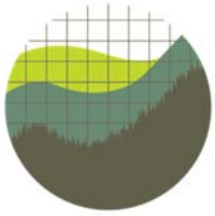

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 6, 2018

VIA ELECTRONIC SUBMISSION

Department of Homeland Security

Attn: Office of Policy, U.S. Immigration and Customs Enforcement

Re: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018)

Docket ID: ICEB-2018-0002

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Department of Homeland Security ("DHS") and the Department of Health and Human Services ("HHS") (collectively, "the Departments") regarding a set of proposed regulatory amendments that would significantly expand DHS's ability to detain immigrant children who enter the United States in the company of a parent or guardian ("Proposed Rule").[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Our comments focus on inadequacies in the Regulatory Impact Analysis accompanying the Proposed Rule. Specifically, we note the following:

- The Departments do not adequately consider the financial costs that lengthier detentions will impose on the U.S. government.
- The Departments fail to consider the significant non-financial costs that lengthier detentions will impose on detained children.
- The Departments provide no evidentiary support for their claims regarding the Proposed Rule's benefits.
- The Departments fail to describe regulatory alternatives with any specificity, much less describe how the costs and benefits of those alternatives would differ from those of the Proposed Rule.
- The Proposed Rule should be classified as an "economically significant" regulatory action.

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018).

Background

In 1997, after extensive litigation over alleged abuses in the detention of immigrant minors, the federal government executed the Flores Settlement Agreement ("FSA").[3] The FSA required that minors in federal custody be held in the "least restrictive conditions" possible and that the government place children with a relative or family friend "without unnecessary delay."[4] The agreement also required the government to transfer minors not released into the community to non-secure facilities that were "licensed by a State agency."[5] A subsequent stipulated agreement between the parties provided that the FSA would terminate 45 days after the federal government published final regulations implementing it.[6] To date, no such rule has been promulgated.[7]

In 2002, the Homeland Security Act[8] assigned responsibility for immigration enforcement to DHS[9] and the care of unaccompanied alien children to the Office of Refugee Resettlement in HHS.[10] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA")[11] imposed additional statutory requirements on the detention of unaccompanied minors, including that such minors "be promptly placed in the least

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[3] *See generally* Rebeca M. Lopez, Comment, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1647 (2012). Stipulated Settlement Agreement at ¶¶ 3, 7–18, 20, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997), http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter Original Flores Settlement Agreement]. For earlier history, see, *inter alia*, *Flores v. Meese*, 934 F.2d 991, 993 (9th Cir. 1990) and *Reno v. Flores*, 507 U.S. 292 (1993).

[4] Dara Lind & Dylan Scott, *Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 20, 2018), https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration.

[5] 83 Fed. Reg. at 45,493 (quoting Original Flores Settlement Agreement ¶ 6, 12(A)).

[6] Stipulated Settlement Agreement at ¶ 40, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Dec. 7, 2001), https://www.aclu.org/sites/default/files/field_document/flores_settlement_final_plus_extension_of_settlement011797.pdf [hereinafter Extended Flores Settlement Agreement].

[7] Lopez, *supra* note 3, at 1649-50; 67 Fed. Reg. 1670 (Jan. 14, 2002).

[8] Pub. L. No. 107-296, 116 Stat. 2135.

[9] Within DHS, U.S. Citizenship and Immigration Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP") all have responsibility in the realm of immigration of law. For the most part, ICE is charged with enforcing immigration laws in the interior of the country and CBP enforces them at the border. *See* Sofie Werthan, *What ICE Really Does*, SLATE (July 3, 2018), https://slate.com/news-and-politics/2018/07/difference-between-ice-and-cbp-the-role-of-each-agency-in-family-separations-and-immigration-enforcement.html.

[10] 6 U.S.C. § 279(a)-(b).

[11] Pub. L. No. 110-457, 122 Stat. 5044.

restrictive setting that is in the best interest of the child."[12] These statutes did not purport to override or alter the terms of the FSA.

