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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO

14 PANGEA LEGAL SERVICES, *et al.*,

15 Plaintiffs,

16 vs.

17 U.S. DEPARTMENT OF HOMELAND  
18 SECURITY, *et al.*,

19 Defendants.

) Case No. 3:20-cv-09253-JD

) **BRIEF OF *AMICI CURIAE* KIDS IN**  
) **NEED OF DEFENSE, YOUNG CENTER**  
) **FOR IMMIGRANT CHILDREN’S**  
) **RIGHTS, AND PUBLIC COUNSEL IN**  
) **SUPPORT OF PLAINTIFFS’ MOTION**  
) **FOR A PRELIMINARY INJUNCTION,**  
) **TEMPORARY RESTRAINING ORDER,**  
) **AND ORDER TO SHOW CAUSE**

) Date: January 7, 2021

) Time: 10:00 a.m.

) Judge: Hon. James Donato

) Date Filed: December 21, 2020

) Trial Date: Not yet set

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**INTEREST OF AMICI CURIAE**

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2 *Amici curiae* are leading advocacy organizations for unaccompanied children and other  
3 persons seeking asylum and other protections in the United States. *Amici* therefore have a significant  
4 interest in the impact of asylum regulations on unaccompanied children and their service providers;  
5 the subject of this litigation. Based on specialized experience serving uniquely vulnerable  
6 populations, *amici* submit this brief to highlight how the new Rule challenged here would conflict  
7 with long-established law and policy, particularly statutory protections for unaccompanied children.

8 Kids in Need of Defense, Inc. (“KIND”) is a national non-profit organization whose ten field  
9 offices provide free legal services to unaccompanied immigrant children. Since 2009, KIND has  
10 received referrals for over 21,000 children from 71 countries and has trained and mentored pro bono  
11 attorneys at over 670 law firms, corporations, law schools, and bar associations. KIND also  
12 advocates for changes in law and policy to enhance protections for unaccompanied children.

13 The Young Center for Immigrant Children’s Rights advocates on behalf of the best  
14 interests—safety, permanency, and well-being—of unaccompanied immigrant children. Since 2003,  
15 the Young Center has been appointed as the independent Child Advocate (best interests guardian  
16 *ad litem*) for thousands of unaccompanied children, providing best interests recommendations to  
17 federal agencies based on the unique capacities and vulnerabilities of each child. The Young Center  
18 runs Child Advocate programs in eight locations and engages in policy to develop and promote  
19 standards for protecting the best interests of immigrant children.

20 Public Counsel, based in Los Angeles, California, is the nation’s largest not-for-profit law  
21 firm specializing in delivering pro bono legal services. Through a pro bono model that leverages the  
22 talents of thousands of attorney and law student volunteers, Public Counsel annually assists more  
23 than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and  
24 civil rights issues through impact litigation and policy advocacy. Its Immigrants’ Rights Project  
25 provides pro bono placement and direct representation to individuals and families—including  
26 unaccompanied children and asylum seekers—in the Los Angeles Immigration Court, the Board of  
27 Immigration Appeals, and the U.S. Court of Appeals for the Ninth Circuit.



**SUMMARY OF ARGUMENT**

Unaccompanied immigrant children are among the most vulnerable people to seek protection through the asylum system. Congress has made clear that children fleeing violence and danger across international borders must receive a fair hearing of their claims to protection. *Amici* here describe the system Congress created for these children, and explain just some of the ways in which the challenged rule of the Departments of Justice and Homeland Security (collectively, “the Departments”), published as *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020) (the “Rule”), conflict with those distinct statutory protections and impairs due process for unaccompanied children. The Rule authorizes “pretermission” of claims on the basis of written submissions, without the evidentiary hearing that is often critical to presenting the most meaningful evidence in a child’s asylum case. It violates Congress’s mandate that regulations affecting children’s cases take into account their specialized needs, and for many children, it will foreclose the opportunity to build trust with, and thereby obtain meaningful assistance of, counsel. The Rule also imposes unrealistic “internal relocation” standards, conflicts with unaccompanied children’s exemption from the “safe third country” bar to asylum, and unfairly forecloses persecution claims based on gender and gang violence that underlie the harm to many children served by *amici*.

**ARGUMENT**

**I. Congress Expressly Mandated the Use of Safeguards in the Consideration of Unaccompanied Children’s Claims for Protection**

Congress has recognized that unaccompanied children are a uniquely vulnerable population: often survivors of trauma, and unable to adequately advocate for themselves. Consequently, Congress has mandated child-appropriate safeguards for such children as they pursue claims for protection, including asylum. Many provisions of the Rule undercut those protections, particularly those arising from the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Pub. L. No. 110-457, codified in pertinent part at 8 U.S.C. § 1232, in which Congress responded to the range of situations that lead children to flee to the United States for protection, and how such experiences impact them during the immigration process.

