



The High Costs of the Proposed *Flores* Regulation

By Philip E. Wolgin

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In early September—in the midst of a family separation crisis of its own making, and with hundreds of children still separated from their parents¹—the Trump administration published a notice of proposed rulemaking² to dissolve the two-decades-old *Flores* settlement, which sets standards for the treatment of children in immigrant detention.³ At its most basic, the proposed rule would provide the Trump administration with a way to get around the requirement that children not be kept in secure, unlicensed detention facilities for more than 20 days.⁴ This requirement, and the *Flores* settlement in general, has, to date, prevented the Trump administration from indefinitely incarcerating children alongside their parents in unsafe, inappropriate conditions.

The Department of Homeland Security (DHS) has previously tried and failed to get its family incarceration facilities—known as “family residential centers” (FRCs)—licensed by an appropriate state agency, as required by the settlement.⁵ Likewise, DHS has tried and failed to get the judge overseeing the *Flores* settlement to let it out of the licensing requirement with respect to children detained with a parent, which would make it possible for the department to detain accompanied children indefinitely.⁶ Now, rather than continue to pursue state licensing, the Trump administration has proposed a rule that would allow DHS itself to pursue “alternative licensing.”⁷ Under the proposed rule, the department would be authorized to write its own standards and identify its own external auditors, who would then be charged with certifying that these facilities can reasonably hold and protect children. Given that, as recently as June 2018, the DHS inspector general found that “ICE’s inspections and monitoring of detention facilities do not lead to sustained compliance or systemic improvements,”⁸ and given the widespread abuses already occurring in family detention,⁹ DHS should not be granted new authority to certify conditions for the protection of children in its own facilities.

In the proposed rule, the administration is clear that the DHS “alternative licensing process” may extend the detention of some children—along with their parents—in family incarceration facilities.¹⁰ However, the proposed rule fails to mention the ample research that demonstrates that incarcerating children for any length of time is detrimental to their health and well-being.¹¹ Put simply, children should not be locked up.¹²

The Trump administration has at its disposal a range of alternatives to detention that are far more humane and cost a fraction of what it takes to incarcerate someone while still ensuring that families complete the legal process to make their case for protection.¹³ With this proposed rule, DHS is choosing to pursue maximum detention at maximum cost—and with minimal oversight.

In publishing its proposed rule, the Trump administration declined to estimate the potential costs, even though this is required under a long-standing executive order.¹⁴ For example, while DHS argues that children and parents would likely be held for longer under the proposed rule, it states that “ICE is unable to estimate how long detention would be extended for some categories of minors and their accompanying adults.”¹⁵ In essence, the proposed rule argues that historical data on the number of people kept in custody, their average lengths of stay, and more are subject to too many external factors to use for future projections. DHS also does not project the number of additional family facilities it might build once freed from the requirement to seek state licensing. Yet the logic of the proposed rule implies that, in order to hold more family members, the department would need to obtain more bed space than the current 3,326-person capacity of its three existing facilities.¹⁶

In the proposed rule, DHS presents data from as recently as fiscal years 2014 and 2015, before a federal court affirmed that the *Flores* protections apply to children held in family detention. These data provide a clear window into what a world without *Flores* might look like. Given the available data, the administration’s excuses for not attempting a cost estimate of the proposed rule appear weak at best.¹⁷

This issue brief runs the numbers on what the implementation of the proposed rule would likely cost DHS. It first calculates DHS’ additional detention bed space needs once the department is freed from the current 20-day limitation, putting a dollar figure on just how expensive these additional beds would be. The brief then estimates how many new family residential centers the department would need to acquire in order to hold these additional children and families, before calculating the start-up costs of these new facilities. Finally, while the government has not released enough data to calculate the proposed rule’s potential costs to the Department of Health and Human Services (HHS)—particularly the Office of Refugee Resettlement (ORR), which is charged with the care and custody of unaccompanied children—the brief details some of the ways in which HHS could also incur high costs.

Proposed rule could cost DHS as much as \$12.9 billion

Using the government’s own data, the Center for American Progress estimates that, over a decade, the proposed rule would cost DHS slightly more than \$2 billion at the low end, and as much as \$12.9 billion at the high end.¹⁸ On an annualized basis, the low-end estimate would cost \$201 million each year, and the high-end estimate would cost slightly less than \$1.3 billion each year.

These costs include two parts: first, annual costs from the additional detention beds that would be necessary under the rule as more children and parents are detained together for longer; second, one-time start-up costs for DHS to acquire additional family residential centers in order to incarcerate these children and parents for longer. These calculations do not take into account any costs to HHS under the rule, which could easily run into the millions of dollars.