In a 2015 proceeding to enforce the FSA, the U.S. District Court for the Central District of California held that the agreement applied to *all* alien minors in government custody, including *accompanied* minors.[13] In a separate proceeding, the court held that the phrase "without unnecessary delay" required release of these minors, or their transfer to non-secure, state-licensed facilities, within 20 days.[14]

The Proposed Rule, however, purports to eliminate the FSA's bar on detaining accompanied minors for longer than 20 days in facilities that are not licensed by a state. In place of the state licensing requirement, the Departments propose a federal licensing system for Family Residential Centers ("FRCs") that would create significantly more room to detain accompanied minors with their families.

The Proposed Rule would also restrict parole for certain children in DHS custody. Relevant statutory provisions allow DHS to release on parole those detained pending immigration proceedings if the government finds "urgent humanitarian reasons or significant public benefit."[15] For minors, current DHS regulations interpret this authority to allow release "when . . . the detention of the minor is not required either to secure timely appearance before an immigration judge, or to ensure the minor's safety or that of others."[16] The Proposed Rules, however, would permit release only in the event of "a medical necessity or a law enforcement need."[17]

Introduction

Executive Order 12,866 requires an assessment of costs and benefits for all significant regulatory actions.[18] Such an assessment must be based "on the best reasonably obtainable scientific, technical, economic, and other information," must include non-monetary effects, and must consider regulatory alternatives.[19] Longstanding guidance on regulatory analysis

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[12] 8 U.S.C. § 1232(c)(2)(A).

[13] *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015), *aff'd*, *Flores v. Lynch*, 828 F.3d. 898, 902-03 (9th Cir. 2016) (holding that the FSA's application to all alien minors was "unambiguous" but reversing the district court's holding that the accompanying parents had to be released as well). Note that DHS still disputes the correctness of the court's holding that the *Flores* agreement applies to accompanied minors as well as unaccompanied ones. 83 Fed. Reg. at 45,491 n.4.

[14] *See Flores v. Lynch*, 212 F. Supp. 3d at 914 (C.D. Cal. 2015).

[15] 8 U.S.C. § 1182(d)(5)(A).

[16] 83 Fed. Reg. at 45,502.

[17] *Id.*

[18] Exec. Order No. 12,866 § 6(c), 58 Fed. Reg. 190 (Oct. 4, 1993).

[19] *Id.* § 1(b)(6)-(7).

from the Office of Management and Budget ("OMB") similarly instructs agencies that a "good regulatory analysis" will include an evaluation of the "quantitative and qualitative" benefits and costs of a proposed action, as well as identified alternatives.[20] OMB further advises that "when there are important non-monetary values at stake, [the agency] should also identify them in [its] analysis."[21]

Here, the cost-benefit analysis prepared by Departments is deficient in at least five respects. First, the Departments do not adequately consider the costs to the government that will result from increased use of FRCs—despite the fact that these costs are relatively easy to quantify given data the Departments already have. Second, the Departments fail to consider significant non-financial costs to children who will be detained for longer periods of time under the Proposed Rule. Third, the Departments fail to support their claims regarding the Proposed Rule's benefits. Fourth, the Departments do not describe identified regulatory alternatives with any specificity, much less analyze them to the extent necessary to evaluate them in comparison with the Proposed Rule. Lastly, the Proposed Rule has been improperly classified as "other significant" rather than "economically significant." Under Executive Order 12,866, an economically significant rule requires a more rigorous cost-benefit analysis in which effects must be quantified wherever possible. The Departments' analysis should be subjected to this higher analytical standard.

Separate from the requirements of Executive Order 12,866, courts have held that "[w]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."[22] For example, an agency may not "promot[e] possible benefits while ignoring their costs."[23]

Here, the Departments have "inconsistently and opportunistically framed" the economic impacts of the Proposed Rule by failing to quantify its financial costs to the government, ignoring entirely its non-financial costs to detained children, and making unsupported

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[20] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 at 2 (2003).

[21] *Id*. at 3.

[22] *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious standard requires agency to "examine the relevant data" and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).[22]

[23] *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs" of an action).

claims regarding its benefits.[24] Finalizing the Proposed Rule in reliance on this flawed cost-benefit analysis would be arbitrary and capricious.

