

No. 19-5272

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

O.A. et al.,

Plaintiffs-Appellees,

vs.

DONALD. J. TRUMP, PRESIDENT OF THE UNITED STATES et al.,

Defendants-Appellants.

On Appeal From the United States District Court
for the District of Columbia, Case No. 18-cv-02718
The Honorable Randolph D. Moss

**BRIEF OF KIDS IN NEED OF DEFENSE AND
CENTER FOR GENDER & REFUGEE STUDIES AS
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel submits the following certification:

(A) Parties, Intervenors, and Amici. Except for the following amici, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants: (1) The Immigration Reform Law Institute; (2) Peter Keisler, Carter Phillips, Stuart Gerson, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein; (3) the County of Los Angeles, the City of Oakland, the City of New York, and the City of Chicago; (4) the professors of immigration law; (5) the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia; (6) The United Nations High Commissioner for Refugees; and (7) the signatories to this brief, KIND, Inc. and the Center for Gender & Refugee Studies.

KIND, Inc., d/b/a Kids in Need of Defense (“KIND”), is a nonprofit corporation registered in the District of Columbia, with no parent

corporation, and no corporation owns 10% or more of its stock. KIND is the leading national organization advocating for the rights of unaccompanied migrant and refugee children in the United States.

The Center for Gender & Refugee Studies (“CGRS”) is a nonprofit organization with no parent corporation, and no corporation owns 10% or more of its stock. CGRS engages in litigation, policy advocacy, technical assistance, and scholarship in furtherance of its core mission to advance the human rights of refugees and to ensure asylum protections under U.S. law conform with international obligations.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellant.

(C) Related Cases. The only related cases of which amici are aware appear in the Brief for Appellants.

Dated: August 21, 2020

/s/Scott L. Winkelman

Scott L. Winkelman

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Amici Curiae state the following:

KIND, Inc., d/b/a Kids in Need of Defense (“KIND”), is a nonprofit corporation registered in the District of Columbia, with no parent corporation, and no corporation owns 10% or more of its stock. KIND is the leading national organization advocating for the rights of unaccompanied migrant and refugee children in the United States.

The Center for Gender & Refugee Studies (“CGRS”) is a nonprofit organization with no parent corporation, and no corporation owns 10% or more of its stock. CGRS engages in litigation, policy advocacy, technical assistance, and scholarship in furtherance of its core mission to advance the human rights of refugees and ensure asylum protections under U.S. law conform with international obligations.

Dated: August 21, 2020

/s/ Scott L. Winkelman

Scott L. Winkelman

CERTIFICATE OF COUNSEL AS TO SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), the undersigned certifies that it is necessary for Amici Curiae Kids in Need of Defense (“KIND”) and the Center for Gender and Refugee Studies (“CGRS”) to file this Brief. KIND and CGRS are leading organizations focused on the rights of refugees and other migrants. KIND, in particular, is the leading national organization advocating for the rights of unaccompanied migrant children. CGRS has played a central role in the development of asylum and other law pertaining to humanitarian protections, and has an interest in the legal questions under consideration in this appeal as they implicate the fundamental rights of those fleeing persecution and torture to seek protection upon arrival in the United States. Given their experiences serving those seeking asylum, Amici are uniquely positioned to provide the Court with their insight and experience into the real-world effects that the Interim Final Rule and Presidential Proclamation at issue in this case will have on unaccompanied asylum-seeking children.

Dated: August 21, 2020

/s/Scott L. Winkelman

Scott L. Winkelman

TABLE OF CONTENTS

	PAGE
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	iii
CERTIFICATE OF COUNSEL AS TO SEPARATE BRIEFING	iv
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION	2
ARGUMENT.....	6
I. Conditions Beyond Their Control Drive Children Seeking Protection to Cross the Southern Border Between Ports of Entry.....	6
A. Children Seeking Asylum Flee from Their Countries of Origin Because of Persecution That Threatens Their Life and Safety.....	6
B. The IFR Amplifies the Danger of the Already Perilous Journey Unaccompanied Children Undergo in Traveling to the United States.....	12
II. The IFR Further Endangers Unaccompanied Children by Forcing Them to Navigate Dangerous Conditions at the U.S.-Mexican Border.....	14
A. Unaccompanied Minors Are Disproportionately Affected by the Violent and Hazardous Conditions at the U.S.-Mexican Border.....	16
B. Unaccompanied Children Are Often Stymied from Applying for Asylum at Designated Ports of Entry by a Lack of Access to Information and U.S. Government Policy.....	20
C. The IFR and Proclamation Endanger Unaccompanied Children by Exposing Them to the Harms they Sought to Avoid by Seeking Asylum in the United States.....	23
III. Congress and the Courts Have Repeatedly Recognized the Heightened Vulnerability Children Face and Have Made Provisions for Necessary Safeguards.....	24

