July 15, 2020

Ms. Lauren Alder Reid
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Falls Church, Virginia 22041
Via federal eRulemaking portal, http://www.regulations.gov

RE: RIN 1125-AA94, EOIR Docket No. 18-0002, Public Comment Opposing Joint Notice of Proposed Rulemaking on "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (Collection of Information OMB Control Number 1615-0067)

Dear Ms. Alder Reid:

Kids in Need of Defense (KIND) submits the following comments in response to the above Notice of Proposed Rulemaking (NPRM) on Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, published by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) (collectively, the "agencies") on June 15, 2020 at 85 FR 36264 (the "Proposed Rule"). While we focus our comments on those issues most affecting the unaccompanied children we serve, we object to the rule as a whole, which is a systemic attack on asylum in the United States. We describe in detail below some of the many infirmities of the rule, noting in particular its failure to adhere to U.S. law and international treaty obligations, as well as specific statutory protections accorded to unaccompanied minors in the asylum context.

Implementation of this rule would make it virtually impossible for unaccompanied children and other asylum-seekers to receive full and fair consideration of their protection claims or obtain protection to which they are entitled; consequently, the NPRM must be withdrawn in its entirety. The comments that follow also identify some of the provisions that would be unlawful as a whole or as applied to unaccompanied children. But this submission does not identify all flaws in the Proposed Rule, due to the NPRM's truncated 30-day comment period, which denies concerned stakeholders sufficient opportunity to provide the agencies with comprehensive comments on the Proposed Rule – an additional reason why the NPRM should be withdrawn in its entirety.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 20,000 children from 70 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City,

Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture (CAT) on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. 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. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

KIND and its pro bono partners have helped hundreds of children to obtain asylum in the United States, and our organization is well-known for providing expert advice and guidance on the unique issues and needs facing children, particularly unaccompanied children, throughout the asylum process. We are deeply disturbed by the impact of the NPRM which, if implemented, would impose extraordinary obstacles to obtaining asylum for children, contrary to all applicable law. Moreover, the process by which the rule has been promulgated, and the long-term impact of the rule for our clients and for all asylum seekers, suggests that the NPRM is being promulgated not to enhance the efficiency of adjudicating of asylum claims, but to deter applications for relief and to reduce the availability of asylum and related relief to those who seek protection within the United States.

Introduction

The Proposed Rule offers no coherent justification for dramatically reducing the availability of asylum relief in the United States. It sadly begins from the premise that extending protection to refugees is an "issue" in need of a "solution," 85 F.R. 36265, rather than a signature feature of the American identity and a point of national pride. *See, e.g., Mojica v. Reno,* 970 F. Supp. 130 (E.D.N.Y. 1997). The Preamble situates asylum law within "'the power to exclude aliens . . . inherent in sovereignty,'" invoking *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) – a case that does not address refugee admissions, and was decided years before the Refugee Act of 1980 was enacted.[1] The Preamble thus implies that the dismantling of the asylum system is "'necessary for . . . defending the country against foreign encroachments and dangers,'" conveniently omitting internal citations that would reveal the insidious and long-ago repudiated foundations for the arguments on which they rely.[2]

From that point forward, the Proposed Rule rejects any obligation to acknowledge or follow the laws governing asylum. With respect to unaccompanied minors, there is no acknowledgement of the critical role that the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[3] plays in regulating the treatment of unaccompanied minors seeking asylum. The TVPRA mandates that "[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child

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[1] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *codified in pertinent part at* 8 U.S.C. § 1101(a)(42). *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).
[2] 85 F.R. 36265. The omitted citations belong to a long-ago dim chapter in Supreme Court jurisprudence, *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *See Kleindienst*, 408 U.S. at 765.
[3] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110 – 457.

is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases."[4] Yet in an NPRM of over 5,100 words, the term "unaccompanied alien child" (UAC) appears exactly once, in a footnote.[5] Even the more general term "child" appears only about 13 times, confined to references to imputation of firm resettlement from parent to child, disclosures by officials to deter child abuse, and inclusion of dependent children in a parent's fear evaluation (85 FR 36286-295). Neither the text of the Proposed Rule nor the Preamble accounts for the ways in which children are subjected to and affected by persecution and other harm, or the particular vulnerabilities of unaccompanied children. In short, the agencies have undertaken a rulemaking that leaves a statutory mandate completely unfulfilled.

For these reasons alone, the Proposed Rule cannot be applied to unaccompanied children. The rule is rife with specific issues, however, that highlight its dangerous tendency to ignore laws, simplify issues, and mandate decision-making processes that do not comport with international protection law. In the following sections we address the nature of the rule-making itself; the dangerous decision to authorize pretermission of hearings on asylum applications; the inadequate and ultra vires attempts to redefine core elements of the refugee definition, including persecution and particular social group; the expansion of exclusionary grounds such as internal relocation and firm resettlement to reduce access to asylum; the expansion of the grounds for labeling a claim as frivolous to penalize asylum- seekers; and the creation of mandatory bases for discretionary denials, defying the very concept of discretion. This parade of horribles is a low point in America's treatment of asylum seekers, signaling a complete rejection of the principles that govern not only the Refugee Act, but the American tradition of refuge.

I. The Proposed Rule Must Be Evaluated in Concert With Other Pending Proposals to Amend the Same Regulations.

The Proposed Rule continues a pathology of DHS's and EOIR's recent immigration rulemakings, whereby closely related amendments to sections of the C.F.R. are split into multiple concurrent rulemaking notices, inhibiting a reasoned evaluation of the cumulative or interacting effects of the various proposed rules.[6] This problem is only made worse by the repeated failure to abide by the presumptive 60-day comment periods in this and other notices of proposed rulemakings.[7] In this case, providing only 30 days to comment on a dense 42-page rule is part of this ongoing attempt to prevent commenters from systematically reviewing regulatory actions as a whole.

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[4] 8 U.S.C. § 1232(d)(8).

[5] 85 FR 36265, n.5 (recognizing that UAC are exempt from expedited removal).

[6] *See, e.g.*, USCIS, Asylum Application, Interview and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020) (amending 8 C.F.R. Parts 208 and 274 to limit employment authorization for asylum applicants); USCIS, Removal of 30-Day Processing Provision for Asylum Applicant, 85 Fed. Reg. 37502 (June 22, 2020) (separate amendment to 8 C.F.R. Part 208, four days apart, also changing employment authorization process for asylum applicants).

[7] *See* Regulatory Planning and Review, E.O. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

The Proposed Rule overlaps substantially with at least two pending interim final rules, both of which were declared illegal and never converted into final rules,[8] *and* two other pending notices of proposed rulemaking,[9] all of which also would modify 8 C.F.R. §§ 208.13 and 1208.1 3. It also has substantial practical interaction with a proposal to charge new fees and massively increase existing fees on asylum applicants[10]: The restrictive standards and new bars could so reduce asylum filings as to throw into question the economic analysis underlying the fee rule.

While the APA does not impose a rigid requirement that agencies modify a regulation all at once, a series of executive orders and judicial interpretations of the APA and related statues make clear that it is arbitrary and capricious for an agency to so carve up its regulatory activity to evade comprehensive evaluation and comment.

It is hard to evaluate, for example, whether these multiple overlapping proposals to amend the same asylum provision abide by Executive Order 12866's directive that "[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or that of other Federal agencies," or take into account costs and benefits, with so many different proposals seeking to accomplish the same (unlawful) goal of blocking meritorious asylum claims from being granted.[11] It would be arbitrary and capricious for the agency to be counting costs and benefits in favor of *this* proposal that are simply the same as the costs and benefits already priced into the other revisions of the same provision.[12] There is no indication in the Proposed Rule that the agencies have made any effort to identify such overlap.

Accordingly, the Proposed Rule, as well as the other pending proposed rules affecting 8 C.F.R. §§ 208.13 and 1208.13, should be withdrawn and re-noticed for comment as an integrated whole, to allow for a comprehensive evaluation of the related amendments.

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[8] USCIS and EOIR, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019) (interim final rule creating new 8 C.F.R. §§ 208.13(c)(4) and 1208.13(c)(4)), *enjoined*, *East Bay Sanctuary Covenant v. Barr*, __ F.3d __ (9th Cir. July 6, 2020); USCIS and EOIR, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) (interim final rule creating new 8 C.F.R. §§ 208.13(c)(3) and 1208.13(c)(3)), *enjoined*, *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).
[9] USCIS and EOIR, Security Bars and Processing, 85 Fed. Reg. 41201 (July 8, 2020) (defining new bars at 8 C.F.R. §§ 208.13(c)(10) and 1208.13(c)(1)); USCIS and EOIR, Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69640 (Dec. 19, 2019) (adding, inter alia, new bars in 8 C.F.R. §§ 208.13(c)(6) and 1208.13(c)(6)).
[10] USCIS, Fee Schedule and Changes to Certain other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280 (Nov. 14, 2019).
[11] Regulatory Planning and Review, E.O. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993), § 1(b)(10).
[12] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056, 1065-66 (D.C. Cir. 2014) (holding it arbitrary and capricious for agency to rely on unexplained double-counting of regulatory costs).

II. The Proposed Rule Would Deprive Unaccompanied Children of Due Process by Empowering Judges to Deny Applications for Relief without Evidentiary Hearings, Contrary to the INA and the TVPRA.

The Proposed Rule creates troubling new procedures that would allow immigration judges, upon motion or at their own instance, to pretermit a hearing and deny relief if they conclude, based on the initial paper submission alone, that an applicant "has not established a prima facie claim for relief or protection under the applicable laws and regulations." (Proposed § 1208.13(e)).[13] This proposed provision threatens to deprive thousands of asylum seekers of a fair day in court and poses particular hardships for unaccompanied children, who due to their developmental stage, trauma history, and lack of familiarity with immigration law have great difficulty disclosing traumatic experiences, compiling evidence, and completing asylum applications. Yet unaccompanied children are also a population for which Congress has enacted special protections against return to trafficking, danger, or harm. The NPRM fails to consider the serious risk if a child's meritorious claim is pretermitted. It similarly fails to--and indeed it cannot--explain how these procedures comport with protections for unaccompanied children provided for by the TVPRA. Consequently, the Proposed Rule violates not only the APA, but also the INA and TVPRA.

Pursuant to the TVPRA, unaccompanied children's asylum claims are heard in the first instance at the Asylum Office, as Congress determined that an interview is a more child-appropriate forum than an immigration court hearing. If not granted asylum, an unaccompanied child may renew his or her asylum claim before the immigration court. For many reasons, an asylum officer may refer a meritorious asylum claim to EOIR. For example, a child's trauma may have affected his or her interview, or the child may have had insufficient time to process and explain his or her history, insufficient time to receive evidence, or inexperience with the adjudicatory process. Thus, many unaccompanied children ultimately file approvable claims before EOIR, and under the Proposed Rule, would become vulnerable to pretermission of their claims.

