



March 27, 2023

Submitted via: <https://www.regulations.gov>

Daniel Delgado
Acting Director, Border and Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice

Re: CIS No. 2736–22; Docket No: USCIS 2022–0016, Circumvention of Lawful Pathways, 88 Fed. Reg. 11,704 (Feb. 23, 2023)

Dear Acting Director Delgado and Assistant Director Alder Reid:

Kids in Need of Defense (KIND) submits the following comments in response to the Notice of Proposed Rulemaking (NPRM) titled “Circumvention of Lawful Pathways,” published by the Department of Homeland Security’s U.S. Citizenship and Immigration Services and the Department of Justice’s Executive Office for Immigration Review on February 23, 2023.¹

KIND strongly supports the Administration’s expansion of lawful pathways for migration and its efforts to ensure safe, humane, and orderly processing and access to protection at the U.S.-Mexico border. The Proposed Rule, however, stands in stark contrast to these aims and would reinforce restrictive approaches that are inconsistent with U.S. and international refugee law and that have proven devastating to the rights and wellbeing of children and other protection seekers. By dramatically limiting asylum eligibility for most individuals who travel through another country in their search for protection, the Proposed Rule would dangerously contract the U.S.’ humanitarian protection system and deepen the vulnerability of children, families, and others seeking safety. Although the Proposed Rule contains narrow exceptions and exempts unaccompanied children, it would nonetheless undermine the safety of all children, as the conditions imposed on the broader population of protection seekers will create a more dangerous and unstable environment for anyone attempting to seek protection at the U.S.-Mexico border.

¹ Circumvention of Lawful Pathways, 88 Fed. Reg. 11,704 (Feb. 23, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-02-23/pdf/2023-03718.pdf>.

In this comment, we highlight the particular impact of the Proposed Rule on children, but underscore throughout the manner in which the Proposed Rule undermines protection generally and weakens U.S. leadership in promoting refugee protection globally. We urge the agencies to withdraw the Proposed Rule and to instead dedicate their efforts to deploying appropriate resources, staffing, and expertise to ensure safe and appropriate reception and full and fair access to asylum at the U.S.-Mexico border.

KIND is an international nonprofit organization headquartered in Washington, D.C., with programming in the United States, Mexico, Central America, and Europe. With 17 locations in the United States, KIND plays a pivotal role in the representation of unaccompanied and separated immigrant children throughout the immigration process. KIND's core program focus is on the delivery of legal and social services to children through our vast private-sector pro bono network and in-house legal team, including work to reunify families and providing psychosocial support services to address the trauma often experienced by children who have been forcibly displaced. KIND also delivers legal training and technical assistance to empower lawyers, and engages in impact litigation and policy advocacy to promote laws and policies that protect migrant children. KIND also works to address the root causes of child migration from Central America; and advocates for laws, policies and practices to improve the protection of unaccompanied children in the United States. Our work serving children directly informs our policy recommendations and provides us with a unique vantage point from which to consider holistically the needs of these children.

It is through this lens that we offer the following comments on the ways the Proposed Rule undermines access to protection for the most vulnerable, contrary to U.S. and international law.

The Proposed Rule is Inconsistent with U.S. and International Asylum Law.

Section 208 of the INA contains U.S. asylum procedures that were enacted by Congress to implement the U.S.' obligations as a signatory to the 1967 Protocol to the Convention Relating to the Status of Refugees.² Central to these protections is the concept of access to asylum regardless of an individual's immigration status. The Proposed Rule would narrow eligibility for lifesaving asylum protection by imposing unlawful conditions on this access, creating a rebuttable presumption of ineligibility based on an asylum seeker's failure to make use of prescribed "pathways" for securing permission to present themselves at the Southwest border.³ These pathways attempt to obscure that the Proposed Rule itself is an effort to penalize transit through another country while fleeing in search of safety. The Proposed Rule would exclude from this presumption asylum seekers who provide travel authorization pursuant to an approved parole process; present at a port of entry for a prescheduled appointment (or who can demonstrate that it was not possible to use the CBP One app); or who sought and were denied asylum or other protection in a transit.⁴ It also includes a vital exception for unaccompanied children⁵—a clarification necessary to comport with specific legal protections in the Trafficking Victim Protection Reauthorization Act of 2008 (TVPPRA), U.S. policy, and fundamental values, but one that in the context of the Proposed Rule is wholly insufficient to protect vulnerable children and to cohere with domestic and international asylum law.