	PAGE
A. The <i>Perez-Funez</i> Injunction.....	26
B. <i>Flores</i> Consent Decree	27
C. Homeland Security Act of 2002.....	29
D. Trafficking Victims Protection Reauthorization Act	30
CONCLUSION.....	32
CERTIFICATE OF COMPLIANCE.....	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<i>Al Otro Lado v. McAleenan</i> , 394 F. Supp. 3d 1168 (S.D. Cal. 2019)	22
<i>E. Bay Sanctuary Covenant v. Barr</i> , 964 F.3d 832 (9th Cir. 2020).....	25
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<i>Inestroza-Antonelli v. Barr</i> , 954 F.3d 813 (5th Cir. 2020).....	11
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STATUTES	
6 U.S.C. § 279(b)(1)	30
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8 U.S.C. § 1158(a)(2)(A)	24
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8 U.S.C. § 1232	30
8 U.S.C. § 1232(a)(2)	31
8 U.S.C. § 1232(a)(4)	31
8 U.S.C. § 1232(a)(5)	31
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INTEREST OF AMICI CURIAE¹

Amici curiae provide representation to asylum-seekers and provide legal training and technical assistance to volunteer attorneys who provide pro bono legal assistance.

Kids in Need of Defense (“KIND”) is a national nonprofit organization dedicated to providing free legal representation and protection to immigrant and refugee children in the United States who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court. KIND also advocates for laws, policies, and practices to enhance protections for unaccompanied immigrant children in the United States. In 2019, 2,643 children were referred to KIND for legal services.

The Center for Gender & Refugee Studies (“CGRS”) plays a central role in the development of asylum and other law pertaining to humanitarian protections nationwide through its litigation, scholarship, and development of policy recommendations. It also provides technical

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution for preparation of this brief. All parties have consented to the filing of this brief.

assistance and expert consultation for attorneys representing asylum-seekers across the country in a wide range of cases.

INTRODUCTION

The Refugee Act of 1980² codified the current framework for the United States’ asylum process, implementing the nation’s treaty commitments to participate in the international system of refugee protection. Pursuant to the Refugee Act, and consistent with the 1951 Refugee Convention, which prohibited “Contracting States” from penalizing refugees for unlawful entry or presence, the United States has protected eligible refugees when seeking asylum irrespective of their location or manner of entry.³ The Interim Final Rule and Presidential Proclamation,⁴ if permitted to stand, would in one fell swoop dismantle these protections, in violation of the plain text of section 208 of the Immigration and Nationality Act (“INA”) and our obligations under international law.

² Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157–59 (1980)).

³ 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 31(1).

⁴ As used in this Brief, “IFR” refers to the Interim Final Rule and “Proclamation” refers to the Presidential Proclamation.

Amici endorse the legal positions put forward by Plaintiffs-Appellees on the illegality of the IFR and Proclamation. By obligating all asylum-seekers to enter the United States at a port of entry—a command with which children and other vulnerable people seeking asylum may have no ability to comply—Defendants would disturb years of settled expectations, violate treaty commitments, and unlawfully deny humanitarian protection based purely on the manner of entry.

While the IFR and Proclamation will adversely affect many asylum-seekers, the burden will fall hardest—as it often does—on unaccompanied children because they lack the resources, life skills, and legal acumen to navigate both the immigration process and the hazardous conditions along the U.S.-Mexican border. Cognizant of the particular vulnerabilities of children who lack parental support, Congress and the courts have crafted specific protections intended to ensure that the asylum claims of unaccompanied alien children⁵ receive

⁵ The term of art “unaccompanied alien child” is defined by the Homeland Security Act to mean a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 279(g)(2).

a full and fair hearing and are resolved on the merits. The IFR upends these protections.

The IFR and Proclamation erect a new, unnecessary, and unlawful hurdle for children who have endured an already long and perilous journey to seek protection in this country. This brief describes that journey, the range of conditions that cause children to flee their homes, and the ways those factors understandably drive many children to cross the U.S.-Mexico border at places other than ports of entry when seeking protection. It also explains why in many cases it is the government's own actions that force children and others seeking protection to cross between ports.

If permitted to stand, the IFR and Proclamation would fashion an immigration tool that prioritizes *where* children cross the border over *why* they cross. In the process, the IFR and Proclamation would punish children based on decisions about their border crossing location that many do not make themselves. Courts have long recognized that this country's labyrinthine immigration laws are challenging to understand even for those with legal training—let alone a minor who may very well

speak no English.⁶ The expectation that a child has the knowledge and wherewithal to comply with the IFR and Proclamation is unreasonable and inconsistent with the directives of a Congress that has recognized these concerns. And yet the result would be the invariable categorical rejection of many children's meritorious asylum claims.

The district court rightly vacated the IFR. It faithfully applied the plain language of the INA in concluding that asylum-seekers have a right to apply for asylum whether or not they arrived at a designated port of entry. Amici submit this brief to share their distinctive insights—based on their experience representing children seeking asylum and expertise in the intent and purpose of the laws protecting them—into the pernicious effects the IFR and Proclamation will have on child asylum-seekers. Amici urge this Court to affirm the injunction against the IFR and Proclamation to ensure that children are not denied asylum due to their understandable need to cross where practical without risking life and limb, and their inability to parse the complexities of U.S. immigration law.

⁶ See, e.g., *Perez-Funez v. District Director, I.N.S.*, 611 F. Supp. 990, 1002 (C.D. Cal. 1984).

ARGUMENT

I. Conditions Beyond Their Control Drive Children Seeking Protection to Cross the Southern Border Between Ports of Entry.

