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Re: DHS Docket No. ICEB—2018—0002 Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

The Center for Democracy & Technology (CDT) appreciates the opportunity to comment on this notice of proposed rulemaking (NPRM), *Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children*.<sup>1</sup> Our comments focus on one section of the NPRM: 45 CFR 410.302—*Sponsor Suitability Assessment Process Requirements Leading to Release of an Unaccompanied Alien Child From ORR Custody to a Sponsor*.<sup>2</sup> This section addresses U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) vetting of prospective sponsors of unaccompanied children in ORR custody. The NPRM formally expands extensive suitability assessments to all prospective sponsors of unaccompanied children.<sup>3</sup> Past practice limited these assessments only to distant relatives or non-relatives that sought sponsorship of a child. These suitability assessments require prospective sponsors to allow ORR to share their fingerprints with the Department of Homeland Security (DHS), which uses the data to run a criminal and immigration background check.

At the center of this proposed rule is a practice that has long concerned the Center for Democracy & Technology and other advocates of privacy: the use of sensitive personal information given to a governmental entity for one purpose for an entirely different purpose. This re-purposing of data, as it does in other circumstances, will undermine the goals the government is seeking to accomplish. In this case, the goal of placing an unaccompanied minor with his or her parents or another close family member, will be undermined, and at great cost to taxpayers.

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<sup>1</sup> See U.S. Dep't of Homeland Security & Dep't of Health and Human Services, Notice of Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (Federal Register Number 45486- 45534), Regulations.gov, <https://www.regulations.gov/docket?D=ICEB-2018-0002>.

<sup>2</sup> *Id.* at 45507.

<sup>3</sup> *Id.*

HHS's aims with this NPRM are no doubt admirable—complying with its responsibility to place children in ORR's custody with a caregiver that will provide for the well-being of the child and ensure their attendance at their upcoming removal hearing.<sup>4</sup> However, HHS has not demonstrated that an expansion of the suitability assessments is legally or practically necessary. Rather, what superficially appears to be an innocuous policy change places prospective sponsors—the vast majority of whom are either parents or close family members of the unaccompanied child—at incredible risk. Many of these individuals are in the United States unlawfully, and due in part to changes in immigration enforcement priorities,<sup>5</sup> they are targets for enforcement. Further, in April 2018, ORR and Immigration and Customs Enforcement (ICE) executed a data sharing a Memorandum of Agreement (MOA), wherein ICE is a partner in the vetting of sponsors and a recipient of HHS data.<sup>6</sup> ICE maintains it is free to use this data for enforcement purposes and has already used this data to arrest sponsors of unaccompanied children.<sup>7</sup> This NPRM will codify the expanded suitability assessments that subjects sponsors to ICE review.

Data collected for the purpose of assessing the suitability of a sponsor should not be repurposed for enforcement; a program designed to focus on child welfare should not be co-opted for enforcement. Parents and family members are put in an impossible position: choose separation from your child or relative, or risk alerting ICE to you and your housemates' presence. We urge HHS not to expand these assessments, or in the alternative, to limit the use of information gathered in connection with these assessments solely to vetting sponsors. Without either of these changes this NPRM in concert with the MOA will chill sponsors from engaging with HHS. Children will be separated from loved ones, and spend more time in detention. And HHS will need to expend significantly more resources to host unaccompanied children.

**1. The expanded suitability assessments described in this NPRM have not been demonstrated to be necessary for HHS to assess sponsor eligibility.**

The NPRM proposes codifying expanded suitability assessments to all potential sponsors and their household members. Past HHS practice did not subject prospective sponsors to the lengthy background checks described in this NPRM. Instead the below chart reflected HHS's

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<sup>4</sup> ORR Policy Guidance Children Section 2.4.1 (2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

<sup>5</sup> The White House, Executive Order No. 13,768 Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

<sup>6</sup> Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1>.

<sup>7</sup> Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN (Sept. 20, 2018), <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

screening process.<sup>8</sup> Notably, the past procedures streamlined the review of parents seeking to sponsor their own children, reflecting the fact that parents are often the most trusted and capable caregivers.<sup>9</sup> Parents would face a public records check. HHS conducted more in-depth checks, including a criminal history and immigration status review, if the initial public records check raised a red flag, or in the case of a particularly vulnerable child.<sup>10</sup> These procedures facilitated both family reunification and child welfare.

