State of California
Office of the Attorney General

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ATTORNEY GENERAL

May 23, 2025

Submitted via Federal eRulemaking Portal

The Honorable Robert F. Kennedy, Jr., Secretary
Angie Salazar, Acting Director
Office of Refugee Resettlement
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Unaccompanied Children Program Foundational Rule: Update to Accord with Statutory Requirements, Docket Number ACF-2025-0004, 90 Fed. Reg. 13554

Dear Secretary Kennedy and Acting Director Salazar:

We, the Attorneys General of California, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington (States), write in opposition to the Department of Health and Human Services's (HHS) interim final rule (IFR), Unaccompanied Children Program Foundational Rule; Update To Accord With Statutory Requirements, 90 Fed. Reg. 13554 (March 25, 2025).

Protecting and integrating unaccompanied immigrant children is important to our States. Every year, thousands of children are released from immigration custody and reunited with family members or adult sponsors who are residents of our States. These children become members of our communities, attend our schools, and grow into adults raising their own families. Each of our States is committed to ensuring that unaccompanied children residing in our States are released from federal custody as expeditiously as possible to be reunited with their families or placed in a safe and appropriate family-like setting with a suitable sponsor.

The States are concerned with the negative impacts that the IFR will have on unaccompanied children and their prospective sponsors, many of whom are parents and close relatives of those children. The IFR's rescission of the Unaccompanied Children Program Foundational Rule's (the Foundational Rule) protections against disqualifying sponsors based solely on immigration status, and against collecting sponsors' immigration status information for

law enforcement or immigration enforcement related purposes, will deter prospective sponsors for unaccompanied children from coming forward out of fear that any information they provide to ORR may be used for immigration enforcement purposes against them, their family members, or even the unaccompanied child they are sponsoring. And the rescission of the prohibition on disqualifying potential sponsors based solely on immigration status may lead to the disqualification of safe, appropriate placements for unaccompanied children. The States are concerned that these changes will lead to unaccompanied children spending prolonged lengths of time in federal custody, causing long-lasting harms to these children. The purported unlawfulness of the information sharing restriction contained in 45 C.F.R. § 410.1201(b) is not sufficient justification for rescinding the entire provision and removing these important protections for sponsors and unaccompanied children.

The States also oppose HHS's decision to make this significant regulatory change through an IFR rather than providing notice and sufficient opportunity for the public to comment prior to the change taking effect as required under the Administrative Procedure Act (APA). HHS does not adequately justify its determination that there is good cause to exempt this action from notice and comment requirements, offers no substantial reason to rescind the portions of 45 C.F.R. § 410.1201(b) that HHS does not assert conflict with federal law, and does not consider the impact on the public of rescinding the regulation. The States urge HHS to withdraw the IFR and to provide the public with notice and the opportunity to comment on any future proposal to rescind Section 410.1201(b).

I. The States Have an Interest in Ensuring Unaccompanied Children Are Promptly Released from Immigration Custody and Placed with Suitable Sponsors

A. The States have demonstrated interest in keeping families together and supporting constitutional rights to family integrity.

Both state and federal law and policy support keeping families together whenever possible, which is consistent with the States' strong interest in the well-being of families and tradition of maintaining laws and institutions to address family matters. Children have a constitutional right to family associations, which includes the right of unaccompanied children in ORR custody to maintain relationships with parents and extended family members.[1] Federal law reflects this priority, and charges ORR with placing children "in the least restrictive setting that is in the best interest of the child," preferring placement with a "suitable family member," and limiting secure placements to cases in which the child poses a danger to self or others or has been charged with a criminal offense.[2] Other areas of federal law reflect the same values. For example, in the child welfare context, the Family First Prevention Services Act, signed by President Trump during his first term, aims to shift system interventions toward an early

[1] *Moore v. City of E. Cleveland,* 431 U.S. 494, 503-04 (1977); *Curnow By & Through Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991); *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG (PLAx), 2022 WL 2177454, at *14 (C.D. Cal. Mar. 11, 2022).

