

Nos. 19-16487 & 19-16773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General of the United States, et al.,

Defendants-Appellants.

On Appeal From the United States District Court
for the Northern District of California

Case No. 4:19-cv-4073-JST

The Honorable Jon S. Tigar

**BRIEF OF AMICUS CURIAE KIDS IN NEED OF DEFENSE IN SUPPORT
OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Kids in Need of Defense states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Dated: October 15, 2019

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INTEREST OF AMICUS CURIAE

Kids in Need of Defense (“KIND”) is a national nonprofit organization dedicated to providing free legal representation to immigrant children who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court. Since January 2009, KIND has received referrals for over 20,000 children from 72 countries, serving children through its 10 field offices and in partnership with over 600 law firms, corporations, law schools, and bar associations. KIND promotes protection of children in countries of origin and transit countries, and works to address the root causes of child migration from Central America through a team of regional experts who regularly travel to and work in Central American countries. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children. KIND and its pro bono partners have assisted thousands of unaccompanied children in obtaining asylum or other forms of humanitarian protection. KIND has a compelling interest in ensuring that the asylum process remains accessible to all children seeking protection from harm, and that no child’s meritorious claim is denied through application of an arbitrary and unlawful restriction.

KIND sought and received consent from all parties to file this amicus brief.

INTRODUCTION

Flight across multiple national borders is in the fabric of our nation’s asylum laws. Created to protect refugees escaping violence and persecution abroad, the U.S. asylum system implements international treaty obligations designed after World War II to outlaw the horrors unleashed on those forced to travel across multiple countries while fleeing from religious and other persecution. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–41 (1987). Congress enacted a body of law making clear that merely transiting through a third country is not a basis to deny asylum. Further, Congress acted to ensure that the most vulnerable refugees—unaccompanied children—would have a meaningful opportunity to claim protection irrespective of the route traveled to reach a U.S. border.

The Defendants’ interim final rule contravenes this decades-old framework. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (the “IFR”). The IFR bars any asylum seeker—even an unaccompanied child—who enters or attempts to enter the United States at the southern border from asylum eligibility unless he or she also applied for and was denied asylum in a country of transit. Other than Mexican nationals, every person fleeing over land to the southern U.S. border necessarily transits at least one third country. A large proportion of the asylum seekers reaching the southern U.S. border have fled Honduras, El

Salvador, or Guatemala, nations that are among the world's most dangerous and corrupt; others come from as far away as Cameroon or India. The IFR requires these refugees to show that they sought protection in transit countries such as Mexico or Guatemala—countries plagued by the same criminal gangs, cartels, traffickers, endemic gender-based violence, and other dangers that propelled them to flee their countries of origin in the first place. As a practical matter, the IFR essentially forecloses asylum for those who lack the means and travel documents to fly directly into the United States.

Unless the district court's nationwide injunction is upheld, the IFR will result in the denial of countless otherwise meritorious asylum claims. This brief focuses on the ways the IFR will exacerbate the acute dangers faced by already vulnerable unaccompanied children, who are particularly ill-equipped to navigate asylum processes. The IFR disregards the special solicitude for these children mandated by Congress.

Unaccompanied children from around the world seek asylum based on a range of harrowing experiences. Many flee from violent and predatory gangs such as the infamous Mara Salvatrucha (also known as MS-13), responsible for nearly 20,000 murders in El Salvador between 2014 and 2017 alone. Others watched as their parents, siblings, and loved ones were threatened, humiliated, tortured, or even murdered. Some are victims of trafficking coerced into prostitution or slavery. At best,

the IFR will prolong the risks such children face in countries plagued by the dangers they fled and that lack the resources to protect them. At worst, children with meritorious claims will be denied asylum solely because of the IFR and returned to the persecution from which they fled.

As just one example, Michael was 14 when he fled Guatemala.¹ On his journey to the United States, a “coyote” imprisoned Michael in Mexico for two weeks while extorting money from his father. Only after receiving a payoff did the coyote release Michael, who crossed the border into the United States. Represented by KIND pro bono counsel, Michael received asylum in 2016 and subsequently became a lawful permanent resident. Had the IFR been in effect during Michael’s journey, the U.S. government would have refused to protect him on the ground that he was supposed to seek asylum in Mexico *while* he was being held captive and his father extorted.

That outcome would be anathema to the plain language of the Immigration and Nationality Act (the “INA”), which contains safeguards to ensure that “children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances” would not be “forced to struggle through an immigration system designed for

¹ A pseudonym has been used to protect Michael’s identity.

adults.” 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (Stmnt. of Sen. Feinstein). Among those safeguards are an exemption from the “safe third country” bar to asylum (8 U.S.C. § 1158(a)(2)(E)), and the opportunity for a non-adversarial asylum interview (8 U.S.C. § 1158(b)(3)(C)). The IFR overrides these congressionally mandated safeguards for unaccompanied children, and will prolong the time—potentially, indefinitely—that child asylum seekers remain in harm’s way. For these reasons, the IFR was properly enjoined as inconsistent with the INA.