**Table 1: Required Background Checks Conducted by Office of Refugee Resettlement (ORR) Grantees, by Sponsor Category, as of February 2016**

	Public records check	National (FBI) criminal history check based on digital fingerprinting <sup>a</sup>	Immigration status check conducted through the Central Index System (CIS)	Child abuse and neglect check <sup>b</sup>
<b>Category 1:</b> Parent or legal guardian	●	◐	◐	◐
<b>Category 2:</b> Close relative	●	●	●	◐
<b>Category 3:</b> Distant relative or unrelated adult	●	●	●	●
<b>Category 4:</b> No potential sponsor	(These instances are rare, but when they occur, children remain in ORR facilities or are placed in ORR's long-term foster care.)			

Legend: A full-circle indicates that the background check is required in all cases. A half-circle indicates that the background check is only required in cases in which there is a documented risk to the safety of the unaccompanied child, the child is especially vulnerable, and/or the case is being referred for a mandatory home study.

Source: ORR Policy Guide. | GAO-18-506T

The NPRM extends an expanded assessment to all prospective sponsors and their adult household members. A prospective sponsor will approach HHS and seek custody of a child. These individuals will provide identification documents and submit fingerprints to ORR. ORR then provides the fingerprints to ICE to perform criminal and immigration status checks on ORR's behalf. ICE then submits the results to ORR. ORR also conducts additional background screening without going through DHS, which may include a review of criminal history and child abuse/neglect checks. These steps will also be required of all adult household members that reside in the home of the prospective sponsor.<sup>11</sup> HHS implemented this expansion informally in the summer of 2018,<sup>12</sup> and this NPRM codifies the practice.

<sup>8</sup> GAO, Testimony of Kathryn A. Larin, Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate: Unaccompanied Children, GAO-18-506T, 11 (Apr. 26, 2018), <https://www.gao.gov/assets/700/691526.pdf>.

<sup>9</sup> GAO, Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care, GAO-16-180, 16 (Feb. 5, 2016), <https://www.gao.gov/assets/680/675001.pdf>.

<sup>10</sup> GAO, Testimony of Kathryn A. Larin, Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate: Unaccompanied Children, GAO-18-506T, 11 (Apr. 26, 2018), <https://www.gao.gov/assets/700/691526.pdf>.

<sup>11</sup> ORR Policy Guide Section 2.5.1 (2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.5.1>

<sup>12</sup> *Id.*

- a. *The expanded suitability assessments are not legally required, and have not been demonstrated to be necessary.*

HHS is under no legal obligation to expand the suitability assessments as described in the NPRM. HHS has always vetted each prospective sponsor prior to the release of a child. The NPRM fails to explain or justify the change of course. HHS notes in the beginning of this section that the Flores Settlement Agreement (*Flores*) affords ORR the discretion to require a suitability assessment prior to the release of a child into the custody of a sponsor.<sup>13</sup> HHS further notes that the Trafficking Victims Protection Reauthorization Act (TVPRA) states that ORR may not release an unaccompanied child to a potential sponsor unless ORR decides that the sponsor is “capable of providing for the child’s physical and mental well-being. Such a determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.”<sup>14</sup> These legal obligations certainly demand of HHS a screening process, but do not mandate the changes HHS seeks to codify.

Furthermore, the expansion has not been demonstrated to be a practical necessity. When HHS’s screening protocols were reviewed in the wake of concerns about the release of children to child traffickers in 2014,<sup>15</sup> the Senate Permanent Subcommittee on Investigations wrote a report that focused entirely on procedures for distant relatives or non-relative sponsors “because such placements require the most care.”<sup>16</sup> And, indeed, in those cases, expanded background checks were recommended. However, the topic of parental and close relative sponsors was untouched despite the fact that parents and close relatives accounted for almost 90% of sponsors.<sup>17</sup> More recently, in April 2018, the Government Accountability Office (GAO) released a report recommending improvements to HHS’s care of unaccompanied children. No recommendations were made calling for enhancements to the agency’s sponsor suitability

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<sup>13</sup> U.S. Dep’t of Homeland Security & Dep’t of Health and Human Services, Notice of Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (Federal Register Number 45486- 45534) Regulations.gov, <https://www.regulations.gov/docket?D=ICEB-2018-0002>.

<sup>14</sup> 8 U.S.C. 1232(c)(3)(A).

<sup>15</sup> Abbie VanSickle, *Obama administration placed children with human traffickers, report says*, Wash. Post (Jan. 28, 2016), [https://www.washingtonpost.com/national/obama-administration-placed-children-with-human-traffickers-report-says/2016/01/28/39465050-c542-11e5-9693-933a4d31bcc8\\_story.html?utm\\_term=.a368f772183e](https://www.washingtonpost.com/national/obama-administration-placed-children-with-human-traffickers-report-says/2016/01/28/39465050-c542-11e5-9693-933a4d31bcc8_story.html?utm_term=.a368f772183e).