² See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, at art. 1; see Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, at art. 33(1) ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."). [hereinafter "UN Refugee Convention"]

³ See 88 Fed. Reg. 11,723.

⁴ *Id.*

⁵ *Id.* at 11,724.

By elevating the path of transit that children and families may take in search of safety above the imperative to prevent their return to harm the Proposed Rule runs afoul of the principle of nonrefoulement at the foundation of U.S. and international asylum law and would exact impermissible and life-threatening consequences on asylum seekers.⁶ In practice, the Proposed Rule would create a near-ban on asylum eligibility by requiring children, families, and other protection seekers to first present evidence about why they merit relief to rebut a presumption *against* their protection, apply for other (albeit temporary) legal pathways, or make an online appointment requiring internet connectivity and a smartphone—all while seeking safety from persecution and threats to their lives. The grave risks posed by the Proposed Rule cannot be excused by its purportedly temporary duration.⁷

The NPRM grounds its sweeping and dangerous conditions in part on INA provisions providing the Attorney General and the DHS Secretary with authority to establish “additional limitations and conditions, consistent with [section 208], under which [a noncitizen] shall be ineligible for asylum.”⁸ Yet neither U.S. nor international law limits asylum based on the route one fled or on an asylum seeker’s first having sought different forms of legal relief, in recognition of the dire, urgent, and often unpredictable circumstances facing people fleeing for protection. Indeed, while the UN Refugee Agency, UNICEF, and International Organization for Migration have expressed support for alternative legal pathways for migration, they have cautioned that these should not be used at the exclusion of fundamental asylum access required under the UN Refugee Convention.⁹ The UN agencies have noted particular concern for the impact of restrictive policies on children, stating in reference to Title 42 and other policies that “[e]very day such policies remain in place puts more desperate individuals, families and children at risk. The safety and well-being of children, including children arriving with family members, are a critical concern; their best interests must be protected.”¹⁰ The Proposed Rule, however, dangerously perpetuates these risks and miscasts the requirements of asylum protection and the realities facing children and families seeking safety in the U.S.

The Proposed Rule Fails to Meaningfully Consider the Risks of Family Separation and the Return of Children and Families to Harm and Persecution.

Asylum seekers often are forced to flee without notice and to make spontaneous decisions during their journeys to avert danger. Children fleeing persecution, abuse, and other harm face particular vulnerabilities stemming from their age, developmental stage, and trauma history. With limited access to resources children often have little control over the precise path of their travel, and they often must rely on others to meet their basic needs. As a result of these circumstances, children often experience

⁶ 88 Fed. Reg. at 11,718 (“Despite this monumental effort to counter human smuggling, it alone will not decrease the daily number of encounters at the SWB to a manageable level—these efforts must be combined with other efforts, including an increase in available lawful pathways throughout the region and consequences for migrants who bypass them.”); *see also* UN Refugee Convention, *supra* note 2, at art. 31.

⁷ *Id.* at 11,727 (“Because the Departments intend for the rule to address the surge in migration that, in the absence of this rule, is anticipated to follow the lifting of the Title 42 public health Order, the Departments propose for the rule to be temporary in duration, applying to those who enter the United States at the SWB during the 24-month period following the rule’s effective date.”).

⁸ 88 Fed. Reg. at 11,735.