The IFR and Proclamation are indifferent to the realities that many asylum-seekers, especially children, face in their countries of origin and en route to the United States. Here, amici provide that background, including: (a) the intolerable conditions persecuted children face in their countries of origin that lead them to flee their homes; (b) the perilous journey these children must take to seek refuge in the United States; (c) why it is implausible to believe that children have the knowledge and means to comply with the IFR and Proclamation; and (d) the distinct set of dangers children face at ports of entry and their surrounding border towns. While children's heightened vulnerability has led to the specific statutory protections described in Part III, many of the hazards described here apply more broadly to people fleeing violence and other forms of persecution.

A. Children Seeking Asylum Flee from Their Countries of Origin Because of Persecution That Threatens Their Life and Safety.

Any discussion of this matter should begin with the circumstances that impel children to flee their countries and traverse Mexico to find

safety in the United States. An in-depth study conducted by the United Nations High Commissioner for Refugees (“UNHCR”) found a dramatic increase since 2011 in the number of unaccompanied children fleeing El Salvador, Guatemala, Honduras, and Mexico.⁷ Many seek protection and reunification alongside family members who have already fled the same persecution and resettled in the United States.⁸ The UNHCR study found “[t]wo overarching patterns of harm” driving these children to leave their countries of origin that would warrant international protection: “violence by organized armed criminal actors and violence in the home.”⁹

The epidemic of gang violence that has plagued these countries is well documented and not reasonably disputed. By 2019, this violence had reached a “crisis point,” where “[h]eavily armed gangs terrorize local

⁷ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN 4-5 (2014), <https://www.unhcr.org/56fc266f4.html> (hereinafter “CHILDREN ON THE RUN”).

⁸ KIDS IN NEED OF DEFENSE & HUMAN RIGHTS CENTER FRAY MATÍAS DE CÓRDOVA, CHILDHOOD CUT SHORT: SEXUAL AND GENDER-BASED VIOLENCE AGAINST CENTRAL AMERICAN MIGRANT AND REFUGEE CHILDREN 5 (June 2017) (hereinafter “CHILDHOOD CUT SHORT”), https://supportkind.org/wp-content/uploads/2019/12/Childhood-Cut-Short-KIND-SGBV-Report_June2017.pdf.

⁹ *Id.* at 6.

populations with almost complete impunity. Murder, sexual assault, and abductions, as well as widespread forced recruitment into gangs, have driven countless people in the region to seek safety elsewhere.”¹⁰ The impunity rates of gang violence in El Salvador, Guatemala, and Honduras are staggering: 90.30%, 88.20%, and 85.71%, respectively.¹¹ Across the region, gangs “terrorize residents into submission and recruit young people by force or coercion, promising ‘work’ for youths who have little prospect of finding formal employment—and threatening death for

¹⁰ *Thousands are fleeing mass gang violence in the North of Central America*, UNHCR MAGAZINE (Mar. 21, 2019), <https://www.unhcr.ca/news/thousands-fleeing-gang-violence-north-of-central-america/>.

¹¹ Ruth Elizabeth Prado Perez, *Better Governance to Fight Displacement by Gang Violence in the Central American Triangle*, MIGRACIONES INTERNACIONALES, July-Dec. 2017, at 240. The United Nations defines “impunity” as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to make reparations to their victims.” U.N. DEP’T OF ECON. & SOC. COUNCIL, PROMOTION & PROTECTION OF HUMAN RIGHTS: IMPUNITY, at 6, U.N. Doc. E/CN.4/2005/102/Add.1 (2005). An impunity rate of 90%, for example, means that only 10% of crimes are punished in the jurisdiction.

those who refuse.”¹² In a similar vein, some Mexican children—precisely because of their age and vulnerability—are trafficked for work, forced to engage in dangerous criminal activity, and threatened by the cartels that control the human smuggling industry.¹³ The near-hopeless odds for protection or justice through governmental authorities in the region often “make[] fleeing the only way out.”¹⁴

As the UNHCR study found, many children from these countries also face considerable violence in the home.¹⁵ This finding is corroborated by U.S. State Department’s 2019 Country Reports. For example, the State Department found that in El Salvador, “[c]hild abuse remained a serious and widespread problem.”¹⁶ The same is true in Honduras, Guatemala, and, to a lesser degree, Mexico.¹⁷ The abuse of minors that

¹² Jeff Ernst, ‘A death sentence’: migrant caravan member killed in Honduras after US sent him back, THE GUARDIAN (Jan. 13, 2019), <https://www.theguardian.com/world/2019/jan/13/nelson-espinal-death-deported-migrant-caravan-us-border-honduras>.

¹³ *Id.* at 38–39.

¹⁴ Perez, *supra* note 11, at 240.

¹⁵ CHILDREN ON THE RUN, *supra* note 7, at 6.

¹⁶ U.S. DEP’T OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR 20 (2019) (hereinafter “EL SALVADOR HUMAN RIGHTS REPORT”).

