DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

June 7, 2021

The Honorable Greg Abbott
Governor of Texas
P.O. Box 12428
Austin, TX 78711-2428

The Honorable Jose A. Esparza
Deputy Secretary of State
P.O. Box 12887
Austin, TX 78711-2887

The Honorable Cecile Erwin Young
HHSC Executive Commissioner
4900 North Lamar Blvd.
P.O. Box 13247
Austin, TX 78711-3247

Re: May 31, 2021 Proclamation

Dear Governor Abbott, Deputy Secretary Esparza, and Commissioner Young,

I write in response to Governor Abbott's May 31, 2021 Proclamation directing the Texas Health and Human Services Commission (HHSC) to "discontinue state licensing of any child-care facility in this state that shelters or detains unlawful immigrants or other individuals not lawfully present in the United States under a contract with the federal government." Congress has charged the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR) with responsibility for the care and custody of unaccompanied non-citizen children seeking refuge in the United States. Please confirm by June 11, 2021, whether you intend to apply the Proclamation to ORR's network of 52 state-licensed grantee care provider facilities operating in Texas, and if so, whether you are willing to grant an exception that would allow ORR's grantees to retain their licenses subject to the same standards applied to other child-care facilities that are not affiliated with the Federal government.

In relevant part, the May 31 Proclamation directs HHSC to "deny a license application for any new child-care facility that shelters or detains unlawful immigrants or other individuals not lawfully present in the United States under a contract with the federal government, to renew any existing such licenses for no longer than a 90-day period following the date of this order, and to provide notice and initiate a 90-day period beginning on the date of this order to wind down any existing such licenses."

Pursuant to the May 31 Proclamation, on June 2, 2021, HHSC issued a notice to licensed care providers directing that "[b]y August 30, 2021, you must wind down any operations at your child-care facility that provide care under a federal contract to individuals who are not lawfully present in the United States." The June 2 HHSC notice warns that after August 30, "[i]f you are still providing care for individuals who are not lawfully present in the United States under a contract with the federal government, HHSC will take necessary steps to comply with the proclamation and ensure no state-licensed child-care

facility is sheltering or detaining individuals who are not lawfully present under a contract with the Federal Government."

As an initial matter, the U.S. Department of Health and Human Services (HHS) requests clarification regarding the meaning of "unlawful immigrants or other individuals not lawfully present in the United States." In particular, HHS requests clarification regarding whether you intend for this language to encompass the population of unaccompanied non-citizen children sheltering in ORR's network of 52 state-licensed grantee care-provider facilities operating in Texas. The children in ORR's care and custody are "unaccompanied alien children" (UC), as defined by the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 8 U.S.C. § 1232(g). Federal law provides that UC do not accrue unlawful presence while they are in the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(I). HHS therefore does not consider UC to be "unlawful immigrants or other individuals not lawfully present in the United States." Accordingly, HHS does not believe the Proclamation should apply to ORR's network of grantee care providers sheltering UC in Texas. Assuming you do intend the Proclamation to apply to ORR grantees, HHS requests clarification regarding how HHSC plans to ensure that no state-licensed child-care facility is sheltering UC under an agreement with the Federal government after August 30, and what Texas contemplates with respect to the children who would otherwise be housed in such facilities. Of particular concern to HHS is the Proclamation's reference to "alternative detention facilities."

To the extent that you intend to apply the Proclamation to ORR's network of grantee care-providers in Texas, please understand that the Proclamation facially discriminates against the Federal government and its grantees in violation of the Supremacy Clause and the well-established doctrine of intergovernmental immunity. It is beyond dispute that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations." *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (some citations omitted). Indeed, the Proclamation concedes that enforcement of the country's immigration laws "is the federal government's responsibility."

Among those laws is the TVPRA, 8 U.S.C. § 1232 *et seq*., through which Congress entrusted the care and custody of UC to the Secretary of HHS. 8 U.S.C. § 1232(b)(1) ("[T]he care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services."). The TVPRA provides that, with limited exceptions, UC encountered by other Federal agencies generally must be transferred to HHS custody within 72 hours absent exceptional circumstances, 8 U.S.C. § 1232(b)(3), and directs that UC be placed in the least restrictive setting that is in the best interest of the child. 8 U.S.C. § 1232(c)(2)(A). The Homeland Security Act of 2002 (HSA) further assigns responsibility for the care and custody of UC to the Director of ORR, including "coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status," 6 U.S.C. § 279(b)(1)(A), "making placement determinations," 6 U.S.C. § 279(b)(1)(C), and "overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside." 6 U.S.C. § 279(b)(1)(G).