⁹ UNHCR, UNICEF, IOM, *Joint Statement: UNHCR, IOM and UNICEF welcome new pathways for regular entry to the US, reiterate concern over restrictions on access to asylum* (Oct. 14, 2022), <https://www.unhcr.org/en-us/news/press/2022/10/63497be44/unhcr-iom-and-unicef-welcome-new-pathways-for-regular-entry-to-the-us-reiterate.html> (“Any such initiatives, however, cannot come at the expense of the fundamental human right to seek asylum. Access to safe territory for asylum seekers is a cornerstone of the 1951 Refugee Convention and of international refugee law. We remain concerned by asylum restrictions that are inconsistent with international law standards, including those imposed through Title 42 public health action, and reiterate the call for their urgent termination.”).

¹⁰ *Id.*

heightened risks of exploitation, human trafficking, and other harms. Compounding these challenges, children frequently are not provided with information about their rights or may even be misinformed by authorities about their eligibility for humanitarian protection and turned back to the countries they fled, without consideration of their protection needs or best interests. Without an attorney or other adult to assist them in navigating complicated and shifting laws and policies, children confront insurmountable barriers to obtaining legal protection.

Mindful of this reality and in an effort to prevent the return of children to trafficking or other exploitation, Congress passed the TVPRA, which provides specific protections for unaccompanied children in the U.S. immigration system.¹¹ Among these are exemptions from certain asylum restrictions, such as the one-year filing deadline for asylum claims and the safe third country bar to asylum.¹² The NPRM acknowledges these legal authorities and excepts unaccompanied children from the Proposed Rule's application.¹³ While vital, this exemption by itself is insufficient to protect children from the Proposed Rule's harms, including to children who may travel with family members and experience similar vulnerabilities.

In its work along the border and in Mexico, KIND has witnessed the grave perils faced by children as a result of the Title 42 policy, limited access to ports of entry, turnbacks and metering, and technological difficulties with the CBP One app. KIND has represented several children who approached ports of entry alone to request protection but who were erroneously denied access by CBP and turned back to Mexico, where they faced grave threats and violence.

In one such instance, KIND's border team interviewed Alejandra,¹⁴ a pregnant 17-year-old who had survived severe sexual assault by cartel members and sought protection at the Paso del Norte Port of Entry. Alejandra was deeply traumatized, having fled her town in southern Mexico, where she had been kidnapped by cartel members, held captive, and raped repeatedly. Alejandra had escaped after several months and fled for safety with relatives who were also targeted by the cartel. In September 2021, she arrived in Ciudad Juarez in an advanced stage of pregnancy and presented herself to a CBP officer at the Paso del Norte Port of Entry. The CBP officer asked Alejandra if she was Mexican, but rather than conducting a protection screening as is required for Mexican unaccompanied children pursuant to the TVPRA, the officer merely told her to go to a "white building," referring to the site of a Mexican social services organization. Despite the exception of unaccompanied children from the Title 42 policy then in effect at the time and the TVPRA's specific protections, Alejandra remained unable to access the U.S. protection system until an attorney assisted in ensuring her ability to present for inspection, be received by CBP, and referred to the care and custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR). While in ORR custody, Alejandra gave birth to her son.

In February 2022, KIND received an urgent call from staff of a Mexican organization located at the foot of the international bridge dividing Ciudad Juarez from El Paso—a 9-year-old Haitian child, completely alone, had just been turned around on the bridge by CBP officials after the group the child was traveling with was processed for a CBP One appointment. Rather than being taken in safely and treated as an unaccompanied child, as the law requires, U.S. officials had sent the child back down the corridor of the bridge to be turned over to the Mexican National Guard. KIND staff discovered the child had been traveling through Mexico with an uncle who died during the journey. Another migrant family had been helping care for the child. When the family received an appointment through CBP One, they brought the child with them, hoping that U.S. officials would assist the child. Rather than receiving him safely as

¹¹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5078 (2008).

¹² 8 U.S.C. § 1158(a)(2)(E).

¹³ 88 Fed. Reg. at 11,724. The NPRM also notes that pursuant to the TVPRA unaccompanied children are already precluded from expedited removal and the credible fear process. *Id.*

¹⁴ Pseudonyms are used for children named in this comment to protect their confidentiality.

required by the TVPRA, CBP sent the child alone back to the Mexican side of the bridge. Alone and now separated from trusted adults, the boy, who had been seeking to reunify with his parents in the U.S., was confused and highly vulnerable. After KIND's quick intervention, the boy was able to re-present to CBP and finally processed.

