

United States Senate

WASHINGTON, DC 20510

September 26, 2018

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Kirstjen M. Nielsen
Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Dear Secretary Azar and Secretary Nielsen:

After a brief interlude it appears that the great minds in your agencies have come up with an even worse idea than the ongoing family separation crisis you created a few months ago. A policy of universal family detention is morally wrong, harmful to children and parents alike, and inconsistent with our most fundamental values as a nation. We therefore urge you to rescind your September 7, 2018 proposed regulation to avoid complying with the government's binding legal obligations under the *Flores* Settlement Agreement (*Flores*) and to facilitate the indefinite detention of children in taxpayer-funded Immigration and Customs Enforcement (ICE) facilities.

Prolonged and unnecessary ICE detention violates the core protections for children that *Flores* requires. The requirements of *Flores*, in effect since 1997, are unequivocal: "[The Department of Homeland Security (DHS)] shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before [DHS] and the immigration courts and to protect the minor's well-being and that of others" (emphasis added). *Flores* also requires that, unless DHS determines that detention is required to secure a minor's timely appearance for agency or immigration court proceedings or is required to ensure the minor's safety or that of others, DHS "shall release a minor from its custody without unnecessary delay" (emphasis added).

Your regulatory proposal would replace the Trump Administration's inhumane forcible family separation policy with indefinite detention in facilities that child development and health care experts have found to be harmful to children and families. While ICE official Matthew Albence inappropriately characterized ICE's family detention facilities as being "more like a summer camp" at a recent Judiciary Committee hearing,¹ child development and health care experts provide a more credible perspective. The American Academy of Pediatrics has found that DHS facilities "do not meet the basic standards for the care of children in residential settings."² The American Medical Association opposes "family immigration detention, separation of children from their parents in detention, and any plans to expand these detention centers" because of "the negative health consequences that detention has on both children and their parents."³ Additionally, Congress received a letter from two of DHS's own medical consultants in July who investigated ICE family detention centers over several years and concluded that they pose "a high risk of harm to children and their families."⁴

Existing law provides ample authority for DHS to detain individuals who pose a threat to their own safety or to the safety of others or who pose a flight risk, while utilizing alternatives to detention for other individuals. As U.S. District Court Judge Dolly Gee stated in her July 9 order rejecting the government's attempt to undermine its *Flores* obligations: "Absolutely nothing prevents [the government] from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion."

In addition to humanitarian concerns, the detention of children and families is an extraordinary cost to taxpayers. DHS acknowledges spending more than \$866 million over the last three years to maintain space to detain just over 3,000 family units per year.⁵ Your proposed rule acknowledges that it could result in even more people being detained for longer periods of time. However, you have failed to provide an estimate of expected increased family detention costs, so Congress and the American people are unable to see how wasteful your plan could truly be.⁶

There are robust alternatives to detention available to the Administration that are more humane, use far less taxpayer money, and yet are effective at ensuring compliance for individuals who may pose a flight risk. For example, ICE's Family Case Management Program, which was terminated by the Administration last year, showed 100 percent attendance at court proceedings for enrollees⁷ and an estimated cost of approximately \$36 per person per day versus approximately \$319 per day for an ICE family detention bed. Similar community management programs run by non-profit providers have also been highly effective and cost-efficient.

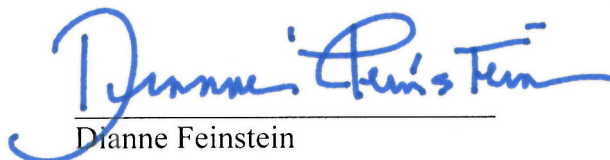
The Department of Health and Human Services must be a science-driven agency. Secretary Azar, we were encouraged to hear you declare your commitment to evidence and science during your confirmation hearing when you said "I firmly believe in following evidence and science."⁸ Yet the policy in your proposed rule runs counter to this position. We urge you to demonstrate leadership by heeding the findings of scientific experts on child development and health care, evaluating the evidence regarding the harmful effects of family detention on the physical and mental health of children and their families, and standing by your statement to Congress by withdrawing the proposed rule.