Even under the most conservative estimate, the proposed rule would far exceed the \$100 million threshold by which a regulation would be considered economically significant, thus triggering additional review and analysis—which DHS and HHS declined to undertake.¹⁹ These high costs would also render the proposal a “major rule” under the terms of the Congressional Review Act—a designation that would trigger both a Government Accountability Office (GAO) report prior to the rule’s implementation and additional time before the rule takes effect, giving Congress the opportunity to take action to stop it.²⁰

The proposed Flores rule is unlikely to deter future family members from arriving

In justifying the need for the proposed rule—and with it, the indefinite incarceration of children alongside their parents—the Trump administration has argued that its inability to detain families for longer than 20 days in secure, unlicensed facilities has led to many families being released, thus creating “a powerful incentive for adults to bring juveniles on the dangerous journey to the United States.”²¹ However, as University of California, San Diego professor and CAP senior fellow Tom K. Wong has illustrated, the evidence does not support the idea that overturning *Flores* will serve as a deterrent to future migration. In his analysis of family detention data, Wong found, “The expanded use of family detention is not statistically significantly related to decreases in the monthly number of U.S. Border Patrol apprehensions of families at the southwest border.”²² Likewise, Wong’s research finds no statistically significant increase in apprehensions of families at the border after July 2015. This finding disproves DHS’ claims in the proposed rule that the court ruling—which confirmed that the terms of the *Flores* agreement applied to accompanied children in family incarceration—has led to more families coming to the United States.²³

In addition, it is unlikely that overturning the *Flores* settlement will lead to fewer children and families seeking asylum in the United States, given the harrowing conditions in countries like El Salvador and Honduras that are pushing people to seek protection here.²⁴ For these reasons, the analysis in this brief assumes that future migration patterns will continue apace.²⁵

Additional bed costs under the *Flores* rule

Under the proposed rule, there are at least two ways that U.S. Immigration and Customs Enforcement (ICE) could incur higher costs relating to the detention of children and families in family residential centers:

- Costs that stem from detaining people for longer than they are currently being held
- Costs that stem from detaining more people than are currently being held

In estimating additional bed costs under the *Flores* rule, the Center for American Progress considered two scenarios.

Scenario 1

In Scenario 1, the overall number of children and families stays largely the same as it was in FY 2017—the most recent year for which data are available.²⁶ However, the length of their stay in detention is increased to the historic FY 2014 level. (see the Appendix for more information on the methodology)

Scenario 1 includes four primary assumptions:

1. The number of people booked into FRCs remains the same as in FY 2017, during which 37,825 individuals were incarcerated in family facilities. This assumption is likely conservative, given that significantly more families arrived in FY 2018 than in FY 2017, meaning that the baseline FRC population for FY 2018 is likely higher too.²⁷
2. The length of stay under the rule will revert back to the historical average. In FY 2014, individuals were held in FRCs for 47.4 days, on average.²⁸ This changed after a 2015 ruling from Judge Dolly M. Gee, the district court judge overseeing the *Flores* settlement, which held that children cannot be held in unlicensed secure detention facilities for more than 20 days.²⁹ As of FY 2017, the average length of stay had dropped to only 14.2 days.³⁰ By dissolving the *Flores* settlement and allowing the federal government to self-certify facilities, this analysis assumes that the average length of stay will revert, at a minimum, to FY 2014 levels.³¹
3. DHS estimates that, had the proposed rule been in effect in FY 2017, an additional 2,787 children—including children who received negative credible fear determinations or final orders of removal—would have been held in detention for longer. Although, in the proposed rule, DHS explicitly declines to estimate how much longer these children would be held in FRCs, this analysis assumes that their average lengths of stay would increase to 25 days.³²
4. The daily cost per family detention bed, which ICE estimated in its FY 2019 congressional budget justification, remains the same: \$318.79.³³

Importantly, ICE’s three family residential centers—South Texas Family Residential Center (Dilley), Karnes County Residential Center, and Berks County Residential Center—operate on fixed-cost contracts.³⁴ This means that the price per bed is the same regardless of whether these facilities are half full or at their total capacity of 3,326 beds.³⁵ Therefore, to ensure the most conservative estimates, these calculations assume that ICE begins to incur new costs only after it reaches maximum capacity—in other words, only for the 3,327th bed and beyond.

Under Scenario 1, the annual additional detention costs under the rule would be slightly more than \$194 million. (see Appendix for more details)

That being said, the proposed rule would not simply allow the administration to hold children and families for longer; it would also allow them to detain a much greater number of families. Members of the Trump administration, such as Attorney General Jeff Sessions and Secretary of Homeland Security Kirstjen Nielsen, have been clear that their goal is to apply the maximum consequences to the maximum number of people.³⁶ However, a key restraint in their ability to do so has been the 20-day limitation for holding children in secure, unlicensed facilities. Without this, there is every reason to believe the administration will pursue widespread incarcerations.