I. The Departments Do Not Adequately Consider the Proposed Rule's Costs to the Government

The Departments offer no estimate of the financial costs to the U.S. government that will result from longer periods of detention for accompanied minors and their families in FRCs. Currently, families detained in FRCs are held for an average of less than 15 days.[25] Under the Proposed Rule, the Departments concede that "detention would be extended for some categories of minors and their accompanying adults."[26] Yet the Departments do not even attempt to estimate how many minors and adults will be affected by the Proposed Rule, for how many additional days they will be detained, or how many additional FRCs will need to be licensed to meet this increased demand. The Departments point to the "uncertainty surrounding estimating an increased length of stay and the number of aliens this may affect,"[27] but courts have made clear that uncertainty regarding the magnitude of a regulatory effect does not justify excluding it from an agency's cost-benefit analysis.[28]

With data the Departments already have, a rough quantification of potential costs to government should be relatively straightforward. First, the Departments have data on the number of accompanied minors who arrived in the U.S. in past years and were released with a parent or released to other family members while their parent remained in detention. The Departments estimate that 2,787 minors who were released during Fiscal Year 2017 would have been detained under the Proposed Rule.[29]

Further, the Departments have data on current fixed costs associated with maintaining FRCs and additional, variable costs. The three currently operating FRCs—Berks, Dilley, and Karnes—hold a total of 3,326 beds.[30] The monthly fixed costs charged by the FRCs are not listed in the Proposed Rule, but using those numbers, the Departments can calculate average daily housing costs for each detained person.[31] Variable costs include a general $16

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[24] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (chastising agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule").

[25] 83 Fed. Reg. at 45,512.

[26] *Id.* at 45,518.

[27] *Id.* at 45,519.

[28] *See* Ctr. for Biological Diversity, 538 F.3d at 1200 ("While the record shows that there is a range of values [for the cost of carbon emissions], the value . . . is certainly not zero."); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

[29] 83 Fed. Reg. at 45,512.

[30] *Id*.

[31] *Id*. at 45,519.

per-person, per-day fee at Berks, as well as a $75 per-student, per-day fee for education at Karnes and a $79 per-student, per-day fee for education at Berks.[32]

Finally, the Departments have data on the average length of time for which minors and accompanying family members were held in FRCs prior to the 2015 court decision holding that the FSA's 20-day limit on detention in unlicensed facilities applies to accompanied minors. Presumably, if the state licensing requirement is eliminated and accompanied minors can be held indefinitely in FRCs, DHS will revert to its pre-2015 practices.[33]

Together, the above statistics should provide the foundation for a quantitative estimate of the likely costs of detaining minors and family members who would be released in the absence of the Proposed Rule.[34] Indeed, a recent report from the Center for American Progress relied on similar data to estimate that the Proposed Rule would increase annualized detention costs for DHS by between $201 million and $3.1 billion.[35] The Departments are, of course, free to disagree with the conclusions of this analysis, so long as they can provide adequate evidentiary support for their own position. The Departments cannot, however, disclaim any responsibility to estimate the Proposed Rule's budgetary impacts.

II. The Departments Fail to Consider the Proposed Rule's Significant Non-Financial Costs to Detained Children

In addition to failing to estimate the Proposed Rule's financial costs to the government, the Departments largely ignore the significant non-financial costs that lengthier detentions will impose on detained minors. Executive Order 12,866 explains that an assessment of a rule's costs should include not just "cost . . . to the government in administering the regulation," but also "any adverse effects on . . . health, safety, and the environment" that the rule may cause.[36] The Supreme Court has similarly made clear that "cost includes more than the expense of complying with regulations" and that "any disadvantage could be termed a cost."[37] But in the cost-benefit analysis for the Proposed Rule, the Departments make only

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[32] *Id*. at 45,513. At Dilley, there is a fixed monthly cost for educational services of $342,083.

[33] Alternatively, the Departments could look to the average number of days for which adults are currently detained pending removal proceedings. By eliminating the FSA's time limit on the detention of accompanied minors in unlicensed facilities, the Proposed Rule could result in accompanied minors and their families being held, on average, for the same amount of time as detained adults.

[34] *Id.* at 45,512.

[35] PHILIP E. WOLGIN, CTR. FOR AM. PROGRESS, THE HIGH COSTS OF THE PROPOSED *FLORES* REGULATION 2 (2018), https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation.

[36] Exec. Order No. 12,866 § 6(a)(3)(C)(ii).

