No. 25-6308

In the United States Court of Appeals for the Ninth Circuit

JENNY LISETTE FLORES, *et al.*,

Plaintiffs-Appellees,

v.

PAMELA BONDI, Attorney General, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Elizabeth B. Wydra
Brianne J. Gorod
Joshua D. Blecher-Cohen
Simon Chin
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Senate with direct experience with the budget reconciliation process and the Congressional Budget Act's constraints on reconciliation legislation. *Amici* have participated in reconciliation proceedings and navigated the process's requirements.

Based on these experiences, *amici* understand that reconciliation bills are considered under special rules that limit debate and preclude filibuster in the Senate. Because of these special rules, reconciliation may be used only for provisions that are predominantly budgetary in nature, not for provisions that would result in substantial policy changes. As a result, *amici* understand that the One Big Beautiful Bill Act (OBBB Act), enacted through budget reconciliation, cannot be interpreted as effecting substantive policy changes. The OBBB Act's detention-related provisions appropriated funds for detention capacity—a permissible budgetary measure—but could not and did not override the *Flores* Settlement Agreement's requirements for how detention must be conducted. Such substantive policy changes would have violated the rule that governs what matters may be included in reconciliation, and as few as forty-one Senators could have successfully stricken them from the bill. Because any contrary interpretation would misunderstand both

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

what Congress can do without challenge through reconciliation and what it did do when passing the OBBB Act, *amici* have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *Flores* Settlement Agreement ("the Settlement"), approved by the district court in 1997, establishes a "nationwide policy for the detention, release, and treatment of minors in the custody of the [Immigration and Naturalization Service]." ER 683, ¶ 9. The Settlement requires that children be held in safe and sanitary conditions, *id.* at 684-85, ¶ 12, placed in state-licensed facilities or their equivalent, *id.* at 687, ¶ 19, and released without unnecessary delay when detention is not required, *id.* at 686, ¶ 14. Appellants now seek to terminate the Settlement under Federal Rule of Civil Procedure 60, arguing in part that "changed circumstances" render continued enforcement inequitable. Appellants Br. 28, 31-32. The district court rejected this argument, concluding that Appellants "fail[ed] to identify any new facts or law that warrant . . . termination." ER 3.

Among the changed circumstances Appellants invoke is the One Big Beautiful Bill Act (OBBB Act), enacted in July 2025 through budget reconciliation. The OBBB Act appropriates $45 billion for detention capacity, including family residential centers (FRCs). Pub. L. No. 119-21, § 90003, 139 Stat. 72, 358-59 (2025). Appellants contend that this appropriation reflects congressional approval of family detention and constitutes a significant policy shift warranting termination

of the *Flores* Settlement. Specifically, they argue that the OBBB Act "shows that Congress approves of FRCs to house class members" and that the Settlement "makes the use of FRCs impossible based on non-existent state licensing or equivalent requirements." Appellants Br. 63.

The district court correctly rejected this argument, explaining that the OBBB Act "allocates $45 billion in additional funding . . . for detention facilities," but that the Settlement "does not preclude [the Department of Homeland Security (DHS)] from the use of FRCs—it simply requires that they be licensed and that minors be held in the least restrictive setting possible." ER 17 n.8. Appellants' contention that the bill reflects a policy change favoring detention over release fundamentally misunderstands the constraints of the budget reconciliation process.

Budget reconciliation is a limited procedural tool designed to expedite fiscal legislation—not to bypass the deliberative process by which Congress enacts substantial policy changes. The Byrd Rule rigorously enforces this distinction by prohibiting the inclusion of "extraneous" matter in reconciliation bills, including any provision whose budgetary effect is "merely incidental" to its non-budgetary policy components. 2 U.S.C. § 644(b). The penalty for violating the Byrd Rule is that the offending provision can be subject to a vote, and sixty votes are then required for the provision to remain in the bill.