Scenario 2

For this reason, Scenario 2 assumes that every person arriving in a family unit is incarcerated and that their length of stay is increased to the historical FY 2014 level. Under this scenario, ICE would need significantly more detention beds than it currently has; in FY 2018, 107,063 people were apprehended in family units.³⁷ As such, the annual additional detention costs under the rule would be as high as \$1.24 billion. (see Appendix)

It is important to note that both of these scenarios envision that the government reverts back to FY 2014 lengths of stay. However, if the Trump administration even increases the time that families stay in detention past the 47.4-day mark, the costs enumerated above would only increase.

The cost of new family residential centers

Because both of the above scenarios go above the current 3,326-family-detention-bed capacity, ICE would inevitably have to either build or acquire new family residential centers.³⁸ However, in the proposed rule, DHS abdicates its responsibility to estimate the cost of new facilities, simply stating that it “is unable to determine how the number of FRCs may change due to this proposed rule.”³⁹

To estimate the cost to ICE of acquiring new bed space, this analysis uses the number of additional detention beds identified in the two scenarios above and calculates the costs based on the two most reasonable routes that ICE can take: one, acquiring new facilities that look more like the Karnes County Residential Center—which has

830 beds—or two, acquiring facilities that look more like the Dilley, which has 2,400 beds.⁴⁰ The conversion of the Karnes facility to an FRC cost \$36 million,⁴¹ and the opening of the Dilley facility cost \$104 million.⁴²

At the lowest end, acquiring the new facilities needed to detain additional families—as estimated above—would require one-time start-up costs of at least \$72 million and as much as \$520 million at the highest end.

Under Scenario 1—where the number of people in family incarceration largely stays the same as in FY 2017, but the lengths of stay increase—ICE would need to acquire 1,669 new family detention beds annually, on top of its current maximum capacity.⁴³

- If ICE chooses to build facilities the size of Karnes in order to house these additional detention beds, it would require two new FRCs, at a total start-up cost of \$72 million.
- If ICE chooses to build facilities the size of Dilley, it would require one new FRC, at a start-up cost of \$104 million.⁴⁴

Under Scenario 2—where ICE detains every person in a family unit and detains them for longer—ICE would need to acquire 10,660 new family detention beds annually, on top of its current maximum capacity.⁴⁵

- If ICE chooses to build facilities the size of Karnes, it would require 13 new FRCs, at a total start-up cost of \$468 million.
- If ICE instead chooses to build facilities the size of Dilley, it would require five new FRCs, at a total start-up cost of \$520 million.⁴⁶

Potential additional costs to HHS

The calculations above only estimate detention costs to ICE to implement the proposed rule. In addition, however, HHS—and particularly the ORR, which runs the Unaccompanied Alien Children program—would likely incur new costs under the proposed rule. While HHS has not provided sufficient data to estimate a dollar figure for these additional costs, it is important to note that, if the rule goes into effect, these costs would nonetheless be incurred.

Over the past year, the ORR's costs have been rising sharply. As *The New York Times* and CNN recently reported, in the past few months, the number of children in ORR care has skyrocketed: from only 2,400 in May 2017 to nearly 13,000 children in custody as of September 2018. Meanwhile, the average length of stay in ORR care has also risen. As of September, the average length of stay was 59 days, compared with 48 days in FY 2017.⁴⁷

These increases are not due to a new influx of unaccompanied children entering the country. Rather, under the Trump administration, the ORR is releasing far fewer unaccompanied children to sponsors, and an agreement between ICE and HHS to share information on potential sponsors is having a chilling effect on these sponsors coming forward.⁴⁸ Just between July and late September, ICE arrested 41 potential sponsors.⁴⁹ Rather than have sponsors assume the burden of caring for these children as they await their day in court to make their claim for asylum or other forms of relief from deportation, the government is keeping these children in custody at high costs.

To deal with the rising numbers of children being held in custody, the Trump administration recently announced that it would triple the size of an emergency tent city in Tornillo, Texas.⁵⁰ However, at \$750 per bed, per day, the emergency facility's beds cost nearly three times more than nonemergency ORR shelter beds.⁵¹ To pay for these additional costs, in early September, HHS Secretary Alex Azar sent a letter to Congress stating his intention to take \$266 million away from programs such as the National Cancer Institute and the Ryan White HIV/AIDS program.⁵²

Beyond the higher costs that HHS is already bearing, there is reason to believe that the proposed rule would impose even greater burdens. In particular, the rule makes a series of changes to when and how unaccompanied alien children (UACs) can be held in secure facilities, which function more like juvenile jails than shelters.