[37] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (internal quotation marks omitted).

one, fleeting mention of "costs to the individuals being detained," without any discussion of the nature of these costs or their magnitude relative to the Proposed Rule's benefits.[38]

Minors detained in FRCs are at risk for many physical and psychological harms.[39] At some FRCs, including Berks, sexual abuse has been reported.[40] In 2018, psychologists and pediatricians visited Berks and produced a report finding that long-term confinement led to "symptoms of depression, behavioral regression and anxiety" in children they saw.[41] A study analyzing the detention of asylum-seeking children in Australia reported similarly sobering findings as to the psychological effects of detention:

> Among children aged less than 5 years, developmental delays were common. Out of ten such children, half had delays in language and social development. Emotional and behavioural dysregulation as well as attachment problems were observed. Among the children in the older age range (6–17 years) mental health difficulties were extensive. All ten of these children met clinical criteria for PTSD. In addition, all ten had major depression and expressed suicidal ideation. Eight children had actually engaged in self-harm and the authors noted that a culture of self-harm existed within the detention centre. Seven had symptoms of anxiety disorder and half had persistent physical health symptoms. Children regularly reported boredom, a sense of injustice, sleep difficulties, anxiety regarding delays in educational progress and a sense of shame.[42]

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[38] 83 Fed. Reg. at 45,520.

[39] *See generally* Katy Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. PSYCHIATRY 306 (2009) (reviewing ten studies that reported anxiety, depression, and post-traumatic stress disorder and noting that time in detention was positively correlated with severity of distress).

[40] Jacob Pramuk, *A Controversial Detention Center in Pennsylvania Could Be a Model as Trump Looks to Detain Migrant Families Together*, CNBC (July 17, 2018, 3:19 PM), https://www.cnbc.com/2018/07/17/berks-county-pennsylvania-detention-center-could-be-model-for-trump.html ("In 2016, a guard was convicted of sexually assaulting a 19-year-old woman at the facility. A child witnessed it."); *cf.* Michael Grabell & Topher Sanders, *Immigrant Youth Shelters: 'If You're a Predator, It's a Gold Mine'*, PROPUBLICA (July 27, 2018), https://www.propublica.org/article/immigrant-youth-shelters-sexual-abuse-fights-missing-children (noting that police have responded to at least 125 calls reporting sex offenses at HHS shelters serving immigrant children).

[41] Renée Feltz, *Mothers at US Immigration Center on Hunger Strike to Protest Year in Custody*, GUARDIAN (Aug. 15, 2016), https://www.theguardian.com/us-news/2016/aug/15/ immigration-women-hunger-strike-pennsylvania-berks-county.

[42] Sarah Mares & Jon Jureidini, *Psychiatric Assessment of Children and Families in Immigration Detention Clinical, Administrative and Ethical Issues*, 28 AUST. & N.Z. J. PUB. HEALTH 520, 526 (2004), https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-842X.2004.tb00041.x. This study involved 16 adults and 20 children who were detained at the time of the study and had been in detention for 1–2 years at the time of the first interview. The study also included a follow-up interview for five families at 12 months. All participants were interviewed by child psychiatrists or allied health clinicians and consensus diagnoses were made.

In addition to harming mental health, prolonged detention risks reducing educational outcomes for minors over the short and long term. While ICE requires educational programs in these detention centers, anecdotal reporting suggests that these programs provide far from ideal instruction.[43]

By extending the length of time for which accompanied minors can be detained in FRCs, the Proposed Rule will likely put them at greater risk of the aforementioned physical, psychological, and educational harms. The Departments' failure to acknowledge or assess these non-financial costs is arbitrary and capricious,[44] particularly in light of the Departments' emphasis on the Proposed Rule's non-financial *benefits*, like "family unity" and the desire for a unified legal regime.[45]

III. The Departments Provide No Evidentiary Support for Their Claims Regarding the Proposed Rule's Benefits

In justifying their intent to increase the use of family detention, the Departments claim that immigrants released from custody are currently failing to appear for court hearings, but they cite no apposite evidence to support this assertion. The Proposed Rule contends:

> In many cases, families do not appear for immigration court hearings after being released from an FRC, and even when they do, many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders.[46]

Yet elsewhere the Departments acknowledge that they lack data to substantiate this claim, noting that "statistics specific to family units have not been compiled."[47]

In lieu of relevant data, the Departments link to a misleading chart that shows only that *in absentia* removal orders are issued at a higher rate in unaccompanied minor cases than in

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[43] *Cf.* Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights*, 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 (relating that, at a facility associated with HHS, five-year-old Helen was "given a pack of crayons and spent the summer coloring patriotic images: busts of George Washington and Abraham Lincoln, the torch on the Statue of Liberty" and was "granted an hour of 'Large Muscle Activity and Leisure Time' each day").