[2] 8 U.S.C. § 1232(c)(2)(A).

intervention approach that allows children to remain at home and expands services supporting relative placements when they cannot.[3]

The States have enacted their own laws prioritizing family integrity, demonstrating commitment to these same principles, and have dedicated efforts and resources to administering systems to protect these rights. In juvenile court matters in California, it is the stated interest of the Legislature "to preserve and strengthen the minor's family ties whenever possible," removing a minor from lawful custodians "only when necessary for his or her welfare or for the safety and protection of the public."[4] Likewise Oregon law states policies to recognize children's rights to "[p]ermanency with a safe family" and "to safeguard and promote each child's relationships with parents, siblings, grandparents, [and] other relatives."[5] When removal of a child from their family is deemed necessary, reunification with that family is "a primary objective."[6] State laws include preferences for placement with other family members while dependency cases are pending, and California law explicitly requires that such preference continue "regardless of the relative's immigration status."[7]

The IFR is inconsistent with this collection of state and federal legislation that aims to support the thriving of families who reside in our states because, as described in further detail below, the IFR will result in youth spending longer periods of time in ORR custody, rather than with safe and appropriate sponsors who are, in many cases, family members. The States oppose the IFR because its impact will be to make family connection more difficult, which is contrary to the policy goals the States regularly seek to achieve when legislating and maintaining systems that impact families.

B. The IFR will raise unnecessary barriers to unaccompanied children's timely release from federal immigration custody, resulting in harms to these children.

The IFR has removed important provisions from the Foundational Rule that prohibited ORR from: (1) disqualifying potential sponsors based solely on their immigration status; (2) collecting information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes; and (3) sharing immigration status information about sponsors with law enforcement and immigration enforcement related entities.[8] Even assuming that the information sharing restriction is inconsistent with federal law, as the IFR asserts, the removal of the first two of these critical protections will cause harm to unaccompanied children.

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[3] See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64; *see also* Cal. Dep't of Soc. Servs., Family First Prevention Services Act (FFPSA) Overview, https://www.cdss.ca.gov/inforesources/cdss-programs/ffpsa-part-iv/overview (as of May 21, 2025).

[4] Cal. Welf. & Inst. Code § 202(a).

[5] Or. Rev. Stat. §§ 419B.090(2)(a), 419B.090(3).

[6] Cal. Welf. & Inst. Code §§ 202(a); *see also* N.Y. Soc. Serv. Law 384-b; Or. Rev. Stat. §§ 419B.090(5).

[7] Cal. Welf. & Inst. Code § 361.3; *see also* Or. Rev. Stat. § 419B.192.

[8] 89 Fed. Reg. 34,384, 34,591.

The removal of the protection against disqualifying sponsors based on their immigration status will significantly reduce the number of otherwise suitable sponsors, including family members, who under the IFR can be disqualified from sponsoring an unaccompanied child based solely on their immigration status. The removal of these critical protections will also cause a chilling effect on prospective sponsors, many of whom are parents or close relatives of unaccompanied children, discouraging them from coming forward to sponsor unaccompanied children out of fear that any information they provide to ORR may be shared with immigration enforcement authorities and used to take immigration enforcement actions against them, their family or household members, or even the unaccompanied child they are sponsoring.

The IFR's removal of protections that help facilitate the timely release of unaccompanied children from ORR custody thus conflicts with HHS's obligations under the Foundational Rule to release unaccompanied children from custody "without unnecessary delay,"[9] and under federal law to place them in the least restrictive settings.[10] Although the States support an appropriate and thorough screening process for sponsors to ensure the well-being and safety of children after they are released from federal custody, the States oppose policies, such as this IFR, that create unnecessary barriers to unaccompanied children's prompt release to suitable sponsors, prolong the time children spend in federal custody and separated from their families and other caregivers, and undermine the well-being of these children.

The States' concerns over the potential impact of the IFR are informed by the negative impacts of past information sharing between ORR and the Department of Homeland Security (DHS). In 2018, ORR and DHS entered into a memorandum of agreement that mandated information sharing about unaccompanied children, potential sponsors, and adult members of potential sponsors' households.[11] This action deterred suitable sponsors from coming forward, regardless of their immigration status.[12] As a result, the average length of stay of children in ORR custody doubled from an average of 47 days in November 2017 to a peak of 93 days by November 2018.[13] HHS and DHS eventually terminated the 2018 agreement, recognizing that it "undermined the interests of children and had a chilling effect on potential sponsors (usually a parent or close relative) from stepping up to sponsor an unaccompanied child placed in the care

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[9] 45 C.F.R. § 410.1201(a).