ARGUMENT

Nothing in the INA permits predicating an unaccompanied child’s eligibility for asylum on the route he or she traveled to our nation’s borders. To the contrary, Congress enacted specific protections focused on the vulnerable status of unaccompanied children navigating the asylum system, assuring they can seek asylum in the United States no matter how they arrive here, and regardless of third-country alternatives. The IFR guts these statutory protections.

The IFR presumes that migrants, including vulnerable children, can access protection in transit countries, but that presumption is flawed. Mexico’s asylum system is under-resourced and interfaces with an inadequate child welfare system. Guatemala barely has a functioning asylum system at all: It employs three officers and processes dozens of cases a year, relative to the thousands of transiting asylum seekers. Expecting children to remain for months or years in these transit countries

awaiting a possible asylum decision exposes them to threats of harm and victimization, often from the very same gangs and violence they fled initially.

The fallback forms of withholding and deferral of removal impose higher eligibility standards and provide weaker protections from deportation. The IFR would deny unaccompanied children the asylum protection for which they are statutorily eligible, and subject them to serious risk of harm, including death, upon their wrongful return to their countries of origin.

I. The IFR Contravenes Congressionally Mandated Safeguards For Child Asylum Seekers

Unaccompanied children generally are unaware of their rights with respect to asylum and protection. Frydman Decl. ¶ 26.² Many have been severely traumatized, and most speak little English when they arrive at the U.S. border. In recognition of these vulnerabilities, Congress established numerous statutory protections for unaccompanied child migrants.

² Citations to “Frydman Decl.” are to the Declaration of Lisa Frydman submitted in support of Plaintiffs’ Motion for a Temporary Restraining Order, D.Ct. Dkt. 3-6. Ms. Frydman is the Vice President for Regional Policy and Initiatives at KIND. Her declaration presents KIND’s extensive knowledge of the deficient asylum systems and dangerous conditions in Guatemala and Mexico, as well as in the Northern Triangle countries from which unaccompanied children seek protection.

In passing the Trafficking Victims Protection Reauthorization Act (“TVPRA”) over a decade ago, Congress sought “to protect [unaccompanied] children . . . who have escaped traumatic situations.” 154 Cong. Rec. S10886-01 (Stmt. of Sen. Feinstein). Among other things, the TVPRA amended the INA to exempt unaccompanied alien children from the “safe third country” limitation, ensuring they would not be denied asylum based on the perceived availability of safety pursuant to a formal asylum collaboration agreement with a third country. 8 U.S.C. § 1158(a)(2)(E). In addition, the TVPRA amended asylum jurisdictional provisions to permit unaccompanied alien children to present their cases in a confidential, non-adversarial setting, rather than in open immigration court. 8 U.S.C. § 1158(b)(3)(C). Both of these protections have been effectively abrogated by the IFR.

The IFR imposes an absolute bar to asylum regardless of the merits, solely for failure to seek asylum in transit, and thereby renders the statutory protections for unaccompanied children meaningless. Because the INA expressly provides that any “additional limitations or conditions” on asylum must be “consistent with” its provisions (8 U.S.C. § 1158(b)(2)(C)), and the IFR is inconsistent with each of the INA’s provisions aimed at protecting unaccompanied children, the district court’s injunction should be sustained.

Additional substantive TVPRA amendments reflect Congress’ specific and careful attention toward the needs of unaccompanied children.³ Yet the IFR “does not provide for a categorical exception for unaccompanied alien children.” 84 Fed. Reg. 33,839 n.7. Because unaccompanied children are even less equipped than adults to navigate the barriers to eligibility imposed by the IFR, the rule paradoxically *disadvantages* children, flouting the congressional admonition to show special solicitude toward unaccompanied children.

A. The IFR Overrides The Statutory Exemption Of Unaccompanied Children From The “Safe Third Country” Bar To Asylum

The INA bars the grant of asylum in cases where a satisfactory bilateral or multilateral agreement provides an asylum seeker with access to a “full and fair procedure” to seek asylum in a third country where his or her life or freedom will not “be threatened on account of a [protected characteristic].” 8 U.S.C. § 1158(a)(2)(A). This “safe third country” bar has limited reach, as discussed in Appellees’ Answering Brief. Red Br. 23–25. The IFR omits these statutory limitations, and instead

³ Additional TVPRA protections for unaccompanied children include (1) transfer to the Department of Health and Human Services Office of Refugee Resettlement within 72 hours for placement in the least restrictive setting that is in the best interests of the child; (2) placement in full removal proceedings (instead of expedited removal processing); (3) eligibility for voluntary departure at no cost to the child; and (4) safe and humane repatriation to their country of nationality if found ineligible to remain in the United States. 8 U.S.C. §§ 1232(a)(5)(C), 1232(a)(5)(D), 1232(b)(3), 1232(c)(3)(C)(5).

focuses only on whether the country through which the asylum seeker passed is a party to certain international accords. *See* 8 C.F.R. § 208.13(c)(4)(iii). In other words, the IFR denies asylum to those who traverse a third country en route to the southern U.S. border without considering whether the asylum procedures available in that third country are “full and fair,” or whether the asylum seeker will be at risk there on the basis of race, religion, nationality, political opinion, or particular social group.