In section 410.203 of the proposed rule, HHS sets out the criteria for placing children in secure facilities. It expands the population of children who might be placed in these facilities to include any child who “engages in unacceptably disruptive behavior that interferes with the normal functioning” of the shelter, as well as any child that “displays sexual predatory behavior.”⁵³ A separate section of the proposed rule—Proposed 8 CFR 236.3(n)—gives HHS new authority to “reassum[e] custody of previously released minors if they become an escape-risk, become a danger to the community, or are issued a final order of removal after being released.”⁵⁴

Based on information HHS has made publicly available, it is impossible to know how many more children would be placed in secure facilities because of these sections of the proposed rule. However, placing children in secure facilities could lead to large costs. For example, secure bed space in the Yolo County Juvenile Detention Center in California costs \$651 per bed, per day—more than 2.5 times the cost of the average ORR shelter bed.⁵⁵ Not only are these beds more expensive, but on average, children spend nearly four times longer in secure facilities.⁵⁶ In total, given the higher per-bed costs and much longer lengths of stay, the cost to hold one child in secure care is nearly 10 times the cost to hold a child in regular shelter care.⁵⁷

HHS argues that it “does not expect this proposed rule to impose any additional costs” related to increased detention in ORR facilities.⁵⁸ However, given the likelihood that costs will, in fact, rise for the ORR, HHS needs to make a full accounting of what the proposed rule will likely cost.

Conclusion

Altogether, at the lowest end, the proposed rule to dissolve the *Flores* settlement would cost DHS slightly more than \$2 billion over a decade. This would include \$194 million annually in additional detention bed space and start-up costs of at least \$72 million. Meanwhile, at the highest end, this rule would cost DHS an astronomical \$12.9 billion over a decade—including \$1.24 billion annually in additional detention bed space and a one-time start-up cost of \$520 million. Given the cost to the government, as well as the incalculable harm of this mass incarceration to children and families, the Trump administration must not move forward with this rule.

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Appendix

This appendix explains how the cost estimates above were calculated.⁵⁹

Definitions and acronyms

Average daily population (ADP): the average number of people in detention on any given day

Average length of stay (ALOS): the average number of days that an individual stays in a detention facility, from the time they are booked in to the time they are released

Family residential center (FRC): ICE's name for family incarceration facilities

Unaccompanied alien child (UAC): the term for an individual under the age of 18 who lacks lawful immigration status and arrives, or is apprehended, in the United States without a parent or legal guardian⁶⁰

Scenario 1: Current detainees are held for longer

The formula for calculating the costs for added detention is as follows:

Scenario 1 Cost = (New ADP - FRC Current Capacity) × Cost Per Detention Bed × 365 Days.

$$\text{Scenario 1 Cost} = \$194,100,000 = (4,995 - 3,326) \times \$318.79 \times 365$$

Breaking this down, calculating New ADP is the sum of three parts:

$$\text{New ADP} = 4,995 = \text{FY 2017 ADP} + \text{Total Additional ADP A} + \text{Total Additional ADP B}$$

In this case, the FY 2017 ADP of 1,472 is extrapolated from the fact that 37,825 family members were booked into FRCs in FY 2017, with an average length of stay of 14.2 days.

$$\text{FY 2017 ADP} = 1,472 = (37,825 \times 14.2) / 365 \text{ Days}$$

To get to Additional ADP A, we assume that each of the 37,825 people booked into an FRC in FY 2017 would have their stay lengthened from 14.2 days to the FY 2014 historical average of 47.4 days.

Thus:

$$\text{Additional ADP A} = 3,441 = (37,825 \times (47.4 - 14.2)) / 365 \text{ Days}$$

To get to Additional ADP B, we take the four groups of children who DHS estimates would have been held for longer in FY 2017 had the rule been in place—a total of 2,787 children—and estimate that their average length of stay would be increased from 14.2 days to a total of 25 days.⁶¹

Thus:

$$\text{Additional ADP B} = 82 = (2,787 \times (25 - 14.2)) / 365 \text{ Days}$$

Scenario 2: Every person in a family unit is incarcerated

As with Scenario 1, the formula for costs in this scenario is as follows:

Scenario 2 Cost = (New ADP - FRC Current Capacity) × Cost Per Detention Bed × 365 Days.

$$\text{Scenario 2 Cost} = \$1,240,400,000 = (13,986 - 3,326) \times \$318.79 \times 365$$

Here, the New ADP is much higher since the assumption is that all children and families who arrive together are put into family detention, at longer lengths of stays.

$$\text{New ADP} = 13,986 = \text{FY 2018 ADP} + \text{Total Additional ADP B}$$

In this scenario, the FY 2018 ADP is calculated as follows: In FY 2018, U.S. Customs and Border Protection apprehended 107,063 people in family units.⁶² This number is then multiplied by the FY 2014 ALOS of 47.4 days as such:

$$FY\ 2018\ ADP = 13,904 = (107,063 \times 47.4) / 365\ Days$$

Additional ADP B, of 82, is calculated as in Scenario 1 above.