The Trump Administration's handling of the ongoing family separation crisis has been characterized by a toxic mixture of incompetence, cruelty, and disregard for humanity, science, and morality. Rather than accept responsibility and repair the damage you have caused, you have now doubled down with a plan to lock up children indefinitely. We urge you to rescind this flawed proposed rule, heed the advice of child development and health care experts about the harmful impacts of family detention, and comply in good faith with the terms of *Flores*. This proposed rule is an embarrassment to our great nation and the American people.

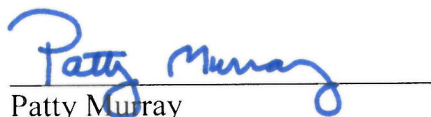
Sincerely,



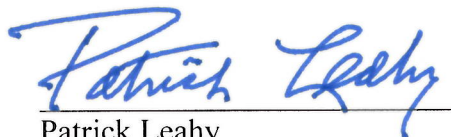
Richard J. Durbin
United States Senator



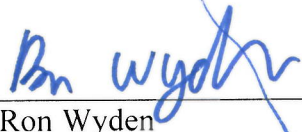
Dianne Feinstein
United States Senator



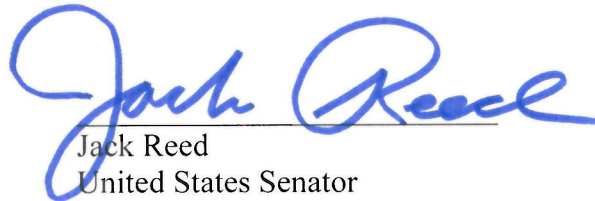
Patty Murray
United States Senator



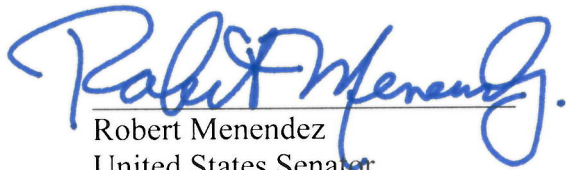
Patrick Leahy
United States Senator



Ron Wyden
United States Senator



Jack Reed
United States Senator



Robert Menendez
United States Senator



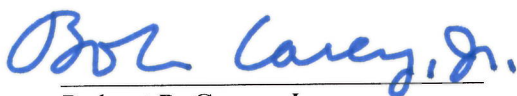
Benjamin L. Cardin
United States Senator



Bernard Sanders
United States Senator



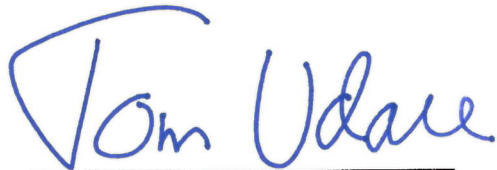
Sherrod Brown
United States Senator



Robert P. Casey, Jr.
United States Senator



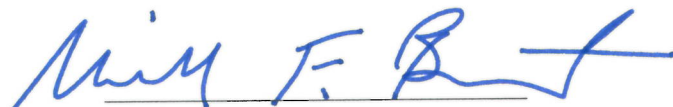
Sheldon Whitehouse
United States Senator



Tom Udall
United States Senator



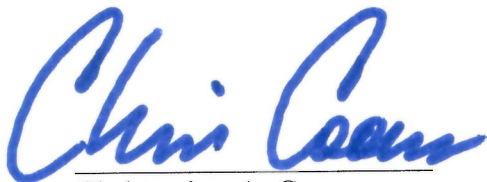
Jeffrey A. Merkley
United States Senator



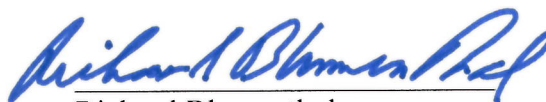
Michael F. Bennet
United States Senator



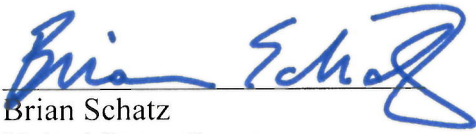
Kirsten Gillibrand
United States Senator