1 Since 2014, over 300,000 unaccompanied children have sought safety at our borders,<sup>1</sup> the  
 2 majority of them from northern Central America and Mexico, largely driven by violence inflicted  
 3 with impunity and an inability to obtain protection in their home countries.<sup>2</sup> Guatemala, Honduras,  
 4 and El Salvador all rank among the top ten most dangerous countries by homicide rates.<sup>3</sup> In 2017  
 5 alone, the United States granted asylum to 8,473 individuals from these countries.<sup>4</sup> Studies from the  
 6 United Nations High Commissioner for Refugees (“UNHCR”) and *amicus* KIND have identified  
 7 gang violence and sexual and gender-based violence as the primary vectors forcing children to flee.<sup>5</sup>

8 For children fleeing Central America, gang violence—well documented and far beyond state  
 9 control—is often the proximate cause. “Heavily armed gangs terrorize local populations with almost  
 10 complete impunity.”<sup>6</sup> Gangs use kidnapping, gang rape, and forced sexual relationships as tactics to  
 11 exert control over territories, to punish girls and their family members,<sup>7</sup> and to force girls into sexual  
 12

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13  
 14 <sup>1</sup> Kids in Need of Defense, *The Border, Trafficking, and Risks to Unaccompanied children*, at 2  
 15 (Nov. 14, 2019), [https://supportkind.org/wp-content/uploads/2019/12/KIND\\_Child-trafficking-at-  
 border-paper-11-18-19-FINAL-1.pdf](https://supportkind.org/wp-content/uploads/2019/12/KIND_Child-trafficking-at-border-paper-11-18-19-FINAL-1.pdf).

16 <sup>2</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN 6 (2014),  
 17 <https://www.unhcr.org/56fc266f4.html> (last accessed Dec. 31, 2020) (hereinafter “CHILDREN ON  
 18 THE RUN”).

19 <sup>3</sup> In 2017, El Salvador ranked first in the world by homicide rate, followed by Honduras (third)  
 20 and Guatemala (ninth). UNODC, *Global Study on Homicide* (2019), available at  
 21 <https://dataunodc.un.org/content/data/homicide/homicide-rate> (last accessed Dec. 31, 2020).

22 <sup>4</sup> Dep’t of Homeland Security, Office of Immigration Statistics, *Annual Flow Report, Refugees  
 23 and Asylees: 2017* (Mar. 2019), at 9, available at  
 24 [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf). The only  
 25 country accounting for more grants of asylum that year was China, with 5,548 grants and a  
 26 population more than 42 times larger than these three countries combined. See World Bank  
 27 Microdata Data Catalog, available at  
 28 [https://data.worldbank.org/indicator/SP.POP.TOTL?end=2017&locations=CN-HN-  
 GTSV&start=2017&view=bar](https://data.worldbank.org/indicator/SP.POP.TOTL?end=2017&locations=CN-HN-GTSV&start=2017&view=bar) (last accessed on Dec. 31, 2020).

<sup>5</sup> CHILDREN ON THE RUN at 6; Kids in Need of Defense, *Neither Security Nor Justice: Sexual and  
 Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala* 5 (May  
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 Gang-Report-FINAL.pdf](https://supportkind.org/wp-content/uploads/2019/12/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf). (Hereinafter “NEITHER SECURITY NOR JUSTICE”).

<sup>6</sup> *Thousands are fleeing mass gang violence in the North of Central America*, UNHCR MAGAZINE  
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 america](https://www.unhcr.ca/news/thousands-fleeing-gang-violence-north-of-central-america) (last accessed on Dec. 31, 2020).

<sup>7</sup> NEITHER SECURITY NOR JUSTICE at 5.

1 and domestic slavery.<sup>8</sup> Femicide, or the gender-motivated killing of women and girls, is also  
 2 pervasive in these countries.<sup>9</sup> The impunity rates of gang violence in El Salvador, Guatemala, and  
 3 Honduras are staggering: 90.30%, 88.20%, and 85.71%, respectively.<sup>10</sup> As many as 99 percent of  
 4 femicides in Mexico occur without consequence.<sup>11</sup> With regional authorities unwilling or unable to  
 5 provide protection or justice, “fleeing [is] the only way out” for many children.<sup>12</sup>

6 Congress recognized that child survivors of violence and persecution were particularly  
 7 vulnerable to trafficking and other harm. The TVPRA takes into account the specialized needs of  
 8 “unaccompanied alien children”<sup>13</sup> and addresses both procedural and substantive aspects of  
 9 handling their cases. An unaccompanied child encountered by any federal agent must be transferred  
 10 to the custody of the Department of Health and Human Services, Office of Refugee Resettlement  
 11 (“ORR”); the TVPRA provides this must generally occur within 72 hours. 8 U.S.C. § 1232(a)(3).<sup>14</sup>  
 12 Children are thus placed under the care of a department expressly tasked with safeguarding their  
 13 interests and more suited to do so than a law enforcement agency. Before this requirement was  
 14

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15 <sup>8</sup> *Id.*

16 <sup>9</sup> See UNODC, *Global Study on Homicide* (2019) (reporting that in 2017, El Salvador and  
 Honduras ranked first and third in the world for female homicide rates).