A. The right to an evidentiary hearing, which the Proposed Rule would gut, is essential to due process for asylum seekers, particularly unaccompanied children.

Individuals fleeing persecution, torture, and other harm face high stakes in removal proceedings, and could be returned to grave peril, harm, or even death if their claims are denied in error. Despite these grave risks, asylum seekers, including unaccompanied children, are not appointed attorneys to help them navigate one of the most complex areas of the law. Indeed, more than half of unaccompanied children appear in immigration court without an attorney, raising the risk of return to harm or danger without due process. Language barriers pose additional obstacles to preparing and submitting applications for protection and even learning of the right to do so. Even if represented by counsel, the task of assembling support for asylum and related relief is formidable, especially under time and resource constraints. Confinement in government custody compounds these challenges, creating both psychological and logistical barriers that can have grave consequences for a child's ability to

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[13] Although structured as authority to "pretermit…an application," in the scheme of the Proposed Regulation, the thing pretermitted is a full hearing of the claim, *see* 85 FR 36277.

prepare and submit a thorough asylum application. Applications for relief might necessitate not only obtaining expert witnesses and documentation from the child's country of origin, but also the child's processing of traumatic experiences that occurred in his or her country of origin and during the journey to the U.S. to be able to disclose material evidence. An initial filing can rarely capture a complete account of reasons why relief is merited.

The Proposed Rule would further tip the scales against asylum seekers, and unaccompanied children in particular--permitting a claim to be summarily evaluated on a partial record by denying the applicant the right to testify and to present fact and expert witnesses to support the claim for protection. The Preamble to the Proposed Rule suggests that pretermission would apply to cases that are "legally deficient" (85 FR 36277) but provides no definition of this standard, and no limits that would prevent use of this new authority in any or every asylum case. More to the point, the Preamble sidesteps a major flaw in the premise for this change: a claim shown to be not just legally sufficient but compelling after a full hearing could be dismissed as "legally deficient" on the basis of a paper record, particularly where the adjudicator (or the government attorney filing the request for pretermission) misapprehends aspects of the claim that could have been clarified through the adversarial hearing process. Neither due process safeguards nor the right to seek asylum, withholding, and CAT protection can be dispensed with through so simplistic a proposal.

Thus the NPRM stands on weak ground in contending that "neither the INA nor current regulations require holding a full merit hearing on purely legal issues, such as prima facie legal eligibility for relief." *Id.* Moreover, the distinction between fact and law can seldom be neatly delineated in a written submission. As the NPRM acknowledges, asylum claims are inherently fact-specific and society-specific.[14] The details of who, what, when, and where in a given case are not merely descriptive, but may support eligibility for legal relief by establishing factors such as membership in a particular social group and other elements of asylum claims.

The role of witness testimony in an asylum claim is indispensable. It allows the adjudicator to assess credibility and clarify the facts to which the law will be applied and allows the asylum seeker to offer essential detail that may be difficult to reduce to writing or that the applicant may not have appreciated as necessary to the adjudicator's comprehension. This is especially so in the case of unaccompanied children, for whom oral testimony is often the best available evidence of the persecution they feared or experienced.

Evidentiary hearings take on particular importance for unaccompanied children and other asylum seekers who are constrained to prepare their written submissions on short notice and/or without legal representation. An asylum seeker may be unfamiliar not only with relevant legal standards, but also with the kind and depth of information to provide in his or her application for relief. As a result, a written application may insufficiently describe, e.g., the extent or nature of persecution, or the context for an applicant's decision to flee the country rather than seek protection locally. Of course,

[14] *See, e.g.,* 85 FR 36279 (proposed rule provision "does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society- specific nature of this determination.")

a hearing is not merely the opportunity for the applicant to present his or her case-in-chief, but also the government's opportunity to test the evidence and its theory of the case; by posing questions and observing the applicant, the immigration judge may resolve confusion and ensure that his or her decision will be well-supported.[15] Indeed, both judges and government attorneys alike have a duty to develop the record in the cases of unrepresented asylum seekers to ensure fair consideration of their cases.[16] Perplexingly, the NPRM describes an asylum adjudication without a full and fair hearing as "consistent with current practice, applicable law, and due process." 85 FR 36277. As described in the NPRM, pretermission would require "first allowing the alien an opportunity to respond. The alien would be able to address any inconsistencies or legal weaknesses in the asylum application in the response to the judge's notice of possible pretermission." (85 FR 36277). But the text of the Proposed Rule requires only that the immigration judge consider any material the applicant files in response to a DHS motion to pretermit, or within 10 days of notice from the judge of intent to pretermit. Proposed § 1208.13(e)(1), (2). But this proposed process is no substitute for the in-person exchange conducted at a hearing. The 10-day time for response to a judge's notice is insufficient. Being limited to a written response undermines any meaningful opportunity to address misunderstandings about the application or directly engage the judge and DHS on the factors that gave rise to the motion or judge's notice. In short, the Proposed Rule on pretermission would replace a key tenet of due process with a wholly inadequate process.

The new process would likewise prove inefficient, as the number of appeals will expectedly balloon as a consequence of pretermissions, defeating the time-saving benefits speciously claimed by the agency.[17] Decisions of immigration judges denying asylum may be appealed to the BIA, and after, to the relevant federal circuit court, where denials of due process will be challenged. As the BIA and circuit

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[15] *Matter of Fefe,* 20 I&N 116, 118 (BIA 1989) ("We note that there are often significant differences (either discrepancies or meaningful omissions) between the written and oral statements in an asylum application; these differences cannot be ascertained unless an applicant is subjected to direct examination. Moreover, if an applicant is not fully examined under oath there would seldom be a means of detecting those unfortunate instances in which an asylum claim is fabricated. On the other hand, there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.")

[16] *See, e.g., Matter of J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006) ("It is appropriate for Immigration Judges to aid in the development of the record, and directly question witnesses, particularly where an alien appears pro se and may be unschooled in the deportation process, but the Immigration Judge must not take on the role of advocate."), *citing inter alia Agyeman v. INS,* 296 F.3d 871, 884 (9th Cir. 2002) (stating that "the IJ has a duty to fully develop the record when an alien proceeds pro se"); *Matter of M-A-M*, 25 I&N Dec. 474, 482 (BIA 2011), *citing Matter of J-F-F-*, Section 240(b)(1), and 8 CFR 1240.11(a)(2); *Jacinto v. INS* (9th Cir. 2000) ("Should the immigration judge fail to fully develop the record, information crucial to the alien's future remains undisclosed. Thus, under the statute and regulations previously cited, and for the reasons we have stated here, immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel, as is this case.").

[17] 85 FR 36279 ("These regulations will enable the immigration judge to adjudicate the alien's particular claim for relief or protection timely and efficiently, including deciding whether or not pretermission of the alien's application may be appropriate.")

courts do not develop the factual record, they will have to remand for that purpose – requiring immigration judges to perform the denied evidentiary hearings and ultimately prolonging the process.

These inefficiencies and impacts of the proposed changes are compounded by the Proposed Rule's interaction with a host of other policies that undermine due process for asylum seekers, and unaccompanied children in particular.

B. The proposed changes violate the TVPRA's protective provisions for unaccompanied children.

The TVPRA provides protections designed by Congress to address the unique vulnerabilities of unaccompanied children in the U.S. immigration system. Among the stated purposes of the TVPRA is "to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances" and to fulfill "a special obligation to ensure that these children are treated humanely and fairly."[18] In response, Congress has provided both substantive and procedural protections to ensure that children receive a basic level of due process in "a system designed for adults."[19] These protections include referral to the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR) for appropriate custody and safety assessments before release,[20] access to counsel and child advocates,[21] the opportunity to have asylum claims first considered by USCIS,[22] and exemption from the one-year filing deadline and safe third country bars to asylum.[23]

Under the TVPRA, unaccompanied children have the right to present their asylum claims in a non-adversarial interview setting, free of a defined filing deadline. These procedures respond to the developmental and psychological needs of unaccompanied children, many of whom have experienced harrowing abuse and violence, and arrive in the U.S. traumatized and frightened. It may take time before children develop the trust needed to be able to discuss traumatic experiences at the base of their claims for protection. The TVPRA's protections help to afford children adequate time to prepare their asylum claims and an opportunity to present them in a more child-appropriate environment -- before an asylum officer trained in child-sensitive and trauma-informed interviewing techniques. The Proposed Rule, coupled with other policies, runs counter to the text and the spirit of the TVPRA by creating new hurdles that increase rather than decrease the risk that unaccompanied children will be unable to meaningfully participate in the adjudication of their claims for relief, exacerbating the risk of return to harm.

In stark contrast to the TVPRA's child-sensitive protections, the Proposed Rule would allow the immigration judge to both expedite and truncate review of unaccompanied children's asylum claims. The Proposed Rule is silent as to the TVPRA's protections and makes no effort to reconcile the Proposed

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[18] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).
[19] 153 Cong. Rec. S3004 (daily ed. Mar. 12, 2007) (statement of Sen. Feinstein).
[20] 8 U.S.C. § 1232(c).
[21] 8 U.S.C. § 1232(c)(5), (6).
[22] INA § 208 (b)(3)(C).
[23] INA § 208(a)(2)(E); TVPRA § 235(d)(7).

Rule on pretermitting asylum applications with the text and legislative history of the TVPRA, with its statutory provisions exempting unaccompanied children from bars to asylum that might otherwise result in denial of their asylum claims. It strains credulity that Congress would insulate unaccompanied children from the impact of bars related to the one-year filing deadline and the safe third-country rule, only to pretermit these children's asylum applications without a fair hearing.

The Proposed Rule similarly lacks meaningful discussion of how the new procedures would interact with USCIS' initial jurisdiction over unaccompanied children's asylum claims. This omission is especially glaring in light of the Administration's concerted efforts to strip unaccompanied children of the TVPRA's protections if a child turns 18 or reunifies with a parent or legal guardian before filing an asylum application, and to require these children to present their asylum claims in immigration court.[24] Where an immigration judge exerts jurisdiction over a child's asylum application that is pending before USCIS, this not only creates confusion but may force the child to submit a duplicate application in immigration court while facing the unexpected requirement of proving an exception to the one-year filing deadline if it is deemed newly applicable to them. The Proposed Rule simply ignores these impacts and the fundamental unfairness that would result were a child's asylum application deemed "legally deficient" with neither an interview *nor* a hearing. The Proposed Rule facially violates multiple statutory provisions, and the agency failure to address this in the Proposed Rule is arbitrary and capricious.