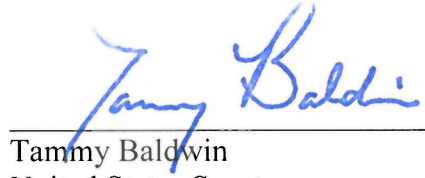
Christopher A. Coons
United States Senator



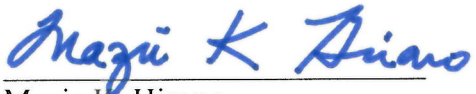
Richard Blumenthal
United States Senator



Brian Schatz
United States Senator



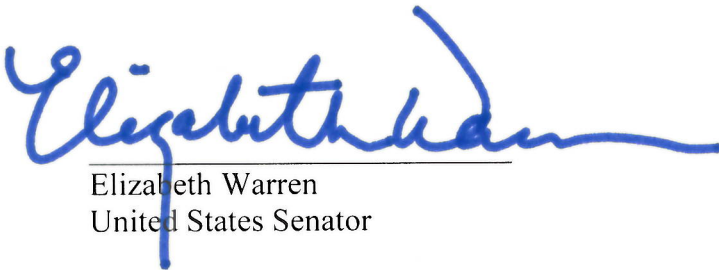
Tammy Baldwin
United States Senator



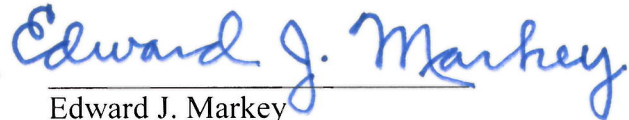
Mazie K. Hirono
United States Senator



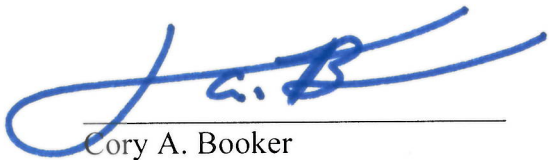
Martin Heinrich
United States Senator



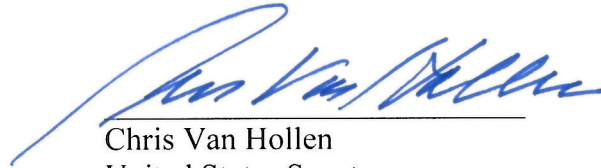
Elizabeth Warren
United States Senator



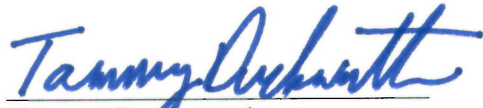
Edward J. Markey
United States Senator



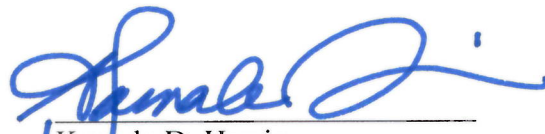
Cory A. Booker
United States Senator



Chris Van Hollen
United States Senator



Tammy Duckworth
United States Senator



Kamala D. Harris
United States Senator



Catherine Cortez Masto
United States Senator

¹ Senate Committee on the Judiciary, *Hearing on Oversight of Immigration Enforcement and Family Reunification Efforts*, July 31, 2018.

² American Academy of Pediatrics Policy Statement, Mar. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

³ AMA Adopts New Policies to Improve Health of Immigrants and Refugees, June 12, 2017, <https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees>.

⁴ Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm,’ *The New York Times*, July 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>.

⁵ See Proposed Rule: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children at 45513, 83 Federal Register 174, Sept. 7, 2018.

⁶ *Id.* at 45488.

⁷ See U.S. Immigration and Customs Enforcement’s Award of the Family Case Management Program Contract at 5, DHS Office of the Inspector General, Nov. 30, 2017, <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.

⁸ Senate Committee on Health, Education, Labor, and Pensions, *Hearing on Nomination of Alex Azar to serve as Secretary of Health and Human Services*, Nov. 29, 2017.