17 <sup>10</sup> Ruth Elizabeth Prado Perez, Better Governance to Fight Displacement by Gang Violence in the  
 Central American Triangle, MIGRACIONES INTERNACIONALES, July-Dec. 2017, at 240. (hereinafter  
 18 “Better Governance”). The United Nations defines “impunity” as “the impossibility, de jure or de  
 19 facto, of bringing the perpetrators of violations to account . . . since they are not subject to any  
 20 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.  
 21 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.

22 <sup>11</sup> Ann Deslandes, *Despite the Coronavirus Mexican Women are Fighting Femicide*, FOREIGN  
 POLICY (May 20, 2020), available at: [https://foreignpolicy.com/2020/05/20/coronavirus-mexico-](https://foreignpolicy.com/2020/05/20/coronavirus-mexico-women-fightingfemicide/)  
 23 [women-fightingfemicide/](https://foreignpolicy.com/2020/05/20/coronavirus-mexico-women-fightingfemicide/) (last accessed on Dec. 31, 2020).

24 <sup>12</sup> Better Governance at 240.

25 <sup>13</sup> An “unaccompanied alien child” was defined in the Homeland Security Act as “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  
 26 parent or legal guardian in the United States is available to provide care and physical custody.” 6  
 U.S.C. § 279(g)(2).

27 <sup>14</sup> For children from Mexico or Canada, different directives apply. 8 U.S.C. § 1232(a)(2).  
 28

1 implemented, unaccompanied children apprehended by Department of Homeland Security (“DHS”)  
2 agents were ineffectively screened and too many were summarily turned away at the U.S. border  
3 without protection from trafficking or other harm.<sup>15</sup>

4 Further, having determined that the adult asylum system had failed to adequately protect  
5 children, Congress provided that unaccompanied children may not be placed in expedited removal  
6 proceedings and instead must be placed in “full” (or “Section 240”) removal proceedings. 8 U.S.C.  
7 § 1232(a)(5)(D). Unaccompanied children are exempt from both the one-year filing deadline and  
8 the “safe third country” bar to asylum. 8 U.S.C. § 1158(a)(2)(E). Government officials who have  
9 contact with these children “shall be trained to work with unaccompanied alien children.” 8 U.S.C.  
10 § 1232(e). Congress has also created an exception to the default that removal defense be “at no  
11 expense to the Government,” 8 U.S.C. § 1229a(b)(4)(A), allowing ORR to fund unaccompanied  
12 children’s legal services. 8 U.S.C. § 1232(c)(5). The TVPRA also promotes pro bono representation  
13 for children (such as through the legal service provider *amici*) and the appointment of independent  
14 child advocates to identify and advocate for children’s best interests (such as from *amicus* the Young  
15 Center). 8 U.S.C. § 1232(c)(5), (6). Through these and other accommodations for unaccompanied  
16 children, Congress set a procedural floor below which the consideration of their claims cannot fall.

17 Moreover, and critically, the TVPRA affords unaccompanied children *two* opportunities to  
18 pursue asylum: first in a non-adversarial interview and then, if needed, in an adversarial hearing.  
19 Even where unaccompanied children are in removal proceedings in immigration court, where others  
20 would pursue asylum “defensively,” the TVPRA vests initial jurisdiction over the child’s asylum  
21 application with the U.S. Citizenship and Immigration Service (“USCIS”) Asylum Office. 8 U.S.C.  
22 § 1158(b)(3)(c). This is so even after the child turns 18 or is reunited with a parent or guardian.<sup>16</sup>  
23 The USCIS asylum process is non-adversarial, with interviews conducted by asylum officers trained

24 \_\_\_\_\_  
25 <sup>15</sup> See, e.g., *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human*  
26 *Rights & the Law of the S. Comm. on the Judiciary*, 110th Cong. 19 (2007) (statement of  
Katherine Kaufka, Supervising Attorney, National Immigrant Justice Center).

27 <sup>16</sup> See USCIS, Updated Procedures for Determination of Initial Jurisdiction over Asylum  
28 Applications Filed by Unaccompanied Alien Children (May 28, 2013),  
<https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf>.