[10] 8 U.S.C. § 1232(c)(2)(A).

[11] *See* 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.aila.org/files/o-files/view-file/1FAE732E-EFDF-424A-9930-EC1986462E9D.

[12] *See* White et al., *Care under pressure: Policy contradictions of speedy release, safety, and placement suitability in ORR-contracted programs for unaccompanied migrant children* (2025) 169 Children and Youth Services Rev. 108093, https://www.sciencedirect.com/science/article/abs/pii/S0190740924006650.

[13] *Id*.

of HHS."[14] The States are concerned that the IFR will predictably have a similar chilling effect on potential sponsors and result in prolonged ORR detention for unaccompanied children. As the agency charged with protecting the safety and well-being of these vulnerable children and ensuring their timely release to a suitable sponsor, ORR undermines its mission and statutory directives, and the well-being and best interests of unaccompanied children, when it takes such actions that raise unnecessary barriers to the timely release of unaccompanied children from federal custody.

The likelihood that the IFR's recission of these protections will increase the time that children spend in immigration custody is particularly concerning because a robust body of research shows that prolonged time in immigration custody is particularly harmful for children's physical and mental health and disrupts their development. Many unaccompanied children in federal custody have experienced intense trauma from events before and after their arrival in the United States. Many are asylum seekers who have fled extreme violence, gang activity, persecution, poverty, or abusive situations in their home countries, and the journey to the United States exposes these children to further trauma.[15] The trauma from these experiences is compounded by the impact of prolonged separation from parents or other caregivers.[16] These experiences place them at risk for psychological distress, including depression, anxiety, and posttraumatic stress.[17] Prolonged stays in ORR custody can exacerbate this trauma.[18] ORR facilities housing unaccompanied children have reported that longer lengths of stay in ORR custody resulted in deteriorating mental health for some children, and that children with longer stays experienced more stress, anxiety, hopelessness, and behavioral issues, along with more instances of self-harm and suicidal ideation.[19] Youth held in ORR facilities can also experience education disruption that interferes with the normal course of social and cognitive development, and which is particularly harmful for children with learning or other disabilities that cannot be adequately addressed in custodial settings.[20]

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[14] U.S. Dep't of Homeland Sec., HHS and DHS Joint Statement on Termination of 2018 Agreement (March 12, 2021), https://www.aila.org/files/o-files/view-file/76252400-9036-4262-BFDD-7A34BC730B95.

[15] *See* NeMoyer, et al., *Psychological Practice with Unaccompanied Immigrant Minors: Clinical and Legal Considerations*, Transl. Issues Psychol. Sci. 5(1): 4-16 (March 2019), https://pmc.ncbi.nlm.nih.gov/articles/PMC6415685/pdf/nihms-1011765.pdf; *see also* U.S. Dep't of Health and Human Serv., Off. of Inspector Gen., *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, OEI-09-18-00431 (Sept. 2019), https://oig.hhs.gov/documents/evaluation/3153/OEI-09-18-00431-Complete%20Report.pdf.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, *supra* note 15. ORR facilities participating in this 2019 study attributed longer stays for children to ORR policy changes, including new sponsor screening requirements.

[20] Adamson et al., *Educational Advocacy for Unaccompanied Immigrant Youth in California*, Nat'l Ctr. for Youth Law (2024), https://tinyurl.com/4vrr86rr.

The States have a significant interest in minimizing the length of time unaccompanied children spend in federal custody, as many of these children will eventually be released to sponsors in the States. In recent years, approximately 36% of all children who have been released from immigration custody by the federal government have come to our States.[21] The harms caused to unaccompanied children from prolonged time in federal custody will impact these children's ability to thrive in their communities upon release, leading them to require mental health and health care or intensive educational interventions at greater rates. Additional state funded resources will be needed to respond to the consequences of any harms to these children caused by the IFR. The States therefore have a significant interest in ensuring that these children do not suffer additional and unnecessary harm that is likely to result from the IFR's removal of important protections provided by the Foundational Rule.