In contrast to the IFR, the INA contains an unambiguous directive that the “safe third country” bar “*shall not apply to an unaccompanied alien child.*” 8 U.S.C. § 1158(a)(2)(E) (emphasis added). The IFR thus creates a perverse situation: Unaccompanied children are *exempt* from a requirement to seek asylum in a transit country where the United States has concluded, based on a satisfactory bilateral or multilateral agreement, that the country provides a “full and fair procedure for determining a claim to asylum,” yet are *obligated* to apply in transit countries where the United States has no such assurance. The IFR is not even facially consistent with the INA, and therefore was properly enjoined. *See* ER 142–43.

The palpably inadequate asylum systems in Guatemala and Mexico, particularly for unaccompanied children, reinforce the conclusion that a requirement to seek asylum there is incompatible with unaccompanied children’s exemption from applying for asylum even in “safe” third countries. *See infra* Parts II.A, II.B & III.B. The

district court's injunction should be upheld.

B. The IFR Is Incompatible With The Firm Resettlement Bar

The INA also bars asylum for a person who “was firmly resettled in another country prior to arriving in the United States.” 8 U.S.C. § 1158(b)(2)(A)(vi). This provision does not bar asylum based solely on transit through a country. Consistent with the INA's unambiguous terms, this Court has expressly held that the firm resettlement bar applies only where there is evidence that an asylum seeker received “an offer of permanent, not temporary, residence in a third country where the applicant lived peacefully and without restriction.” *Maharaj v. Gonzales*, 450 F.3d 961, 969 (9th Cir. 2006); *see also Cheo v. I.N.S.*, 162 F.3d 1227, 1229 (9th Cir. 1998).

Critically, this Court has cautioned that firm resettlement “does not mean that as soon as a person has come to rest at a country other than the country of danger, he cannot get asylum in the United States.” *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005) (quoting *Cheo*, 162 F.3d at 1230). “Such narrow interpretation of the firm resettlement bar would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge” and would contravene “the international obligation [the United States] agreed to share when [it] enacted the Refugee Convention into law.” *Id.*

The applicable regulations reinforce the plain statutory text, providing that an individual is firmly resettled if he or she received “an offer of permanent resident

status, citizenship, or some other type of permanent resettlement” prior to arrival in the United States. 8 C.F.R. § 208.15. Even then, the firm resettlement bar does not apply if the individual’s transit through a third country “was a necessary consequence of his or her flight from persecution” and “he or she remained in that country only as long as was necessary to arrange onward travel.” *Id.*

Despite the statute’s plain language, consistent regulations, and decades of jurisprudence interpreting firm resettlement to require *more* than “temporary” residence in a third country, the IFR purports to require *only* that—effectively writing the firm resettlement requirement out of the INA. *See* 84 Fed. Reg. 33,829. In other words, the IFR bars from asylum eligibility the very group of people Congress sought to protect via the firm resettlement bar—individuals, including unaccompanied children, who transited through another country as a necessary consequence of fleeing persecution, and who stayed only as long as necessary to arrange for onward travel to their ultimate destination, the United States. The district court properly held that this too is flatly inconsistent with the INA. ER 125–26.

C. The IFR Moots The Statutory Grant Of Initial Jurisdiction To USCIS Asylum Offices Over Claims By Unaccompanied Children

The IFR effectively dismantles another protection prescribed by Congress for children who enter the United States without parents or legal guardians: the opportunity to have their asylum claims decided through a non-adversarial interview at a

U.S. Citizenship and Immigration Services (“USCIS”) asylum office, even if removal proceedings are pending in immigration court.

An immigration judge has exclusive jurisdiction over claims for asylum filed during removal proceedings. 8 C.F.R. § 1208.2(b). At an immigration court hearing, an asylum seeker may be questioned by the judge and cross-examined by an Immigration and Customs Enforcement (“ICE”) prosecutor regarding details of painful, traumatizing, or humiliating events underlying the claim. *See generally* 8 C.F.R. §§ 1240.1–1240.16. Children generally lack familiarity with litigation procedures, and are not guaranteed representation by counsel. Accordingly, Congress carved out an exception from this adversarial process for unaccompanied children.