Recently, KIND received word of three tender-aged siblings in a shelter in a dangerous Mexican border town whose mother, unable to secure a CBP One appointment for herself and her children, made the desperate decision to go ahead alone and leave her children behind. This mother believes her life was being threatened and felt she had no other choice. She attempted many times to get an appointment for all four family members through CBP One. She is now desperately seeking to reunite with her children, who she believes are also in danger.

Children turned back at the border do not often have the assistance of attorneys to intervene to protect their rights. Instead, children turned back or denied an opportunity to present are frequently targeted by criminal actors who prey upon their desperation and need for assistance. The Proposed Rule would only exacerbate these perils by conditioning asylum eligibility on requirements that could force children and their families to remain in harm's way to apply for protection in a third country or for another lawful pathway to the U.S., or to receive an appointment to present at a port of entry. Given the frequent shifts in border policies, programs limited by nationality, and inconsistent application of existing legal protections, the Proposed Rule also risks increasing confusion among border agents and officers about which procedures are applicable to children and families, and consequently will result in further deprivations of due process and refoulement.

To date, policies and practices such as turnbacks and closure of ports of entry have forced many families to remain in peril, at risk of being followed or found by their persecutors or other criminal actors. Human rights organizations have documented the severe dangers facing children and families at the Southwest border, including exploitation by cartels and criminal actors, rape, kidnapping, and other harms. Without access to the U.S. and unable to apply for new parole processes due to limited eligibility criteria or the lack of a financial sponsor in the U.S., some families face impossible decisions to wait in danger or to separate so that children may seek protection in the U.S. as unaccompanied children. Persistent peril and separation both pose significant psychological and emotional trauma to children and deprive them of the stability and conditions they need to grow in safety. Families forced apart by operation of these policies often have no means of learning about their family members' whereabouts or reuniting. Separations may endure indefinitely.

Impeded access to protection impacts not only children's wellbeing, but also their legal cases once in the U.S. Children forced by restrictive policies to separate from their families may be without other relatives or contacts in the U.S. who can care for them—increasing the risk that they may face prolonged stays in government care. Without the support and care of parents and other loved ones with whom they traveled, children may also lack access to critical information and documents relevant to their legal claim for asylum or other humanitarian protection. If unable to adequately prove their cases or to endure lengthy stays in government custody that may result from separation, these children could be returned to countries in which their lives and wellbeing remain at risk. Additionally, children who may be compelled to wait in a third country to comply with the Proposed Rule's conditions on asylum eligibility may be deprived of access to other forms of U.S. protection for which they may be eligible, such as Special Immigrant Juvenile Status (SIJ). Consequently, for children, the Proposed Rule would likely block, rather than expand, access to lawful pathways, contrary to the NPRM's claims.¹⁵

¹⁵ 88 Fed. Reg. 11,729 ("The Departments anticipate that the rebuttable presumption proposed by this rule, particularly in light of the innovative steps the United States Government and other governments are taking to provide other safe, lawful, and orderly pathways, would—as evidenced by the success of the Venezuela process and U4U— incentivize migrants to seek protection through such lawful pathways."); *id.* at 11,724 ("As

The NPRM seeks to avoid the harsh impacts of potential family separation by stating that the Executive Office for Immigration Review will protect family unity when adjudicating relief by providing for all members of a family to be deemed to have rebutted the presumption of asylum ineligibility if one accompanying family member is excepted from or has rebutted the presumption.¹⁶ The NPRM vastly overstates the availability of this minimal safeguard. Such an exception would still require that an asylum seeker first know of this process and make a sufficient showing of “exceptionally compelling circumstances by a preponderance of the evidence,” likely while without the assistance of counsel, with no information about how to prove such circumstances, and while potentially confronting language barriers and persistent danger. For example, proving an exception based on the presence of an imminent threat of rape, kidnapping, torture or murder at the time of the asylum seeker’s crossing would likely require the adjudication of facts and evidence that would be beyond the ability of most asylum seekers to produce in the context of the Proposed Rule.¹⁷ Moreover, asylum seekers would likely experience confusion about whether the threats they would need to prove must be separate from and additional to those that compelled them to flee for safety and to seek asylum.

