Summary of S. 1494 Secure and Protect Act of 2019 -- Manager's Amendment*

**This summary is a summary based on the manager's amendment that was circulated on July 30th, 2019 at 3:25 PM.*

On May 15, 2019, Senator Lindsey Graham introduced the Secure and Protect Act of 2019. The bill includes many provisions that would be detrimental to the safety and wellbeing of immigrant children and families, including changes to the Trafficking Victims Protection Reauthorization Act (TVPRA) and the application of the *Flores* Settlement Agreement and its related court orders. The bill also imposes substantial barriers to applying for asylum and other forms of legal relief, increasing the likelihood that those fleeing persecution will be unable to apply for protection. S. 1494 is a non-starter that guts basic protections and due process for immigrant children and families. Below is a summary, analysis, and section-by-section.

Summary and Analysis

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Flores and TVPRA:

Authorizes Indefinite Family Detention: S. 1494 would gut *Flores* protections (and override subsequent court decisions enforcing the settlement) for accompanied children by permitting DHS to detain accompanied children with their parents in family detention centers **indefinitely**, through the end of their removal proceedings. Medical and mental health professionals and DHS' own advisory committee have reported far-reaching concerns about the impact of family detention of any length on children. Moves to dramatically expand the use and duration of family detention run directly contrary to the best interests of children, threaten to further traumatize particularly vulnerable populations, and impose unnecessary and significant costs.

Sets Unreasonable Expedited Timelines for Asylum Proceedings Involving Families: S. 1494 directs the Attorney General to prioritize the cases of families seeking asylum and to set goals for completing these cases within 100 days. Many accompanied children and families have fled grave violence and threats to their lives. Revealing sensitive details that give rise to

eligibility for protection, navigating complex immigration laws, and compiling necessary documentation to prove one's legal case frequently takes time and requires the assistance of legal counsel. Detention only compounds these difficulties by limiting one's ability to secure legal representation and prepare difficult cases for protection. Unreasonably short timelines for adjudicating such cases further threaten due process and the return of children and families to harm, danger, or death.

Strips Accompanied Children of Protections Under *Flores*: S. 1494 prevents states from mandating that family detention facilities meet state licensing requirements and instead assigns the DHS Secretary sole and unreviewable discretion to determine the conditions of these facilities. The Amendment further states that its provisions and the TVPRA, not the *Flores* settlement agreement and related court orders, are the standards governing conditions of care in family detention and allows DHS to hold accompanied children in unlicensed, secure facilities. The bill does include some requirements for conditions in family detention, such as requirements that detention be "secure and safe"; have suitable living accommodations; access to drinking water and food; timely access to medical assistance (including mental health assistance); and access to all other services necessary for the adequate care of children. However, these additions attempt to cover up the fact that the bill guts protections for accompanied children required by the *Flores agreement,* in part to avoid compliance with *Flores'* general policy favoring release of all children, including accompanied children.

Together, the Trafficking Victims Protection Reauthorization Act (TVPRA) and *Flores* provide protections related to care, custody, and due process for children. In particular, *Flores* provides national minimum standards for the treatment, detention, and release of children to ensure the safe and appropriate care of children--standards far more specific and comprehensive than those outlined in the Amendment. Recent motions to enforce the settlement in light of repeated and egregious violations illustrate the necessity of *Flores'* provisions and of the rigorous third-party oversight and monitoring it provides. The recent deaths of children in immigration custody, as well as recent news regarding the conditions in border facilities, further underscore the need for transparency and oversight to ensure the safe and appropriate treatment of the most vulnerable in our immigration system.