II. Full Rescission of Section 410.1201(b) Is Not Justified by a Purported Conflict with Section 1373

The States oppose the IFR's rescission of the entirety of Section 410.1201(b) based on its purported conflict with 8 U.S.C. §1373. HHS's sole stated justification for rescinding this provision is the information-sharing restriction's purported conflict with Section 1373. Section 1373 provides in part that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." The IFR states that the information sharing restriction in the Foundational Rule directly conflicts with this statutory limitation in Section 1373 and is thus "not in accordance with law" under 5 U.S.C. 706(2)(A) and must be removed.[22]

As discussed previously, Section 410.1201(b) contains three provisions. It prohibits ORR from (1) disqualifying potential sponsors based solely on their immigration status; (2) collecting information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes; and (3) sharing immigration status information about sponsors with law enforcement and immigration enforcement related entities. Even assuming that the third provision conflicts with Section 1373, HHS has provided no justification for rescinding the regulation's restrictions on disqualifying sponsors based solely on immigration status and on collecting sponsors' immigration status information for law enforcement or immigration enforcement purposes. There is no federal law that requires ORR to disqualify potential sponsors based on their immigration status or to collect information on the immigration status of potential sponsors for law enforcement or immigration enforcement purposes. Nor does federal law bar

[21] In Fiscal Years 2023 and 2024, our States received approximately 36% of all unaccompanied children released from federal immigration custody. Since Fiscal Year 2015, almost 82,000 children have been released to sponsors in California alone. Off. of Refugee Resettlement, Unaccompanied Alien Children Released to Sponsors by State (May 12, 2025), https://acf.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state.

[22] 90 Fed. Reg. 13,554.

HHS from prohibiting the collection of information on the immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. As such, even assuming the information sharing restriction in Section 410.1201(b) conflicts with federal law, this purported conflict does not provide adequate justification for HHS to rescind the remaining lawful parts of the regulation without providing a reasoned explanation for this change.[23]

Indeed, HHS recognizes that these provisions do not conflict with Section 1373, but, in a brief footnote in the IFR, summarily asserts that these provisions "are inextricably linked and there was no indication in the Foundational Rule that it was intended to treat the information-sharing and the eligibility issues as distinct."[24] HHS acknowledges that the Foundational Rule contains a severability provision, but claims that the Foundational Rule's preamble explains "that severability runs—at most—to provisions, not to portions of provisions" and thus the entire provision must be removed.[25] However, contrary to this claim, the Foundational Rule does not specifically prohibit the severing of parts of provisions that are found to be invalid.[26]

Furthermore, HHS has determined to rescind the entirety of Section 410.1201(b) without showing that it has considered the potential impact on unaccompanied children and sponsors or whether this IFR conflicts with ORR's other obligations under federal law, in particular its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child and release them to sponsors without unnecessary delay.[27] An agency's failure to consider important aspects of the problem when rescinding a regulation is arbitrary and capricious and therefore unlawful under the APA.[28]

III. HHS's Finding of Good Cause to Exempt the IFR from Notice and Comment Requirements Lacks Adequate Justification

The States are also concerned that an IFR is not the proper mechanism for HHS to make the rule changes it seeks here. A federal agency may bypass notice and comment under 5 U.S.C. § 553(b)(B) "when the agency for good cause finds. . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" and states such finding and its justification in the rule. Bypass is an emergency procedure that should apply in narrow

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[23] See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

[24] 90 Fed. Reg. 13,554, 13,555 n. 1.

[25] *Id*.

[26] *See* 89 Fed. Reg. 34,384, 34,389.

[27] *See* 8 U.S.C. § 1232(c); 45 C.F.R. § 410.1201(a).

[28] *See* 5 U.S.C. § 706(2)(A) (courts "shall … hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has … entirely failed to consider an important aspect of the problem").

circumstances.[29] Courts have reinforced the narrow application of this exception, finding that the "unnecessary" prong applies to situations that are routine, insignificant in nature and impact, and inconsequential to the public, and that the "contrary to the public interest" prong applies in situations where *the notice and comment*, not the regulation, are contrary to the public interest.[30]

The reasons offered by HHS to justify its finding that good cause exists to bypass the notice and public comment procedure do not meet this high bar, and an IFR is therefore an inappropriate vehicle to rescind Section 410.1201(b) in its entirety. HHS asserts that good cause exists because "ORR had no authority to promulgate such a rule; revoking it immediately is in the public interest; and notice and comment is unnecessary and contrary to the public interest because no amount of public input could give ORR the power to contravene a duly enacted law of Congress via regulation."[31] But this misapprehends the good cause exception in at least two significant ways.