<sup>16</sup> Staff Report, Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement Oversight of the Care of Unaccompanied Alien Children, United States Senate Permanent Subcommittee on Investigations, 26 (Jan. 2016), <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf>.

<sup>17</sup> GAO, Testimony of Kathryn A. Larin, Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate: Unaccompanied Children, GAO-18-506T, 2 (Apr. 26, 2018), <https://www.gao.gov/assets/700/691526.pdf>.

assessments.<sup>18</sup> The same is true of two other GAO reports evaluating HHS's care of unaccompanied children in 2015 and 2016.<sup>19</sup>

The NPRM fails to justify legally or practically the need to expand the background checks and HHS's data collection. Such a showing should be a prerequisite to the collection and retention of more data or the deployment of more resources to accommodate these discretionary policy changes.

*b. Immigration status is not necessary to assess sponsor eligibility; but if HHS decides immigration status is needed, it can be determined in a way that does not involve DHS.*

Per this NPRM, HHS will transmit the fingerprints of all sponsors and all adult household members to DHS, and DHS will use them to search criminal and immigration databases.<sup>20</sup> As noted above, HHS has provided no explanation as to why the longstanding assessment it has done in the past is no longer sufficient, or why this additional step is necessary to assess the suitability of potential sponsors. The immigration status of sponsors is not mentioned in either *Flores* or the TVPRA. In the NPRM, HHS points to the following language: “[t]he [Flores Settlement Agreement] at paragraph 17 allows ORR the discretion to require a suitability assessment.”<sup>21</sup> However, that paragraph in *Flores* only directs HHS to conduct “a positive suitability assessment.”<sup>22</sup> HHS has made clear that potential sponsors’ immigration status has limited relevance to the suitability assessment. Indeed, the HHS policy guide states that immigration status is not used to disqualify a parent or guardian from sponsoring their child.<sup>23</sup> HHS should not collect and store data that are unnecessary for it to complete adequate screening.

Even if HHS determines immigration status is necessary for a complete assessment, ICE need not undertake this review. HHS can review a sponsor’s immigration status by calling the Executive Office of Immigration Review (EOIR) Hotline, which provides the status of

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<sup>18</sup> See GAO, Testimony of Kathryn A. Larin, Before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate: Unaccompanied Children, GAO-18-506T (Apr. 26, 2018), <https://www.gao.gov/assets/700/691526.pdf>.

<sup>19</sup> GAO, Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody, GAO-15-521 (July 14, 2015), <https://www.gao.gov/assets/680/671393.pdf>; GAO, Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care, GAO-16-180 (Feb. 5, 2016), <https://www.gao.gov/assets/680/675001.pdf>.

<sup>20</sup> ORR Policy Guide Section 2.6.2 (2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

<sup>21</sup> U.S. Dep’t of Homeland Security & Dep’t of Health and Human Services, Notice of Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (Federal Register Number 45486- 45534) Regulations.gov, <https://www.regulations.gov/docket?D=ICEB-2018-0002>.

<sup>22</sup> Stipulated Settlement Agreement at Para 17, *Flores v. Reno*, No. CV 85-4544- RJK(Px)(C.D. Cal. Jan. 17, 1997).

<sup>23</sup> ORR Policy Guide Section 2.5.2, 2.6 (2018), <https://www.acf.hhs.gov/orr/resource/children-enteringthe-united-states-unaccompanied-section-2>.

immigration court hearings.<sup>24</sup> It is not necessary to export this task to ICE; doing so inherently exposes sponsors to risk and deters their sponsorship, which is discussed in more detail below.

**2. This NPRM and the Memorandum of Agreement among ICE, CBP and ORR will have a pronounced chilling effect deterring prospective sponsors of children in ORR custody.**

On April 13, 2018, a Memorandum of Agreement (MOA) was executed between the Office of Refugee Resettlement and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection regarding ‘Consultation and Information Sharing in Unaccompanied Alien Children Matters.’ The MOA states that:

“ORR will provide ICE with the name, date of birth, address, fingerprints (in a format and transmitted as prescribed by ICE from time to time), and any available identification documents or biographic information regarding the potential sponsor and all adult members of the potential sponsor’s household. ICE will then provide ORR with the summary criminal and immigration history of the potential sponsor and all adult members of the potential sponsor’s household to the extent available to ICE, consistent with the applicable confidentiality provisions of the Immigration and Nationality act (INA).”<sup>25</sup>