10-year and annualized costs

Calculating the total low- and high-end cost to DHS from the proposed rule is as follows:

$$10\text{-Year Costs} = (\text{Cost of Additional Detention Beds} \times 10) + \text{Cost of Acquiring New FRCs}$$

$$\text{Low-end: } \$2,013,500,000 = (\$194,100,000 \times 10) + \$72,000,000$$

$$\text{High-end: } \$12,923,800,000 = (\$1,240,400,000 \times 10) + \$520,000,000$$

$$\text{Annualized Costs} = 10\text{-Year Costs} / 10$$

$$\text{Low-end: } \$201,300,000 = \$2,013,500,000 / 10$$

$$\text{High-end: } \$1,292,400,000 = \$12,923,800,000 / 10$$

Endnotes

- 1 Brie Stimson and Erika Cervantes, "More Than 200 Migrant Children Separated From Parents Still in U.S. Custody," NBC 7 San Diego, September 15, 2018, available at <https://www.nbcsandiego.com/news/local/200-Plus-Migrant-Children-Still-Separated-From-Parents-493389261.html>.
- 2 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register* 83 (174) (2018): 45486–45534, available at <https://www.regulations.gov/document?D=IC-EB-2018-0002-0001>.
- 3 *Jenny Lisette Flores v. Janet Reno*, CV 85-4544 (1997), available at https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf; Human Rights First, "The Flores Settlement: A Brief History and Next Steps," February 19, 2016, available at <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps>.
- 4 Put another way, the proposed rule would allow the administration to get around the 20-day limit without creating facilities that would be safe enough for states to license them. *Jenny Lisette Flores v. Loretta E. Lynch*, CV 85-04544 (2015), available at <https://www.aila.org/File/Related/14111359p.pdf>.
- 5 See, for example, *Grassroots Leadership, Inc. v. Texas Department of Family and Protective Services (DFPS)* D-1-GN-15-004336 (2006), available at https://grassroots-leadership.org/sites/default/files/uploads/gli_v_dfps_final_judgment.pdf; Human Rights First, "Texas Judge Denies Licenses to Family Detention Facilities," Press release, December 5, 2016, available at <https://www.humanrightsfirst.org/press-release/texas-judge-denies-licenses-family-detention-facilities>. The Berks facility was previously licensed, but the state of Pennsylvania revoked its license in early 2016 since the facility housed not just children but families as well. See letter from Matthew J. Jones of the Pennsylvania Department of Human Services to Diane Edwards of the Berks County Commissioners, January 26, 2016, available at http://services.dpw.state.pa.us/Resources/Documents/Pdf/ViolationReports/20160128_14386.pdf.
- 6 Laura Jarrett, "Federal judge rejects Trump administration's bid to alter rules on detaining minors," CNN, July 10, 2018, available at <https://www.cnn.com/2018/07/09/politics/federal-judge-trump-administration-detaining-children/index.html>.
- 7 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."
- 8 Office of Inspector General, "ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements" (U.S. Department of Homeland Security, 2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.
- 9 Letter from Dr. Scott Allen and Dr. Pamela McPherson to Sen. Chuck Grassley (R-IA) and Sen. Ron Wyden (D-OR) of the Senate Whistleblowing Caucus, July 17, 2018, available at <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf>.
- 10 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."
- 11 Leila Schochet, "Trump's Family Incarceration Policy Threatens Healthy Child Development" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/early-childhood/reports/2018/07/12/453378/trumps-family-incarceration-policy-threatens-healthy-child-development/>.
- 12 In fact, the administration goes so far as to claim that "the proposed rule may in some respects strengthen the stability of the family and the authority and rights of parents in the education, nurture, and supervision of their children, within the immigration detention context." U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."
- 13 Philip E. Wolgin, "Incarcerating Entire Families Cannot Be the Solution to the Separation of Children," Center for American Progress, June 20, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/06/20/452571/incarcerating-entire-families-cannot-solution-separation-children/>.
- 14 Executive Order no. 12866, "Regulatory Planning and Review" (1993), available at https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
- 15 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."
- 16 *Ibid.*
- 17 *Ibid.*
- 18 *Ibid.* All data are from the notice of proposed rulemaking (NPRM), unless otherwise noted.
- 19 Importantly, this estimate directly contradicts the proposed rule, which argues—even as DHS and HHS decline to estimate the potential costs—that "[t]his rulemaking would not result in an annual effect on the economy of \$100 million or more." *Ibid.*; Executive Order no. 12866, "Regulatory Planning and Review."
- 20 See (names redacted), "The Congressional Review Act: Frequently Asked Questions" (Washington: Congressional Research Service, 2016), available at https://www.everycrsreport.com/files/20161117_R43992_884558f6ea0b211468900ccb8039b6369b75a6e.pdf.
- 21 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."
- 22 Tom K. Wong, "Do Family Separation and Detention Deter Immigration?" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>.
- 23 See Tom K. Wong, "Did a 2015 *Flores* Court Ruling Increase the Number of Families Arriving at the Southwest Border?," Center for American Progress, October 16, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>.
- 24 Silva Mathema, "They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/>; Binh X. Ngo, "Women and LGBTQ Deportees Face Compounded Dangers Upon Return," Center for American Progress, August 10, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/08/10/454637/women-lgbtq-deportees-face-compounded-dangers-upon-return/>.
- 25 See U.S. Customs and Border Protection, "Southwest Border Migration FY2018," available at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed October 2018).
- 26 On September 20, 2018, CAP submitted a Freedom of Information Act request for the relevant FY 2018 statistics. We have yet to receive the data from ICE.