More problematic still, the above policies, together with recent Attorney General decisions and EOIR guidance curtailing the availability of continuances, administrative closure, and termination of proceedings, increase the likelihood that unaccompanied children will be forced to navigate the new procedures without an attorney.[25] More than half of unaccompanied children appearing in immigration court do not have an attorney to represent them.[26] Without adequate time to locate an attorney, children may be required to submit applications for relief and supporting evidence by themselves—a near impossibility. In this context, allowing immigration judges to pretermit an unaccompanied child's asylum application—potentially before the child finds an attorney, and despite a child's developmental

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[24] EOIR, Operating Policies and Procedures Memorandum 17-03*,* Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, (Dec. 20, 2017) ("OPPM 17-03"); USCIS, Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019), *preliminarily enjoined by JOP* v. *DHS*, 8:19-cv-01944-GJH (Dkt. 71) (Oct. 15, 2019); *see also Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018).

[25] *See, e.g., Matter of Castro-Tum,* 27 I&N Dec. 271 (A.G. 2018); *Matter of L-A-B-R-,* 27 I&N Dec. 405 (A.G. 2018); *Matter of S-O-G and F-D-B-*, 27 I&N Dec. 462 (A.G. 2018); *but see Zuniga-Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019) (finding that 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) confer to IJs and the BIA the authority to administratively close cases and overturning *Matter of Castro-Tum*); *see also* EOIR, Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download; EOIR, Memorandum from Director James McHenry, Case Priorities and Immigration Court Performance Measures (Jan. 17. 2018), https://www.justice.gov/eoir/page/file/1026721/download.

[26] Yet the TVPRA directs HHS to "ensure, to the greatest extent practicable . . . , that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking." 8 U.S.C. § 1232(c)(5).

needs, limited understanding of immigration law, language barriers, and trauma history--vitiates due process.

EOIR is not at liberty to simply pretend that protections for children do not exist. It defies logic that Congress would directly provide for unaccompanied children's access to counsel only to countenance the rejection of their asylum applications—in an adversarial setting—before they have even had an opportunity to obtain such assistance. The safety and well-being of unaccompanied children, and the APA, demand far greater consideration than the Proposed Rule provides.

C. The NPRM mischaracterizes and overlooks legal authority requiring evidentiary hearings.

The DOJ seeks to justify the proposed procedures for forgoing evidentiary hearings on asylum through a cursory and misleading review of federal law and regulations. This discussion in the NPRM also omits meaningful consideration of binding federal court precedent and important policy considerations that demand providing asylum seekers a full and fair opportunity to be heard, not least because of the potentially life-or-death implications of decisions in their cases.

The NPRM emphasizes that "[c]urrent regulations require a hearing on an asylum application only 'to resolve *factual* issues in dispute.' 8 CFR 1240.11(c)(3) (emphasis added)." Indeed in this selective reading of the regulations, the drafters of the NPRM supplied not only the emphasis, but also the modifier "only": the regulation demands that factual disputes be resolved through an evidentiary hearing, but does not limit hearings to that purpose, as would be inconsistent with decades of practice. The NPRM's crabbed interpretation falls apart as soon as the cited subsection is read in the context of closely adjacent provisions, two of which state:

> "Nothing in this section is intended to limit the authority of the immigration judge to properly control the scope of any evidentiary hearing." 8 CFR 1240.11(c)(3)(ii).
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> "The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing." 8 CFR 1240.1(c).

The drafters of the NPRM cannot proffer any serious justification for abrogating provisions like these, which would become so much surplusage with every application of the proposed pretermission rule.

The mischaracterization of current regulations continues: "To the contrary, current regulations expressly note that no further hearing is necessary once an immigration judge determines that an asylum application is subject to certain grounds for mandatory denial." 85 FR 36277,[27] emphasis added. Of course, the reference to a "further hearing" is at odds with

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[27] The regulation relied on states: "An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required." 8 CFR § 1240.11(c)(3).

pretermitting a hearing entirely, and the NPRM never explains how, without a hearing, the immigration judge is to identify grounds for mandatory denial.

Perhaps to normalize the deprivation of a full and fair hearing, the Preamble also rationalizes that "pretermission due to a failure to establish prima facie legal eligibility for asylum is akin to a decision by an immigration judge or the BIA denying a motion to reopen to apply for asylum on the same basis, and both immigration judges and the BIA have routinely made such determinations for many years." *Id.* This reference is inapt, however, as the Board has likewise underscored the right to a full evidentiary hearing and the appropriateness of reopening cases to provide for such in certain contexts, regardless of whether prima facie eligibility for relief was shown.[28] The NPRM's reference to regulations related to motions to reopen is also unavailing, as the regulation it cites by its very language presumes that the applicant was previously afforded a hearing.[29]

The NPRM similarly miscasts the legislative history of IIRIRA, stating in part that "the Departments do not believe that requiring a sufficient level of detail to determine whether or not an alien has a prima facie case . . . would necessarily require a voluminous application." (FR 36277, FN26) Importantly, the House report cited in the NPRM discusses streamlining the asylum application and process to enable asylum seekers to file sooner;[30] by contrast, the Proposed Regulation would intensify the burdens on asylum seekers in order to streamline the *review* of their applications—the opposite of what was stated.

In *Matter of Fefe*, the Board found "the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself."[31] The BIA concluded "[a]t a minimum, we find that the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be

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[28] *See, e.g., Matter of Ruiz*, 20 I&N Dec. 91, 92 (BIA 1989) ("But in the context of a prior in absentia hearing, the underlying relief being sought by way of the motion to reopen is the opportunity to present the applications for relief at a full evidentiary hearing. The right to such a hearing for purposes of determining excludability and presenting any applications for relief from exclusion is provided by statute and regulation.")
[29] 85 FR 36279 ("This limitation is consistent with current requirements for motions to reopen that preclude the raising of claims that could have been brought in a prior proceeding. See 8 CFR 1003.23(b)(3) ('''A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.''')).
[30] *See* H.R. Rep. No. 104–469, part 1, at 175–76 (1996) ("Finally, the Committee believes that the interest in filing a timely application supersedes the interest in filing a comprehensive application. The Committee is aware that current INS regulations require a relatively long and detailed application for asylum. While it may be important for an applicant to be able to commit the details of his or her case to writing prior to an interview with an asylum officer, it is more important that the case be commenced as soon as possible after the alien's arrival in the U.S. Thus, the Committee encourages the INS to adopt a simpler form of application for asylum, with generous allowance for amendment. Furthermore, the INS should take affirmative steps to notify the public of the 30day filing requirement.")
[31] 20 I&N Dec. 116, 118 (BIA 1989).

questioned as to whether the information in the written application is complete and correct.[32] The DOJ dismisses this important decision on the basis that the regulations at issue there are no longer in effect. (85 FR 36277). Yet the BIA examined this very fact in its later decision in *Matter of E-F-H-L* and concluded that the language of current regulations [8 C.F.R. § 1240.11(c)(3)] "does not differ in any material respect from that in the prior regulations. We therefore see no reason to disturb our conclusion in *Fefe….*"[33]

The Preamble to the Proposed Rule states that the BIA's decision in *Matter of E-F-H-L* "was subsequently vacated by the Attorney General, and no longer has any precedential effect." (85 FR 36277). However, nothing in the Attorney General's decision addresses the Board's prior analysis of the right to a hearing or seeks to substitute the Board's reasoning with an alternative interpretation. Instead, the Attorney General's decision rests solely on the asylum seeker's having withdrawn his underlying asylum application.[34]

The critical role of testimony and evidentiary hearings has been considered in prior Board and federal court decisions.[35] The NPRM makes no effort to address these cases or to challenge their reasoning, and any effort to do so would, in any event, be unavailing. DOJ cannot simply disregard federal court decisions finding a right to an evidentiary hearing within the immigration statute and regulations, regardless of its policy wishes.

Policymaking, particularly with tens of thousands of lives in the balance, cannot be made so cavalierly or callously. Passing references to efficiency cannot reasonably justify dispensing with basic notions of due process. By allowing immigration judges to reject applications for protection without providing asylum seekers an opportunity to testify to their claims and advance the adjudicator's understanding of their cases the Proposed Rule not only undermines the integrity of the very system it purports to protect, but risks the return of the most vulnerable, including children, to danger and death. Such a result is not simply cruel, but arbitrary and capricious, and violates the APA, the INA, the TVPRA and international treaty obligations.

III. The Proposed Rule Oversimplifies the Concept of Persecution, Minimizing the Imperative of Fact-Specific Analysis and Omitting Guidance on Analyzing Harm to Children

Through the Proposed Rule, the agencies seek to promulgate a shared regulatory definition of persecution. Proposed 8 CFR §§ 208.1(e), 1208.1(e). The proposed definition draws upon certain well-recognized holdings, but inevitably omits important aspects of a concept that has been elaborated through several generations of case law. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Factors that weigh *against* a finding of persecution are over-represented in the Proposed Rule, while the

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[32] *Id.*
[33] *Matter of E-F-H-L,* 26 I&N Dec. 319, 323 (BIA 2014).
[34] *Matter of E-F-H-L,* 27 I&N Dec. 226 (A.G. 2018).
[35] The Board's analysis in *Matter of E-F-H-L* "begins with the language of section 240(b)(4)(B) of the Act" (which provides for "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government,") and considers additional statutory and still-extant regulatory provisions, as well as multiple precedent decisions. *See* 26 I&N Dec. at 320-324.

role of fact-specific analysis is under-represented. And the Proposed Rule provides no guidance on considerations specific to children's cases, in disregard of a statutory mandate to take into account the specialized needs of unaccompanied children.[36] Because it does not accurately reflect the many ways in which children and other asylum seekers present a well-founded fear of persecution, the Proposed Rule should be withdrawn.

A. The proposed definition of persecution selectively presents established case law concepts in a necessarily incomplete and therefore misleading view of the law.

The text of the Proposed Rule presents a general description of two elements of persecution. Proposed 8 CFR §§ 208.1(e), 1208.1(e). Although some of the proposed language tracks that of seminal holdings (*cf. Matter of Acosta,* 19 I&N Dec. 211, 222 (BIA 1985)), not all of the requirements are so grounded; for example, the agencies do not explain the support for proposing to define persecutory action as constituting "an exigent threat." Proposed 8 CFR §§ 208.1(e), 1208.1(e). A literal interpretation of that clause could foreclose a finding of persecution where threatened harm is extreme yet not imminent – for example, if a child receives an ultimatum involving grievous bodily harm, with a period of time to choose whether to comply. And although the proposed definition emphasizes the severe and extreme nature of persecution, "persecution does not require bodily harm or a threat to life or liberty," *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998). The Preamble compounds confusion with overstatement – for example, reducing "Persecution is an extreme concept, which *ordinarily* does not include discrimination" to a selective quote, "Persecution . . . does not include discrimination." 85 FR 36281, citing *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (emphasis added).