Permits Immediate Repatriation of Unaccompanied Children: S. 1494 erodes critical protections for unaccompanied children in the TVPRA and would allow immigration officers--in their sole and unreviewable discretion--to immediately repatriate an unaccompanied child. The bill requires immigration officers to assess whether or not a child is able to make an independent decision to withdraw their application for admission to the United States. If a child is unable to make an independent decision, they are referred for full immigration court removal proceedings before an immigration judge. If they are able to make an independent decision, an immigration

officer must make a record for a repatriation order, which "shall be carried out and the child shall be returned" to their country unless the officer finds that it is more likely than not that the child would be trafficked upon return or would qualify for asylum, withholding of removal, or protection under the Convention Against Torture. (Being a survivor of human trafficking--i.e., a child's having previously been trafficked--is not a factor taken into consideration; only future risk of trafficking would be taken into account. This means that children would lose access to forms of relief for those who have previously been trafficked, such as the T visa.) If an officer determines that a child does not have a claim for asylum, withholding of removal, or protection under the Convention Against Torture, the child will be returned to their country of nationality or last residence without any consideration of whether they will be safe when they return. This is problematic for many reasons, not least of which being that the UNHCR found serious deficiencies in CBP's screening of children for protection and trafficking concerns. The TVPRA sets the current standard for children's repatriation and requires the Department of State to ensure the safe repatriation of children to their home countries.

S. 1494 would require unaccompanied children to show that it is "more likely than not" that they would be trafficked if returned or would be granted asylum - a standard never before applied to children and one that is higher than the standard currently applied to adults to be able to access protection. This runs directly contrary to the TVPRA's intent to recognize the particular vulnerability of children alone in the immigration system.

Limits Unaccompanied Children's Access to Due Process and Humanitarian Protection: Under S. 1494, if an immigration officer determines that it is more likely than not that an unaccompanied child will be trafficked on return the child will be referred for full removal proceedings before an immigration judge.

If an immigration officer determines it is more likely than not that an unaccompanied child's claim for asylum, withholding of removal, or protection under the Convention Against Torture will be granted the child will be referred to an immigration judge for a determination regarding the child's eligibility for only these forms of relief. Consideration of other forms of legal protection for which the child might qualify, such as Special Immigrant Juvenile Status or a T visa, would be foreclosed.

This use of a "more likely than not" standard, which exceeds the current standard for credible fear applied to adults, effectively requires children to prove their claims in the initial screening phase--while detained and without counsel. As a result, it greatly increases the risk that children will be returned to harm.

Authorizes Prolonged Detention of Unaccompanied Children: S. 1494 prohibits the release of unaccompanied children from DHS or ORR custody while their immigration proceedings are ongoing and provides for release only at the sole and unreviewable discretion of the ORR Director. This provision runs directly contrary to both *Flores* and the TVPRA, which provide for the prompt placement of unaccompanied children in the "least restrictive setting" in their best interests. While *Flores* articulates a policy favoring the release of children from custody and includes a list of preferred sponsors to whom children may be released, S. 1494 would allow for a child's release by the ORR Director to a parent or legal guardian, a close relative, a distant relative or an unrelated adult only as an exception to the Act's default detention of unaccompanied children throughout their proceedings. However, the Act also includes a large exception prohibiting the release of children to sponsors who have committed a broad range of criminal offenses, including those that may be unrelated to a sponsor's ability to safely care for a child; is detained pursuant to regular removal proceedings; has "assisted or facilitated the smuggling or trafficking of a child"; or "would otherwise pose a threat to the well-being" of the child, a large catch-all provision that could render any possibility of release meaningless.

While the Act would allow for the release of unaccompanied children without sponsors to programs for refugee children who have obtained such status, it does not otherwise provide for the release of children to licensed programs, as provided for in *Flores*. The Act makes no reference to requirements that the government prioritize the release of children from custody without unnecessary delay, as required by *Flores*, and in practice may lead to the indefinite detention of unaccompanied children--the precise circumstance *Flores* sought to prevent.

The Act also directs HHS to share information about sponsors, potential sponsors, and others in the sponsors' homes with DHS, with no limitations on how such information may be used by DHS. In practice, this may lead to immigration enforcement against sponsors and others in their homes, as resulted from an earlier information-sharing Memorandum of Agreement signed by the agencies in April 2018. Both enforcement against sponsors and those residing with them and the broader chilling effect on sponsorship that follows will contribute to the prolonged detention of children, contrary to the aims of the TVPRA and *Flores* and the best interests of children. Recognizing these concerns, prior appropriations legislation placed limits on the agencies' use of information obtained during the sponsorship process for enforcement purposes. S. 1494 only intensifies such concerns.