1 for sensitivity to the vulnerabilities of child immigrants. If the asylum officer does not grant asylum,  
 2 the child may renew the claim in an adversarial hearing before the immigration court. In *amici*'s  
 3 experience from serving thousands of children, many claims denied at the Asylum Office are  
 4 successfully proven in immigration court. The court may also find children entitled to protection  
 5 through withholding of removal under the Immigration and Nationality Act ("INA") or the  
 6 Convention Against Torture, remedies the Asylum Office cannot consider.<sup>17</sup>

7 The Rule is one of a long line of recent administrative actions that erode protections for  
 8 asylum seekers, including unaccompanied children, many of which have been enjoined as contrary  
 9 to law. Of particular concern for children, the current administration has attempted to shift the claims  
 10 of unaccompanied alien children who applied for asylum after reuniting with a parent or reaching  
 11 age 18 into the defensive asylum system, forcing them to forego an Asylum Office interview and  
 12 proceed solely before an immigration judge even though they entered the country as unaccompanied  
 13 children. *See Matter of M-A-C-O-*, 27 I. & N. Dec. 477, 480 (BIA 2018). A May 2019 USCIS  
 14 memorandum attempted to similarly restrict USCIS's jurisdiction over asylum claims of  
 15 unaccompanied children but has been enjoined. *J.O.P v. U.S. Dep't of Homeland Sec.*, 409 F. Supp.  
 16 3d 367, 380 (D. Md. 2019); *see also J.O.P v. U.S. Dep't of Homeland Sec.*, No. GJH-19-1944, 2020  
 17 WL 7489017, at \* 25 (D. Md. Dec. 21, 2020) (expanding preliminary injunction to enjoin USCIS  
 18 "from deferring to EOIR determinations in assessing jurisdiction over" unaccompanied child  
 19 asylum applicants). Additionally, USCIS has attempted to restrict the ability of unaccompanied  
 20 children to obtain photo identification to access public services, *CASA de Maryland v. Wolf*, CA No.  
 21 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sep. 11, 2020), and limit fee waivers while  
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23 <sup>17</sup> Congress directed that unaccompanied children's applications for relief "be governed by  
 24 regulations that take into account the specialized needs of unaccompanied children and which  
 25 address both procedural and substantive aspects of handling unaccompanied alien children's  
 26 cases." 8 U.S.C. § 1232(d)(8). Neither EOIR nor USCIS have finalized such regulations in the  
 27 ensuing 13 years, though a plan to do remains on the agencies' Unified Agenda of proposed  
 28 regulatory activities. *See* Office of Information and Regulatory Affairs, DOJ/EOIR RIN 1125-  
 AA70, "Implementation of Section 235 of the William Wilberforce Trafficking Victims Protection  
 Reauthorization Act of 2008,"  
<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=1125-AA70> (last  
 accessed on Dec. 31, 2020).

1 substantially increasing filing fees for various USCIS forms, *Immigrant Legal Resource Center v.*  
 2 *Wolf*, CA No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sep. 29, 2020). EOIR has also  
 3 drastically increased certain filing fees. *See* EOIR Fee Review, 85 Fed. Reg. 82750 (Dec. 18, 2020).  
 4 This Rule is yet another step in a trend of hostility toward humanitarian protections for children.

5 **II. The Rule’s Provisions for Pretermission Deprive Unaccompanied Children of Due**  
 6 **Process**

7 The Complaint and Plaintiffs’ motion well explain how the Rule’s pretermission provisions  
 8 violate the INA generally. The harm of pretermission is compounded in the case of a child seeking  
 9 asylum or related protection in immigration court.

10 **A. The Rule authorizes superficial adjudications of asylum claims brought by**  
 11 **unaccompanied children**

12 An asylum applicant “bears the burden of proving eligibility for asylum and must  
 13 demonstrate that he has suffered past persecution or has a well-founded fear of future persecution  
 14 on account of race, religion, nationality, membership in a particular social group, or political  
 15 opinion.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019). Every asylum application  
 16 must be evaluated on a case-by-case basis in light of the “totality of the circumstances.” *Guo v.*  
 17 *Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004); accord *Zhu v. Barr*, 827 F. App’x 657, 659 (9th Cir.  
 18 2020). Yet the Rule permits an immigration judge (*sua sponte* or upon motion by DHS) to pretermit  
 19 and deny any application for asylum “if the alien has not established a prima facie claim for relief  
 20 or protection under applicable law,” 8 C.F.R. § 1208.13(e), based solely on review of an initial paper  
 21 application. The asylum applicant is given ten days to respond to a pretermission notice or DHS  
 22 motion, but the judge is not required to conduct *any* hearing prior to pretermitting and denying an  
 23 asylum application. 8 C.F.R. § 1208.13(e)(1), (e)(2).

24 The Departments assert that the Rule will “allow the immigration system to more efficiently  
 25 focus its resources on adjudicating claims that are more likely to be meritorious.” 85 Fed. Reg.  
 26 80286. But this rationale is not backed by any statistical analysis, and is specious in that asylum  
 27 applicants retain the right to appeal, including from denials of asylum through pretermission. *Id.* at  
 28 80287 (citing 8 C.F.R. § 1003.38, § 1003.1(b)(9)). The very efficiency allegedly gained would be  
 lost in part: denials through pretermission will fuel appeals to the Board of Immigration Appeals,



1 petitions for review, and possibly, federal court challenges to a process that effectively closes the  
2 record to probative evidence. More importantly, any case that is *wrongfully* pretermitted is a false  
3 efficiency, and an applicant who lacks counsel may be unable to appeal for the same reasons that  
4 made their written application less effective than a live hearing would be.