Other aspects of the proposed definition present a risk of confusion. The definition states that "persecution requires an intent to target a belief or characteristic," Proposed 8 CFR §§ 208.1(e), 1208.1(e), but divorced from the context of case law, this statement has potential to mislead the adjudicator into concluding that a persecutor must have subjective intent to punish the victim.[37]

Absent from the Proposed Rule and Preamble is any recognition of the fact-dependent nature of the persecution determination. *See, e.g., Chouchkov v. INS*, 220 F.3d 1077, 1084 n.19 (9th Cir. 2000) (noting "the very fact-specific process for determining what constitutes persecution" and citing *Singh v. INS*, 134 F.3d 962, 967-68 (9th Cir. 1998) (describing persecution inquiry as "heavily fact-dependent, and . . . perhaps best answered by comparing the facts of Petitioner's case with those of similar cases," and noting that reasonable factfinders may differ on whether facts are sufficient to establish past persecution). The Proposed Rule and Preamble also exclude from persecution "intermittent harassment, . . . brief detentions, . . . non-severe economic harm," and "minor physical abuse"

[36] 8 U.S.C. § 1232(d)(8).

[37] *Cf. Niang v. Gonzales,* 422 F.3d 1187, 1197 (10th Cir. 2005) ("subjective punitive or malignant intent is not required for harm to constitute persecution" (citation omitted)).

(Proposed 8 CFR §§ 208.1(e), 1208.1(e); 85 FR 36281) – yet conspicuously fail to mention that harm in the aggregate may rise to the level of persecution.[38]

Approximately half of the proposed persecution definition is devoted to "nonexhaustive" examples of circumstances that are *not* persecution. (Proposed 8 CFR §§ 208.1(e), 1208.1(e)). As a consequence of this approach, adjudicators looking to the Proposed Rule for examples of circumstances that support a finding of persecution will not find them, but those looking for examples negating persecution will find many, and by power of suggestion, may even be more likely to be influenced by a negative example that is only an approximate fit for the case facts. For example, the Proposed Rule states that persecution "does [not] encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional," which discourages the equally valid conclusion that *some* treatment seen as unfair, offensive, unjust, unlawful, or unconstitutional *does* rise to the level of persecution. Because the line between the two cannot be determined without resort to case law, this aspect of the Proposed Rule is not instructive, but may serve to tip the scales toward negative findings. This dynamic is particularly counterproductive in the case of a child, in that "children's testimony should be given liberal benefit of the doubt with respect to evaluating a child's alleged fear of persecution," *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (citation omitted).

B. The proposed definition of persecution omits considerations relevant to evaluating the persecution of children.

The proposed definition of persecution provides no guidance concerning unaccompanied children, failing to respond to a congressional directive calling for "regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases."[39] Ten years before that legislation was passed, the Immigration and Naturalization Service adopted guidelines for children's claims, yet the Proposed Rule squanders an opportunity to codify any of the longstanding child-appropriate practices that have been since relied upon by numerous courts.[40] Because a well-founded fear includes both objective and subjective components, a child's claim of persecution must be evaluated from a child's perspective, taking into account age, cognitive development, and other factors. Courts have held it appropriate to recognize that a child's perception of harm is qualitatively different than an adult's, but this principle is absent from the Proposed Rule.[41] And EOIR has also provided

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[38] *See* *Poradisova v. Gonzales,* 420 F.3d 70, 79-80 (2d Cir. 2005) (persecution determination requires considering events cumulatively).
[39] 8 USC § 1232(d)(8).
[40] *See, e.g.,* Jack Weiss, Guidelines for Children's Asylum Claims, INS Policy and Procedural Memorandum at 26 (Dec. 10, 1998).
[41] *See, e.g., Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (holding combined circumstances "could well constitute persecution to a small child totally dependent on his family and community," and citing INS Guidelines for the proposition that "[t]he harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution."); *see also Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (age may bear heavily on persecution determinations).

guidance on the special considerations that children's cases demand.[42] The Proposed Rule not only fails to consider children's specialized needs, but actually codifies propositions that are inimical to children's needs in multiple ways.

First, the proposed definition categorically states that persecution "does not include . . . threats with no actual effort to carry out the threats," Proposed §§ 208.1(e), 1208.1(e). In other words, a child would have to wait until threats materialized into harm before becoming eligible for protection. As an example, a teenaged girl who rebuffed a corrupt official's inappropriate advances would have to wait until persuasion and coercion developed into full-blown assault before fleeing and seeking protection.

Second, not only the experience of harm, but also the child's capacity to comprehend, disclose, and testify to the harm may be a function of factors such as chronological age, development, and mental health factors. Accordingly, EOIR guidance instructs that:

> Immigration Judges should also recognize that children, especially young children, will usually not be able to present testimony with the same degree of precision as adults. Vague, speculative, or generalized answers by a child, especially a particularly young child, are not necessarily indicators of dishonesty. Immigration Judges should recognize that a child's testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.

OPPM 17-03 at 7. Likewise, federal courts have recognized that it is appropriate to "assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the same degree or with the same level of detail as an adult." *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (citing INS Guidelines for guidance that "the adjudicator must take the child's statements into account, but that "children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors."). Through blanket statements excluding a laundry list of circumstances from the definition of persecution, the Proposed Rule hinders the adjudicator's ability to take children's needs and capacities into account.

Third, the proposed definition fails to address the specialized needs of children with regard to the requirement of showing that the government was unable or unwilling to control the child's persecutor. But it is unrealistic to expect children to identify and access potential official sources of protection, particularly since a demand for protection may first require an assessment of whether it is safe to report harm to officials who may be corrupt or beholden to the child's persecutor.

Finally, the Proposed Rule takes no account of the profound effect on children of persecution of their family members, particularly parents or other caregivers. For example, children may be persecuted on account of a political opinion of the caregiver that is imputed to the child, or on account of their relationship to another individual. Moreover, harms to a parent, individually or in the aggregate, may constitute persecution of a child. *See, e.g., Jorge-Tzoc*, 435 F.3d at 150 (vacating finding

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[42] EOIR, OPPM 17-03, cited *supra*.

of no persecution of child applicant who was "necessarily dependent on both his family and his community.")

The Proposed Rule addressing persecution is deeply flawed by selectivity, slant, overstatement, and lack of clarity. The rule poses particular disadvantages for children, by subjecting them to regulations that default to the perspective of adults' cases, contrary to congressional expectations and directives. This necessitates withdrawal of the Proposed Rule.

IV. The Proposed Changes to the Meaning of "Membership in a Particular Social Group" Exceed the Agencies' Authority and Are Arbitrary and Capricious.

The founding documents of modern humanitarian law establish that persons persecuted on the basis of their "membership in a particular social group" are refugees.[43] The treaty term was carried over into the definition of "refugee" in the Act,[44] and given a reasonable and workable meaning in the landmark case *Matter of Acosta*.[45] As the Proposed Rule notes (with unwarranted hostility), this provision has gained legal content through decades of case-by-case decision making since *Acosta*, rather than a further legislative or regulatory definition. 85 FR at 36278. The agencies propose replacing the common-law development of refugee law that has worked, largely successfully, for 40 years with a regulatory provision made up of two distinct kinds of constraint.

A. The Proposed Rule improperly narrows the particularity and distinctiveness requirements contrary to law.

The Proposed Rule would codify a series of decisions of the BIA that narrowly define "particular social group" to mean one that meets the three-pronged test that the group is "based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at [sic] question." Proposed 8 C.F.R. § 208.1(c). These glosses on "particular social group" have met an uneven fate in the Courts of Appeals, with many courts rejecting at least one of the provisions as inconsistent with the statutory text. For example, the Third Circuit has rejected the "particularity" and "social distinction" requirements as unreasonable interpretations of the statute,[46] while the Seventh Circuit says the "social distinction"/"social visibility" test "makes no sense."[47] (The Proposed Rule does not so much as mention these cases.) To the extent that several courts have thus *already held* that such interpretations are not permissible resolutions of statutory ambiguity, the Proposed Rule is arbitrary and capricious in failing to engage with or overcome those holdings. While the Proposed Rule notes in its

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[43] United Nations Convention Relating to the Status of Refugees (''Refugee Convention''), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 1(A)(2), 33; United Nations Protocol Relating to the Status of Refugees (''Refugee Protocol''), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268, art. I.2 (reincorporating relevant provision of Art. 1(A) of the Convention).
[44] *Supra* note 1.
[45] 19 I.&N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I.&N. Dec. 439 (BIA 1987).
[46] *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582 (3d Cir. 2011).
[47] *Gatmi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

first footnote that agencies have the power to re-interpret *ambiguous* statutory phrases, it also fails to explain how these definitions arise from an ambiguous term.

B. The Proposed Rule creates unlawful general rules barring claims based on status of the persecutor

Sections 208.1(c) and 1208.1(c) of the Proposed Rule would also carve out, even from particular social groups that satisfy that restrictive three-pronged test, a laundry list of particular social groups toward which the Administration has demonstrated pervasive, unlawful hostility as ones where the Secretary or Attorney General, "in general, will not favorably adjudicate claims," without any effort to ground those exceptions in the Agencies' statutory authority. The result is a clear violation of the APA. Under the Proposed Rule, an asylum applicant who claims persecution on the basis of membership in a particular social group could establish that the social group *satisfies* the regulatory definition that a social group be "based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society [in] question," only to face the Proposed Rule's *per se* disapproval if that qualifying social group involves "being the subject of a recruitment effort by . . . persecutory groups" or "status as an alien returning from the United States." *Id.*

Many of these same categories of advance discretionary disapproval have been advanced in opinions of the Attorney General, such as *Matter of A-B-*[48] and *Matter of L-E-A-.*[49] It is telling, then, that a federal district court reviewing a collateral implementation policy under *A-B-* in *Grace v. Whitaker* has held that all these

> general rules that effectively bar[] the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." The new general rule is thus contrary to the Refugee Act and the INA. In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[] within the bounds" of his statutory authority.[50]

The Proposed Rule provides no statutory basis for the agencies to be promulgating such a general bar on eligibility beyond those identified in *Grace*. Such per se bars simply have no place in an explication of the statutory term "membership in a particular social group." Attempting to hide a per se bar in the pseudo-discretionary formulation "in general, will not favorably adjudicate such claims" is not materially different.

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[48] 27 I&N Dec. 316 (A.G. 2018).
[49] 27 I&N Dec. 581 (A.G. 2019).
[50] 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (citations omitted), *appeal pending*, No. 19-5013 (D.C. Cir.).

C. The proposed rule embeds a punitive waiver for ineffective assistance of counsel in the definition of particular social group.

The Proposed Rule offers a fundamentally unfair burden shifting in cases of ineffective assistance of counsel, whereby a represented asylum applicant who fails to define a particular social group at a hearing waives such claims on the merits *and* as grounds for an ineffective assistance claim. The Proposed Rule provides no reasoning—*none*[51]—for expansion of the punitive effect of waiver to encompass ineffective assistance claims. Shielding ineffective assistance of counsel from remedy in this way is against general public policy and, in the context of this rulemaking, arbitrary and capricious in light of the failure of the agencies to provide any rationale whatsoever. Thus, proposed 8 C.F.R. § 208.1(c) and 1208.1(c) should be withdrawn, as should the Proposed Rule as a whole.