- 27 In FY 2017, 75,622 people arrived in family units, 37,825—or 50 percent—of which were sent to FRCs. In FY 2018, 107,063 people were apprehended in family units. At the same 50 percent referral rate, this means that 53,532 people would have been sent to FRCs in FY 2018. Given that the calculations in Scenario 1 are based on the lower FY 2017 figures, it is reasonable to believe that the costs would be higher, based on FY 2018 data. See U.S. Customs and Border Protection, “Southwest Border Migration FY2017,” available at <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (last accessed September 2018). October through August FY 2018 data from U.S. Customs and Border Protection, “Southwest Border Migration FY2018.” September FY 2018 data are preliminary numbers released to *Politico*. See Ted Hesson, “Trump administration considers family separation option as border arrests soar,” *Politico*, October 12, 2018, available at <https://www.politico.com/story/2018/10/12/trump-administration-family-separations-return-846971>.
- 28 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 29 *Jenny Lisette Flores v. Loretta E. Lynch*.
- 30 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 31 These estimates purposefully use the FY 2014 average length of stay (ALOS) of 47.4 days, rather than the slightly lower FY 2015 ALOS of 43.5 days. Since Judge Gee’s ruling came in August 2015, it is reasonable to assume that the FY 2015 ALOS is lower, on an annualized basis, than it would have been without the ruling. Therefore, the FY 2014 numbers are likely the most accurate indication of what lengths of stay would be without the 20-day limit. *Jenny Lisette Flores v. Loretta E. Lynch*; U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 32 There is reason to believe that children with negative credible fear findings or orders of removal, for example, would be kept for longer than the current—FY 2017—average length of stay of 14.2 days, so that they can be processed for deportation, but still for less time than FY 2014’s 47.4-day average length of stay. Twenty-five days roughly splits the difference between these two figures and is in line with anecdotal evidence. See, for example, Ana’s story in Guillermo Cantor and Tory Johnson, “Detained, Deceived, and Deported: Experiences of Recently Deported Central American Families” (Washington: American Immigration Council, 2016), p. 21, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/detained_deceived_deported_experiences_of_recently_deported_central_american_families.pdf.
- 33 U.S. Immigration and Customs Enforcement, “Budget Overview: Fiscal Year 2019, Congressional Justification” (U.S. Department of Homeland Security, 2018), p. 13, available at <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.
- 34 The Karnes and Berks facilities do have additional, variable educational costs per person, and Berks has a small additional per-person cost. Nevertheless, because these costs are included in the average \$318.79 cost per bed provided by DHS, the author chose not to include additional per-person costs for these facilities in his estimates. U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 35 DHS points out that these facilities can be considered at capacity even below 3,326 beds, given the different makeups of family units. For example, if a family comprising three people is placed in a room with four beds, that fourth bed cannot be filled. Nonetheless, with no way to calculate an average maximum capacity based on the changing makeup of families incarcerated in FRCs, the author used the most conservative estimates possible and calculated additional bed needs over the 3,326 current maximum capacity. U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 36 In the spring, for example, DHS and the U.S. Department of Justice announced a zero-tolerance policy with the goal of criminally prosecuting—and detaining—anyone crossing the border without status, including families seeking asylum. While the administration fell short of its goal of 100 percent prosecutions and faced widespread public outrage due to the family separation consequences of the policy, Attorney General Sessions should be taken at his word: The administration’s goal is 100 percent prosecutions and detention. See U.S. Department of Justice, “Attorney General Sessions Delivers Remarks on Immigration Enforcement (April 11, 2018),” available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> (last accessed October 2018); U.S. Department of Justice, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018),” available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (last accessed October 2018); *The New York Times*, “Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript,” June 18, 2018, available at <https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html>; Richard Gonzales, “Sessions Says ‘Zero Tolerance’ For Illegal Border Crossers, Vows To Divide Families,” NPR, May 7, 2018, available at <https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>; Transactional Records Access Clearinghouse, “Zero Tolerance’ at the Border: Rhetoric vs. Reality” (2018), available at <http://trac.syr.edu/immigration/reports/520/>; *The New York Times*, “The Continuing Tragedy of the Separated Children,” August 30, 2018, available at <https://www.nytimes.com/2018/08/30/opinion/family-separation-trump-zero-tolerance.htm>.
- 37 U.S. Customs and Border Protection, “Southwest Border Migration FY2018”; Hesson, “Trump administration considers family separation option as border arrests soar.”
- 38 This is not merely an academic assumption. In late June, just days after President Donald Trump signed an executive order that substituted family separation with family incarceration, the administration took two steps: First, it put out a request for information to “conduct market research and obtain information about pricing, delivery, and other market information” in order to learn more about what it would take to acquire up to 15,000 new family detention beds. Then, DHS asked the U.S. Department of Defense to look into space for up to 12,000 new family detention beds. These actions illustrate that the Trump administration is serious about detaining more children and families. Immigration and Customs Enforcement, “Request for Information-Family Residential Services” (U.S. Department of Homeland Security, 2018), available at https://www.fbo.gov/index?s=opportunity&mode=form&id=d2f0c2388851d8697ae60523b4c09f38&tab=core&_cview=1; The Associated Press, “Officials: DHS asks military for 12,000 beds to detain families,” *Politico*, June 28, 2018, available at <https://www.politico.com/story/2018/06/28/migrant-families-border-detain-beds-680632>; Jolie McCullough and Chris Essig, “The Trump administration is making plans to detain more immigrants in Texas. Here’s where they would be held,” *The Texas Tribune*, August 2, 2018, available at <https://www.texastribune.org/2018/08/02/trump-administration-texas-migrant-detention-facilities-map/>; Executive Order no. 13841, “Affording Congress an Opportunity to Address Family Separation” (2018), available at <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.
- 39 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 40 *Ibid.*
- 41 The Karnes facility was first opened in 2010 as a civil detention facility for adults, before being converted into an FRC starting at the end of 2014. The \$36-million figure represents the GEO Group’s costs to expand and convert it to a larger family facility. See The GEO Group, “The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas,” Press release, December 19, 2014, available at <https://www.businesswire.com/news/home/20141219005408/en/GEO-Group-Announces-626-Bed-Expansion-Karnes-County>; Grassroots Leadership, “GEO Group tells shareholders everything is fine in Karnes family detention center,” Press release, August 5, 2015, available at <https://grassrootsleadership.org/releases/2015/08/geo-group-tells-shareholders-everything-fine-karnes-family-detention-center>.