¹⁷ U.S. DEP’T OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HONDURAS 17 (2019) (hereinafter “HONDURAS HUMAN

these reports document includes abuse from parents, siblings, and other caregivers and includes “physical abuse, emotional abuse, sexual abuse, sibling violence, intimate partner violence and abandonment.”¹⁸ Impunity for such home and gender-based violence is also prevalent.¹⁹

In addition, a KIND study found that girls in Central America face sexual and gender-based violence that forces them to flee.²⁰ This study reveals sexual and gender-based violence perpetrated by gangs to be “widespread” and “extremely brutal”—involving terrors such as

RIGHTS REPORT”); U.S. DEP’T OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA 17 (2019) (hereinafter “GUATEMALA HUMAN RIGHTS REPORT”). Additionally, in Mexico “[t]here were numerous reports of child abuse.” U.S. DEP’T OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO 23 (2019).

¹⁸ CHILDREN ON THE RUN, *supra* note 7, at 28.

¹⁹ *See, e.g.*, CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES v, ix, 15, 58–59, 136 (Center for Gender & Refugee Studies & Migration and Asylum Program, Justice and Human Rights Center eds., Feb. 2015), https://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English_1.pdf; OHCHR, *Special Rapporteur on Violence against Women Finalizes Country Mission to Honduras and Calls for Urgent Action to Address the Culture of Impunity for Crimes against Women and Girls* (July 7, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14833>.

²⁰ CHILDHOOD CUT SHORT, *supra* note 8, at 5.

kidnapping, gang rape, and forced sexual relationships.²¹ Courts, too, have recognized that gender-based violence against female children may constitute persecution based on membership in “particular social groups” defined by gender and childhood. The Fifth Circuit recently cited a United Nations study that “classified Honduras as having more women murdered *because of their gender* than anywhere else in the world.”²²

In addition to persecution, trafficking drives children to flee and seek the humanitarian protections U.S. law provides. The State Department observes that the “commercial sexual exploitation of children, including child sex tourism, remained a problem, including in privately run orphanages.”²³

In short, children seeking asylum—particularly those arriving by land from the North of Central America—seek access to protection in the United States because they face an onslaught of violence in their countries of origin that leaves them little choice. Many of these children

²¹ *Id.* at 5–6.

²² *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 816 (5th Cir. 2020).

²³ GUATEMALA HUMAN RIGHTS REPORT, *supra* note 17, at 18; *see also* HONDURAS HUMAN RIGHTS REPORT, *supra* note 17, at 17; El SALVADOR HUMAN RIGHTS REPORT, *supra* note 16, at 20.

are eligible for asylum, yet the IFR will result in the denial of their otherwise meritorious claims merely because of where they cross.

B. The IFR Amplifies the Danger of the Already Perilous Journey Unaccompanied Children Undergo in Traveling to the United States.

Most children traveling by land from El Salvador, Honduras, and Guatemala face a perilous journey from their countries of origin to the U.S. border. And this peril would be magnified by the IFR. By the time children reach the border, many have journeyed well over 2,000 miles, some of it through scorching desert climate. According to UNICEF, each year thousands of children who start the journey never make it to the U.S. border.²⁴ Along the way, many children face “assaults, robbery and abduction by criminal gangs” as well as “extortion and ill-treatment by police and immigration officials.”²⁵

²⁴ UNICEF, *BROKEN DREAMS: CENTRAL AMERICAN CHILDREN’S DANGEROUS JOURNEY TO THE UNITED STATES 2* (2016), https://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF_Child_Alert_Central_America_2016_report_final.pdf (hereinafter “BROKEN DREAMS”).

²⁵ Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try To Cross the Border*, AMNESTY INTERNATIONAL (last visited July 24, 2020), <https://www.amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/>.

Asylum-seekers en route to the United States, including children, are also kidnapped with alarming frequency—as many as 20,000 per year—and are then held for ransom by criminal gangs.²⁶ The kidnapers “often extort money from the migrants or force them to carry drugs as they make their way into the United States, threatening to kill them if they don’t comply.”²⁷ One individual described how he and his four children were held hostage in Mexico for 42 days with hundreds of others, including children and babies.²⁸ This individual stated, “Whenever the children did something wrong they would punish them, lock them in a place with no air. They’d only let the child out when he would collapse.”²⁹

Sexual abuse is pervasive during transit to the United States. Although data on the topic are scarce due to predictable underreporting, reliable estimates are disconcerting. The Los Angeles-based Immigrant Defenders Law Center reports that between a quarter and a half of their child clients have suffered sexual and gender-based violence during their

²⁶ *Id.*

²⁷ Broken Dreams, *supra* note 24, at 6.

²⁸ *Id.*

²⁹ *Id.*

journey.³⁰ Some estimates are even higher: Amnesty International reports that, according to health professionals, “as many as six in ten migrant women and girls are raped on the journey” to the United States.³¹

Children seeking asylum may face a harrowing journey to reach the United States. To unnecessarily prolong this journey by forcing them to find, wait near, and enter through a port of entry further magnifies these harms. And for many children who are unable to control the time and manner of their crossing, the IFR and Proclamation effectively negate their ability to obtain asylum in the United States. Compounding the unfairness, most children lack the agency to make decisions that would allow them to avoid this draconian penalty.

II. The IFR Further Endangers Unaccompanied Children by Forcing Them to Navigate Dangerous Conditions at the U.S.-Mexican Border.

The IFR poses an additional risk to unaccompanied children: conditions at the U.S.-Mexican border near ports of entry are perilous. Many border towns abutting ports of entry are beset by violence, and

³⁰ CHILDHOOD CUT SHORT, *supra* note 8, at 28.