In addition to imposing unrealistic standards on protecting-seeking families, the Proposed Rule would add substantial training, adjudication, and administrative burdens on USCIS asylum officers and immigration judges by layering additional requirements and standards onto review of fear of return claims that are already highly complex. This would potentially contribute to, rather than reduce, adjudication delays. Additionally, because application of the Proposed Rule will likely lead to many asylum seekers being limited to impermanent forms of relief such as withholding of removal or CAT protection that do not allow them to petition for their family members, it is possible that families will be unable to reunite with those from whom they may have been separated during their journey to safety or who remain in the country they fled. Family unity and children’s best interests must be prioritized for all, not limited to the few, if any, who are able to successfully navigate harmful, multilayered restrictions.

The Proposed Rule Unlawfully Restricts Access to Protection for Children and Families through CBP One.

The NPRM asserts that the CBP One application, on which the Proposed Rule heavily relies, will expand DHS’ ability to safely and humanely process people arriving at ports of entry.¹⁸ This assertion is belied by serious challenges that many families and other protection seekers have experienced while attempting to use the app in past months. Recent border policies requiring asylum seekers to have individual CBP One appointments have created grave barriers for children and families, given CBP One’s limitations in

unaccompanied children are already precluded from expedited removal, which may already be an incentive for children to arrive unaccompanied at our border, the Departments do not expect—based on their experience implementing current law concerning expedited removal and asylum—that this exclusion of unaccompanied children from the rebuttable presumption would serve as a significant incentive for families to send their children unaccompanied to the United States. Moreover, under this NPRM, families would be able to avail themselves of lawful pathways and processes to enter the United States and not be subject to the rebuttable presumption.”).

¹⁶ *Id.* at 11,730.

¹⁷ *Id.* at 11,723 (“Examples of imminent and extreme threats would include imminent threats of rape, kidnapping, torture, or murder that the noncitizen faced at the time the noncitizen crossed the SWB, such that they cannot wait for an opportunity to present at a port of entry in accordance with the processes outlined in this proposed rule without putting their life or well-being at extreme risk; it would not include generalized threats of violence”); *see also id.* at 11,707 n.27.

¹⁸ *Id.* at 11,719 (“The use of CBP One is expected to create efficiencies that will enable CBP to safely and humanely expand its ability to process noncitizens at land border ports of entry, including those who may be seeking asylum.”)

generating appointments simultaneously for multiple individuals and due to limited appointment availability.¹⁹

As a result of these failures, some children were compelled to pursue protection alone and to separate from their parents. In other cases, parents had to forgo their own appointments after being unable to obtain appointments for their children at the same time or at all due to the app's capacity and connectivity issues. Some parents with appointments were forced to leave children with relatives, potentially to present in the future.²⁰ Requirements related to CBP One have also posed confusion for unaccompanied children, for whom the TVPRA provides specific processing procedures and who need not obtain a CBP One appointment to request protection. Additionally, language limitations in the app have compounded access issues for Haitian, indigenous Guatemalan, and other asylum seekers, as has the requirement of photographs, which perpetuates known challenges with facial recognition that continue to deepen racial disparities in asylum access.

Although limited improvements to the app have since been made, they fail to resolve the fundamental infirmity of hinging children and families' access to asylum on their technological resources or understanding, access to the internet, or time and ability to manage technical challenges to request protection. By operating in practice to delay or deny access to request asylum protection at ports of entry the required use of CBP One threatens to restore and expand metering practices that have already been found unlawful by courts and endangered the lives and wellbeing of the most vulnerable. The Proposed Rule would only exacerbate these challenges.