5 The Departments also fail to respond adequately to a more fundamental concern:  
6 pretermission would deny due process to vulnerable groups, including unaccompanied children. The  
7 Departments assert that the thin procedural protections remaining, including notice of impending  
8 denial and an opportunity to be heard, are sufficient. *See, e.g.*, 85 Fed. Reg. 80287. But an applicant  
9 facing potential pretermission is limited to a *written* response, within a very short time frame. This  
10 remedy is essentially circular: an applicant whose initial written filing is deemed insufficient gets  
11 ten days for another written filing, rather than an opportunity to give live testimony. A written  
12 submission is no substitute for in-person proceedings, and applicant testimony plays a particularly  
13 crucial role in asylum adjudications. This may help explain why Congress required that an  
14 unaccompanied child be permitted to appear before both an asylum officer and, if necessary, an  
15 immigration judge. Live testimony allows the adjudicator to assess credibility,<sup>18</sup> consider the  
16 testimony in light of individual characteristics, including age (there is no lower age limit in removal  
17 proceedings), and to clarify the facts to which the law will be applied. Live testimony also allows  
18 the asylum seeker to offer essential details that may be difficult for a vulnerable child, even if  
19 counseled, to reduce to writing.

20 The Rule's attempt to curtail and automate the asylum process reduces transparency and  
21 undermines both the letter and the spirit of the INA as amended by the TVPRA. Recounting  
22 traumatic experiences underlying an asylum request requires time for a child to process those  
23 experiences. Compiling evidence and completing a long, technical form are arduous tasks. Children  
24 are further hobbled by their developmental stage, language barriers, past trauma and attendant  
25 impairment of capacity to trust adults, unfamiliarity with the American legal system, familial  
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27 <sup>18</sup> Credibility is key because an asylum applicant may demonstrate entitlement to relief solely  
28 based on testimony that “is credible, is persuasive, and refers to specific facts.” 8 U.S.C.  
§ 1158(b)(i)(B)(ii); *see also Tang v. U.S. Att’y Gen.*, 578 F.3d 1270, 1276 (11th Cir. 2009).

1 pressures, and limited financial means. Many children who seek protection lack the ability—due to  
2 their age, their stage of development, or limited or denied schooling—to both read and write. Even  
3 children represented by an attorney must work under significant time and resource constraints.  
4 Successful applications for relief will likely require expert testimony, documentation from the  
5 child’s country of origin, and rounds of clarifying questioning on factual support for the application.  
6 The Rule replaces a key tenet of due process—the in-person hearing to which unaccompanied  
7 children are entitled under the TVPRA—with an inadequate written procedure. This will necessarily  
8 lead to wrongful denials of children’s legitimate asylum claims.

9 **B. The proposed revisions to the asylum application form increase the risk that**  
10 **an unaccompanied child’s valid asylum claim will be pretermitted**

11 When Defendants proposed the Rule, they concurrently proposed revisions to Form I-589,  
12 Application for Asylum and for Withholding of Removal, and accompanying instructions, rendering  
13 them far less accessible to applicants, particularly children, due to heavy use of legalese, an implicit  
14 expectation of familiarity with legal concepts, and the chilling effect of repeated warnings against  
15 frivolous filings.<sup>19</sup> The proposed revisions add complex questions that must be answered fully,  
16 completely, and accurately to avoid pretermission. 85 Fed. Reg. 80303 (an individual who completes  
17 the form “in accordance with the instructions and provide[s] all information requested by the form  
18 would provide sufficient information for the prima facie determination” and thereby avoid  
19 pretermission). But as noted, many children are initially unable to disclose the full breadth of the  
20 harm they have experienced or may lack full knowledge of the circumstances necessitating asylum  
21 if, for instance, family members shielded them from harm.

22 Even a represented asylum applicant must understand the information being sought and  
23 review their counsel’s work; an unrepresented applicant would face an even greater challenge

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24 <sup>19</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear  
25 Review, Proposed Rule, 85 Fed. Reg. 36,264 (June 15, 2020). Comparisons of the proposed and  
26 current versions are available at <https://downloads.regulations.gov/EOIR-2020-0003-0003/content.pdf> (hereinafter “Table of Changes Form”) and  
27 <https://www.regulations.gov/document?D=EOIR-2020-0003-0005> (Instructions) (last accessed on  
28 Dec. 31, 2020).



1 completing the form fully and under time pressure. Worse still, the proposed form and instructions  
 2 devote significant attention to eliciting information that may trigger an unfavorable exercise of  
 3 discretion, yet never invite the applicant to offer information to support a positive exercise of  
 4 discretion—a serious imbalance likely to present the adjudicator with a skewed view of the  
 5 application’s merits.<sup>20</sup> Applicants, including unaccompanied children, will thus face pretermission  
 6 based on an initial submission that has already been slanted against the possibility of relief.