³¹ Shetty, *supra* note 25.

refugee camps lack access to food, water, and basic sanitation. By obligating asylum-seekers to apply for protection at designated ports of entry, the IFR funnels refugees to these dangerous border towns and thereby exacerbates the risks to unaccompanied children, who must confront the scourges of violence and hunger without parental support. As a result, many of the unaccompanied children who enter the United States between ports of entry are fleeing the violence not only of their respective countries of origin but also of the refugee camps in Mexican border towns.³²

The IFR and Proclamation would categorically deny those children asylum eligibility—regardless of the merits of their applications—and return them to the dangers from which they fled. No child should be forced to choose between her own safety and her right to asylum. But by forcing children to either seek shelter in violent border towns while they

³² Some children who do brave the devastating conditions in border towns and seek to enter through a port of entry are denied access by CBP agents, forcing them to enter between denied ports of entry. KIND, *The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border* 3 (Dec. 21, 2018), https://supportkind.org/wp-content/uploads/2018/12/Protection-Gauntlet_12-21-18-FINAL.pdf (hereinafter “*Protection Gauntlet*”).

await processing or arrive at safety sooner by crossing between a port of entry, that is precisely the choice the IFR imposes.

A. Unaccompanied Minors Are Disproportionately Affected by the Violent and Hazardous Conditions at the U.S.-Mexican Border.

By forcing unaccompanied children to apply for asylum at ports of entry, the IFR functionally pushes already-vulnerable children into dangerous refugee camps in northern Mexican border towns. In many of those towns, violence has been at or near an all-time high.³³ According to a 2017 report, “[v]iolence and crimes against migrants in Mexico’s northern border states have long been documented to include cases of disappearances, kidnappings, rape, trafficking, extortion, executions,

³³ Julián Aguilar, *Mexican Border Cities: Too Dangerous for Americans But Safe Enough for Migrants, U.S. Government Says*, THE TEX. TRIB. (Dec. 11, 2019), <https://www.texastribune.org/2019/12/11/us-government-mexican-border-dangerous-americans-safe-migrants/> (“Mexican authorities have attributed the violence, which this year has claimed more than 1,400 lives in Ciudad Juárez alone, to cartel wars as criminals vie for control of smuggling routes into Texas and beyond. But migrants have also been easy prey for criminals to extort, sexually assault or kidnap amid the lawlessness.”); Elliot Spagat, *Migrants Fill Tijuana Shelters, Brace for Long Stay as They Await Border Processing*, CHI. TRIB. (Nov. 15, 2018), <https://www.chicagotribune.com/nation-world/ct-migrants-caravan-tijuana-us-border-20181115-story.html> (“Mexican law enforcement was out in force in a city that is suffering an all-time-high homicide rate.”).

and sexual and labor exploitation by state and non-state actors.”³⁴ Between February 14, 2019 and May 7, 2020, Human Rights First identified 1,114 instances of rape, kidnapping, and torture against migrants, including children—what it considered the tip of the iceberg.³⁵ The U.S. government, even as it forces unaccompanied children to congregate near the border as they request asylum, has issued travel advisories warning U.S. citizens to avoid traveling to these very same border towns.³⁶ The IFR and Proclamation take the cruel position that what is unacceptable risk for the voluntary traveler is perfectly suitable for the abandoned refugee.

³⁴ *Washington Office on Latin America, Situation of Impunity and Violence in Mexico’s Northern Border Region* (Mar. 2017), <https://www.wola.org/wp-content/uploads/2017/04/Situation-of-Impunity-and-Violence-in-Mexicos-northern-border-LAWG-WOLA-KBI.pdf>.

³⁵ *Publicly reported cases of violent attacks on individuals returned to Mexico under the “Migrant Protection Protocols”*, Human Rights First, (May 13, 2020), <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks5.13.2020.pdf>.

³⁶ U.S. DEP’T OF STATE, MEXICO TRAVEL ADVISORY (June 17, 2020), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

For unaccompanied children, crossing the border expeditiously, outside a designated port of entry, is sometimes the best or only means of escaping the danger and squalid conditions of the refugee camps and shanty towns constructed near the border. Unaccompanied children waiting in Mexico to apply for asylum are often packed into overcrowded shelters,³⁷ and children “lucky” enough to be housed at one of the Mexican government’s open-air complexes report lack of access to food and water, and face exposure to rain, mud, and extreme temperatures.³⁸ Meanwhile, asylum-seekers at some makeshift refugee camps near the border live in tents or sleep outside.³⁹ According to Doctors Without Borders, conditions at some of the camps are particularly dire; at a tent-city in

³⁷ Spagat, *supra* note 33 (describing how a shelter designed for 45 women and children was housing 100 and another designed for 100 housed nearly 200).

³⁸ Camila Montoya-Galvez, *U.S. Suspends Protections for Migrant Kids at Border; Expelling Hundreds Amid Pandemic*, CBS NEWS (May 7, 2020), <https://www.cbsnews.com/news/coronavirus-immigration-migrant-children-protections-border/> (“She was also concerned about his safety in the squalid tent camp in Matamoros, located in the Mexican state of Tamaulipas, which the U.S. government warns Americans not to visit because of the rampant violence and crime there.”).