The OBBB Act's detention provisions survived the reconciliation process

precisely because they are appropriations—budget authority to incur obligations and make payments from the Treasury—not substantive changes to the legal standards governing detention. *See* U.S. Gov't Accountability Office, GAO-16-464SP, *Principles of Federal Appropriations Law* 2–3 (rev. 4th ed. 2016). Had Congress attempted to override the *Flores* Settlement's requirements through the OBBB Act, those provisions would have been subject to the Byrd Rule, and just forty-one Senators could have voted to strike them from the bill. The Senate Parliamentarian has rejected attempts to use reconciliation for "tremendous and enduring policy change" that should proceed through regular order. Committee on the Budget, United States Senate, Committee Print, 117th Congress, *The Congressional Budget Process* 723 (Comm. Print 2022). The fact that the OBBB Act's detention provisions survived reconciliation confirms that they are budgetary in nature, not policy overrides.

Appellants' argument to the contrary rests on a false premise: that an appropriation for detention capacity silently displaces a consent decree's substantive protections for children. Appropriations provide budget authority—permission to incur obligations and make expenditures. They simply tell an agency what to spend on a given program. The OBBB Act in particular appropriates funds for detention capacity. The *Flores* Settlement, by contrast, establishes legal standards for the treatment of children in detention. These are distinct functions, and the former does

not—and cannot—override the latter. This Court should affirm.

ARGUMENT

I. The Byrd Rule Limits Reconciliation to Budgetary Matters.

Budget reconciliation is a process established under Section 310 of the Congressional Budget and Impoundment Control Act of 1974 (codified at 2 U.S.C. § 641). It is an expedited procedure for enacting legislation that affects federal spending and revenues. Because reconciliation bills are considered under special rules that limit debate and preclude filibuster in the Senate, the process is subject to important constraints designed to prevent abuse. Tori Gorman, Cong. Rsch. Serv., No. R48444, *The Reconciliation Process: Frequently Asked Questions* 1, 4 (2025).

Reconciliation provides an exception to the general rule that legislation requires sixty votes to overcome a filibuster in the Senate and proceed to a final vote. Under reconciliation, certain budget-related measures can pass with a simple majority. *Id.* at 1. Congress has used reconciliation to enact major fiscal legislation, including tax cuts, changes to mandatory spending programs, and deficit reduction measures. *Id.* at 2. But the tradeoff for this procedural advantage is significant: reconciliation may be used only for provisions that are predominantly budgetary in nature. Substantive policy legislation that would otherwise require sixty votes cannot be enacted through reconciliation simply by attaching a budgetary component. *See* Bill Heniff Jr., Cong. Rsch. Serv., No. RL30862, *The Budget*

Reconciliation Process: The Senate's "Byrd Rule" 2 (2022).

The most significant constraint on reconciliation is the Byrd Rule, codified at 2 U.S.C. § 644. Named after its principal sponsor, Senator Robert C. Byrd of West Virginia, the rule prohibits the inclusion of "extraneous" matter in reconciliation legislation. *Id.* § 644(a). Senator Byrd introduced the rule in 1985 to prevent abuse of the reconciliation process—specifically, the use of expedited procedures to enact controversial policy changes that would otherwise face full Senate debate and the sixty-vote requirement for cloture. Ahead of the Senate unanimously adopting the rule, Senator Byrd explained that the reconciliation process "was never meant to be used as it is being used" and that the rule was necessary "to preserve the deliberative process" in the Senate. 131 Cong. Rec. 28968 (1985) (statement of Sen. Byrd). Substantive policy changes, such as the "repeal of the Hobbs Act, acid rain, you name it," Senator Byrd insisted, should be subject to the Senate's "normal cloture" rules. *Id.* at 28969.