[44] *See Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

[45] For a discussion of these purported benefits, see *infra* Section III.

[46] 83 Fed. Reg. at 45,520.

[47] *Id.* at 45,504.

other immigration proceedings.[48] But this data concerns *unaccompanied* minors, and the Proposed Rule does not purport to address the failure of such minors to appear at hearings. Thus, this chart does not at all support the Proposed Rule.

Additionally, the Departments claim that "family unity" is a benefit of the Proposed Rule. However, the Departments already have a mechanism that they have long used to promote family unity in this context—releasing families together from custody. The Departments do not explain what their current policy is with regard to how often accompanied minors are released with their parents or guardians and how often accompanied minors are released alone to live with a relative or family friend. In other words, it is not altogether clear how much "family unity" is present in the baseline. Furthermore, the benefits of family unity are neither described nor clearly weighed against the presumptive alternative of unity with a relative or family friend.

Finally, Departments claim that it is desirable to have a unified legal regime governing minors and parents. While the Departments provide no clear evidence of the intrinsic benefits of a unified legal regime, if a unified legal regime is in itself better, the same uniformity can be achieved by the opposite policy. That is, *releasing* these families from detention would achieve the purported benefits—promoting family unity and simplifying the legal regime—at a far lower cost both to the government and to detainees. Needless to say, the Departments know this policy is a feasible alternative, as it was employed in the recent past.

The Departments may be implicitly arguing that increased family detention will stop undocumented parents from traveling to the U.S. with minors in the first place.[49] But they have not supported this claim.[50] Moreover, even if it were true, the Departments would need to consider the countervailing risk that this new policy could result in minors making this journey without their parents, making them even more vulnerable to the attendant dangers.

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[48] *See* Comparison of *In Absentia* Rates, Executive Office for Immigration Review, Department of Justice, https://www.justice.gov/eoir/file/1083096/download.

[49] 83 Fed. Reg. at 45,493.

[50] *See* TOM K. WONG, CTR. FOR AM. PROGRESS, DO FAMILY SEPARATION AND DETENTION DETER IMMIGRATION? 2 (2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/familyseparation-detention-deter-immigration/ (finding "no statistically significant decrease in apprehensions of families at the border after the widespread expansion of family detention in July 2014").

IV. The Departments Do Not Adequately Describe or Analyze Regulatory Alternatives

Executive Order 12,866 requires agencies to perform cost-benefit analyses for "potentially effective and reasonably feasible alternatives" and explain "why the planned regulatory action is preferable to the identified potential alternatives."[51] Here, the Departments discuss two alternatives: "no regulatory action" and "comprehensive regulation." However, neither of these alternatives is described or analyzed in any specificity. The Departments offer only a perfunctory paragraph for each alternative and provide no quantitative analysis. Moreover, on a more basic level, these alternatives may not be the relevant alternatives that should be analyzed: if the Departments are attempting to solve the problem that detainees are (allegedly) failing to appear for their hearings, then they should consider alternatives that target this problem.

The first alternative, "no regulatory action," lacks any substantive description or analysis. Though it is not described in any depth, this alternative appears to be identical to the current practices that "[t]he Departments [have] been engaged in . . . prior to proposing the rule."[52] As briefly discussed *supra* in Section III, however, the Departments do not clearly explain their current practices with respect to the release or detention of accompanied minors. In the absence of the Proposed Rule, how often would accompanied minors be released with the parents or guardians who accompanied them into the United States, and how often would they be released alone to a relative or friend? Without clearly establishing this baseline, the Departments cannot accurately measure how the Proposed Rule differs in its costs and benefits.

