibility to use multiple methods in combination to ensure optimal accuracy, for both minimum age and most probable age determinations. The proposed regulations appear to meet both TVPRA statutory standards at 8 U.S.C. § 1232(b)(4) and legacy FSA requirements. IRLI concurs with the proposed standard at §410.701 that an alien be treated as an adult for all purposes if a reasonable medical professional, applying the approved procedures, concludes that an individual is an adult. This standard is mandated for jurisdictional as well as medical reasons. ORR has no authority or control over an alien whose probable age is over eighteen. IRLI also supports the reform in proposed 8 C.F.R. § 236.3(d) to require DHS immigration officers to make a determination of whether an alien meets the definition of a UAC each time the alien is encountered. UAC protections are only authorized for persons meeting statutory conditions that are inherently time-limited.

E. Detention and Release from DHS or ORR Custody.

It is important that the proposed rules are fully consistent with presidential policy in Executive Order 13841, which gives the highest priority to maintaining family unity in the detention process, by detaining alien families together where appropriate and consistent with law and available resources.

One of the most dangerous and egregious outcomes of the existing regulatory regime is the unacceptably high rate at which minors and UACs and non-UAC minors released to sponsors abscond into the interior. High absconder rates make a mockery of the humanitarian entry regime's elaborate and costly bureaucracy of "protections" for vulnerable underage entrants. IRLI thus supports the clarification in proposed 8 C.F.R. § 236.6(j) that minors will only be released to a parent or legal guardian. In most cases the parent is in the best position to represent the minor's rights and wishes and can help the minor to prepare for immigration proceedings.

IRLI agrees that the proposed rule will adapt existing FSA ¶14 standards to the extensive amendments to the immigration statutes since implementation of the FSA in 1993. The NPR correctly observes that parents have never had a right of release under the FSA. 83 Fed. Reg. 45503. IRLI also supports the post-TVPRA clarification in proposed 8 C.F.R. § 236.3(g) that only UACs who are permanent residents of Mexico or Canada may withdraw applications for admission once apprehended, but notes that it has the effect of returning all minors in ORR custody who lose UAC status for any reason to DHS legal custody, and in general subjecting them to mandatory detention.

DHS no longer has the authority to release a minor to anyone other than HHS or a parent or legal guardian, because the HSA and TVPRA have superseded the original FSA conditions. 83 Fed. Reg. 45502. IRLI supports the proposed revision of 8 CFR § 236.3(j), which will only permit release of a minor to a parent or legal guardian who is available to provide care and custody. The proposed rule would better align FSA ¶ 14 release standards with current detention statutes and regulations, and thus permit DHS to exercise its existing discretionary authority governing release.

DHS must be able to exercise its discretionary authority governing detention and release of unadmitted entrants, as affirmed by the Supreme Court in *Jennings v. Rodriguez,* 138 S. Ct. 830 (2018). IRLI believes the *Jennings* holding now affects releases of minors in custody in multiple ways:

First, after *Jennings,* the agencies are correct to recognize that minors in family units subject to expedited removal who have been found not to have credible fear, or are still awaiting a credible

fear determination, are subject to mandatory detention pursuant to 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The Supreme Court held that INA § 235(b)(1) "mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin." 138 S. Ct. at 845.

Second, *Jennings* has overruled a BIA holding in *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), finding a lack of specificity in relevant law and regulation regarding relief from mandatory detention for "clause (iii)" aliens—that is, those aliens in expedited removal proceedings found to have a credible fear and referred for Section 240 proceedings. *Jennings* held that in both §§ 235(b)(1) and 235(b)(2) (8 U.S. §§ 1225(b)(1) and 1225(b)(2)), the INA uses the unequivocal mandate "shall be detained," which the Court construed as a "requirement of detention [that] precludes a court from finding ambiguity here…." 132 S. Ct. at 844.