This MOA formalizes ICE’s access to information that sponsors and their housemates provide to ORR for the purpose of demonstrating their eligibility. Nothing in the MOA prevents ICE from using this information for immigration enforcement purposes as well. Rather that ability has been reserved and operationalized. DHS expanded the categories of persons included in a criminal alien database one of whose purposes includes “to identify and arrest those who may be subject to removal” to include prospective sponsors and their household members.<sup>26</sup>

In the fall of 2017, before the MOA, Kids In Need of Defense reported that ICE used unaccompanied children to lure sponsors to present themselves to the government, raising the risk of arrest.<sup>27</sup> And since the MOA was executed, ICE has completed enforcement actions as a

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<sup>24</sup> United States Dep’t of Justice, Customer Service Initiatives (2018), <https://www.justice.gov/eoir/customer-service-initiatives>.

<sup>25</sup> Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters, 5 (Apr. 13, 2018), <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1>.

<sup>26</sup> 83 Fed. Reg. at 20846, <https://www.regulations.gov/document?D=DHS-2018-0013-0001> (noting among purposes of the system “[t]o screen individuals to verify or ascertain citizenship or immigration status and immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children . . . and to identify and arrest those who may be subject to removal”). Categories of individuals covered by the proposed system include “[i]ndividuals seeking approval from HHS to sponsor an unaccompanied alien child, and/or other adult members of the potential sponsor’s household.” *Id.*

<sup>27</sup> See KIND, Targeting Families (Dec. 2017), [https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families\\_-December-2017.pdf](https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf).

result of the data sharing. On September 18, 2018, Matthew Albence, an Executive Associate Director for ICE, testified before the Senate Homeland Security and Governmental Affairs Committee that since entering into the MOA, ICE had arrested 41 adults who came forward to sponsor children.<sup>28</sup> Of those arrests, 70 percent were categorized as “administrative” arrests for immigration purposes only and were not done for criminal enforcement purposes. Albence also told the Senate that ICE data indicated that four out of five sponsors are in the United States unlawfully.<sup>29</sup>

Prospective sponsors are put in an impossible position. If the overwhelming majority of sponsors are undocumented, then interacting with HHS bears an incredible cost. Most unaccompanied children are sponsored by a legal guardian, parent, and close relative. In FY 2017, ORR released 93 percent of children to a sponsor. Of those, ORR released 49 percent to parents, 41 percent to close relatives, and 10 percent to other-than-close relatives or non-relatives.<sup>30</sup> The NPRM and MOA, by chilling sponsorship by parents, effectively prevents or delays family reunification. Additionally, the proposed changes may deter individuals who are lawfully present, including U.S. citizens, from sponsoring unaccompanied children in order to avoid interacting with ICE or exposing others living with or near them to potential interaction or enforcement.<sup>31</sup>

Prior to this arrangement, within 24 hours of a child’s release, ORR routinely provided DHS with demographic information and the child’s and sponsor’s names, address, and relationship, for use in connection with the child’s immigration proceedings. However, DHS had to submit a detailed and individualized request for all other information.<sup>32</sup> Furthermore, sponsors were not immediate enforcement targets for ICE because the Priority Enforcement Program (PEP) was in effect, which prioritized enforcement actions against immigrants with criminal records over

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<sup>28</sup> Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN (Sept. 20, 2018), <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

<sup>29</sup> Senate Homeland Security and Governmental Affairs Committee, Hearing on Reinterpretation of Flores Settlement and Its Impact on Family Separation and Catch and Release, <https://www.c-span.org/video/?451534-1/justice-homeland-security-officials-testify-migrant-children-policy> (Testimony of Albence in response to a question posed by Senator Lankford at 1:14).

<sup>30</sup> Testimony of Steven Wagner, HHS responsibilities for the Care and Placement of Unaccompanied Alien Children, Before the Permanent Subcommittee on Investigations Committee on Homeland Security and Government Affairs (Apr. 26, 2018), <https://www.acf.hhs.gov/olab/resource/testimony-of-steven-wagner-on-responsibilities-for-the-care-and-placement-of-unaccompanied-alien-children>.

<sup>31</sup> See KIND, Targeting Families (Dec. 2017), [https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families\\_-December-2017.pdf](https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf).