Although KIND supports the ability of protection seekers to preregister for processing where optional, mandatory use of such systems turns humanitarian protection on its head--conditioning access to territory on intermediate and inaccessible steps that would likely leave children and families in continued danger or at even greater risk. The NPRM itself acknowledges the existence of concerns about CBP One's accessibility but seeks to dispense with these through assertions that the app and the Proposed Rule take accessibility into account.²¹ The NPRM includes several unavailing justifications: that most asylum seekers have smartphones, that asylum seekers can receive assistance from third parties, and that exemptions are available for individuals who demonstrate through a preponderance of the evidence that use of CBP One was not possible.²² Reasoned policymaking requires that concerns be meaningfully considered prior to implementation, particularly as relates to mechanisms on which the Proposed Rule fundamentally relies. The burden on the government to evaluate the potential impacts of its policies should not be shifted to asylum seekers by requiring that they prove the known limitations and technical difficulties of the government's own tools or that they seek assistance from unidentified third parties to navigate them.

While the NPRM references potential improvements²³ to CBP One, this possibility does not alter the very real and harmful impacts it poses at present and before such changes are in place. In the interim,

¹⁹ See Miriam Jordan, Biden Administration Announces New Border Crackdown (Feb. 21, 2023), N.Y. Times, <https://www.nytimes.com/2023/02/21/us/biden-asylum-rules.html>.

²⁰ See, e.g., Sandra Sanchez, Parents sending migrant children alone across border into South Texas (Feb. 23, 2023), Border Report, <https://www.borderreport.com/immigration/parents-sending-migrant-children-alone-across-border-into-south-texas/>.

²¹ 88 Fed. Reg. at 11,720.

²² *Id.*

²³ 88 Fed. Reg. at 11,707 ("In addition, once the Title 42 public health Order is terminated, the United States will expand implementation of the CBP One application ("CBP One app"), an innovative mechanism for noncitizens to schedule a time to arrive at ports of entry at the SWB, to allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain ports of entry, in accordance with operational limitations at each port of entry.").

under the Proposed Rule, children and families would be required to prove by a preponderance of the evidence why they could not obtain an appointment—forcing upon them responsibility to bear the consequences of technological applications over which the government has lone authority.

The Abbreviated Comment Period Hinders Meaningful Review of the Proposed Rule by the Public and Demonstrates a Lack of Meaningful Consideration of Potential Harms and Policy Alternatives.

The NPRM provides a 30-day period for the submission of public comments. This abbreviated period, which departs from the 60-day period generally recommended through Executive Orders,²⁴ frustrates the public’s ability to meaningfully assess and consider the potential impacts of the Proposed Rule, which would affect most individuals seeking protection at the U.S.-Mexico border. KIND joined 171 other organizations in requesting at least 60 days to comment on the Proposed Rule.²⁵

The public’s thorough review of the Proposed Rule is particularly important given that a similar Trump Administration regulation barring access to asylum based on transit through a third country was found unlawful by multiple federal courts.²⁶ It is critical for the public to discern how and whether the Proposed Rule’s content relates to the enjoined and vacated regulations and the context in which the Proposed Rule would be implemented following the end of the Title 42 policy. This review includes consideration of the direct experiences of protection seekers with the programs and tools on which the Proposed Rule relies, including CBP One and new lawful pathways.

As discussed in this comment, KIND has witnessed firsthand the profound impacts of the Title 42 policy on children and families at the U.S.-Mexico border, even amid the exemption of unaccompanied children, and the challenges and dangers that children and families have faced in requesting protection at ports of entry and through the new CBP One app. These serious harms—which include separation from family members, exploitation and violence by criminal actors, and ongoing exposure to danger while waiting to access the U.S. asylum system—underscore the arbitrariness of expediting notice and comment on *new* border restrictions that will only exacerbate protection seekers’ vulnerability without meaningful consideration of these significant harms and available alternatives.

The NPRM also includes concerning language suggesting that the agencies may shorten the waiting period before the rule is implemented or potentially issue an interim final rule even prior to the conclusion of notice and comment rulemaking.²⁷ Although the end of the Title 42 policy necessitates

²⁴ Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993), at Sec. 6(a) (“In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”); Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”).