- 42 The Dilley facility, in particular, was rife with abuse from the beginning. In 2018, the DHS Office of the Inspector General found that ICE had failed to follow federal procurement rules in the creation of Dilley. Instead of working directly with Corrections Corporation of America (CCA)—now CoreCivic—to operate the facility, ICE modified an intergovernmental service agreement (IGSA) with the city of Eloy, Arizona, at an annual cost of \$438,000 to the taxpayers, in order to be a middleman between ICE and CCA. More recently, after a 19-month-old child died just weeks after being released from Dilley, the city of Eloy withdrew from the agreement. Office of Inspector General, “Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Services” (U.S. Department of Homeland Security, 2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf>; Daniel González, “Eloy ends role in deal that let prison company run immigration detention center in Texas,” *The Arizona Republic*, September 26, 2018, available at <https://www.azcentral.com/story/news/politics/immigration/2018/09/26/eloy-exits-deal-let-company-run-immigration-detention-center/1438185002/>. This start-up cost is extrapolated from the original contracted yearly cost for Dilley—\$260 million per year—and the current operating costs of \$156 million per year. The delta between these two numbers is \$104 million. Guillermo Contreras, “Inside the country’s largest immigrant family detention center,” *San Antonio Express-News*, August 12, 2018, available at <https://www.expressnews.com/news/local/article/Inside-the-country-s-largest-immigrant-family-13149672.php>.
- 43 This figure is calculated using the New ADP of 4,995 beds minus the current maximum capacity of 3,326 beds. See Appendix for more information.
- 44 Technically, if ICE chooses to build facilities the size of Dilley, it would require only 70 percent of a new facility. This number is rounded up since one cannot build just 70 percent of a building.
- 45 This figure is calculated using the New ADP of 13,986 beds minus the current maximum capacity of 3,326 beds. See Appendix for more information.
- 46 Technically, it would require 4.44 new facilities the size of Dilley. This number is also rounded up, since one cannot build 44 percent of a building.
- 47 Tal Kopan, “The simple reason more immigrant kids are in custody than ever before,” CNN, September 14, 2018, available at <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>; Caitlin Dickerson, “Detention of Migrant Children Has Skyrocketed to Highest Levels Ever,” *The New York Times*, September 12, 2018, available at <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.
- 48 Ibid.
- 49 Avery Anapol, “ICE arrested dozens of immigrants who tried to sponsor undocumented migrant children,” *The Hill*, September 20, 2018, available at <https://thehill.com/laino/407669-ice-arrested-dozens-of-immigrants-who-tried-to-sponsor-undocumented-migrant-children>.
- 50 As of early October, the administration has moved 1,600 children to the Tornillo facility. *The New York Times* reported that these moves are happening in the middle of the night to a facility with limited access to legal representation and no actual education. Caitlin Dickerson, “Migrant Children Moved Under Cover of Darkness to a Texas Tent City,” *The New York Times*, September 30, 2018, available at <https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html>.