<sup>32</sup> ORR, Request for UAC Case File Information, (last updated Dec. 8, 2017), <https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information>.

immigrants just with unlawful presence.<sup>33</sup> PEP was revoked by the Trump Administration<sup>34</sup> and enforcement against non-criminal aliens has accordingly skyrocketed.<sup>35</sup>

This NPRM is one of a number of policy decisions that facilitates the use of sponsor data as lead generation for ICE, which will have a chilling effect on sponsorship of unaccompanied children. A follow up report issued in August 2018 by the Senate Permanent Subcommittee on Investigations responded to these concerns raised by advocates and recommended that “DHS and HHS [] evaluate their information-sharing policies [] to mitigate circumstances that could dissuade potential sponsors from claiming unaccompanied children because of fear of enforcement.”<sup>36</sup> Instead, the reverse has happened: DHS has proposed a rule that would expand the circumstances in which potential parental sponsors would be dissuaded from sponsoring unaccompanied children because of fear of enforcement.

### **3. This NPRM and the Memorandum of Agreement between ICE and ORR will harm the children in ORR custody.**

ORR is to prioritize the placement of children with their families, which this NPRM in combination with the MOA makes exceedingly difficult. As noted above, the expanded suitability assessments will chill many parents and relatives from interacting with HHS, delaying children’s reunification with their families. As required by the settlement agreement in *Flores*, preference for sponsorship is supposed to be given to parents, legal guardians, and adult relatives.<sup>37</sup> This preference is consistent with studies indicating that children are more likely to experience physical and emotional well-being, safety, and stability when they are living with and being cared for by family members.<sup>38</sup> Family unity is particularly important for immigrant children, who are more likely to be disadvantaged in navigating a new language and culture.<sup>39</sup> A shared culture at home is particularly important for these children, many of whom have just

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<sup>33</sup> Priority Enforcement Program, ICE (2018), <https://www.ice.gov/pep>.

<sup>34</sup> The White House, Executive Order No. 13,768 Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

<sup>35</sup> Alan Gomez, *ICE arresting more non-criminal undocumented immigrants*, USA Today (May 17, 2018), <https://www.usatoday.com/story/news/nation/2018/05/17/ice-arresting-more-non-criminal-undocumented-immigrants/620361002/>.

<sup>36</sup> Staff Report, Oversight of the Care of Unaccompanied Alien Children, United States Senate Permanent Subcommittee on Investigations, 9 (Aug. 15, 2018), <https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf>.

<sup>37</sup> Stipulated Settlement Agreement at 14-15, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

<sup>38</sup> See The Annie E. Casey Foundation, *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, 2 (2012), <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

<sup>39</sup> See KIND, *Targeting Families* (Dec. 2017), [https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families\\_-December-2017.pdf](https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf).

survived a harrowing journey.<sup>40</sup> And relying on non-familial sponsors carries greater risk for the safety of the child.<sup>41</sup>

Not only will children whose release is delayed miss out on the benefits of family unification, they will be harmed by the prolonged detention that consequently results. For families that do come forward, the background search parents and close relatives are now subjected to will require more time to complete. And, in the absence of finding willing sponsors, it will be more time consuming to identify alternatives in foster care. Children in detention may have limited access to health care, and can face physical and emotional abuse.<sup>42</sup> Countless immigrants' rights organizations have advocated for the duration of children's' detention to be as limited as possible, and research demonstrates that any period of incarceration is detrimental to a child's health and well-being.<sup>43</sup>

Finally, these policies may cause children to feel responsible for their parents' immigration issues. Research shows that children of undocumented parents are likely to experience guilt about their parents' deportation, and often interpret their own struggle for protection as the cause of their parents or loved ones' negative interactions with ICE.<sup>44</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., FBI, New Fraud Schemes Targeting Families of Unaccompanied Children (July 19, 2014), <https://www.fbi.gov/contact-us/field-offices/sanantonio/news/press-releases/new-fraud-schemes-targeting-families-of-unaccompanied-children>.

<sup>42</sup> See, e.g., Emma Platoff, *Report: Toddler died after contracting infection at ICE family detention facility*, The Texas Tribune (Aug. 27, 2018), <https://www.texastribune.org/2018/08/27/toddler-died-ICE-custody-vice-news-dilley/>; Andrew Gumbel, *'They were laughing at us': immigrants tell of cruelty, illness and filth in US detention*, The Guardian (Sept. 12, 2018), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities>; Amy Taxin, *Immigrant children describe treatment in detention centers*, AP (July 18, 2018), <https://www.apnews.com/1a8db84a88a940049558b4c450dccc8a>; Ella Nilsen, *How the Trump administration is using undocumented kids' confidential health information to lock them up*, Vox <https://www.vox.com/policy-and-politics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids>.