³⁹ Nomaan Merchant, *Tents, Stench and Smoke: Health Risks Are Gripping Camp*, ASSOCIATED PRESS (Nov. 14, 2019), <https://apnews.com/337b139ed4fa4d208b93d491364e04da>.

Matamoros, Mexico, just across the border from Brownsville, Texas, drinking water is scarce, people bathe in the e-coli contaminated Rio Grande, and the smell of human waste lingers in the air.⁴⁰

Children may be least able to withstand or make decisions to mitigate these perils. Of the 178 patients examined by Doctors without Borders during a three-week period who had diarrhea, hypertension, diabetes, asthma, or psychiatric conditions, more than half were younger than age 15.⁴¹ Medical research indicates that prolonged exposure to these stressful conditions causes particularly acute trauma for unaccompanied children, even compared to their accompanied peers. They have “higher rates of anxiety, depression, conduct problems, and post-traumatic stress disorder (PTSD),”⁴² and prolonged exposure to

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Kiara Alvarez & Margarita Alegría, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, AM. PSYCHOL. ASS'N (June 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors>.

highly stressful situations can adversely affect children's short- and long-term health.⁴³

B. Unaccompanied Children Are Often Stymied from Applying for Asylum at Designated Ports of Entry by a Lack of Access to Information and U.S. Government Policy.

Unaccompanied children arriving at Mexican border towns often stay in camps and shelters. There is no centralized system for educating unaccompanied children about their right to seek asylum in the United States,⁴⁴ and there is no formalized mechanism for educating unaccompanied children about their rights and relative risks of different paths open to them to seek protection in the United States. Ideally, children could seek assistance from international non-governmental organizations or regional government actors, but such resources are

⁴³ *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy and Com.*, 116th Cong. 3 (2019) (statement of Julie M. Linton, MD, Fellow, American Academy of Pediatrics). *See also* AM. ACAD. OF PEDIATRICS, *AAP Calls for Urgent Changes in Care of Migrant Children Following Latest Border Visit* (2019), <https://www.aappublications.org/news/aapnewsmag/2019/07/12/border071219.full.pdf>.

⁴⁴ *Protection Gauntlet*, *supra* note 32, at 4.

highly limited.⁴⁵ Left to their own devices, these children seek guidance from informal relationships. This presents a significant impediment for unaccompanied children seeking asylum in the United States, many of whom may understand their rights in only the simplest terms and, being children, lack the legal acumen and life skills to navigate the immigration process.

Even those children who manage to understand the intricacies of U.S. immigration policy are confronted with a daunting process that exacerbates the dangers to an already-vulnerable population. For instance, although the IFR and Proclamation require asylum-seekers to apply for asylum at a port of entry, other U.S. government policies restrict asylum-seekers' ability to access those ports, creating additional barriers to weed out otherwise meritorious asylum claims. Under the U.S. government's 2018 "metering" policy, asylum-seekers have often been denied access to ports of entry by armed CBP officers standing guard at the border.⁴⁶ Each asylum-seeker's name is placed on an

⁴⁵ *See id.*

⁴⁶ DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 6 (OIG-18-84,

informal “metering list” and required to wait in Mexico—sometimes for 6 to 9 months⁴⁷—until the U.S. government determines that there is sufficient capacity to process them.⁴⁸ As of June 2020, approximately 30,000 asylum-seekers were living in northern Mexico waiting to submit asylum claims at ports of entry or have their claims adjudicated.⁴⁹

Unaccompanied children are often denied even this sub-standard treatment. KIND has first-hand accounts from unaccompanied children who were excluded from metering lists despite presenting themselves at

Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

⁴⁷ Jason Kao & Denise Lu, *How Trump’s Policies are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html>.

⁴⁸ The purpose of the IFR is to “encourage aliens entering the United States along the southern border to do so at a designated port of entry, where they—and their applications for asylum—can be processed in an orderly and efficient fashion. 83 Fed. Reg. 55,935, 55,936 (Nov. 9, 2018). As is evidenced by the wait times at the southern border, the IFR fails to achieve this basic objective.

⁴⁹ Eric Reidy, *Briefing: Coronavirus and the Halting of Asylum at the US-Mexico Border*, THE NEW HUMANITARIAN (June 29, 2020), <https://www.thenewhumanitarian.org/news/2020/06/29/Mexico-US-coronavirus-mass-expulsions-asylum-halt>. A Southern District of California decision from July 2019 provides further information on the U.S. government’s metering policy. See *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019).

a port of entry, and of CBP and Mexican officials telling unaccompanied children that they are ineligible for inclusion on those lists.⁵⁰ Even children who have negotiated the metering process and other obstacles may be falsely informed by U.S. officials that unaccompanied children are ineligible to apply to for asylum in the United States.⁵¹ By precluding children from making claims for asylum when they present themselves at a port of entry, the IFR fails to accord children seeking asylum the protections they are afforded under U.S. law.

C. The IFR and Proclamation Endanger Unaccompanied Children by Exposing Them to the Harms they Sought to Avoid by Seeking Asylum in the United States.