Congress enacted the above statutory framework against the backdrop of the Flores Settlement Agreement (FSA), which governs the care and custody of non-citizen children in Federal immigration custody and is the subject of ongoing proceedings in the Central District of California, as well as oversight

by a court-appointed independent monitor. *See Flores v. Garland*, No. 2:85-cv-04544, Dkt. No. 1122 (C.D. Cal. May 12, 2021) (order setting oversight reporting schedule and scheduling next status conference for June 25, 2021). Among other things, the FSA requires that UC be placed in a state-licensed facility, subject to certain exceptions. *See* FSA, ¶ 19 ("In any case in which [ORR] does not release a minor . . . such minor shall be placed temporarily in a licensed program until such time as release can be effected . . . or until the minor's immigration proceedings are concluded, whichever occurs earlier."). HHS has enacted regulations implementing the FSA, including this requirement. *See* 45 C.F.R. § 410.100 *et seq.* ("This part governs those aspects of the care, custody, and placement of [UCs] agreed to in the settlement agreement reached in Jenny Lisette Flores v. Janet Reno, Attorney General of the United States, Case No. CV 85-4544-RJK (C.D. Cal. 1996).").

To fulfill its statutory and court-ordered obligations, ORR has developed a nationwide network of care-provider facilities that shelter and care for UC on ORR's behalf, according to ORR's policies and under ORR's supervision. ORR operates 52 state-licensed facilities in Texas, which comprise a significant portion of ORR's total operational footprint, and represent an indispensable component of the Federal immigration system. If interpreted to reach ORR's network of grantee-facilities in Texas, the May 31 Proclamation would be a direct attack on this system.

Under the Supremacy Clause, "the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). Accordingly, state laws are invalid if they "regulate[] the United States directly or discriminate [] against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990). State laws discriminating against those who contract with the Federal government are prohibited by the intergovernmental immunity doctrine. *See, e.g.*, *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014) ("SB 990 also violates intergovernmental immunity because it discriminates against the federal government and Boeing as a federal contractor."). The May 31 Proclamation discriminates against the Federal government by targeting the licenses held only by those entities providing shelter to "unlawful immigrants or other individuals not lawfully present in the United States *under a contract with the federal government*." (Emphasis added); *see also* June 2, 2021 HHSC Notice (affirming that the proclamation does not apply to facilities that "do not have any contracts with the federal government"). The key criteria by which HHSC is to apply the May 31 Proclamation is a provider's relationship with the Federal government. Such a regulation facially discriminates against the Federal government, its contractors, and the Federal government's decision to meet its obligations under Federal law by using contractors. For these reasons, if interpreted to reach ORR's grantees in Texas, the May 31 Proclamation would violate the Supremacy Clause and the doctrine of intergovernmental immunity.

Furthermore, the Proclamation's assertion that the Federal government has unconstitutionally "commandeer[ed]" Texas "to continue administering state-licensed facilities" is groundless. Congress has not required Texas to administer a federal regulatory scheme. The U.S. Constitution merely prohibits Texas from discriminating against the Federal government and those it is working with to implement a Federal program. The legal premise of the Proclamation's treatment of licensed entities working with the Federal government is thus unsupported.

If interpreted to reach ORR's grantees in Texas, the May 31 Proclamation will obstruct Federal immigration operations by threatening to shutter the facilities used to house the vulnerable population of UC. If HHSC enforces the May 31 Proclamation against ORR's Texas care providers by rescinding their licenses, ORR may be unable to meet the requirements of the FSA and TVPRA, and ORR could face

significant disruption to its system for sheltering thousands of UC pursuant to Federal law. “The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.” *M’Culloch v. Maryland*, 17 U.S. 316, 317 (1819).

HHS has successfully collaborated with other state governments, and welcomes the opportunity to work with Texas to address issues of concern. Although we prefer to resolve this matter amicably, in light of the legal issues outlined above, HHS is consulting the U.S. Department of Justice and intends to pursue whatever appropriate legal action is necessary to ensure the safety and wellbeing of the vulnerable youth that Congress entrusted to ORR. Because of the serious implications for ORR operations in Texas and our ability to comply with Federal law and binding court orders, HHS requests that you indicate in writing by June 11 whether you intend the May 31 Proclamation to apply to ORR’s network of grantee care providers in Texas, and if so, whether you will grant an exception for ORR’s state-licensed grantees operating in Texas. Absent an understanding with Texas by June 11 that ensures ORR’s grantees will be able to retain their licenses subject to the same licensing standards as other child-care facilities operating in Texas, HHS will be prepared to pursue all available relief.

Respectfully,

Paul Rodriguez
Deputy General Counsel