Third, in light of *Jennings*, IRLI agrees with how the NPR would apply the two statutory standards for parole. IRLI agrees that DHS cannot make universal parole determinations for all minors or broad classes of minors placed into FRCs. *Jennings* held that as a unique exception to mandatory detention, the availability of parole, consistent with the "Negative Implication Canon" of statutory construction (*expressio unius est exclusio alterius*) "implies that there are no *other* circumstances under which aliens detained under §1225(b) may be released," and further "precludes the sort of implicit time limit on detention that we found in *Zadvydas*." 132 S. Ct. at 844 (emphasis in original).

DHS can parole detained minors in family units "on a case by case basis for urgent humanitarian need or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). The agency has prudently construed this statute under 8 C.F.R. § 235.3(b)(4)(ii) by limiting parole to cases of medical necessity or law enforcement need. IRLI agrees with the agencies that the U.S. District Court holding in *Flores v. Sessions*, 2:85-CV-04544 (C.D. Cal. July 9, 2018), now on appeal to the Ninth Circuit, was in error. By the plain language of the statute, parole must be within the discretion of DHS. For minors *not* in expedited removal, parole is available subject to the generally applicable parole regulation. 8 C.F.R. § 212.5(b).

IRLI strongly agrees that DHS may and should use all available evidence, such as birth certificates or other available documentation, to ensure that claimed family unit relationships are *bona fide*. 83 Fed. Reg. 45503. If a relationship cannot be established, the juvenile should be treated as a UAC and transferred to HHS custody, although, as recommended above in § D, UAC status should be re-verified every time custody of the alien is transferred from one agency to another, a placement determination is made, or before the alien is released into the interior.

F. Bond hearings

After *Jennings*, absent some hypothetical but unusual showing by the detainee of a material change in circumstances, the immigration courts now must deny bond redetermination requests from applicants for admission detained under any of the provisions of INA § 235(b)(1). *See* § E above. IRLI thus supports proposed 8 C.F.R. § 236.3(m), which clarifies that minors detained in DHS custody but *not* in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determination. On this point, the proposed rule is governed by and will be consistent with TVPRA.

The one part of the proposed regulation that does give rise to concern is the proposal to create new HHS administrative tribunals to conduct bond redetermination hearings for UACs, displacing the current use of DOJ immigration judges, consistent with FSA ¶ 24(A). 83 Fed. Reg. 45509-10. The proposed regulations would authorize HHS to create an independent "810" hearing officer process. The NPR states that this process is intended to provide the same protections, but under a "neutral adjudicator" other than DOJ. *Id.* Independent HHS hearing officers would decide only FSA ¶ 24(A) issues—whether the UAC would present a danger to the community or a risk of flight—and their decisions would supersede current ORR non-adversarial determinations. Although the NPR asserts that the decision would be final if a hearing officer determined that a UAC would be a danger or flight risk, HHS is proposing an elaborate new two-tier appellate system that would mimic the existing Executive Office of Immigration Review (EOIR) system.

IRLI fears that creating yet another specialized immigration-related tribunal will lead to more fragmented adjudications—and judicial review—in the already fragmented and contentious field of flight risk determinations. Such a tribunal and appeals process seem especially unnecessary since the only respondents before the proposed tribunal—UACs in ORR custody—will soon lose their standing by aging out of ORR custody. Under *Jennings* their status would appear to revert to an unadmitted alien. Detention is mandated by default under 8 U.S.C. § 1225(b) for unadmitted minor entrants who lack or lose UAC status, including, in IRLI's view, the very high number of UACs who abscond after release to an ORR-approved sponsor.

IRLI does not believe that the silence of TVPRA about the current use of EOIR adjudicators to decide flight risks implies that Congress contemplated the creation of a novel tribunal at HHS. Instead, IRLI suggests that the agencies consider a regime where ORR continues to make non-adversarial flight risk determinations, with appeals by UACs or their parents or legal guardians of denial of release from ORR custody to be adjudicated by cross-designated immigration judges, and scrap the proposal for a new HHS Hearings Appeal Board.

III. Conclusion

With the exception of the well-intentioned but operationally high-risk proposal to set up a new non-statutory administrative hearing and appeals system within HHS for challenges to determinations that a UAC is a flight risk or danger to the community, IRLI endorses the proposed regulations for both agencies, and urges their implementation on an expedited basis.

Respectfully submitted,

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by Michael M. Hethmon, Senior Counsel