The government, rationalizing the proposed rule, claims that asylum-seekers entering between ports of entry “engage in conduct that seriously endangers themselves, [and] any children traveling with them.”⁵² If the alternatives—crossing at a port of entry or not coming at all—were better, that might be a notable point. But they are *not* better. The IFR and Proclamation only cause further trauma and harm to child asylum-seekers, by subjecting them to the high risks of bodily and

⁵⁰ *Protection Gauntlet*, *supra* note 32, at 2–3.

⁵¹ *Id.*

⁵² 83 Fed. Reg. 55,934, 55,935 (Nov. 9, 2018).

psychological harm that they otherwise might avoid were they to cross the border between ports of entry. Rather than protect children who seek refuge in the United States,”⁵³ the IFR and Proclamation subject them to risk of harms that may be as dangerous as those they sought to escape by seeking asylum.

III. Congress and the Courts Have Repeatedly Recognized the Heightened Vulnerability Children Face and Have Made Provisions for Necessary Safeguards.

Unaccompanied children receive heightened protections under U.S. immigration laws. They are entitled, for instance, to seek asylum in a non-adversarial setting, 8 U.S.C. § 1158(b)(3); they are exempt from the “safe third country” and one-year bars to asylum, *id.* § 1158(a)(2)(A), (B), and (E); and children from non-contiguous countries must be placed in formal, not expedited, removal proceedings, *id.* § 1232(a)(5)(D). These exceptions “reflect . . . Congress’s conviction that unaccompanied minors deserve special treatment under our immigration laws and policies,”⁵⁴ and ensure that “children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced

⁵³ 154 Cong. Rec. S10886-01.

⁵⁴ *Flores v. Sessions*, 862 F.3d 863, 880-81 (9th Cir. 2017) (citation and internal quotation marks omitted).

prostitution, and other life-threatening circumstances” are not “forced to struggle through an immigration system designed for adults.”⁵⁵

Respecting decades of consistent statutory protection of children requires invalidating the IFR. The IFR ignores this Congressional mandate and instead requires unaccompanied children—many of whom are fluent in indigenous languages rather than English or Spanish and are not familiar with complex legal concepts⁵⁶—to navigate a labyrinthine immigration system, and then penalizes them irrevocably when they cannot.

In recently invalidating another effort to thwart asylum claims, the Ninth Circuit noted that defendants had failed to “address[] the special vulnerability of unaccompanied minors.”⁵⁷ Although the Rule challenged here is different, that case also involved a bar on asylum, and the

⁵⁵ 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (Stmt. of Sen. Feinstein).

⁵⁶ See, e.g., Tom Jawetz & Scott Shuchart, CENTER FOR AMERICAN PROGRESS, *Language Access Has Life-or-Death Consequences for Migrants* (Feb. 20, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants/>.

⁵⁷ *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854 (9th Cir. 2020).

underlying considerations are the same. As detailed above, children face special and unique vulnerabilities. As the following recounts, the federal courts and Congress have long so recognized.

A. The *Perez-Funez* Injunction

Early judicial recognition of the heightened vulnerabilities of children seeking asylum came in *Perez-Funez v. District Director, I.N.S.*⁵⁸ There, the 16-year-old plaintiff was arrested by the Immigration and Naturalization Service (“INS”) in California near the Mexican border.⁵⁹ The court issued a mandatory injunction requiring that INS inform unaccompanied minors of their right to counsel and provide them with a list of free legal service providers.⁶⁰ The court reasoned that the INA is a “bewildering and complex statute,” and that “[i]f the Act has this impact upon one sophisticated in legal matters, then it cannot be presumed that a child from a foreign land, speaking, perhaps a foreign tongue, possesses any meaningful understanding of his rights under the Act so as to be able

⁵⁸ 611 F. Supp. 990 (C.D. Cal. 1984).

⁵⁹ *Id.* at 992. In addition, there were also two intervening plaintiffs—one 12 years old and one 13 years old—who were also arrested by the INS. *Id.*

⁶⁰ *Id.* at 1005–06.

to assert or waive rights guaranteed therein.”⁶¹ The court also recognized: “[I]f a minor who wishes to remain in this country consents to voluntary departure only because he is unaware that alternatives exist, then the possibility arises that the minor will be unnecessarily exposed to physical dangers, such as removal to hostile environments which may have initially precipitated the minor’s departure.”⁶²

B. *Flores* Consent Decree

Much of the current regime for the care and custody of children in the immigration system is grounded in a 1997 consent decree that resolved a decade of litigation in *Flores v. Meese*, No. 85-cv-455 (C.D. Cal.)⁶³ and “sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS.”⁶⁴ It duly acknowledges the “particular vulnerability” of minors (¶11), and enumerates certain special protections that “set[] the minimum standards for the detention,

⁶¹ *Id.* at 1002.

⁶² *Id.* at 1003.

⁶³ See generally *Flores v. Barr*, 934 F.3d 910, 912–13 (9th Cir. 2019).