<sup>43</sup> Leila Schochet, *Trump's Family Incarceration Policy Threatens Healthy Child Development*, Center for American Progress (2018), <https://www.americanprogress.org/issues/early-childhood/reports/2018/07/12/453378/trumps-family-incarceration-policy-threatens-healthy-child-development/>.

<sup>44</sup> See, e.g., KIND, *Targeting Families: How Ice Enforcement Against Parents and Family Members Endangers Children*, 13 (Dec. 2017), [https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families\\_-December-2017.pdf](https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf); Nat'l Immigrant Justice Center, et al., *Complaint to DHS Acting Inspector General and DHS Office of Civil Rights and Civil Liberties Re: ICE and CBP Coercive Enforcement Actions against Sponsors of Unaccompanied Children Conducted in Violation of Family Unity, Protection, and Due Process Rights*, 3 (Dec. 6, 2017), [http://www.immigrantjustice.org/sites/default/files/content-type/pressrelease/documents/201712/Sponsor%20Enforcement-OIG\\_CRCL\\_Complaint\\_Cover\\_Letter-FINAL\\_PUBLIC.pdf](http://www.immigrantjustice.org/sites/default/files/content-type/pressrelease/documents/201712/Sponsor%20Enforcement-OIG_CRCL_Complaint_Cover_Letter-FINAL_PUBLIC.pdf); Wendy Cervantes and Christina Walker, *Five Reasons Trump's Immigration Orders Harm Children*, Center for Law and Social Policy (CLASP), (Apr. 2017), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Five-Reasons-Immigration-Enforcement-Orders-Harm-Children.pdf>; Leila Schochet, *Trump's Immigration Policies Are Harming American Children*, Center for American Progress (Jul. 31, 2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/07/31/436377/trumps-immigration-policies-harming-american-children/>.

**4. This NPRM will prevent HHS from complying with its responsibilities and imposes a significant cost on the department.**

HHS relies on the trust of sponsors and children to promptly release children from federal facilities. And ORR is obligated to prioritize placement with family members, and at the very least seeks the safest and most capable caregivers. This NPRM frustrates this mission by placing a roadblock between prospective sponsors and the children. Under the TVPRA, ORR is required to ensure that unaccompanied children are “promptly placed in the least restrictive setting that is in the best interest of the child.”<sup>45</sup> Again, *Flores* stipulates that parents and close relatives are prioritized placements.<sup>46</sup> As has been described above, if HHS implements the changes in this NPRM, it will be challenging to comply with the agency’s responsibilities to the children in their care.

Furthermore, HHS will bear significant additional costs if children remain in its custody for longer periods of time. Over the past few months the number of children in ORR custody has grown from only 2,400 in May 2017 to nearly 13,000 as of September 2018.<sup>47</sup> The average length of stay has also increased to an average as of September to 59 days, compared with an average of 48 days in 2017.<sup>48</sup>

HHS will have to pay the additional cost of supplies, housing, and staff to accommodate these delays. For example, the cost of housing a child in a permanent HHS facility is \$256 per night. By comparison, the cost of housing in a temporary secure detention facility, such as those built this summer, can be as much as \$800 per night per child.<sup>49</sup> It is expected that in order to accommodate all of the changes proposed in this NPRM HHS as well as DHS will have to rely on these more expensive temporary facilities.

**5. HHS should abandon the proposed suitability assessments in this NPRM, or restrict access and use of the data to further only the vetting of prospective sponsors.**

Data solicited by the government for one purpose should not be shared or used for another. In the matter at hand, sponsors must provide information to HHS as a precondition to removing a child from a federal detention facility.<sup>50</sup> These individuals provide their information to HHS for

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<sup>45</sup> 8 U.S.C. § 1232(c)(2)(A).

<sup>46</sup> Stipulated Settlement Agreement at 14-15, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997), <https://www.aclu.org/legal-document/flores-v-meesestipulated-settlement-agreement-plus-extension-settlement>.

<sup>47</sup> Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. Times (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

<sup>48</sup> Tal Kopan, *The simple reason more immigrant kids are in custody than ever before*, CNN (Sept. 14, 2018), <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>.

<sup>49</sup> Emily Stewart, *Report: “tent cities” for separated migrant children cost more than keeping them with their parents*, Vox (Jun. 20, 2018), <https://www.vox.com/policy-and-politics/2018/6/20/17482906/family-separation-border-tent-cities-cost>.