V. The Proposed Rule Imposes Arbitrary and Capricious Criteria for Determining the Applicability of Internal Relocation and Firm Resettlement.

The Proposed Rule creates extraordinary new hurdles for unaccompanied children seeking asylum, but even for those few who can establish core eligibility, asylum will remain out of reach because the rule imposes impossible standards for internal relocation and firm resettlement. Although each element functions differently within the context of current law on refugee determinations, both serve as bases for exclusion from refugee protection under only the most stringent of circumstances. The proposed rule turns this model of limited exceptions upside down, holding the applicant accountable for numerous issues outside his or her control. The justification for amending the current standards defies logic and ignores the practical and real-life issues facing people who are fleeing for their lives. It ignores the unique challenges faced by unaccompanied minors, and further erodes their ability to seek a permanent and safe future.

Both the internal relocation and firm resettlement provisions of the proposed rule assume a level of agency that many unaccompanied minors do not hold. KIND's clients include children and teenagers who are under a legal disability and are not yet legally recognized as capable of making decisions for themselves. Yet the proposed rule places significant burdens on them to strategically move within their countries of origin, be aware of the laws in the countries they pass through, keep a stopwatch on the amount of time they spend in a country, and seek out protection even when there is no access or reasonable way to apply. Many of our clients do not know that they could qualify for refugee protection until they arrive in the United States and meet with an attorney. The only acknowledgement of children's circumstances in this section, however, relates to imputing firm resettlement to a child based on a determination that the parent has been firmly resettled. This provision completely ignores the unique circumstances of unaccompanied children who are pursuing claims on their own, and, as with the rest of the rule, throws up obstacles to legitimate asylum seekers.

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[51] 85 FR 36279 (discussion of §§ 208.13(c) and 1208.13(c) without any mention of the ineffective assistance language found in the proposed rule text itself).

A. **The Proposed Rule creates an unreasonable standard for "internal relocation," imposing an evidentiary burden on applicants that is overly broad and virtually impossible for children to meet.**

Refugee determinations, whether made abroad or in the United States, are premised on a commitment to accord protection to individuals whose own governments have failed to protect them from persecution.[52] Current regulations recognize that internal relocation is seldom a legitimate alternative for persecuted persons, particularly when the government is the persecutor, by shifting the burden to the government to establish the reasonableness of internal relocation once the applicant has established past persecution. 8 CFR § 208.13(b)(1)(ii), 1208.13(b)(1)(ii). Even where the applicant establishes a well-founded fear of persecution, current regulations presume that internal relocation is not reasonable where the government is the persecutor. 8 CFR § 208.13(b)(3) (i).

These regulatory safeguards are particularly important for unaccompanied minors, whose vulnerable status is often exploited by the very people and institutions who are supposed to protect them. In considering an unaccompanied minor's claim for asylum, it would be irrational to presume that an unaccompanied minor has capacity to relocate to another part of the country in order to avoid persecution, and the current factors for determining whether internal relocation is viable prompt an adjudicator to take into account the unique vulnerability of unaccompanied children. The proposed rule, however, would strip away those protections, forcing children to attempt to prove that every part of the country is unsafe for them, and that they could not live on their own, particularly where their persecutor is a non-state actor. The proposed rule confuses flight from persecution with relocation to safety, and in doing so creates a decidedly arbitrary mechanism for assessing internal relocation that is both internally inconsistent and noncompliant with statutory and international treaty obligations.

First, the Proposed Rule suggests that internal relocation is nothing but a set of logistical factors that can be measured without considering an individual's safety or other risks. Under current rules, in cases where the burden is on the asylum-seeker to establish that internal relocation is not reasonable, an adjudicator is required to determine whether "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country" and if so, whether "under all the circumstances, it would be reasonable to expect the applicant to do so." 8 CFR § 208.13(b)(1)(i)(B) and (b)(2)(ii). In assessing the reasonableness of internal relocation, adjudicators "should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 CFR § 208.13(b)(3), 1208.13(b)(3).

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[52] James C. Hathaway and M. Foster, "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination," in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (E. Feller et al., eds.) 357-417. Cambridge Univ. Press (2003).

The preamble to the proposed rule criticizes this standard as imprecise and vague, yet the language is clear: a finding that internal relocation would be reasonable must be based on more than supposition or conjecture and must instead take into account all the factors that would contribute to the applicant's safety and his or her ability to access that safety as a practical matter. Instead, the proposed rule treats the analysis of internal relocation as a geographical calculation that weighs size of the country, internal distances, and the reach of the persecutor (Proposed §§ 208.13(b)(3), 1208.13(b)(3)), irrespective of the nature of the persecution or other factors such as those enumerated in the current regulations, any one of which could make it not only unreasonable but also unsafe to relocate within the country of persecution. This analysis of internal relocation reduces equities to a mileage calculation that dehumanizes the applicant and ignores the importance of an individualized analysis. Moreover, the rule requires an adjudicator to consider the fact that an applicant has "relocated" to the United States, equating fleeing for one's life to a foreign country with moving across town. This cynical interpretation of internal relocation trivializes the level of danger and insecurity that compels asylum-seekers to take flight.

For an applicant whose persecutor is a non-state actor, the consequences of these changes to the internal relocation standard are even greater. As previously discussed, the proposed rule would make it virtually impossible for an applicant to establish persecution based on harm caused by a non-state actor. In the event that an applicant is able to establish past persecution by a non-state actor, the proposed rule would eliminate the presumption under current §§ 208. 13(b)(3) and 1208.13(b)(3) that internal relocation would not be reasonable. This burden shifting compounds the applicant's already significant evidentiary burden to establish past persecution and the tremendous mental and physical cost of reliving the underlying experiences. For unaccompanied children who successfully establish that they were persecuted, eliminating this presumption would force them to prove that the harm they have faced would make them unsafe no matter where they may relocate within their country.

By ignoring relevant factors for assessing the reasonableness of internal relocation and shifting the burden of proof back to an applicant even where he or she has demonstrated past persecution by a non-state actor, the proposed rule elevates what should be a secondary consideration into a central factor in granting asylum. A child who was persecuted in her country may neither feel safe nor be safe there, and yet the proposed rule puts blinders on adjudicators that would hinder them from taking basic psycho-social concerns and country conditions into account. Consequently, the internal relocation amendments are invalid, reinforcing that the Proposed Rule should be withdrawn in its entirety.

B. The proposed rule imposes a virtually insurmountable firm resettlement bar, ignoring the growing necessity of refugee resettlement across the globe and decades of jurisprudence requiring a specific offer of permanent residence for the bar to apply.

The agencies acknowledge that "the definition of firm resettlement has remained the same for nearly 30 years," 85 FR 36285. Under current regulations, an individual found to have been firmly resettled in another country prior to entering the United States will generally be found ineligible for asylum, provided that the government establishes that the individual received an offer of permanent resident status or some other form of permanent resettlement. 8 CFR §§ 208.15, 1208.15. This inquiry is often fact-intensive, subject to a range of questions relating to knowledge, access, availability, and other factors that distinguish between genuine offers of permanent protection and those existing in

theory only.[53] While the BIA and federal courts have recognized that in some circumstances an applicant's failure to take advantage of a program that was clearly available could trigger the bar based on an offer of firm resettlement, those decisions have not stated definitively that the mere existence of a program for which an applicant might qualify is sufficient in all cases to show firm resettlement. The proposed rule seeks to do just that, enumerating three circumstances under which an applicant would be found to have been permanently resettled. The Proposed Rule appears designed to relieve the government of any actual burden of proof on the issue. Implementation of this provision would allow the government to infer an offer of permanent residence to an unaccompanied child, irrespective of her knowledge of or ability to access such protection, and irrespective of the obstacles and delays she may face on her journey to seek protection.

The first prong of the proposed new definition would require an adjudicator to find firm resettlement where an individual "either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status." Proposed § 208.15(a)(1), 1208.15(a)(1). This formulation is so broad that it encompasses virtually any temporary form of residence that exists on paper, as long as it has the potential for renewability, regardless of whether the individual had a realistic chance of obtaining and renewing such status. 85 FR 36286. In practice, the mere existence of a law on the books could serve as proof of firm resettlement, an argument that the government has already made unsuccessfully in the context of the transit bar litigation.[54] The pretext of promoting "the interest of those genuinely in fear of persecution in attaining safety as soon as possible" (85 FR 36285) masks the real conditions that unaccompanied children face in transit – hunger, physical danger, victimization, and a lack of adult protection. Thus, the "existence of a legal mechanism" for obtaining status in a country (85 FR 36286) does not equate to attaining safety.

The remaining prongs of the proposed firm resettlement definition are equally disconnected from the realities of forced migration. Fleeing for one's life can be a dangerous and lengthy journey, and many refugees involuntarily spend time in other countries before reaching permanent safety. The proposed rule, however, arbitrarily provides that one year's residence in any other country constitutes proof of firm resettlement. In essence, if the government cannot establish proof of an offer of firm resettlement, even under the broad terms of the proposed § 208.15(a)(1), the adjudicator can infer firm resettlement from one year's residence in the country even without status. The final category would include individuals with dual citizenship who were present in their second country of citizenship before entering the United States, a category that may include children who are unaware of having acquired a second citizenship through a parent, without regard for individual circumstances and interaction with the legal framework of the government in question.

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[53] *Matter of AGG*, 25 I & N. Dec 486 (BIA 2011) (creating a four-part burden shifting test for firm resettlement that continues to rely on a fact intensive scrutiny of the full circumstances).
[54] See discussion in Section I, *supra.*

The irony of the current administration equating firm resettlement to one year of undocumented status in a country is not lost on the public. Firm resettlement implies that an individual has the opportunity to participate in a full and meaningful way in the life of a community and to live and work without fear of removal. As millions of undocumented immigrants residing in the United States could attest, and as the administration has amply shown over the last three years, decades of residence without lawful status will not protect one from removal—so it is both disingenuous and misleading to declare, in the context of adjudicating an asylum claim, that someone living without documentation in another country for one year has been firmly resettled in that country.

It is also disingenuous to turn the firm resettlement bar into a cudgel to force applicants to apply for and remain in other countries, rather than come to the United States. Firm resettlement is not a punishment, but is instead a burden-sharing assessment, grounded in the complex nature of resettling millions of refugees following World War II. Early laws on displaced persons and refugees in the United States recognized that the purpose of those laws was to provide refuge to the homeless, and the sheer need at that time meant that the U.S. would focus on those persons who had not yet been resettled.[55] The mere fact that a country has signed on to the Refugee Convention, as cited in the NPRM (85 FR 36285, n.41) or has a skeletal asylum program in place, or simply lacks the resources to remove undocumented persons, does not mean that someone has found a permanent home or been firmly resettled in that country. To pretend otherwise will do nothing but condemn many asylum-seekers to prolonged misery and danger.