Eliminates One-Parent SIJS: S. 1494 would restrict the availability of special immigrant juvenile status (SIJS) to children who can prove that <u>both</u> parents have abused, neglected, or abandoned them. Under the bill, if a juvenile court determines that a child can be returned to the custody of <u>any</u> parent, they cannot qualify for SIJS. This provision risks the return of children to an abusive or neglectful parent in their country of origin--a result the TVPRA sought to prevent.

The bill further allows the DHS Secretary to question the decisions and authority of state juvenile courts. The Secretary may inquire into the purpose of the juvenile court proceedings and determine whether the dependency order was issued by an appropriate court with appropriate jurisdiction. No court may review the Secretary's determination.

Subjects Unaccompanied Children to Adversarial Asylum Proceedings and the One Year Filing Deadline: The Amendment also eliminates unaccompanied children's ability to apply for asylum beyond the one year deadline. Many unaccompanied children have fled grave violence and threats to their lives. Under the Amendment, children who arrive in the United States alone would have to navigate a complicated immigration system that was made for adults. Within a year, they would have to reveal sensitive details about their history, compile documents to support their case, and try to find legal counsel. Many children are detained for several months in ORR custody before being released to a sponsor, and under this bill, many will not be released at all. They may be unable to secure an attorney or gather necessary documents in a shorter timeframe and under these conditions.

Additionally, the bill would eliminate unaccompanied children's ability to make their case to an asylum officer in the first instance, rather than in immigration court. While interviews with an asylum officer are non-adversarial, immigration court is an adversarial proceeding where the child will face cross examination by an experienced attorney, sometimes without an attorney of their own.

Parole:

Guts Access to Parole for Asylum Seekers Who Establish Credible Fear: S. 1494 would vastly limit access to parole, including for asylum seekers. The bill includes a provision that defines in statute the concepts "urgent humanitarian reason" and "significant public benefit" for purposes of parole, and uses such definitions to vastly narrow access to parole both into the US and out of ICE custody. By narrowly defining these terms, the bill would overturn the current regulations and the 2009 Parole Directive and effectively eliminate the possibility of parole for asylum seekers who have passed a credible fear interview and do not present a flight risk or danger to the community.

Under the bill, parole for urgent humanitarian reasons would be limited to life-threatening emergencies for the individual or an immediate family member, imminent death of a close family member, and organ or tissue donation for a close family member. Significant public benefit parole is limited to instances where the presence of the individual is necessary for law-enforcement matters, matters involving the termination of parental rights, safety concerns in

detention facilities including the lack of adequate bed space or serious medical condition, as well as to parole in individuals returned under INA 235(b)(2)(C) for immigration court hearing (i.e. the Migration Protection Protocols).

Asylum:

Raises the Credible Fear Standard: S. 1494 would make it more difficult for asylum seekers to pass a credible fear interview (CFI) by increasing the threshold from a "significant possibility" to "more likely than not." It also allows the asylum/CBP officers to decide whether asylum seekers are barred from asylum, a determination historically made by an immigration judge. Judges make these determinations because many of the asylum bars can only be determined after a background check, and there are exceptions to those bars under the INA.

This high screening threshold, which conflicts with the international standard that only manifestly unfounded applications should be processed in accelerated proceedings, and the application of asylum bars during initial screening interviews, would likely result in the deportation of asylum seekers with well-founded fears of persecution.

Cuts Off the Ability to Apply for Other Types of Relief: S. 1494 limits asylum seekers' ability to apply for other types of relief beyond asylum. This is problematic for those who would otherwise qualify for SIJS, trafficking visas, or family-based petitions--types of relief that are cheaper and less burdensome to the already taxed attorneys providing direct services pro bono. The limits on relief also apply to those seeking relief under withholding of removal and the Convention Against Torture.