7 **C. Pretermission conflicts with protections that Congress has afforded to**  
 8 **unaccompanied children**

9 Pretermission under the Rule dismantles protections afforded to children by the TVPRA,  
 10 which contemplates that to provide an unaccompanied child due process, both an interview and a  
 11 hearing may be necessary. In the case of a child who does not secure asylum at the Asylum Office,  
 12 the TVPRA ensures an opportunity to find trusted counsel (if not already represented), for counsel  
 13 to obtain fact and expert witness testimony and documentary evidence to support the claim, and an  
 14 opportunity to establish the credibility of that evidence in an immigration court hearing.  
 15 Pretermission authorizes an immigration judge to dispense with the second component of this two-  
 16 part procedure, vitiating Congress’s intent to ensure that unaccompanied children are afforded  
 17 sufficient opportunity to present the merits of their asylum claims. *See* 154 *Cong. Rec.* S10886  
 18 (daily ed. Dec. 10, 2008) (Stmt. of Sen. Feinstein) (TVPRA ensures “children . . . who have escaped  
 19 traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution,  
 20 and other life-threatening circumstances” are not “forced to struggle through an immigration  
 21 system designed for adults”). The Departments fail to consider the degree to which the persecution  
 22 and attendant trauma underlying a meritorious asylum claim will, especially in the early stages of  
 23 an attorney-client relationship, inhibit a child’s disclosure of factual predicates and delay progress  
 24 in analyzing the claim for relief, such that the presentation may be underdeveloped and under-  
 25 realized when first presented in paper form.

26 The Rule’s pretermission provision expressly contravenes Congress’s directive that

27 \_\_\_\_\_  
 28 <sup>20</sup> Table of Changes Form at 10-13.

1 children’s asylum claims be governed by regulations that properly consider the “specialized needs  
2 of unaccompanied alien children.” 8 U.S.C. § 1232(d)(8). Instead, the Rule would annul the  
3 TVPRA’s two-stage asylum process for children and would ignore their specialized needs with  
4 respect to the presentation of evidence before the immigration court in that second stage.

5 **D. Unaccompanied children whose claims are not granted at the Asylum Office**  
6 **must be afforded the right to a hearing**

7 The assessment of witness credibility plays an essential role in asylum adjudications, and  
8 the deference afforded to the immigration judge’s credibility findings reflects the centrality of live  
9 testimony to the credibility determination. 8 C.F.R. § 1003.1(d)(3)(i); *see also Zumel v. Lynch*, 803  
10 F.3d 463, 476 (9th Cir. 2015).<sup>21</sup> Children of different ages and circumstances may be simply unable  
11 to cover the extensive ground between fresh trauma and unsparing disclosure to a newly-retained  
12 attorney in the limited time available for preparing a written asylum submission. Oral testimony is  
13 often the child’s best vehicle for communicating the persecution or fear they experienced, allowing  
14 them to offer essential detail that may have been difficult to reduce to writing, or that they in earlier  
15 stages of the process may not have appreciated as necessary to the adjudicator’s comprehension.

16 Because children rarely have omniscient knowledge of the circumstances precipitating their  
17 flight, their cases may rely on additional fact witnesses. For example, if adult family members took  
18 pains to shield children from the most frightening or pernicious information, the child may be  
19 unaware of the severity or closeness of the danger he or she faced. By pretermitted a hearing, the  
20 adjudicator and DHS attorney forego the opportunity to gather relevant information, pose clarifying  
21 questions to fact witnesses, and to observe their demeanor. If a hearing is pretermitted, the court  
22 will not have the benefit of expert testimony to elucidate country-specific conditions, interpret case-  
23 specific information in a wider context, and break down medical or other specialized information.

24 The immigration judge has a duty to fully the develop the record. *See, e.g., Jacinto v. I.N.S.*,

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26 <sup>21</sup> The Ninth Circuit has consistently held that “an immigration judge is in the best position to  
27 make credibility findings because [s]he sees the witness as the testimony is given,” thus “special  
28 deference [is] accorded to an IJ’s credibility determination that is based on firsthand  
observations.” *Abovian v. I.N.S.*, 219 F.3d 972, 978 (9th Cir. 2000). Thus, with this deference  
comes the implied need for an in-person hearing.

1 208 F.3d 725, 733, 735 (9th Cir. 2000) (holding that immigration judge’s failure to develop the  
2 record violated asylum applicant’s due process rights); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504  
3 (6th Cir. 2019) (collecting cases). This is so because applicants for humanitarian relief are often  
4 vulnerable in ways that limit their ability to advocate for relief. Affording unaccompanied children  
5 a ten-day period for a written rebuttal is simply not a sufficient means of satisfying this mandate.  
6 The deference accorded an immigration judge’s factual findings is grounded in the duty to ensure a  
7 fully developed record. To satisfy this duty, the INA grants immigration judges the authority to  
8 “interrogate, examine, and cross-examine the alien and any witness.” 8 U.S.C. § 1229a(b)(1).  
9 Though it is the child-applicant’s burden to present a claim for relief, it is the immigration judge’s  
10 responsibility to ensure the child has had every opportunity to develop the record to do so.