Since 2009, USCIS asylum offices—not immigration courts—have had “initial jurisdiction over any asylum application filed by an unaccompanied alien child.” 8 U.S.C. § 1158(b)(3)(C). “Unaccompanied alien child” (“UAC”) is statutorily defined as any child under the age of 18 without a parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. § 279(g)(2). Under policy in effect since 2013, USCIS interprets its initial jurisdiction as extending to any child determined to be a UAC, provided such determination was in place when the asylum application was filed, even if the child later reached 18 years of age or came under the care of a parent or legal guardian. *See* Ted Kim, Acting Chief,

USCIS Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013). USCIS is under a court order to continue following this policy. See USCIS, *J.O.P. v. U.S. Dept. of Homeland Security, et. al., Information*, <https://www.uscis.gov/legal-resources/legal-settlement-notice/jop-v-us-dept-homeland-security-et-al-information>.

A USCIS asylum office interview is conducted by an officer trained in trauma-informed and child-sensitive interviewing techniques. Compared with the adversarial courtroom process, this interview better accommodates the needs and capacities of children, who are often traumatized and ill-equipped to navigate a system designed for adults. It also reduces the risk of re-traumatization and is more conducive to the child's disclosure of facts that support the claim. Following the interview, the asylum office may grant asylum or refer the child to immigration court for *de novo* review. 8 C.F.R. § 208.14(b), (c)(1).

The IFR renders this congressionally mandated opportunity for non-adversarial adjudication meaningless for the overwhelming majority of applicants because, under the IFR, the adjudications can never result in approval. All children arriving at the southern border of the United States must transit through Mexico at minimum (Hondurans and Salvadorans generally also transit through Guatemala), thus requiring them to prove that they sought and were denied asylum in at least one transit

country. But Guatemala and Mexico do not have satisfactory asylum processes in place. *See infra* Parts II.A & II.B. Even if they did, children generally lack the knowledge, resources, and capacity to pursue asylum in transit, and have legitimate fears of doing so. *Id.* The asylum office adjudication will be reduced to a determination of the applicability of the bar, and because the asylum office lacks jurisdiction over withholding of removal claims, a referral to immigration court must follow. It is unavailing to provide children with a special forum and procedures if their applications must be summarily denied without exception. The IFR reduces the INA's statutory framework for USCIS initial jurisdiction to a dead letter, providing yet another basis for affirming the injunction.

II. Asylum Systems In Mexico And Guatemala Are Demonstrably Inadequate To Protect Child Asylum Seekers

The inherent flaws in the IFR are illuminated by the impossible standard it sets in demanding that unaccompanied children arriving at the southern U.S. border first apply for (and be denied) asylum in the ill-equipped and under-resourced systems of Guatemala (if transiting through Guatemala from Honduras, El Salvador, or other countries) or Mexico.

The IFR presupposes that Mexico and Guatemala have the capacity to process and adjudicate asylum applications. There is no evidence to support this premise, and in fact, the opposite is true. Guatemala's system has been in operation for only a matter of months, and has yet to process any meaningful number of its *hundreds*

of pending asylum applications. KIND is not aware of a *single unaccompanied child* who has applied. Mexico's system is overwhelmed and under-resourced, and *illegally deports or detains children* in unsafe conditions if they seek asylum. Congress has not granted the Attorney General power to require unaccompanied children to seek asylum in these countries before the United States will deem them eligible for asylum.

A. Guatemala's Asylum System Cannot Protect Transiting Children

Although Guatemala enacted a migration code in May 2017 that included provisions for an asylum system, the implementing regulations only went into effect earlier this year. Frydman Decl. ¶ 14. Guatemala has *three* officers to interview the already *hundreds* of asylum applications it has received. *Id.* Yet, under the IFR, hundreds of thousands of asylum applicants from El Salvador and Honduras, including more than 30,000 unaccompanied minors, would be required to seek asylum in Guatemala simply to preserve the right to seek asylum in the United States later. *See* U.S. Customs & Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>. Underscoring that such applications are a chimera, in the past two years, Guatemala has decided a mere 20–30 asylum applications. Frydman Decl. ¶ 14. Rather than improve over time, the problem has

grown worse. Between March 2018 and May 2019, *zero* of the hundreds of submitted applications were decided. *Id.*

Thus, even in the best-case scenario, transiting children forced to first seek refuge in Guatemala could wait months, if not years, before they may seek asylum in the United States. That eviscerates any meaningful legal protections, and leaves children at risk of trafficking and further persecution (*see infra* at Part IV).