<sup>50</sup> ORR Policy Guide Section 2.2.3 (2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

the sole purpose of proving their relationship to the child they seek to sponsor, and to verify their identity. They seek to demonstrate they are eligible and suitable sponsors to care for the child currently in ORR custody. They do not seek to engage with ICE.

The enforcement actions stemming from the sponsorship applications are one of a series of enforcement decisions contributing to increasing anxiety about interacting with the government.<sup>51</sup> Individuals have been arrested at their routine check-ins with ICE without notice,<sup>52</sup> at courthouses,<sup>53</sup> at meetings for a green card application with USCIS.<sup>54</sup> Repurposing this data will contribute to the fear that interacting with any government agency will bring about an enforcement action. As is discussed below in greater detail, there are reasons this apprehension will harm everyone in this country, not just immigrant populations.

The repurposing of this data is an incredible misuse and abuse of the government's power. HHS, which has a responsibility for the well-being of the children in its custody, is functionally using these children as bait for ICE enforcement actions. The government, in short, is taking advantage of both the child and prospective sponsor when they are at their most vulnerable. Many children will have just experienced a traumatic journey, and a sponsor who is a parent or very close relative, seeks to be reunited with their family member knowing how harrowing their journey has been.

*a. The data repurposing violates the spirit of the Fair Information Practices Principles.*

This data repurposing violates the spirit of the Fair Information Practices Principles (FIPPs). In 2017 the Trump Administration revoked the application of the Privacy Act to those who are not citizens or lawful permanent residents.<sup>55</sup> In its place, DHS issued a memo stating it would apply the FIPPs, "a widely recognized framework for privacy law and policy used in many parts of the

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<sup>51</sup> See, e.g., Janell Ross, Aaron C. Davis & Joel Achenbach, *Immigrant community on high alert, fearing Trump's 'deportation force'*, Wash. Post., (Feb. 11, 2017) [https://www.washingtonpost.com/national/immigrant-community-on-high-alert-fearing-trumps-deportation-force/2017/02/11/e5c30d06-f06f-11e6-9973-c5efb7ccfb0d\\_story.html](https://www.washingtonpost.com/national/immigrant-community-on-high-alert-fearing-trumps-deportation-force/2017/02/11/e5c30d06-f06f-11e6-9973-c5efb7ccfb0d_story.html); Kathleen M. Roche, et. al, *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, J. of Adolescent Health 5 (2018), [http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/jah\\_10367.pdf](http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/jah_10367.pdf) ("Evidence for adverse consequences of immigration actions and news across residency statuses is consistent with research indicating that immigration policy can be equally harmful to documented and undocumented Latinos.")

<sup>52</sup> *Once Routine, ICE Check-Ins Now Fill Immigrants In US. Illegally With Anxiety*, NPR (Apr. 18, 2017), <https://www.npr.org/2017/04/18/524365639/once-routine-ice-check-ins-now-fill-immigrants-in-u-s-illegally-with-anxiety>.

<sup>53</sup> Kaelyn Forde, *'Where can anyone seek justice?' Experts warn ICE courthouse arrests may mean witnesses, victims won't show up*, ABC News (Jul. 27, 2018), <https://abcnews.go.com/US/seek-justice-experts-warn-ice-courthouse-arrests-witnesses/story?id=56756506>.

<sup>54</sup> Shannon Dooling, *ICE Arrests green Card Applicants In Lawrence, Signaling Shift In Priorities*, WBUR (Mar. 30, 2017), <http://www.wbur.org/news/2017/03/30/green-card-ice-arrests-lawrence>.

<sup>55</sup> The White House, Executive Order No. 13,768 *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

world,” to all persons regardless of their immigration status.<sup>56</sup> HHS is aiding DHS in violating the spirit of two FIPPs principles: individual participation and use limitation.

For individual participation, the DHS memorandum states that “[t]he Department should involve the person in the process of using [personally identifiable information (PII)] and, to the extent practicable, seek the person’s consent for the collection, use, dissemination, or maintenance of PII.”<sup>57</sup> Technically, sponsors must consent to having their fingerprints shared with ICE; however, this consent is coerced since it is required to reunite sponsors with their children or loved ones. In this context sponsors cannot be expected to freely consent to HHS’s sharing of data and ICE’s collection and use of said data.