Restricts Access to Withholding of Removal and Convention Against Toture Protection: While the standard for reasonable fear screening interviews does not appear to change, S. 1494 would allow asylum/CBP officers to decide during the fear interview whether asylum seekers are subject to an asylum bar that would also make the individual ineligible for withholding of removal or Convention Against Toture protection and precludes them from applying for such relief before an immigration judge. The applicability of asylum bars and exceptions to these bars have historically been made by immigration judges given the factual and legal complexity of these issues. By applying bars to withholding and CAT protection at the credible/reasonable fear stage, asylum/CBP officers would be able to deny individuals the right to apply for withholding of removal and CAT protection. This will violate the principles of non-refoulement under withholding and article 3 under CAT, both of which have been adopted into law by the U.S.

Limits Access to Asylum to Designated Ports of Entry Only: S. 1494 limits asylum to those who enter through designated ports of entry. This provision violates both domestic and international law, which allow asylum-seekers to ask for protection regardless of where they cross the border. It would deny asylum to refugees who are illegally turned away by CBP at ports of entry because of the agency's practice of "metering" asylum seekers on the southern U.S. border and who are forced to cross the border between ports of entry to seek protection.

Allows Administration to Unilaterally Send Asylum Seekers to Third Countries: The bill forgoes the requirement that the U.S. reach a bilateral or multilateral agreement with a "safe third country" before denying asylum seekers the ability to request asylum in the United States and sending them to the third country. This provision would allow the administration to unilaterally decide which countries qualify as "safe third countries" without any negotiation with the third country about whether it is able to protect returned refugees from persecution and whether its asylum system is capable of fully and fairly adjudicating asylum claims, the factors required under the INA to establish that a country meets the definition of a "safe third country."

Increases Bars to Asylum: S. 1494 increases the number of bars to asylum, including by barring asylum entirely for those who enter between ports of entry. It also explicitly bars asylum-seekers from Central America from qualifying for asylum if their country or a neighboring country has a refugee processing center, which the bill directs to be established in Mexico and Central America. These bans would apply as of the date that the bill is enacted, while the refugee processing centers will sunset three years and 240 days from enactment.

Replaces Asylum for Central Americans with Extremely Limited Overseas Processing: S. 1494 effectively ends asylum protections in the United States for Central Americans and permits them to apply for protection only at refugee processing centers in a region where they fear for their lives. Even refugees who submit applications in neighboring countries could face mortal danger, as persecutors can easily follow refugees across borders within the region in order to harm them. In addition, the bill imposes a fee on refugee applications and does not include a fee waiver provision - meaning that vulnerable refugees will be denied protection because they do not have the means to pay for it.

Numerical Limitations to Refugees From Central America: Despite the displacement of substantial numbers of refugees fleeing persecution in the region, S. 1494 sets an unknown numerical limitation to refugee admissions from countries with Refugee Processing Centers or that are contiguous to countries with Refugee Processing Centers. As a result, refugees with well-founded fears of persecution will be denied protection in the United States once that cap is met each year. Recent news reports indicate that the Administration intends to accept zero refugees in the next fiscal year.

Taken together with the asylum ban on those who do not present at a port of entry and most Central Americans across the board, these provisions create massive barriers to international protection for Central American refugees in the region and represent another means by which to extend a bar on asylum that discriminates against refugees based on their nationality, targeting individuals from countries that the Administration has repeatedly and publicly denigrated.

Hiring Additional Staff: S. 1494 mandates the hiring of 500 immigration judges and a corresponding and consistent number of staff and ICE attorneys, respectively. Additionally, it authorizes funds for facilities and technology to build immigration courts near the border. Some of these courts might be set up in federally owned "temporary housing units," or trailers. The proposed set up, which would allow for video-teleconferencing technology, would greatly undermine the due process of migrants in immigration court proceedings and diminish their access to legal representation.