Even if Guatemala had the system in place to efficiently process an unaccompanied child's asylum application, its child welfare system is not safe for these children. The living conditions in Guatemala's state-run welfare facilities are utterly inhumane. In 2017, more than 40 Guatemalan girls burned to death after they were locked in an orphanage. *See* Anastasia Moloney, *Guatemala's orphanage children caged, abused: report*, Thomson Reuters (July 16, 2018), <http://www.reuters.com/article/us-guatemala-child-abuse/guatemalas-orphanage-children-caged-abused-report-idUSKBN1K7007>. Other children are held in cages, tied to wheelchairs, and bound to railings like animals. *Id.* And numerous children are trafficked for sex and forced labor from within Guatemala's orphanages, and often sterilized to cover up institutionalized sexual abuse. *See* Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages*, Georgetown Law: Human Rights Institute (Jan. 2017), <https://www.law.georgetown.edu/human-rights-insti->

tute/wp-content/uploads/sites/7/2017/07/Perspectives-on-Human-Rights-Rosen-thal.pdf.

B. Mexico’s Asylum System Remains Inadequate

Mexico’s immigration system is more mature than Guatemala’s, but is nonetheless wholly inadequate to bear the weight placed on it by the IFR. The agency responsible for asylum in Mexico, Comisión Mexicana de Ayuda a Refugiados (“COMAR”), is overwhelmed and under-resourced. The number of asylum applications filed through August 2019 increased by more than 300% from the same period in previous years (from 14,562 to 48,254), but the agency has not grown to meet those numbers; to the contrary, Mexico has *reduced* the agency’s budget by 20%. Frydman Decl. ¶ 23. COMAR has just 30 officers to cover the over 761,000 square mile span of the country, only *six* of whom are tasked with interviewing child asylum applicants. *Id.* For comparison, USCIS’s Asylum Division has 10 regional offices, each with many officers; adjudicated nearly 100,000 affirmative asylum applications last year; and is part of an agency with a staff of nearly 20,000. *See* Written testimony of USCIS Acting Deputy Tracy Renaud, Hearing on the FY2020 Budget Request (May 9, 2019), <http://www.uscis.gov/tools/resources/hearing-a-review-fy-2020-budget-request-us-customs-and-border-protection-us-immigration-and-customs-enforcement-and-us-citizenship-and-immigration-services-may-9-2019-acting-deputy-director-tracy-renaud>.

Moreover, while Mexico’s Immigration Law and General Law on the Rights of Children and Adolescents require officials to consider a child’s best interests in all proceedings affecting the child, and require a “best interest determination” (“BID”) before Mexico deports a child, in practice BIDs are extremely limited and infrequent because resources, procedural protections, and capacity are lacking. Frydman Decl. ¶ 24. Thus few children have BIDs prior to deportation. In fact, KIND is aware of cases in which Mexico deported children *during* the BID process. *Id.* To make matters worse, immigration officers often fail even to confirm whether children would be endangered by returning to their countries of origin before deporting them. *Id.* Thus, whatever the letter of the law, the evidence makes clear that children seeking asylum in Mexico risk deportation back to the dangers they fled without ever having their best interests considered.

It is no wonder that children have a legitimate fear of seeking asylum in Mexico. That fear is compounded by regular reports of government complicity in violence against migrants, including children. Police, military, and other Mexican government officials have been directly and indirectly involved in violence against migrants and refugees, including kidnapping and extortion. Frydman Decl. ¶¶ 16–17. In August 2019, for example, Mexican police shot and killed an unarmed Central American man in front of his eight-year-old daughter as he tried to board a train north. *See* Brendan Cole, *Mexican Police Kill Migrant in Front of his Daughter as*

He Was Trying to Cross to the U.S., Newsweek (Aug. 2, 2019), <https://www.newsweek.com/mexico-migration-el-salvador-honduras-salttillo-coahuila-1452283>. Such incidents invariably cultivate distrust of Mexican authorities and contribute to feelings of insecurity and helplessness, particularly among children. Frydman Decl. ¶ 16.

Further deterring children from seeking asylum in Mexico are the well-documented conditions in which children are detained. Detention centers are overcrowded, unhygienic, lack education or recreation, mix unaccompanied children with unrelated adults, and use isolation cells as punishment for misbehavior. Frydman Decl. ¶ 20. Reports show that “[w]omen slept in hallways or in the dining hall among rats, cockroaches and pigeon droppings, as children wailed, mothers reused diapers and guards treated everyone with contempt,” even though these children are not prisoners. Associated Press, *Overcrowding, abuse seen at Mexico migrant detention center* (June 17, 2019), <https://www.apnews.com/cae4919e5d5d4d6eb280785618dfa865>.