### 11 **III. The Rule Codifies Unlawful Standards that Disadvantage Unaccompanied Children**

12 Congress commanded the Departments to consider unaccompanied children’s asylum claims  
13 under “regulations that take into account the specialized needs of unaccompanied alien children.” 8  
14 U.S.C. § 1232(d)(8). Several provisions of the Rule represent a move in the opposite direction; just  
15 three of them are briefly described here.

16 *First*, the Rule arbitrarily and unlawfully erects a set of “adverse discretionary factors” at  
17 odds with the substantive provisions of the INA. Pls.’ Mot. for PI, TRO & OSC at 10-12. Among  
18 these, the Rule’s provision directing a discretionary denial for most applicants who transit another  
19 country without seeking asylum there, *see* 8 C.F.R. §§ 208.13(d)(1)(ii); 1208.13(d)(1)(ii), is directly  
20 at odds with the TVPRA provision *exempting* unaccompanied children from a bar to asylum for  
21 individuals who pass through a “safe third country.” 8 U.S.C. § 1158(a)(2)(E). That bar prohibits  
22 asylum eligibility for adults who have had “access to a full and fair procedure for determining a  
23 claim to asylum” in a safe country, as recognized by an international agreement. 8 U.S.C.  
24 § 1158(a)(2)(A). Given that Congress exempted children from a bar that presumed access to a fair  
25 procedure in a safe country, it could not have meant that a child could nonetheless be blocked from  
26 obtaining asylum because they merely *transited* a country that was *unsafe*, where the United States  
27 had no assurance that a “full and fair” asylum process was available to the child. But that is precisely  
28 what the Rule would do in establishing this discretionary factor.

1 And the asylum process in Mexico, which most unaccompanied children from a third  
 2 country must transit to reach the U.S. border, is demonstrably inadequate: as of 2019, its asylum  
 3 program had some 30 officers to cover the entire country, with just six of them trained to interview  
 4 children, as compared with USCIS’s hundreds of asylum officers in an agency of 20,000. Further,  
 5 children seeking asylum in Mexico have faced unlawful detention and expulsion prior to any  
 6 assessment of the risk they may face upon repatriation.<sup>22</sup>

7 The administration earlier promulgated a mandatory asylum bar based on failure to pursue  
 8 asylum in a country of transit, through an interim final rule which was ultimately enjoined. *E. Bay*  
 9 *Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019) (J. Tigar), *aff’d*, 964 F.3d 832  
 10 (9th Cir. 2020).<sup>23</sup> The Ninth Circuit, affirming the injunction, found the transit bar rulemaking likely  
 11 invalid, in part because it “in no way addresses the special vulnerability of unaccompanied minors.”  
 12 *E. Bay*, 964 F.3d at 854. As Judge Tigar noted, “[g]iven that children have more difficulty than  
 13 adults pursuing asylum claims in Mexico, the agencies have not explained why it is rational to  
 14 assume that an unaccompanied minor’s failure to apply has the same probative value on the merits  
 15 as an adult’s . . . .” *E. Bay*, 385 F. Supp. 3d at 957 (internal citations omitted). The Rule shares the  
 16 same defect.

17 *Second*, with regard to the “safe internal relocation” element of a well-founded fear, the Rule  
 18 upends longstanding guidelines by jettisoning factors pertinent to the analysis of unaccompanied  
 19 children’s claims, in favor of less probative factors, and in the name of questionable “efficiencies.”  
 20 In a major departure from current rules, even applicants who have demonstrated past persecution  
 21 will bear the burden of proof. Yet the Departments fail to analyze how the internal relocation

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 23 <sup>22</sup> See KIND & CDH Fray Matías de Córdova, *The Invisible Wall: Obstacles to Protection for*  
 24 *Unaccompanied Migrant Children along Mexico’s Southern Border* (July 2019),  
<https://supportkind.org/wp-content/uploads/2019/07/Tapachula-report-FINAL-7-26-19-002.pdf>.

25 <sup>23</sup> Though the injunction was then stayed by the Supreme Court, *Barr v. E. Bay Sanctuary*  
 26 *Covenant*, 140 S. Ct. 3 (2020), the same rule was also permanently invalidated by the D.C. District  
 27 Court for procedural reasons. *Cap. Area Imm. Rights Coalition v. Trump*, 471 F. Supp. 3d 25  
 28 (2020). The Departments have recently purported to re-issue the transit bar as a final rule, without  
 addressing the substantive problems that led to the Ninth Circuit’s affirmation of the injunction.  
*Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 243 (Dec. 17, 2020).