²⁵ See Letter from 172 national, state, and local organizations, Request to Provide a Minimum of 60 days for Public Comment in Response to the Joint Notice of Proposed Rulemaking: Circumvention of Lawful Pathways (Mar. 1, 2023), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2023-03/Biden%20Asylum%20Ban%20-%20Extension%20letter%20to%2030-days%20comment%20period%20FINAL.pdf>.

²⁶ Asylum Eligibility and Procedural Modifications, Interim final rule; request for comment, 84 Fed. Reg. 33,829 (July 16, 2019); Asylum Eligibility and Procedural Modifications, Final rule, 85 Fed. Reg. 82,260 (Dec. 17, 2020); see, e.g., Capital Area Immigrants’ Rights Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020); East Bay Sanctuary Covenant v. Garland, 994 F.3d 962 (9th Cir. 2020); East Bay Sanctuary Covenant v. Barr, 519 F.Supp. 3d 663 (N.D. Cal. 2021).

²⁷ See 88 Fed. Reg. at 11,708 (“[T]he Departments may conclude that it is necessary to shorten or forgo the standard 30-day delay in the final rule’s effective date. In addition, if, prior to the issuance of the final rule, the Title 42 public health Order is lifted or encounter rates rise significantly (even without the lifting of the Title 42 public health Order), the Departments intend to take appropriate action, consistent with the Administrative

careful planning to ensure the full restoration of due process and access to protection too long denied for many, these efforts cannot be used to justify streamlined review of new policies that would restrict access to protection for the most vulnerable. The Administrative Procedure Act—and the wellbeing of the most vulnerable—require far more.

The Proposed Rule relies on inaccurate assumptions about the motives of asylum-seeking children and families and fails to meaningfully consider the factors driving child migration.

The NPRM posits that new asylum restrictions are necessary because “most people processed for expedited removal under Title 8 will likely establish credible fear and remain in the United States for the foreseeable future despite the fact that many of them will not ultimately be granted asylum, a scenario that would likely incentivize an increasing number of migrants to the United States and further increase the likelihood of sustained, high encounter rates.”²⁸ The NPRM also suggests in passing that the exclusion of unaccompanied children from expedited removal “may already be an incentive for children to arrive unaccompanied at our border. . . .”²⁹ This flawed logic rests on inaccurate assumptions about the motives of children and families seeking protection and mischaracterizes their asylum claims.

In recent years, increasing numbers of children and families have fled to the U.S. in search of protection from violence, abuse, war, political instability, and other threats to their lives and wellbeing. Their flight to safety reflects multiple, intersecting drivers of migration and a global increase in forced displacement stemming from humanitarian crises in the Central American countries of El Salvador, Guatemala, and Honduras as well as in Haiti, Venezuela, Nicaragua, Cuba, Ukraine, and Afghanistan, among others. In recent years, the COVID-19 pandemic only exacerbated the dangers facing children and families by imposing additional strain on support services and the ability of public institutions to provide protection. Throughout Mexico and the Northern Triangle countries, for example, unaccompanied children continue to face significant challenges in accessing protection and are often targeted for sexual violence, trafficking, extortion, kidnapping, robbery or other harms, including by authorities. In recent years, restrictive policies such as the Title 42 policy have forced the expulsion of many children and families to countries where they remain in peril, deepening their need for protection.

Having fled their countries many children are unable to find safety in other countries through which they may transit, as the reach of gangs and other organized criminal organizations often spans regions. Despite the NPRM’s assertions, the current protection systems of countries such as El Salvador, Guatemala, and Honduras lack sufficient capacity, resources, and reach to ensure the protection of children and other asylum seekers. Without access to basic necessities, safe shelter, and a means of providing for their survival, asylum-seeking children and families face increased risks of harm and exploitation, including if forced to wait in transit countries for potential protection claims to be adjudicated.