Mexican agencies also regularly fail to (i) inform children of their right to seek asylum; (ii) provide children with clear, child-appropriate information about how to navigate the complex Mexican legal system; and (iii) provide representation for children in seeking asylum, despite a legal obligation to do so. Frydman Decl. ¶¶ 21–22. When children ask about asylum, Mexican officials often discourage it

by saying that, even if granted asylum, the children will remain in detention until they turn eighteen. *Id.* ¶ 21. Until last year, “Mexico receive[d] almost no applications from UACs.” Bryan Roberts et al., Nat’l Ctr. for Risk and Econ. Analysis of Terrorism Events, Univ. of So. Cal., *Northern Triangle Migrant Flow Study: Final Report* (Sept. 30, 2018), https://create.usc.edu/sites/default/files/northern_triangle_migrant_report.pdf. Now it faces the opposite problem with, for example, only nine asylum officers in COMAR’s Tapachula office (on the Guatemala/Mexico border)—only two of them trained in children’s cases—confronted with 14,900 asylum applications, leading to months-long delays in adjudications. *See* KIND & CDH Fray Matías de Córdova, *The Invisible Wall: Obstacles to Protection for Unaccompanied Migrant Children along Mexico’s Southern Border* (July 2019) at 6, <https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.

Thus, like the Guatemalan system, the Mexican system is unequipped to deliver transiting children the protections they need. And the sad reality is that a transiting child forced by the IFR to first seek refuge in Mexico will likely end up being deported, detained, abused, actively discouraged from pursuing asylum, or, at best, waiting months, if not years, for an asylum decision.

* * *

Asylum applicants cannot access systems that are nascent, understaffed, and unsupported by a broader legal framework. The IFR's requirement that asylum seekers pursue applications in such systems and await their processing thus defers the INA's protections to nonexistent third country systems. The IFR is inconsistent with the INA and was properly enjoined.

III. The Requirement To Seek Asylum In Transit Countries Prolongs Children's Exposure To Harm

Even if Mexico and Guatemala had efficient and expeditious asylum systems, relocating there is generally not a viable alternative for unaccompanied children fleeing life-threatening violence. Sexual and gender-based violence, forced gang recruitment, cartel violence, violence against children who identify as lesbian, gay, bisexual, transgender, and/or intersex (LGBTI), and trafficking exist throughout Guatemala and Mexico. Frydman Decl. ¶ 12. Gangs and cartels have region-wide reach and can easily locate fleeing children, making transiting children readily accessible to the persecutors and traffickers from whom they fled. *Id.* ¶ 13. The IFR, which requires children to seek asylum in these dangerous places, prolongs children's exposure to the threats and violence they are fleeing in the first place.

A. Transiting Children Need Protection From Life-Threatening Violence And Persecution

Although children fleeing persecution anywhere in the world may seek refuge by crossing the Mexico-United States border, the vast majority of unaccompanied

children are fleeing the Northern Triangle countries of Guatemala, Honduras, and El Salvador. They are running from violence, including sexual and gender-based violence, violence by criminal gangs and drug cartels, and human trafficking. Frydman Decl. ¶¶ 7, 11. LGBTI children are prime targets of sexual and gender-based violence and killings. *Id.* ¶ 7. Gangs that dominate the urban areas of the Northern Triangle (and increasingly control rural areas) target young girls for non-consensual sex, and those who resist these assaults are met with violence or death. *Id.* ¶ 11. Boys (and increasingly girls) are forced into criminal gangs and resistance is punished by threats, torture, and ultimately death. *Id.*

Rampant corruption and state-sponsored violence in Northern Triangle countries prevents at-risk children and those who are victims of horrific crimes from turning to law enforcement. Frydman Decl. ¶ 9. Extrajudicial killings by state security forces are commonplace and well-documented, particularly in neighborhoods controlled by organized crime—where adolescent boys simply are presumed to be gang members. *See Sarah Kinoshian, El Salvador's Security Policy is Increasing Extrajudicial Killings and Abuse*, Latin Am. Working Grp. (Feb. 12, 2016), <https://www.lawg.org/el-salvadors-security-policy-is-increasing-extrajudicial-killings-and-abuse/>. And juvenile female rape and sexual assault victims underreport these crimes because they fear that contacting law enforcement will lead to repression or violence against their brothers, fathers, and other male family members.

Frydman Decl. ¶ 9. Children in these countries cannot turn to the police because they justifiably fear that doing so will exacerbate the situation.

Facing relentless violence and danger, and with no prospect of protection from their own governments, many children of Northern Triangle countries flee in search of international asylum and protection. They embark on a perilous journey to the United States, leaving behind everything they have ever known in the hopes of finding refuge. On the way north, young women are at significant risk for assault or sex trafficking. Children are robbed, assaulted, and murdered. Gang networks treat these children as a source of income, kidnapping them and extorting their families for money. *See* Lisa R. Seville & Hannah Rappleye, *Border Children Tell Their Stories: Why We Came to the US*, NBC News (June 16, 2014), <https://www.nbcnews.com/news/investigations/border-children-tell-their-stories-why-we-came-us-n129646>.