1 provisions will apply to unaccompanied children—in fact, the words *child*, *minor*, *juvenile*, *youth*,  
 2 *young* do not even appear in discussion of this provision in the relevant preambles to the proposed  
 3 rule or the final Rule. 85 Fed. Reg. 36282, 80338-40. Commenters on the proposed rule raised these  
 4 failures, which should have been addressed in the final Rule.<sup>24</sup> They were not.

5 Before the Rule, an applicant’s age and family ties would be among the non-exhaustive  
 6 factors for determining whether internal relocation would be both safe and reasonable. 8 C.F.R.  
 7 §§ 208.13(b)(3), 1208.13(b)(3) (2019) (recommending that adjudicators’ analysis include “social  
 8 and cultural constraints, such as age, gender, health, and social and familial ties”). By eliding these  
 9 factors, the Rule treats persecuted children as undifferentiated from adults, notwithstanding the legal  
 10 and practical disability of being a child. Under the Rule, asylum could be denied based on an alleged  
 11 possibility of internal relocation without the adjudicator even asking whether it is reasonable to  
 12 expect a persecuted child to identify prospects for safe relocation; to induce his or her family to  
 13 undertake relocation; or alternatively, to relocate independently and become self-supporting. The  
 14 Rule displaces this child-appropriate analysis with an emphasis on logistics that have little bearing  
 15 on a child’s limited autonomy to move: the size of the country, internal distances, and the reach of  
 16 the persecutor. 8 C.F.R. §§ 208.13(b)(3), 1208.13(b)(3).

17 *Third*, the Departments codify “nine, non-exhaustive circumstances” that generally will not  
 18 be recognized as defining a valid particular social group (“PSG”), 85 Fed. Reg. 80280, 8 C.F.R.  
 19 §§ 208.1(c), 1208.1(c)), and accordingly, will “generally” not support favorable adjudication (*see*,  
 20 *e.g.*, 8 C.F.R. § 208.1(c)).<sup>25</sup> Although here the Departments at least address commenters’ criticisms  
 21 that this formulation will undermine case-by-case, fact-specific analysis of PSGs (*see* 85 Fed. Reg.

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23 <sup>24</sup> *See, e.g.*, Center for the Human Rights of Children, Comment Letter Opposing Proposed  
 24 Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review  
 25 (<https://www.luc.edu/media/lucedu/chrc/pdfs/CHRC%20Comment%20on%20Proposed%20Asylum%20Rule%20July%202020%20FINAL.pdf> at 10; *cf.* 85 Fed. Reg. 80340.

26 <sup>25</sup> The Rule elsewhere adopts “eight non-exhaustive circumstances” that purportedly signal “the  
 27 applicant’s inability to demonstrate persecution on account of a protected ground,” *see* 85  
 28 Fed. Reg. 80281. This nexus list, which has several elements in common with the list relating  
 to PSGs, also comprises circumstances that “generally” will not meet with favorable  
 adjudication. *Id.* This provision suffers the same infirmities as the PSG provision.

1 80311-13), the provision’s plain language places a thumb on the scales against the success of the  
 2 enumerated PSG bases. One of those enumerated bases is gender, an element that defines or helps  
 3 to define the basis on which many children are singled out for persecution: for example, transgender  
 4 youth, boys perceived to be effeminate or insufficiently masculine, girls perceived to be masculine  
 5 or insufficiently feminine, or girls subjected to coerced sexual contact. By disfavoring gender as a  
 6 basis for PSGs, the Rule places applicants raising such claims at risk of summary denials. The Rule  
 7 likewise disfavors the many PSGs that are defined in whole or in part by objection, opposition, or  
 8 resistance to gangs or gang recruitment, 8 C.F.R. §§ 208.1(f)(3), (4); 8 CFR §§ 1208.1(f)(3), (4),<sup>26</sup>  
 9 circumstances expressed by numerous children who have sought safety rather than await what they  
 10 feel is an inevitable choice between acquiescing to gang demands or facing punishment for defiance.  
 11 *See, e.g., Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (testifying against gang  
 12 members may define a PSG under which a twelve-year-old could claim asylum). Again, each child’s  
 13 claim must be evaluated on its own merits, free from the list of disfavored factors that appear  
 14 designed to defeat their claims.

### 15 CONCLUSION

16 For the foregoing reasons, *amici curiae* urge the Court to grant Plaintiffs’ Motion for a  
 17 Preliminary Injunction, Temporary Restraining Order and Order to Show Cause.

18 Dated: December 31, 2020

18 /s/ Susan M. Krumplitsch

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26 \_\_\_\_\_  
 27 <sup>26</sup> Here, the Rule carves out a convoluted exception for “expressive behavior in furtherance of a  
 28 discrete cause against such organizations related to control of a state or expressive behavior  
 that is antithetical to the state or a legal unit of the state.” *Id.* An exception that appears to  
 acknowledge the potential for gang activity to implicate state authority or control.

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