In addition to codifying specious grounds for establishing firm resettlement, the Proposed Rule also appears to ease the government's burden by allowing either the DHS or the immigration judge to raise the firm resettlement bar based on the evidentiary record alone, triggering the applicant's burden to prove that he or she was not firmly resettled. Proposed §§ 208.15(b), 1208.15(b). While the governing caselaw does not relieve DHS of a burden to establish an offer of firm resettlement, and in fact, specifically notes that this burden remains,[56] the wording of the Proposed Rule suggests that merely identifying the possibility of firm resettlement is enough to meet the government's burden—and the government appears to be relieved of all responsibility if the immigration judge raises the issue. Proposed §§ 208.15(b), 1208.15(b). The Proposed Rule is thus doubly stacked against the applicant: the mere existence of a program that hypothetically affords permanent or indefinite temporary protection, or the failure to move quickly through a country, is sufficient to establish firm resettlement under the proposed rule, and the government apparently has no obligation other than to point out the existence of the third country's program or the amount of time an individual spent in the country to trigger the bar.

The decision to codify imputation of a parent's firm resettlement to a child likewise would relieve the government of its evidentiary obligations. Where the child is a principal applicant (either

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[55] See USCIS-RAIO Directorate, Firm Resettlement, 12/20/19 at 7. Available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Firm_Resettlement_LP_RAIO.pdf
[56] *Matter of AGG, supra,* at 504.

pursuing a claim on facts separate from a parent's, or as an unaccompanied minor), the government should not be relieved of its obligation to establish firm resettlement.

Taken together, the internal relocation and firm resettlement provisions of the proposed rule are not in keeping with the spirit of refugee protection. They will result in the denial of meritorious claims for protection by children like those served by KIND. Further, they will subject KIND's clients to additional anxiety and uncertainty and force them to expend more time and resources disproving tangential government arguments. The proposals represent truly arbitrary and capricious rulemaking, and should therefore be withdrawn, like the Proposed Rule as a whole.

VI. The Proposed Rule Impermissibly Expands the Use of Discretionary Denials to Such an Extreme That a Grant Of Asylum Will Become the Exception, Rather Than the Rule, When an Applicant Meets the Definition of a Refugee, in Direct Contravention of Domestic Law and International Treaty Obligations.

We have noted throughout this comment that the NPRM is a deliberate and systematic dismantling of the asylum framework Congress created under the Refugee Act of 1980. Nowhere is this more evident than in the transformation of discretionary denials from an extraordinary and seldom-used option[57] to a mandatory exercise in denying the claims of qualified applicants. The process of deciding whether a person found to meet the refugee definition merits asylum in the exercise of discretion would no longer be an act of exercising good judgment, balancing positive and negative factors unique to the individual's case.[58] Instead, adjudicators would be required under proposed to consider a list of adverse factors that would essentially trump the positive equities in the case. Proposed § 208.13(d), 1208.13(d).

Even more egregious, an adjudicator is directed to deny asylum in nine categories of cases except under extraordinary circumstances involving foreign policy, national security, or exceptional and extremely unusual hardship. Proposed §§ 208.13(d)(2), 1208.13(d)(2). In essence, the rule would create the oxymoron of mandatory discretionary denials, and make it impossible for the vast majority of qualified asylum seekers to actually receive the benefit, pushing the vast majority into withholding of

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[57] *Marouf v. Lynch*, 811 F.3d 174, 180 (6th Cir. 2016) (discretionary denials of asylum are "unusual" and "exceedingly rare," citing *Huang v. I.N.S.*, 436 F.3d 89, 90, 92 (2d Cir. 2006); *see also Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007) ("It is rare to find a case where an [Immigration Judge] finds a petitioner statutorily eligible for asylum and credible, yet exercises his discretion to deny relief."). The grounds upon which asylum can be discretionarily denied to an otherwise-eligible applicant appear in practice to be limited to cases of "egregious conduct by the applicant," such as criminal convictions or fraud. *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008). Examples of reasons for discretionary denials upheld on appeal include multiple drunk driving convictions, *Kouljinski v. Keisler*, 505 F.3d 534, 542-43 (6th Cir. 2007), visa fraud, *Aiqin Xue v. Holder*, 538 F. App'x 35, 36-37 (2d Cir. 2013), marriage fraud, *Singh v. Holder*, 568 F. App'x 512 (9th Cir. 2014), multiple convictions for counterfeiting and disorderly conduct, *Barrie v. Gonzales*, 228 F. App'x 66, 69 (2d Cir. 2007), multiple burglary convictions, *Kazlauskas v. I.N.S.*, 46 F.3d 902, 904-07 (9th Cir. 1995), and a history of seven convictions, most for drug crimes, *Dhine v. Slattery*, 3 F.3d 613, 615-20 (2d Cir. 1993).

[58] *Hussam F. v. Sessions*, 897 F.3d 707, 718-19 (6th Cir. 2018) (laying out a recommended list of positive and negative factors that permits an adjudicator to balance equities, while noting that demonstrating past persecution or a well-founded fear of persecution remains the critical determining factor in all but the most egregious cases).

removal, and thereby creating a class of individuals who are protected from removal but have no access to lawful permanent residency. The rule itself is an arbitrary and capricious act of animus against asylum seekers, including unaccompanied children, and virtually requires arbitrary and capricious decision-making in every asylum case. This section must be withdrawn and exemplifies the reasons why the Proposed Rule should be withdrawn in its entirety.

A. The Proposed Rule turns the concept of discretion on its head, mandating denials contrary to administrative law, the Refugee Act of 1980, and U.S. international treaty obligations

Discretionary asylum denials are rare and should be made in only the most egregious of circumstances.[59] The BIA's decision in *Matter of Pula* has, for more than 30 years, guided adjudicators in the exercise of discretion in cases in which applicants have established that they meet the statutory definition of refugee; it requires a balancing of equities and nonetheless holds as the most critical factor the evidence that the applicant is a refugee, except in the face of severe adverse factors.[60]

The proposed rule specifically rejects *Matter of Pula*, offering in its place a list of "significant adverse factors" – entry with fraudulent documents, failure to apply for asylum when transiting through a country to the United States, and unlawful entry — factors that ignore the often precarious and dangerous nature of travel for refugees, as well as the long held principle of international protection that a refugee should not be punished for immigration violations related to their flight.[61] The proposed rule further directs adjudicators to deny asylum as a discretionary matter in nine circumstances as disparate as transiting through or remaining in another country for 14 days, subject to limited exceptions; accruing one year of unlawful presence in the United States; and failing to timely file tax returns. Proposed § 208.13(d)(2).

By enumerating significant adverse factors plus circumstances that preclude favorable exercise of discretion, the Proposed Rule would essentially eliminate the adjudicator's discretion to grant asylum, overcoming the applicant's past persecution, their fear of return, and the suffering and trauma they may continue to experience as a result of the treatment that led them to flee their country. Because the categories are so broad, virtually every asylum seeker will be subject to at least one if not more. For example, many unaccompanied children served through KIND arrive at the border having spent more than 14 days in another country due to limited resources or other constraints, and many have transited through more than one country on their way to the United States with no reason to expect that permanent or even temporary safety could be available to them there. Such children, no matter how much they have been harmed or fear harm, would be denied asylum purely in the name of discretion, unless they could establish that they qualified for one of the limited regulatory exceptions, and barring "extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the

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[59] Discussed *supra*.

[60] *Matter of Pula,* 19 I&N Dec. 467, 474 (BIA 1987).

[61] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV

application for asylum would result in exceptional and extremely unusual hardship to the alien." Proposed §208.13(d)(2)(ii), 1208.13(d)(2)(ii). This importation of the standard used to determine eligibility for some immigration waivers and for cancellation of removal requires an entirely different and complex adjudication, essentially creating a hearing within a hearing. The amount of resources, and the emotional toll it would take on our clients to overcome these hurdles, is staggering.

Some unaccompanied children find access to counsel or first become aware of the availability of protection only after more than a year of living in the United States without authorization. Many children served through KIND have been unaware of the possible forms of relief available to them, may have no idea that asylum is even a possibility, or may be too traumatized upon their initial entry to be able to articulate what has happened to them. Because of such concerns, the TVPRA specifically exempts unaccompanied children from the requirement that an asylum application must be filed within one year. Under the Proposed Rule, however, accruing unlawful presence for more than a year effectively becomes a bar to asylum, albeit under the guise of discretion (Proposed §208.13(d)(2)(i), 1208.13(d)(2)(i)). Notwithstanding that Congress has specifically recognized the need to provide extra time and consideration to unaccompanied children seeking asylum, the ignore this assessment. While children may still apply for asylum more than one year after entering the United States, they would be penalized for doing so under the Proposed Rule. Such blatant disregard of congressional intent is not only illegal, but an audacious attempt to rewrite the asylum statute through regulation.

The Preamble to the Proposed Rule argues that as long as withholding of removal remains available to applicants, the government is not in violation of its non-refoulement obligations under the INA or the Refugee Convention and the 1967 Protocol. 85 FR 36285. This, however, is a misreading of the scope of both domestic and international obligations. The 1980 Refugee Act was designed to give full force to the United States obligations under the Convention and Protocol, which encompasses far more than the duty not to return someone to a country where they would face persecution or other severe harm upon return. The Convention and Protocol also address obligations of a state to ensure that refugees within its territory are treated fairly and with dignity, including provisions that agree to ensure that freedom of movement and rights to employment, education, and other basic needs are accorded on par with those of citizens. In fact, the Convention includes provisions for member states to create pathways for permanent status for refugees, which is reflected in the asylum scheme created by the Refugee Act, providing for the adjustment of status and eventual naturalization of asylees. To narrow the opportunity to receive asylum through a host of regulatory obstacles is to essentially make asylum and the permanent status it provides unattainable. That is clearly inconsistent with the requirements of U.S. law and our international commitments.

B. The rule uses discretion as a guise for effectuating rules that the government has been unable to defend in other contexts.

To a striking degree the Proposed Rule attempts to use discretion as a sort of savings clause for implementing enjoined, invalidated, or challenged policy goals of the Administration. The proposed discretionary factors repurpose failed or stumbling policy initiatives relating to bars to asylum that the government has promulgated over the past three years and that have either been rejected by the courts or are currently the subject of litigation. Most notably, the Proposed Rule incorporates the effort to block asylum applications by those crossing into the United States from Mexico, as both a mandatory

adverse factor under proposed § 208.13(d)(1) and as a categorical basis of denial under proposed §§ 208.13 (d)(2)(i)(A) and (B). In *East Bay Sanctuary Covenant v. Barr*, the Ninth Circuit has specifically rejected this provision as unlawful.[62]

C. The rule virtually ensures that asylum will become a rarity, creating consequences for unaccompanied children and other asylum seekers that are far-reaching and inhumane.