The Byrd Rule implements these principles through six criteria for identifying extraneous matter. A provision is considered extraneous to a reconciliation bill if, among other things, "[it] does not produce a change in outlays or revenues," or "[i]t produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision." 2 U.S.C. § 644(b)(1)(A), (D). The latter criterion—the "merely incidental" test—is critical here. To apply it, the Senate

Parliamentarian conducts a balancing test, asking whether a provision "is a policy change that substantially outweighs the budgetary impact of that change." Committee on the Budget, *supra*, at 690 (quoting the Parliamentarian). The magnitude of the budgetary effect, by itself, is not dispositive: "a provision that actually reduces the deficit but does so through a device of an extensive policy change will receive strict scrutiny." *Id.* at 693. Conversely, "a Senator can find it easy to defend as budgetary a provision that does nothing but spend a great deal of money." *Id.*

Before a reconciliation bill even reaches the Senate floor, it undergoes an exhaustive vetting process known as the "Byrd Bath." The Senate Parliamentarian conducts this review in stages: with multiple meetings with majority and minority staff separately, followed by several adversarial bipartisan sessions where both sides present arguments, going through the bill "line by line." *Id.* at 500-02. The Parliamentarian reviews final legislative text and budget scores before providing advice on provisions that violate the Byrd Rule and thus require the support of sixty Senators to remain in the bill. *Id*. at 500-01. This process routinely eliminates offending provisions, as Senators often decide to strike such provisions at this stage rather than have them defeated on the floor. For example, during consideration of the Omnibus Budget Reconciliation Act of 1993, Senator James Sasser reported that "over 150 items were removed from the reconciliation instrument here, because it

was felt that they would be subject to the Byrd rule." 139 Cong. Rec. 19767 (1993) (statement of Sen. Sasser). Senator Sasser praised "the Senate Parliamentarian . . . and his staff . . . who worked long and hard with us day and night . . . to try to expunge what could have conceivably been called Byrd rule problems." *Id.*

The Senate Parliamentarian's application of the Byrd Rule to immigration provisions is instructive. During debate on the Inflation Reduction Act of 2022, several Senators offered immigration-related amendments. One proposed funding for border wall construction; another proposed funding for the Title 42 border expulsion policy; and yet another proposed funding for Customs and Border Protection (CBP) technologies. The Parliamentarian advised that all three amendments complied with the Byrd Rule. Committee on the Budget, *supra*, at 726-28. Explaining the border wall decision, the Parliamentarian stated: "We do not think this section violates [the Byrd Rule's 'merely incidental' test]. It's money for things in the agency's jurisdiction." *Id.* at 728. The Title 42 funding likewise survived because it directed appropriations for an existing authority, *see id.* at 727, while the CBP funding "resemble[d]" other programs already approved for inclusion in the bill, *id.* at 728.

By contrast, the Parliamentarian has determined that proposals aiming to change immigration status violated the Byrd Rule. When Senators proposed amendments to the Immigration and Nationality Act (INA) that would create

pathways to lawful permanent resident (LPR) status for certain populations, the Parliamentarian advised the amendments violated the Byrd Rule. The Parliamentarian explained: "Changing the law to clear the way to LPR status is tremendous and enduring policy change that dwarfs its budgetary impact." *Id.* at 723. The Parliamentarian drew a critical distinction: provisions in earlier reconciliation bills that changed eligibility for federal benefits were "not about immigration status, it was about access to benefits." *Id.* at 722.

The Senate also enforces the Byrd Rule through points of order during a reconciliation bill's consideration on the Senate floor. Any Senator may raise a point of order against a provision believed to be extraneous. 2 U.S.C. § 644(a), (e). If the presiding officer, advised by the Senate Parliamentarian, sustains a point of order, the provision is stricken from the bill. *Id.* § 644(a); Gorman, *supra*, at 1. A sixty-vote supermajority is required to waive the Byrd Rule. Gorman, *supra*, at 6. This enforcement mechanism has proven highly effective. Of the eighty-three points of order raised under the Byrd Rule between 1985 and 2022, seventy-three were sustained. And of sixty-nine motions to waive the Byrd Rule, sixty were rejected. Heniff, *supra*, at 9. This record confirms that the Byrd Rule operates as a meaningful constraint on the reconciliation process, and not merely as a procedural formality.