Furthermore, the Departments' analysis of why the status quo is unsatisfactory consists largely of a complaint that it "require[s] the government to operate through non-regulatory means in an uncertain environment subject to currently unknown future court interpretations of the FSA that may be difficult or operationally impracticable."[53] But agencies *always* operate under uncertainty as to Article III courts' future interpretations of the law. This argument is nothing more than a complaint about our constitutional system of separation of powers. Also, even if this were a legitimate complaint, promulgating a regulation does not solve the problem: rules such as the one proposed here are subject to judicial review under the Administrative Procedure Act to ensure their legality.

In discussing the second supposed alternative, "comprehensive regulation," the Departments do even less explanatory work, saying only that they "considered proposing within this regulatory action additional regulations addressing further areas of authority

[51] Exec. Order No. 12,866 § 6(C)(iii).
[52] 83 Fed. Reg. at 45,520.
[53] *Id.*

under the TVPRA, to include those related to asylum proceedings for unaccompanied alien children."[54] The Departments may be implying that this "comprehensive" alternative involves extending detention for *unaccompanied* minors as well, but it is unclear.[55] What would these comprehensive regulations involve? What would their costs and benefits be? Instead of attempting to answer these questions, the Departments summarily dismiss them in order to "focus" on the Proposed Rule.[56]

Also, as discussed above, the Departments have adduced no causal link, or even correlation, between releasing minors and failure to appear for court hearings. But even supposing there *were* such a link, the alternatives would need to, at a minimum, address ways to solve *that* problem. If low attendance at hearings is the problem, then the regulatory alternatives should be focused on boosting attendance. Possible solutions might be an improvement in the method by which released minors and their family members are tracked, or an improvement in information-sharing procedures across relevant federal agencies. The Departments should explain why these potential solutions would not achieve the same goal at a lower cost.

V. The Proposed Rule Should Be Classified as an "Economically Significant" Regulatory Action

According to the Departments, OMB has designated the Proposed Rule as an "other significant" regulatory action.[57] However, the Proposed Rule likely qualifies as an *economically* significant regulatory action and, as such, should be accompanied by a more rigorous cost-benefit analysis.

Under Executive Order 12,866, a regulation is "economically significant" if it is expected to "have an annual effect on the economy of $100 million or more."[58] The costs of the Proposed Rule likely exceed this threshold. As discussed above, a Center for American Progress analysis estimates that increased family detention resulting from the Proposed Rule would cost between $201 million and $3.1 billion annually.[59]

Additionally, even if a regulatory action's projected impacts are under the $100 million annual threshold, the action nevertheless qualifies as economically significant under

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[54] *Id.*

[55] If that is the implication, it should be noted in passing that such a rule would have *far* higher costs and, needless to say, could not be justified on the basis of "family unity."

[56] 83 Fed. Reg. at 45,520.

[57] *Id*. at 45,510. Exec. Order No. 12,866.

[58] Exec. Order No. 12,866 §3(f).

[59] PHILIP E. WOLGIN, CTR. FOR AM. PROGRESS, THE HIGH COSTS OF THE PROPOSED *FLORES* REGULATION 2 (2018), https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation.

Executive Order 12,866 if it "adverse[ly] affect[s] in a material way . . . public health and safety."[60] The Proposed Rule's significant physical, psychological, and educational costs to detained minors, discussed *supra* in Section II, should satisfy this requirement.

Under Executive Order 12,866, agencies have a higher burden with respect to cost-benefit analysis of economically significant rules. An agency proposing an economically significant action must provide "an assessment, including the underlying analysis, of benefits anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those benefits."[61] The agency must also prepare "an assessment, including the underlying analysis, of costs anticipated from the regulatory action . . . including, to the extent feasible, a quantification of those costs."[62] As shown above, the analysis accompanying the Proposed Rule does not satisfy these requirements.

That said, the Departments' responsibility to correct the aforementioned flaws in their cost-benefit analysis is not contingent on the Proposed Rule's classification as economically significant. The analysis provided by the Departments is below the standards required even for an "other significant" rule.

Respectfully,

Tim Duncheon
Jack Lienke
Gerald Shalam
Avi Zevin

[60] Exec. Order No. 12,866 §3(f).
[61] *Id*. § 6(C)(i).
[62] *Id*. § 6(C)(ii).