Even when able to access the U.S. immigration system, children and families face significant barriers to obtaining humanitarian protection. They must navigate complex immigration proceedings often without an attorney to assist them, while the government is in all cases represented by a trial attorney. This fundamental due process gap risks the return of children and families to harm, as evidenced by data underscoring the fundamental importance of legal representation in ensuring children’s meaningful access to relief. For example, Executive Office for Immigration Review (EOIR) data on court cases completed from FY 2018 through the first half of FY 2021 shows that immigration judges are nearly 100 times less likely to grant legal relief to unaccompanied children without representation than to

Procedure Act (“APA”), which may include issuance of a temporary or interim final rule similar to this NPRM while the Departments complete the notice-and-comment rulemaking process.”).

²⁸ *Id.* at 11,706.

²⁹ *Id.* at 11,724.

unaccompanied children who are represented by counsel.³⁰ Denial of asylum in the current system, then, cannot be equated with having no need of protection. Far too often it reveals instead impediments to fundamental fairness that deprive children of due process and risk their deportation to the very peril they fled.

The Proposed Rule Inadequately Considers Available Alternatives that Could Improve Safe, Orderly, and Humane Processing.

The Proposed Rule would authorize dramatic restrictions to asylum protection in response to projected increases in arrivals of asylum seekers at the border following the termination of the Title 42 policy. The NPRM purports to take children's interests into account by exempting unaccompanied children and creating special exceptions for families, but as the prior discussion underscores, the Proposed Rule will simply increase the potential harms children face. Rather than focusing on restricting access, there are numerous tools available to DHS that would provide for safer and more efficient processing of children and families and that could assist in meeting known needs in the short and longer terms, rather than formalizing restrictive patchwork approaches.

To date, children processed at the U.S.-Mexico border continue to be held in CBP facilities ill-equipped to meet children's unique needs and vulnerabilities. Children's care and processing is largely overseen by Customs and Border Protection agents and officers with special expertise in law enforcement, rather than child welfare and development. Continued reforms are necessary to ensure that reception spaces provide child-appropriate environments. As part of these efforts, DHS must immediately ensure the hiring of state-licensed child welfare professionals who can improve the administration of screenings and care for children, as directed and funded through recent appropriations laws passed by Congress. Child welfare professionals can not only improve outcomes for children but enable greater processing efficiencies by allowing CBP agents and officers to better focus on tasks for which they have been specially trained.

The Administration can and should also implement reforms to foster a broader humanitarian reception model at the border, focused on ensuring safe processing and fair access to protection for asylum seekers rather than restrictive measures that only compound their vulnerability. One such reform would include the engagement of nongovernmental humanitarian actors to assist with appropriate reception, screening, and care of children and families. In 2021, DHS successfully explored such efforts through the engagement of the American Red Cross during a period of high border arrivals. Efforts such as these should be revisited and expanded. Additional improvements should be made to ensure child-friendly spaces for processing, areas in which children can be confidentially screened by child welfare professionals, and spaces in which nonprofit organizations can provide Know Your Rights presentations and legal assistance.

In tandem with these efforts, DHS can support co-location of professionals and specialists from the Department of Health and Human Services, who can assist in identifying timely and appropriate placements for unaccompanied children and promote family unity by evaluating whether non-parent caregivers who arrive with unaccompanied children may be able to serve as safe and appropriate sponsors—helping to avoid unnecessary separations and potentially reducing children's time in government custody.

Conclusion

KIND strongly supports the Administration's stated commitment to ensuring safe, humane, and orderly processing at the Southwest border, but forcefully rejects the NPRM's contention that this necessitates

³⁰ Calculated from EOIR data included within the Congressional Research Service's report "Unaccompanied Alien Children: An Overview," p. 16 (Sep. 1, 2021); available at <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

harsh restrictions on asylum eligibility and other consequences outlined in the Proposed Rule. Such measures will only deepen risks facing children and families and further erode the U.S.' leadership in the protection of refugees. Several practical alternatives exist to enhance safe and appropriate processing upon the lifting of the Title 42 policy and for the future. We urge the Departments to rededicate themselves to these efforts and to immediately abandon misguided measures such as the Proposed Rule, which would punish the most vulnerable simply for seeking protection.