First, HHS concludes that because it has determined the rule to be unlawful, public comment would not change its actions and is therefore "unnecessary." But notice and comment is not deemed unnecessary because the agency has determined that its decision cannot be changed; it is only unnecessary where the agency action is routine and inconsequential to the public. Not so here, where the rule change will have a significant impact on thousands of unaccompanied children, their potential sponsors and families, and on the States—impacts which the IFR entirely fails to reckon with. Nor does the IFR address the need for any adjustment period, for example, for regulated entities to consider how to handle cases with sponsors whose application process is near completion. This and other practical obstacles that the IFR creates are among the types of important issues that the APA's notice and comment requirement is designed to surface.

Moreover, HHS does not contemplate that the public may offer comment on the determination of unlawfulness itself, or on the determination that the information sharing provisions cannot be severed from the provisions prohibiting collecting certain information or disqualifying sponsors based on immigration status. (See Section II, *supra*.). The fact that the IFR rescinds both a provision alleged to conflict with federal law and other provisions with no such conflict highlights the inappropriateness of HHS's decision to institute broad changes without offering the public an opportunity to be heard and surface these important concerns through the notice and comment process.

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[29] *U.S. v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010).

[30] *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94-95 (D.C. Cir. 2012); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114-15 (2d Cir. 2018) (contrasting a situation in which surprise may be necessary to prevent evasion of the changed rule; "since notice and comment are regarded as beneficial to the public interest, for the exception to apply, the use of notice and comment must actually harm the public interest").

[31] 90 Fed. Reg. at 13,555.

Second, HHS states that it has determined that notice and comment is contrary to the public interest because, again, the agency has determined that its decision cannot be changed. But a notice and comment period is considered contrary to the public interest where the notice and comment process itself would interfere with the agency's aims, not merely because the agency is uninterested in the content of the comments. For example, the agency may determine notice and comment would be contrary to the public interest if the comment period would give a regulated industry advance notice of a rule change so the industry would be able to evade the impact of the rule and defeat its purpose.[32] HHS has identified no such ill effects from providing notice and an opportunity for comment here, and has failed to identify good cause to justify bypassing notice and comment.

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The States oppose the IFR's wholesale rescission of Section 410.1201(b) without the opportunity for notice and comment. Even assuming that Section 410.1201(b)'s information-sharing restriction conflicts with federal law, HHS has provided no substantive justification for rescinding the entirety of Section 410.1201(b) and has failed to show that the agency has considered the potential—indeed likely—negative impacts of the IFR on unaccompanied children, on potential sponsors, and on the States. These impacts are significant, risking that unaccompanied children will spend extended key periods of childhood in overly restrictive facilities, deprived of their rights to maintain association with and receive care from family. As numerous State laws attest, supporting healthy and connected families is among the States' highest interests. Nor, for the reasons described above, is an IFR an appropriate vehicle for rescinding Section 410.1201(b). The States urge HHS to withdraw the IFR, Unaccompanied Children Program Foundational Rule; Update to Accord with Statutory Requirements, 90 Fed. Reg. 13554 (March 25, 2025) and reconsider the proposed change or provide the public with notice and the opportunity to comment on any future proposal to rescind Section 410.1201(b).

Sincerely,

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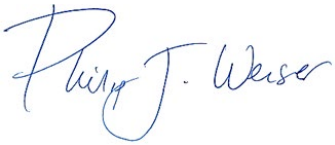
[32] *See Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749, 755 (D.C. Cir. 2001) (offering example in which "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent"); *Jifry v. F.A.A.*, 370 F.3d 1174, 1179-80 (D.C. Cir. 2004) (finding good cause where rule prevented individuals flagged as risks by TSA from obtaining airman certificates).



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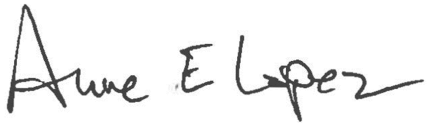

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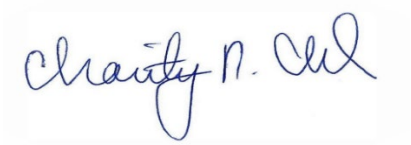

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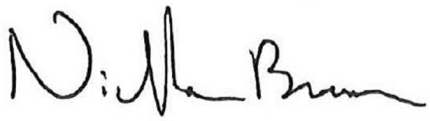

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