Although asylum is a discretionary form of relief, the element of discretion is not a tool for increasing the volume of denied applications, nor an invitation to inject politics into the administrative process, and yet this is exactly what the NPRM does in framing a discretionary standard that is so biased against applicants, sweeping in conduct that applicants cannot reasonably be expected to avoid in the flight to safety. While the Proposed Rule would require the adjudicator to consider adverse factors, particularly relating to manner of entry and failure to apply for asylum in a country of transit, there is no requirement that an adjudicator consider the particular circumstances of the child while in transit, the lack of accessible asylum services in many countries of transit, or the fear and desperation of many children attempting to reach safety that they perceive to be available only in the United States. Nor is an adjudicator required to consider factors such as a child's age, development, the practical impact of a child's experiences (e.g., mistrust of authorities due to being harmed in the past by persons in positions of authority), or trauma. Finally, the proposed discretionary grounds fail to require an assessment of the impact of instability and uncertainty caused by living in limbo under withholding of removal. This last concern is vitally important for children seeking asylum whose need for a stable, predictable future is well-documented. Common sense and basic regard for the right of a child to thrive and succeed in their new country should militate strongly against the use of discretion to deny asylum in all but the most extreme cases, but the proposed rule makes such good judgment virtually impossible.

While the rule is deficient for failing to provide a list of factors that would potentially create a more balanced weighing of the issues, it would not be sufficient to simply add such factors to the Proposed Rule. The discretionary provisions are so flawed that they are unsalvageable, and should be rejected for what they are: a last-ditch effort to bar the door, repurposing the discretionary authority entrusted to the agencies as means to make asylum virtually inaccessible, in the hope that this will deter people from coming to the U.S. to seek asylum.

Thirty-five years ago, the late Arthur Helton warned that the discretionary nature of asylum could easily be subject to political pressure that overwhelmed the system, failing to give meaning to the clear intent of Congress to provide a permanent home for those refugees who sought protection from within the United States.[63] Courts subsequently adopted the standards set out in *Matter of Pula* to guard against such interference, ensuring that the most important factor in a grant of asylum remained the core fact that the individual before the adjudicator was a refugee. The proposed discretionary grounds callously eliminate this consideration, ignore the special considerations that should be given to

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[62] *East Bay Sanctuary Covenant v. Barr*, __ F.3d __ (9th Cir. July 6, 2020), Nos. 19-16487 and 16773, slip op. at 32.
[63] Arthur Helton, The Proper Role of Discretion in Political Asylum Determinations, 22 San Diego L. Rev. 999 (1985), available at https://digital.sandiego.edu/sdlr/vol22/iss5/4.

unaccompanied children, and set forth a scheme that makes asylum unattainable for most refugees. As with the rest of this Proposed Rule, the only decent solution is to withdraw it completely.

VII. The Proposed Rule Would Greatly Expand the Reach of the Penalty for Filing a Frivolous Application, to the Detriment of Vulnerable and Non-frivolous Filers, Including Children.

The Proposed Rule would dramatically increase the potential for an erroneous finding that an asylum application was frivolous, thereby increasing the risk that the draconian statutory consequences of a "frivolous" finding will fall on bona fide asylum seekers, including unaccompanied children. The INA provides that an applicant who knowingly files a frivolous application, after notice of the consequences, "shall be permanently ineligible for any benefits under this Act." INA § 208(d)(6). For children seeking asylum, being "permanently ineligible for benefits under this Act" can mean a future of persecution or exploitation, a lifetime in hiding, or a death sentence.[64] Precisely because those consequences are so draconian, it is imperative to ensure a high degree of accuracy in rendering a finding a frivolousness, and to ensure that the rate of erroneous findings shall be as close to zero as possible. *Cf.* 85 FR 36273 n.19 ("There is no indication that Congress intended a narrow construction of 8 U.S.C. 1158(d)(6), and a narrow view of a frivolous asylum application is at odds with its intent to discourage improper applications.")

Yet under the Proposed Rule, an asylum application could be deemed "frivolous" even if entirely truthful; and the penalties for frivolous applications could attach even to applicants who did not actually know their applications were frivolous, and were offered no chance to address factors that led an adjudicator toward a mistaken "frivolous" finding. The proposed changes that would produce these results include (1) expanding the regulatory definition of "frivolous" beyond the meaning that has been well-settled since 1997, (2) defining the term "knowing" to include "willful blindness," (3) for the first time, authorizing asylum officers to make findings of frivolousness, (4) authorizing immigration judges to make such findings without providing applicants an opportunity to address the specific issues that the judge believes indicate that the application was knowingly frivolous, and (5) offering a mechanism for avoiding a finding that the application was frivolous, but only if the applicant accepts virtually the same consequences that would flow from such a finding. Proposed §§ 208.20, 1208.20.

A. The expanded definition of "frivolous" would place unworkable demands on adjudicators and applicants, including unaccompanied children.

Since 1997, regulations and case law have provided that "an asylum application is frivolous if any of its material elements is deliberately fabricated."[65] The NPRM expressly acknowledges – twice -- that "[t]he current regulatory definition of 'frivolous' related to asylum applications, which limits the concept of frivolousness to deliberate fabrication of material elements, was promulgated in

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[64] Human Rights Watch, Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse (Feb. 5, 2020) (describing two teenagers denied asylum, deported to El Salvador, and thereafter forcibly held and beaten for three days in police barracks), available at https://www.hrw.org/news/2020/02/05/us-deported-salvadorans-abused-killed.

[65] 8 CFR §§ 208.20, 1208.20.

1997 with the intent 'to discourage applicants from making patently false claims.'"[66] The plain language of the current rule is consistent with that objective. Nonetheless, the NPRM faults the current definition for failing to "address other types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings, or explain why these considerations of frivolousness were either no longer necessary or undesirable." 85 FR 36274.

The identical four-part definitions proposed by DHS and EOIR would greatly expand the current definition in ways that fail to place good-faith applicants on clear notice of the type of filing that may result in a "frivolous" finding. Proposed §§ 208.20(c), 1208.20(c).

1) The proposed definition's first prong covers an application that "[c]ontains a fabricated essential element," notably eliding the word "deliberately" from the existing definition that "any of [the] material elements is deliberately fabricated."[67] That amendment clashes with the acknowledgment in the NPRM of multiple decisions that have "observed that 'Fraudulent' would be a more appropriate modifier than 'Frivolous' in the statutory heading," 85 FR 36274. The concept of fraud entails deliberate conduct. Deliberate intent to deceive may be completely absent when any applicant, but particularly a child, repeats, adopts, or proffers fabricated information. Deliberate fabrication is not present when a child is hindered in his or her presentation of information by developmental or capacity limitations, a history of trauma, mistaken expectations, or outside influences. For example, a child's asylum application could contain a false statement that the child believed or understood to be true, or that is the product of a survival mechanism in response to trauma. A child's capacities for drawing distinctions or making appropriate judgments may be undeveloped or impaired. Over time, adults may have kept authentic knowledge from a child for any number of reasons; children are also susceptible to the pressure of real or imagined consequences to themselves or others of disclosing sensitive information. For these reasons among others, fairness and common sense support the current definition of "frivolous application" that is restricted to those fabrications that are deliberate, and any proposed revision to the definition must retain that limitation.

   The NPRM does not discuss the rationale for the proposed change from "material element" in the original definition to "essential element" in the Proposed Rule.[68] Under a plain-language understanding of those terms, this proposed change appears to narrow the definition to elements that are not merely material but also essential to a claim. If this interpretation is correct, such a change would be acceptable, but if a different interpretation was intended, the agencies should explain it in the event they decline to withdraw the Proposed Rule.

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[66] 85 FR 36274; *id.* citing 62 FR at 447 (1997) (stating "the purpose of a definition of 'frivolous' was 'to discourage applicants from making patently false claims.'").
[67] *Compare* Proposed §§ 208.20(c)(1), 1208.20(c)(1) *with* 8 CFR §§ 208.20, 1208.20.
[68] *Compare* Proposed §§ 208.20(c)(1), 1208.20(c)(1) *with* 8 CFR §§ 208.20, 1208.20.

2) The second prong of the proposed definition defines an application as frivolous if "premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence." Proposed §§ 208.20(c)(2), 1208.20(c)(2). This prong includes the undeniable proposition that an application that satisfies every element of asylum eligibility must not be found "frivolous." However, as written it would improperly reach strong claims that contain any "false or fabricated evidence" yet no *material, deliberate* fabrication. This exposes a good-faith asylum seeker with a meritorious claim to a finding that her claim is frivolous solely because a piece of supporting evidence is held to be false, even if that evidence was *not* deliberately fabricated, and even if the remaining evidence (in the adjudicator's view) fell just short of compelling a grant of asylum for any reason. In other words, any rule containing this test would chill meritorious filings by good-faith asylum applicants, including unaccompanied children, who are entitled to seek protection under the law.

3) The third prong of the proposed definition defines an application as frivolous if "filed without regard to the merits of the claim." Proposed §§ 208.20(c)(3), 1208.20(c)(3). This contemplates judgments by an adjudicator as to (a) the applicant's subjective understanding of gradations of merit under evolving asylum standards, (b) the applicant's subjective belief in the degree of merit of his or her claim under those standards, and (c) the applicant's predictive understanding of the adjudicator's assessment of both these factors, even on points where reasonable adjudicators may differ. Such judgments by an adjudicator necessarily call for speculation. Moreover, instead of placing applicants on notice that identifiable conduct may expose them to a "frivolous" finding, and thereby discouraging such conduct, this aspect of the Proposed Rule would have a chilling effect on meritorious claims. Elsewhere, the Proposed Rule redefines core concepts such as persecution and particular social group in ways that are both novel and at odds with long-established law and policy – raising the specter that a child's application could be deemed not merely deficient under newly adopted standards, but also "filed without regard to the merits of the claim." Because this proposed rule change fails even under "the Departments' goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief" (85 FM 36274), it must be withdrawn.

4) The fourth prong of the proposed definition defines an application as frivolous if "clearly foreclosed by applicable law," Proposed §§ 208.20(c)(4), 1208.20(c)(4). Similar to the third prong, this test would call for speculative findings by adjudicators, and the only notice it would provide to prospective applicants is both unclear and chilling. Adjudicators would engage in speculation as to whether a given claim was "clearly foreclosed," as opposed to probably, possibly, or arguably foreclosed. The Proposed Rule's dramatic departure from settled law, in numerous aspects of the refugee definition, further compounds the uncertainty, as the interaction of the proposed standard for frivolousness with other proposed new rules would inhibit children from raising unique claims that are supported by existing caselaw yet conflict

with some aspect of the Proposed Rule. Such foreclosure of claims would itself become another matter to be litigated. The Proposed Rule would place all asylum applicants in the untenable position of prejudging their own claims, a burden incompatible with the right under U.S. law to seek asylum. This burden would force unaccompanied children to weigh their need for a lifetime of protection against the potential for an adjudicator's finding to condemn them to a lifetime without protection, a calculus that is particularly repugnant because children are entitled to an adjudication that employs particular regard for their special vulnerabilities.