⁶⁴ *Flores Settlement* ¶ 9.

housing, and release of non-citizen juveniles who are detained by the government.”⁶⁵ Among those protections are:

- Minors must be “expeditiously process[ed]” and receive a notice of rights, including the right to a bond redetermination hearing if applicable. ¶12.A.
- Minors must be held in facilities that are “safe and sanitary” and are consistent with the “particular vulnerability” of minors. For example, these facilities must, among other things, provide adequate supervision to protect minors from others and provide contact with family members, if applicable. An unaccompanied minor cannot be detained with an unrelated adult for more than 24 hours. Minors must be separated from other delinquent offenders. *Id.*
- Under most circumstances, minors must be released “without unnecessary delay” to a parent, legal guardian, adult relative, or other enumerated categories of adults, provided the adult executes an affidavit of support and agrees to care for the minor. ¶¶14-15.
- Upon taking a minor into custody, the Government must “make and record the prompt and continuous efforts . . . toward family reunification and the release of the minor.” ¶18.
- Minors cannot be placed in a “secure facility” if there are less restrictive alternatives that are available. Any decision to place a minor in a secure facility must be approved by the regional juvenile coordinator, ¶23, and can be reviewed by a district judge, ¶24.B.
- Except in limited circumstances, minors should not be transported with detained adults, and if that is required,

⁶⁵ *Sessions*, 862 F.3d at 866.

the government must take precautions for the child's safety. ¶25.

The common thread running through these and other provisions is recognition of the “particular vulnerabilit[ies]” of children.

While the *Flores* Settlement remains in effect today,⁶⁶ Congress has since passed two statutes that further “address[] the care and custody of unaccompanied, non-citizen minors.”⁶⁷

C. Homeland Security Act of 2002

In creating the Department of Homeland Security, Congress reallocated many of the functions of the former INS. The Homeland Security Act for the first time defined “unaccompanied alien child” in statute.⁶⁸ More importantly, it assigned the INS's functions pertaining to the care of unaccompanied children to the Department of Health and

⁶⁶ While the government has attempted to terminate the consent decree and supersede the *Flores* Settlement with regulatory changes, those efforts have been denied and the regulations enjoined. *Flores v. Barr*, 407 F. Supp. 3d 909, 913 (C.D. Cal. 2019) (enjoining Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019)); *see also Flores*, 934 F.3d at 911–12 (affirming district court decision enforcing the *Flores* Settlement to require minors to be held in safe and sanitary conditions).

⁶⁷ *Flores*, 862 F.3d at 867.

⁶⁸ 6 U.S.C. § 279(g)(2). *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153.

Human Services' Office of Refugee Resettlement ("ORR"), rather than to any of the newly formed immigration agencies inside DHS. ORR was given a broad mandate to protect these children: "ensuring that the interests of the child are considered"; "ensur[ing] that qualified and independent legal counsel is timely appointed to represent the interests of each such child"; and making timely placements of the children with appropriate sponsors.⁶⁹

D. Trafficking Victims Protection Reauthorization Act

With passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"),⁷⁰ Congress more comprehensively addressed the procedures for providing appropriate consideration to children's claims to humanitarian protection. The TVPRA exempted unaccompanied children who seek asylum from the expedited removal process and created a special, child-appropriate system under which their asylum claims are heard, in the first instance, by a trained asylum officer, in a non-adversarial interview—rather than

⁶⁹ 6 U.S.C. § 279(b)(1).

⁷⁰ Pub. L. 110-457, 122 Stat. 5044, *codified in part at* 8 U.S.C. § 1232.

subject to cross-examination by a prosecutor in immigration court.⁷¹ Congress directed agencies to produce regulations (which have still not been produced twelve years later) that would ensure that “[a]pplications for asylum and other forms of relief for removal in which an unaccompanied alien child is the principal applicant” would be subject to procedures “which take into account the specialized needs of unaccompanied alien children.”⁷² And it created a range of procedures to ensure that any child who was returned to a country of origin—and in particular, children returned directly to Mexico by land—would be screened for trafficking and fear of return, and returned to child welfare officials or other appropriate agents of the receiving country.⁷³

The TVPRA also created substantive protections that apply when adjudicating unaccompanied children’s asylum applications. For example, the applications are exempt from a one-year filing deadline that is broadly applicable (with exceptions) to adults; and children cannot be barred from asylum under a “safe third country” agreement.⁷⁴

⁷¹ 8 U.S.C. § 1232(b).

⁷² 8 U.S.C. § 1232(d)(8).

⁷³ 8 U.S.C. § 1232(a)(2), (4), (5).

⁷⁴ TVPRA § 235(d)(7), *codified at* 8 U.S.C. § 1132(a)(2)(E).

* * *

It beggars belief that the Congress that exempted unaccompanied children from expedited removal; that exempted their asylum claims from the safe third country bar; that codified special procedures for transferring their custody to an agency outside the law-enforcement apparatus; that provided for access to counsel and reunification with family members; and that specified trafficking screening and other anti-trafficking measures, could have believed that the Executive Branch had the inherent power to foreclose *all* access to asylum for those children based entirely on their manner and place of entry. The IFR is inimical to Congress's consistent mandate of ensuring protections for children and must be invalidated.

CONCLUSION

The district court's decision should be affirmed.

Dated: August 21, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief:

(1) complies with the type-volume limitation set forth in Rule 29(a)(5) because it contains 6,098 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(2) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 2019 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 21, 2020

/s/Scott L. Winkelman

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CERTIFICATE OF SERVICE

I hereby certify that all participants in this appeal are registered CM/ECF users and that service will be accomplished through the Court's CM/ECF system today, August 21, 2020.

Dated: August 21, 2020

/s/Scott L. Winkelman

Scott L. Winkelman