The IFR would find ineligible for asylum unaccompanied children who did not first seek asylum *within* the Northern Triangle and/or Mexico—countries plagued by the gangs, traffickers, and state-sanctioned violence and abuse that those children have risked everything to escape. Far from “further[ing] the humanitarian purposes of asylum” (84 Fed. Reg. 33,831), the IFR promises to perpetuate the life-threatening dangers our asylum system was enacted to combat.

B. Mexico And Guatemala Are Not Safe For Transiting Children

Gangs and cartels span the entire Northern Triangle and can easily locate fleeing children. Frydman Decl. ¶ 13. An unaccompanied minor running from violence in Honduras or El Salvador thus remains at risk in Guatemala and Mexico. The proximity of Guatemala and Mexico to the Northern Triangle means that children who relocate to these countries remain at risk of violence at the hands of gang members there. *Id.* ¶¶ 17–18.

Mexico also is plagued by its own domestic gangs and cartels that rob, assault, kidnap, traffic, extort, threaten, rape, and otherwise violate young children—and to which law enforcement and others in Mexico often turn a blind eye. Frydman Decl. ¶¶ 16–17. While in Mexico in February 2019, KIND met a teenager fleeing abuse in Honduras who had been kidnapped and tortured in Mexico, and then forced to watch the murders of two children. *Id.* ¶ 16. Mexico is no safe haven for fleeing children.

Transit countries are not viable alternatives for unaccompanied minors fleeing life-threatening harm. Their deficiencies demonstrate the importance of the asylum system Congress established in the United States, replete with explicit protections for unaccompanied minors that the IFR impermissibly upends.

IV. The IFR Necessarily Will Result In Denials Of Meritorious Applications And Deportation Of Children Into Dangerous Conditions

Because the IFR imposes a new threshold requirement for asylum that applicants will virtually never satisfy, the rule necessarily will result in denials of substantively meritorious asylum applications. Some children who would have been granted asylum but for the IFR will fall short of the qualitatively different standards for withholding or deferral of removal. Accordingly, the rule promises that children who should receive protection under the INA will instead be deported to dangerous conditions.

A. The IFR's Categorical Bar Impedes Consideration Of A Child's Individual Circumstances

The IFR establishes a categorical bar to asylum with only “limited exceptions.” 84 Fed. Reg. 33,835. None of the exceptions permits consideration of the individual circumstances a child faces while fleeing danger, nor of the barriers to obtaining protection in the countries traversed prior to arrival at the southern U.S. border (*see supra* at Parts II & III). The IFR provides one exception for those who transited only through a country or countries that are not parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture (“CAT”). 8 C.F.R. § 208.13(c)(4)(iii). But this exception is illusory, in that all arrivals at the southern U.S. border pass through Mexico, which like Guatemala, is party to the three referenced international agreements. *See Red Br.* at

6 n.1. Thus, unless a child meets the definition of a “victim of a severe form of trafficking in persons” (84 Fed. Reg. 33,843), he or she will be denied asylum unless he or she applied for and was denied protection in a transit country. The IFR makes no allowance for cases where it can be shown that authorities in the transit country are unprepared to evaluate claims for protection or unable to offer safety when claims are approved. There is no opportunity under the IFR to offer evidence that, for example, a child’s life or health would have been endangered by prolonging his or her stay in a transit country in the hope of an offer of protection—despite the fact that Congress specifically acted to remove these obstacles for unaccompanied children. *See supra* at Part I.

Although Appellants assert that the IFR reserves asylum for those “legitimately seeking urgent protection from persecution or torture” (84 Fed. Reg. 33,831), the “limited exceptions” to the bar prevent any such inquiry. Accordingly, the requirement to demonstrate that protection was sought and denied would become the sole basis for the denial of meritorious claims for asylum if the injunction is overturned.

B. Even Where Available, Withholding Or Deferral Of Removal Provides Children With Incomplete Relief

The IFR states that those denied asylum “would, however, remain eligible to apply for statutory withholding of removal and for deferral of removal under the

CAT.” 84 Fed. Reg. 33,831. Those remedies are available to ensure that no immigrant is removed to a country where it is more likely than not that he or she would be persecuted on the basis of a protected characteristic, or tortured. 8 C.F.R. §§ 208.16, 208.17. But, as discussed in Appellees’ Answering Brief (Red Br. 7–9), these remedies entail even more stringent standards than for asylum, yet offer lesser forms of protection and status. *See, e.g., Guo v. Sessions*, 897 F.3d 1208, 1213, 1217 (9th Cir. 2018); ER 108–09. Thus, even a child who would qualify for asylum but for the IFR might be denied withholding or deferral of removal.