Thus, the proposed definition of "frivolous" is flawed in all four prongs, overbroad, and unworkably vague. This definition, along with the entirety of the Proposed Rule, should be withdrawn and the existing definition retained.

B. The expanded definition of "knowing" would place unworkable demands on adjudicators and applicants, including unaccompanied children.

The INA provision on frivolous applications uses the term "knowingly" without defining it, INA § 208(d)(6), presumably because Congress intended the ordinary construction of the word "knowingly." *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (term undefined by statute is given its "ordinary, contemporary, common meaning."). Yet DHS's Proposed Rule would specify that a frivolous application is knowingly filed if "filed . . . with either actual knowledge, or willful blindness, of the fact that the application was described in paragraph (c)." (The EOIR Proposed Rule is identical, except that inconsistently, the cross reference is to the section's paragraph (b).) By inviting adjudicators to base a "frivolous application" finding on the applicant's perceived "willful blindness," the Proposed Rule adds another layer of speculation to the adjudicator's task and reinforces the chilling effect on unaccompanied children and other asylum applicants. The Proposed Rule fails to define willful blindness, but the Preamble adds this confusing gloss:

> Willful blindness means the alien was aware of a high probability that his or her application was frivolous and deliberately avoided learning otherwise [sic]. This standard is higher than mere recklessness or negligence and is consistent with well-established legal principles. *See, e.g., Global-Tech Appliances, Inc.* v. *SEB S.A.,* 563 U.S. 754, 769–70 (2011).

85 FR 36273. Even leaving aside the garbled syntax and the reliance on a case unrelated to asylum, the Preamble thereby emphatically reinforces the inappropriateness of this definitional amendment, laying bare the agencies' expectation that adjudicators will engage in subjective, speculative assessments of (a) the applicant's subjective awareness, (b) quantification of the term "high probability," and (c) the actual reasons why an applicant did not acquire actual knowledge – exercises that have been avoided under the provisions on frivolous applications in effect since 1997.

C. If the Proposed Rule's authorization for "frivolous application" findings by asylum officers is extended to unaccompanied children, it will undermine TVPRA procedures.

The Proposed Rule would, for the first time, authorize asylum officers to render determinations that an application was knowingly frivolous, and to deny the application or refer it to an immigration

judge on that basis. Proposed 8 CFR §§ 208.20(b), 1208.20(b). The Preamble explains that the provision applies to "asylum officers adjudicating affirmative asylum applications," and further refers to "handling frivolous asylum applications at the affirmative asylum application stage," emphasis added, with the stated purpose to "strengthen USCIS' ability to root out frivolous applications more efficiently," 85 FR 36274-75. This leaves unclear whether the provision is meant to apply to "unaccompanied alien children" (UAC) in removal proceedings who file defensive asylum applications with USCIS pursuant to the TVPRA's grant of initial jurisdiction over their asylum applications to USCIS. INA § 208(b)(3)(c). The Preamble contemplates that "if an asylum officer identifies indicators of frivolousness in an asylum application, the asylum officer would focus more during the interview on matters that may be frivolous." 85 FR 36275. This focus would render the interview adversarial, defeating Congress' purpose in providing UAC the opportunity to state their asylum claims initially in the non-adversarial, child-appropriate setting of an asylum interview. The provision should be withdrawn in any event, and in particular, it should not apply to UAC.

D. The Proposed Rule would be prejudicial to children, providing inadequate notice of the consequences of and bases for a finding of a "frivolous application."

Before finding an application to be knowingly frivolous under the Proposed Rule, an asylum officer must be "satisfied that the applicant has had a sufficient opportunity to account for any discrepancies or implausible aspects of the claim." Proposed 8 CFR §§ 208.20(b), 1208.20(b). But the Proposed Rule would relieve immigration judges and the Board of a similar requirement found in the current regulations, *see* 8 CFR §§ 208.20, 1208.20, and endorsed in *Matter of Y-L-* 24 I&N Dec. 151 (BIA 2007), in which the Board, on instruction from the Second Circuit, formulated standards for "frivolous application" determinations. Reasoning that *Y-L-* interpreted regulatory rather than statutory provisions, the agencies would abrogate that decision through the Proposed Rule. 85 FR 36276-77.

Moreover, under the Proposed Rule, neither USCIS nor EOIR is required to give an applicant "any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding" once the statutorily required notice of consequences is given. Proposed 8 CFR 208.20(d), 1208.20(d); 85 FR 36275 (asylum officers "would not be required to provide opportunities for applicants to address discrepancies or implausible aspects of their claims . . . when the asylum officer determines that sufficient opportunity was afforded"). Extending authority for frivolous application findings to asylum officers while lowering the standards for notice and opportunity to respond would greatly compound the risk (discussed *supra)* of an erroneous finding that a child knowingly filed a frivolous application. Child asylum-seekers may present apparent "discrepancies or implausible aspects" to their claims, largely due to variations in children's requirements for time to process past harms and acquire the trust in their representatives and in the adjudicative process that is necessary for presenting evidence of the persecution they experienced or fear.[69]

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[69] The agencies also appear to view asylum officers' existing authority to make negative findings on credibility as a sort of proxy for findings of frivolousness. 85 FR 36275 ("The current practice for handling frivolous

Relatedly, the agencies maintain that sufficient notice of the consequences of filing an application deemed frivolous is provided by the written warning in Form I-589. 85 FR 36273, 36276. But in practice, a written notice in legalese may have little value for children, particularly in their first experience with an adjudicative process. *See, e.g.,* statement of Sen. Feinstein, 153 Cong. Rec. S3004 (daily ed. Mar. 12, 2007) (Congress acted to accommodate vulnerable children who are forced to navigate "a system designed for adults.") The agencies further reason that:

> an alien who files an asylum application already both knows whether the application is fraudulent or meritless and is aware of the potential ramifications of knowingly filing a frivolous application. The alien is therefore already on notice and has an opportunity to account for any issues with the claim without the immigration judge having to bring the issues to the alien's attention. Thus, there is no reason to require multiple opportunities for an alien to disavow or explain a knowingly frivolous application . . ..

85 F.R. 36276. But the agencies' dubious syllogism assumes that adjudicators are infallible, and ignores that the good-faith filer of a non-frivolous application has no notice when an adjudicator erroneously believes that the application is fraudulent or meritless, and thus will have neither notice of a need to account for any issues that the immigration judge does not bring to his or her attention, nor an opportunity to do so. As discussed above, numerous circumstances in a child's experience have potential to give rise to an erroneous conclusion of a fraudulent or meritless application. The agencies' rationale for abrogating *Y-L-* is not sound and would be particularly harmful to child asylum-seekers; accordingly, the Proposed Rule should be withdrawn.

E. The Proposed Rule offers an illusory "safety valve" in the event of a false finding that an application was "knowingly frivolous.

The Proposed Rule creates a provision that purports to "ameliorate the consequences" of an erroneous finding that an application was knowingly frivolous, 85 FR 36277, yet the so-called "safety valve" provision would recreate most of those consequences. Under the provision, an application could not be found frivolous if the applicant "wholly disclaims" the application and withdraws it with prejudice, along with all other applications for relief; waives rights to file appeals and motions to reopen or reconsider; and qualifies for and accepts voluntary departure. Proposed 8 CFR §§ 208.20(f), 1208.20(f). As a practical matter, a child accepting these conditions would receive no relief from an erroneous finding that his or her application was frivolous. Moreover, presenting the conditions as a form of "safety valve" is illusory and may operate as pressure for a child to waive valuable rights.

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asylum applications at the affirmative asylum application stage generally involves asylum officers making negative credibility determinations."). However, this contrary to authority. *See, e.g., Liu v. U.S.,* 455 F.3d 106, 113 (2d Cir. 2006) ("a finding of frivolousness does not flow automatically from an adverse credibility determination," citations omitted).

A rare positive feature of the Proposed Rules is that they retain the current rule's affirmation that a finding of knowingly filing a frivolous asylum application does not preclude applications for withholding of removal or CAT protection. Proposed 8 CFR §§ 208.20(g), 1208.20(g).

F. The rationale for the agencies' approach to the finding of "frivolousness" is internally inconsistent and lacking in support.

To justify these extensive proposed amendments, the agencies assert that frivolous filings are rampant and costly (85 FR 36273). In lieu of supporting data or cost analyses, the NPRM cites a recent Ninth Circuit case for the proposition that "if an alien does get caught lying or committing fraud, nothing very bad happens to him" – a statement immediately belied the NPRM's summary of the draconian consequences of a finding that a frivolous application was knowingly filed. 85 FR 36273, citing *Angov v. Lynch,* 788 F.3d 893, 901 - 902 (9th Cir. 2015). The opinion in *Angov* itself offers not data analysis, but further speculation that "for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie." *Id.* at 902. But speculation is not justification.

To "demonstrate[] the limitations" of the current regulatory definition of "frivolous," the agencies rely on *L–T–M–* v. *Whitaker,* 760 F. App'x 498, 501 (9th Cir. 2019), which offered a technical reason for avoiding a finding that an application was frivolous; *see* 85 FR 36274. But the NPRM then observes that *L-T-M-* "run[s] contrary to numerous other federal court decisions upholding frivolousness findings based on fabricated evidence" (*id.*) -- suggesting that the "limitations of the current definition in discouraging false claims" are not so prevalent after all. These inconsistencies and other shortfalls in the NPRM reveal that the overhaul of the "frivolousness" regulations is a solution looking for a problem, with dangerous repercussions for those in need of protections under the asylum laws – falling most heavily on the most vulnerable, including unaccompanied children.

Conclusion

Unaccompanied children who seek asylum in the United States should have access to a system that is fair and reasonable, that recognizes their unique circumstances and needs, and does not play politics with their lives. The NPRM achieves none of those goals, making asylum virtually impossible to attain while creating a permanent underclass of people who are refugees but are only eligible for withholding of removal. While KIND has limited its discussion to those sections which most affect our clients, we agree with the vast majority of commenters that every aspect of this rule is flawed and unfairly skews the system against asylum seekers. Given the extraordinary infirmities of this rule, coupled with the short public comment period, it is impossible to salvage or redeem the current framework, which not only is based on arbitrary and capricious judgments, but would codify arbitrary and capricious behavior in the form of mandatory discretionary denials. We urge the government not to destroy the asylum system it is obligated to protect and to withdraw the proposed rule in its entirety.

Sincerely,

/s/
Jennifer Podkul
Vice President for Policy and Advocacy