- 51 Cost estimates are based on the current \$255 cost per regular shelter bed versus \$750 per bed for the Tornillo emergency facility. U.S. Department of Health and Human Services, “Fiscal Year 2019: Administration for Children and Families, Justification of Estimates for Appropriations Committees” (2018), available at https://www.acf.hhs.gov/sites/default/files/olab/acf_master_cj_acf_final_3_19_0.pdf; Tal Kopan, “Texas tent facility for immigrant children to expand despite wind-down of separations,” CNN, September 11, 2018, available at <https://www.cnn.com/2018/09/11/politics/hhs-expand-tornillo-tent-facility-immigrant-children/index.html>.
- 52 Leila Schochet and Tom Jawetz, “HHS Plans to Strip Vital Programs of Funding to Hold More Immigrant Children in Custody,” Center for American Progress, September 28, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/09/28/458806/hhs-plans-strip-vital-programs-funding-hold-immigrant-children-custody/>; Nidhi Subbaraman, “The Trump Administration Intends To Cut Cancer Research Funding To Pay For The Care Of Immigrant Children,” BuzzFeed News, September 20, 2018, available at https://www.buzzfeednews.com/article/nidhisubbaraman/cancer-research-cuts-migrant-children?bftwnews&utm_term=4ldqpgc#4ldqpgc.
- 53 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 54 Ibid. While this section is technically part of the DHS portion of the proposed regulation, as the rule states: “The regulations also explain that DHS may take a minor into custody if there is no longer a parent or legal guardian available to care for the minor, at which point the minor will be treated as a UAC and DHS will transfer him or her to HHS,” meaning that, for example, UACs who are deemed a danger to the community could be taken back into custody by DHS, transferred to the ORR, and then placed in a secure facility.
- 55 Yolo County facility costs are calculated by dividing the \$5.7 million annual contract by the 24 beds available in the facility. See Anne Ternus-Bellamy, “County to decide fate of ORR contract on refugee minors,” *Davis Enterprise*, June 22, 2018, available at <https://www.davisenterprise.com/local-news/county-to-decide-fate-of-orr-contract-on-refugee-minors/>.
- 56 According to findings in the *L.V.M. vs. Scott Lloyd* case, the average length of stay in a secure ORR facility is currently seven to eight months. Taking the midline of 7.5 months, and assuming that each month has 30.42 days, results in an ALOS of 228 days for secure facilities, which is 3.9 times longer than the overall current average of 59 days in ORR shelter care. *L.V.M. v. Scott Lloyd*, 18 Civ. 1453 (2018), available at <https://assets.documentcloud.org/documents/4563809/20180627-LVM-v-Lloyd-Order.pdf>.
- 57 To hold one child in secure shelter care—at \$651 per day—for 228 days costs \$148,454. By contrast, to hold one child in regular shelter care—at \$255 per day—for 59 days costs \$15,058.
- 58 U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 59 All Appendix calculations are rounded to the nearest hundred-thousand.
- 60 Children can also be rendered unaccompanied when separated from a parent. *Homeland Security Act of 2002*, Public Law 107-296, 107th Cong., 2d sess. (November 25, 2002), §462, 116 Stat. 2202–2205 (codified, as amended, at 6 U.S.C. §279(g)(2)), available at <https://www.law.cornell.edu/uscode/text/6/279>.
- 61 In this calculation, the 2,787 children include 131 “who were not paroled or released on order of their own recognizance,” 349 “who had negative credible fear determinations,” 1,465 “administratively closed cases,” and 842 “who were released and either had final orders of removals at the time of their release or subsequently received final orders following their release.” U.S. Department of Homeland Security and U.S. Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”
- 62 U.S. Customs and Border Protection, “Southwest Border Migration FY2018”; Hesson, “Trump administration considers family separation option as border arrests soar.”