II. The OBBB Act Does Not Override the *Flores* Settlement Agreement.

Appellants' reliance on the OBBB Act as evidence of changed circumstances

rests on a fundamental misunderstanding of the budget reconciliation process and its constraints. Because the bill was enacted through reconciliation, its provisions were limited to budgetary matters—appropriations for detention capacity, not changes to legal standards governing detention. A provision terminating the Settlement would be a major substantive policy change that could not have survived the reconciliation process. Accordingly, the OBBB Act cannot constitute a changed circumstance warranting termination of the Settlement.

1. The immigration-related provisions of the OBBB Act Appellants cite survived the reconciliation process precisely because they are appropriations—budget authority to incur obligations and make payments from the Treasury—and not substantive policy changes.

The principal provision at issue, Section 90003, provides:

> (a) IN GENERAL.—In addition to any amounts otherwise appropriated, there is appropriated to U.S. Immigration and Customs Enforcement for fiscal year 2025, out of any money in the Treasury not otherwise appropriated, to remain available until September 30, 2029, $45,000,000,000, for single adult alien detention capacity and family residential center capacity.
>
> (b) DURATION AND STANDARDS.—Aliens may be detained at family residential centers, as described in subsection (a), pending a decision, under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), on whether the aliens are to be removed from the United States and, if such aliens are ordered removed from the United States, until such aliens are removed. The detention standards for the single adult detention capacity described in subsection (a) shall be set in the discretion of the Secretary of Homeland Security, consistent with

applicable law.

> (c) DEFINITION OF FAMILY RESIDENTIAL CENTER.—In this section, the term "family residential center" means a facility used by the Department of Homeland Security to detain family units of aliens (including alien children who are not unaccompanied alien children (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)))) who are encountered or apprehended by the Department of Homeland Security.

139 Stat. at 358-59. Subsection (a) is a straightforward appropriation: $45 billion for detention capacity. Subsections (b) and (c) serve a budgetary function: they define the scope of that appropriation by describing the facilities and uses the funding covers. Nothing in Section 90003 purports to alter the legal standards governing the detention of minors.

During the "Byrd Bath" process for the OBBB Act, the Senate Parliamentarian advised that dozens of provisions initially included in the bill violated the Byrd Rule. *See, e.g.*, Press Release, Senate Comm. on the Budget, Senate Parliamentarian Advises Several Provisions in Republicans' 'One Big, Beautiful Bill' Are Not Permissible, Subject to Byrd Rule (June 19, 2025), https://perma.cc/YWP7-364U; Press Release, Senate Comm. on the Budget, Several Additional Provisions in Republicans' 'One Big, Beautiful Bill' Are Subject to 60-Vote Threshold, According to Senate Parliamentarian (June 20, 2025), https://perma.cc/VSW2-4BUX; Press Release, Senate Comm. on the Budget, More Provisions in Republicans' 'One Big, Beautiful Bill' Are Subject to Byrd Rule,

Parliamentarian Advises (June 21, 2025), https://perma.cc/8ZJU-JRGF; Press Release, Senate Comm. on the Budget, 'One Big, Beautiful Bill' Has More Provisions That Violate the Byrd Rule, According to Senate Parliamentarian (June 22, 2025), https://perma.cc/5L9E-PJE5.

Section 90003 was not one of them. That provision survived the rigorous screening of the reconciliation process for the same reason that funding for the border wall, Title 42, and CBP technologies did: they all provide "money for things." *See* Committee on the Budget, *supra*, at 728. In other words, the bill's detention provisions were appropriations for capacity—not the sort of "tremendous and enduring policy change" that would be required to change the requirements for the treatment of children established by the *Flores* Settlement: safe and sanitary conditions, ER 684-85, ¶ 12, prompt processing, *id.*, placement in licensed facilities, *id.* at 687, ¶ 19, and a preference for release, *id.* at 686-87, ¶¶ 14-18. That kind of "tremendous and enduring policy change" to immigration law is precisely the sort of change that the Parliamentarian has consistently advised violates the Byrd Rule and is therefore inappropriate for inclusion in reconciliation legislation. Committee on the Budget, *supra*, at 723; *see supra* at 8-9.