With respect to use limitation, DHS is to “use [] information for the purposes specified in its SORNs, PIAs, and notices, and any sharing of such information outside the agency must be compatible with the purposes for which the information was originally collected.”<sup>58</sup> The NPRM violates the spirit of this principle. The data provided to HHS is to demonstrate sponsor eligibility, not to help ICE generate enforcement leads. HHS has chosen to include ICE in the vetting process to determine whether a sponsor would pose a risk to a child, in furtherance of HHS’s mission of placing the children in the care of a suitable sponsor. Immigration status is not a factor in determining eligibility of the sponsor or safety of the child. There is no reason ICE should be using data indicating unlawful status to separate the sponsor from the child. ICE should not use data afforded HHS to further its own separate enforcement agenda.

*b. HHS would not be the first entity to restrict its cooperation with an enforcement agency. In numerous immigration related contexts, access to data has been limited to further a greater societal need.*

If HHS were to construct strict limitations on the use of data it collects, or limit its partnership with ICE, it would not be the first agency to take such steps. Such measures have been undertaken in order to prioritize an agency’s ability to perform its responsibilities, and/or to further a greater societal benefit.

Numerous police departments resist working with or sharing information with immigration enforcement entities because doing so has demonstrably limited their ability to respond to crime. When law enforcement is perceived as an agent of immigration enforcement, immigrant populations have hesitated to report crimes of which they were a victim or a witness.<sup>59</sup>

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<sup>56</sup> Dep’t of Homeland Security, Privacy Policy Guidance Memorandum: DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally Identifiable Information (Apr. 27, 2017), <https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Guidance%20Memo%202017-01%20-%20FINAL.pdf>.

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> See, e.g., Debra Robbin, *When Undocumented Immigrants Don’t Report Crimes, We all Suffer*, WBUR (Sept. 22, 2017), <http://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin>; Freezing Out Justice: How immigration arrests at courthouses are undermining the justice system, ACLU (2018),

Individuals who applied for Deferred Action for Childhood Arrivals (DACA) were promised that the data in their DACA applications would not be proactively shared with ICE for enforcement purposes.<sup>60</sup> DACA provided students who were brought to the United States as children a means of accessing higher education and work permits, and shields them from removal. In other words, thousands of undocumented immigrants could participate more fully in society, to everyone's benefit. The program is based on assurances and trust that the data will not be repurposed for enforcement, and the program could not have been successful absent this trust. In addition, there are restrictions on what data the Internal Revenue Service (IRS) can share with DHS, despite mounting pressure to enable DHS to use IRS data for enforcement purposes.<sup>61</sup> These restrictions encourage immigrants, even those present unlawfully, to pay taxes.<sup>62</sup>

Even ICE has accepted there are circumstances in which enforcement efforts should be constrained in order to further a compelling public interest. In 2011 ICE issued memo 10029.2 Enforcement Actions at or Focused on Sensitive Locations, stating that ICE would not engage in enforcement actions at 'sensitive locations' such as schools and hospitals, with some exceptions including exigent circumstances and prior approval from a supervisor.<sup>63</sup> These enforcement actions include arrests, interviews, searches and surveillance. The memorandum is an acknowledgment that it is important that all people in the United States, regardless of their immigration status, be able to safely access vital services like medical care and education.

HHS's position is therefore a familiar one. It is for the well-being of the children in its custody that prospective sponsors are not deterred. It is in HHS's best interests that children not remain in its custody. And it is for society's best interests that taxpayer funds are not spent on expensive and unnecessary detention facilities, and that unaccompanied children are placed in the care of those who will ensure they are afforded the tools to successfully navigate their new environment. HHS should therefore do as others have done and craft limits on its data sharing practices to ensure it can complete its mission.

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HHS should not expand the suitability assessments as described in the NPRM, or in the alternative refrain from allowing the data it collects for the purpose of assessing sponsors to be

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<https://www.aclu.org/report/freezing-out-justice>; Tom Dart, *Fearing deportation, undocumented immigrants wary of reporting crimes*, The Guardian (Mar. 23, 2017), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

<sup>60</sup> DHS DACA FAQs, USCIS, <https://www.uscis.gov/archive/frequently-asked-questions>.

<sup>61</sup> Jennifer Chang Newell, *Will Immigration Authorities Use our Taxes to Go After Immigrants*, ALCU (Apr. 23, 2018), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/will-immigration-authorities-use-our-taxes-go>.

<sup>62</sup> Alexia Fernández Campbell, *Undocumented immigrants pay billions of dollars in federal taxes each year*, Vox, (Oct. 25, 2018), <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes>.

<sup>63</sup> U.S. Dep't of Homeland Security, Memorandum: Enforcement Actions at or Focused on Sensitive Locations, (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

used for enforcement. This practice will undermine the goal of placing an unaccompanied minor with his or her parents or another close family member, and at great cost to taxpayers.

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Respectfully submitted,

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