Even if a child can satisfy the heightened standard, a grant of withholding or deferral of removal does not provide that child with the same benefits as a grant of asylum. A key distinction is that one year after the grant of asylum, a child can apply for lawful permanent residence, and eventually, for citizenship. 8 U.S.C. §§ 1159(b) & 1421. These forms of permanent status are not available to individuals granted withholding or deferral of removal. *See Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004). Further, the grant of withholding or deferral of removal will not guarantee that the child can remain in the United States; removal to a third country is permitted so long as the child would not be persecuted or tortured there. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.17.

Thus, even where alternative relief is available, it leaves children at risk of removal to a third country without a path to citizenship or even a green card. This

uncertainty and lack of permanent status is the opposite of the permanency and stability that is essential to a child's growth and development. *Cf., e.g.,* J.M. Chavez et al., *Sufren Los Niños: Exploring the Impact of Unauthorized Immigration Status on Children's Well-Being*, Family Court Rev. 50(4) (Oct. 2012) (uncertain status "may impact family stress and uncertainty, health outcomes, and educational attainment").

C. Because The IFR Will Increase Deportations Of Unaccompanied Children Irrespective Of The Merits Of Their Claims, It Directly Contravenes The Humanitarian Purposes of Asylum

When Congress enacted the Refugee Act of 1980, it recognized that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care." Pub. L. No. 96-212 § 101, 94 Stat. 102 (1980). "Congress was motivated by the enduring 'historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,' and sought to provide 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1280 (9th Cir. 1984); *see also Cardoza-Fonseca*, 480 U.S. at 436. By increasing the risk that unaccompanied children will be deported back to the dangers they fled, the IFR directly contravenes this "enduring . . . national commitment." *Bolanos-Hernandez*, 767 F.2d at 1280.

Forcibly repatriated children face acute risk of physical harm and death, including in the form of reprisals for their failed escape attempts. Efforts to monitor

outcomes for repatriated children in Central America illustrate the dangers that many children subject to the IFR could face. Teenage girls in El Salvador are forced to take extreme precautions, including living in safe houses and radically changing their appearance and demeanor. *See* Mark Townsend, *Women deported by Trump face deadly welcome from street gangs in El Salvador*, *The Guardian* (Jan. 13, 2018), <https://www.theguardian.com/global-development/2018/jan/13/el-salvador-women-deported-by-trump-face-deadly-welcome-street-gangs>. While there is no data on the number of repatriated migrants murdered or harmed upon return to their home countries, anecdotal evidence demonstrates that it is all too common. One study that compiled murder rates from local news reports between January 2014 and October 2015 identified 83 Central Americans who were murdered after deportation. *See* Sibylla Brodzinsky & Ed Pilkington, *US government deporting Central American migrants to their deaths*, *The Guardian* (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>. Other reports document similarly alarming murder rates. *See, e.g.*, Anne-Catherine Brigida, *Kicked Out of the U.S., Salvadoran Deportees Are Struggling Simply to Stay Alive*, *World Politics Review* (Oct. 9, 2018), <https://www.worldpoliticsreview.com/articles/26302/kicked-out-of-the-u-s-salvadoran-deportees-are-struggling-simply-to-stay-alive>; Jeff Ernst, *'A death sentence': migrant caravan member killed in Honduras after US sent him back*, *The Guardian* (Jan. 13, 2019),

<https://www.theguardian.com/world/2019/jan/13/nelson-espinal-death-deported-migrant-caravan-us-border-honduras>.

Moreover, many migrant children return alone, leaving them especially vulnerable. *See* Joshua Barajas, *What happens when migrant children are deported home*, PBS.org (Aug. 15, 2018), <https://www.pbs.org/newshour/world/what-happens-when-migrant-children-are-deported-home>. These children often are stigmatized; a particularly insidious form of stigma is directed against returned girls in El Salvador who are assumed to have been subjected to sexual violence during their trip to the United States, and then considered “tainted” and shunned by their communities. UNICEF, *Child Alert: Uprooted in Central America and Mexico* (Aug. 2018) at 19, https://www.unicef.org/publications/files/UNICEF_Child_Alert_2018_Central_America_and_Mexico.pdf. Such children may feel compelled to migrate to escape these post-deportation abuses, placing them in an endless cycle of violence and risk associated with transit across the Northern Triangle and Mexico.

The governments in Honduras, El Salvador, and Guatemala have no demonstrated ability to keep deported children safe, let alone treat the psychological wounds created in transit to the United States and back. *See* UNICEF at 17; *see also*

supra at Part III.A. In uniformly denying these vulnerable children asylum eligibility in the United States *even where they substantively qualify*, the IFR threatens further endangerment to the most vulnerable child migrants.

CONCLUSION

Amicus curiae KIND respectfully urges the Court to uphold our nation's commitment to the protection of asylum seekers, including unaccompanied children, by affirming the nationwide injunction against the IFR.

Dated: October 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2016.

I certify that this brief complies with the word limit set forth in Fed. R. App. P. 29(a)(5) because it contains 6,849 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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