2. Appellants argue that by appropriating funds for family residential centers, Congress expressed approval of family detention. *See* Appellants Br. 62-63; *see also id.* at 63 (arguing that Congress "appropriated money to detain families in FRCs

throughout their removal proceedings" because "Congress wanted such detention").

But Section 90003 did not authorize any new program or establish any new directive with respect to detention—it appropriated money for detention capacity already authorized by law. Courts should not infer that an appropriation implicitly repeals substantive law. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-91 (1978); *see also Env't Def. Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995) (noting that repeals by implication are disfavored "when the claimed repeal rests solely in an Appropriations Act" (quoting *Hill*, 437 U.S. at 190)).

The distinction between appropriating funds and amending substantive law matters enormously in the reconciliation context. Congress appropriated $45 billion for detention capacity, including family residential centers. But this appropriation does not supersede whatever legal standards otherwise govern such detention. Accordingly, the OBBB Act's appropriation for detention capacity does not authorize detention of children in violation of the *Flores* Settlement, eliminate licensing requirements for facilities, or repeal the other substantive protections secured by the Settlement. Congress regularly appropriates funds for activities that remain subject to independent legal requirements. Appropriating money for federal construction projects does not exempt those projects from environmental review. Appropriating money to expand the federal workforce does not displace existing collective bargaining agreements. And appropriating money for detention does not

eliminate the legal standards governing how that detention must be conducted—including the Settlement's requirements for the treatment of children.

Congress has repeatedly demonstrated how it acts when it seeks to change the substantive legal framework governing the treatment of children in custody. The Homeland Security Act of 2002 expressly transferred responsibility for unaccompanied children to the Department of Health and Human Services' Office of Refugee Resettlement (ORR), separating child welfare functions from enforcement. *See* 6 U.S.C. § 279. The Trafficking Victims Protection Reauthorization Act of 2008 expressly codified specific protections, including requirements for prompt transfer to ORR custody and placement in the least restrictive setting. 8 U.S.C. § 1232(c)(2)(A). Congress passed both statutes through regular order, not reconciliation. If Congress sought to override the *Flores* Settlement or eliminate certain protections for detained children, it would have legislated in the same manner—expressly and through regular order. As *amici* well know, it did not.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Dated: January 28, 2026

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
Brianne J. Gorod
Joshua D. Blecher-Cohen
Simon Chin
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

APPENDIX:
LIST OF *AMICI*

Sen. Jeffrey A. Merkley, Ranking Member, Senate Committee on the Budget

Sen. Richard J. Durbin, Ranking Member, Senate Committee on the Judiciary

Sen. Gary C. Peters, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs

Sen. Michael Bennet

Sen. Richard Blumenthal

Sen. Cory Booker

Sen. Catherine Cortez Masto

Sen. Tammy Duckworth

Sen. Martin Heinrich

Sen. Mazie Hirono

Sen. Tim Kaine

Sen. Amy Klobuchar

Sen. Ben Ray Luján

Sen. Edward Markey

Sen. Chris Murphy

Sen. Alex Padilla

Sen. Jack Reed

Sen. Jacky Rosen

Sen. Bernard Sanders

Sen. Adam B. Schiff

Sen. Charles Schumer

Sen. Tina Smith

Sen. Chris Van Hollen

Sen. Elizabeth Warren

Sen. Sheldon Whitehouse

Sen. Ron Wyden

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 25-6308_____

I am the attorney or self-represented party.

This brief contains 3,185 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Elizabeth B. Wydra **Date** January 28, 2026
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2026, I electronically filed the foregoing document using the Court's Appellate Case Management System, causing a notice of filing to be served upon all counsel of record.

Dated: January 28, 2026

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra