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**Re: 85 FR 36264; EOIR Docket No. 18-0002, A.G. Order No. 4714-2020; RIN 1125-AA94; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review**

Dear Ms. Reid,

The Young Center for Immigrant Children's Rights (Young Center) writes to object to the above referenced proposed rule, published June 15, 2020 by the Departments of Justice (DOJ) and Homeland Security (DHS).<sup>1</sup>

The Young Center serves as the federally-appointed best interests guardian *ad litem* (Child Advocate) for trafficking victims and other vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>2</sup> The Young Center is the only organization authorized by the Department of Health and Human Services' Office of Refugee Resettlement (ORR) to serve in that capacity. The role of the Child Advocate is to champion the best interests of the child. A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody, many of whom have filed and won claims for asylum.

We understand the unique vulnerability of immigrant children who flee life-threatening persecution in their countries. We recognize the basic principle that children are different from adults. Children face threats to their safety that are particular to their status as children, and they react to harm and trauma differently from adults. Regulations governing the adjudication of children's asylum claims must recognize children's distinct vulnerabilities and experiences.

The proposed rule would jeopardize the safety and well-being of immigrant children by increasing the barriers to their right to seek and win asylum. It would have adjudicators presume that many child-specific forms of persecution do not warrant a grant of asylum by specifically

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<sup>1</sup> See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Interview, 85 Fed. Reg. 36264-36306 (June 15, 2020). Where this comment includes linked material in footnotes, we request that the agencies review the linked material in its entirety and consider it part of the record.

<sup>2</sup> 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 116-146).

listing grounds for asylum that generally would be denied. This would result in children being returned to danger in violation of immigration laws enacted by Congress, contained in international treaties, and which reflect basic principles of child welfare and human decency. By unnecessarily narrowing the legal standard for asylum, creating sweeping categories of mandatory discretionary denials, and denying due process protections, the proposed rule would breach the United States' treaty obligations to bring U.S. law into greater congruence with the Refugee Protocol's principle of non-refoulement.

Given the sweeping changes proposed in the rule, a 60-day comment period for the public would have been appropriate to fully address the impact that the rule would have on the asylum system. Due to the shortened comment period, we have not been able to cover every topic given the constricted timeframe in which to respond. We submit these comments to object to the sweeping effects this rule would have on children's access to asylum. For the reasons including but not limited to those that follow, DOJ and DHS should immediately withdraw the proposed rule and instead dedicate their efforts to ensuring that there is a robust asylum system and policies that are tailored to the specific needs and vulnerabilities of child asylum-seekers.

## **I. The Proposed Rule Contradicts U.S. and International Law.**

### **a. U.S. Law Already Places a High Burden on Children to Prove Their Eligibility for Asylum.**

The U.S. asylum system was first codified in statute through the Refugee Act of 1980, which amended the Immigration and Nationality Act. The Act created a "broad class of refugees who are eligible for a discretionary grant of asylum."<sup>3</sup> Children's right to seek asylum finds even greater protection in U.S. law. The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) provides special protections for unaccompanied children who apply for asylum, to ensure they have a fair opportunity to present their claim for protection in a manner that reflects their status as children. The TVPRA directs that asylum officers, rather than immigration judges, first hear the cases of unaccompanied children so that they can recount the sensitive and often traumatic facts of their claims in a non-adversarial setting.<sup>4</sup>

U.S. case law and guidance have required decision makers to contemplate certain considerations when examining the elements of asylum in children's cases. The complicated nature of asylum—having to show past persecution or fear of future persecution based on particular grounds—have required various aspects of substantive asylum law to be examined with a child-sensitive lens,

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<sup>3</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

<sup>4</sup> 8 U.S.C.A. § 1158(b)(3)(C) (Westlaw through Pub. L. No. 116-146).

especially when examining the elements of persecution<sup>5</sup> and the ground of “particular social group.”<sup>6</sup>

Despite these accommodations for unaccompanied children, the current laws, regulations, and processes governing asylum adjudications are exceedingly complicated, and winning asylum is difficult for all applicants, most especially for children. Asylum seekers bear the burden of establishing their eligibility for asylum<sup>7</sup> in the face of a complex web of laws and regulations, without the benefit of appointed counsel and often from a remote immigration jail.<sup>8</sup> Despite their age and early stages of development, unaccompanied children also must show they have suffered persecution or will suffer persecution based on a protected ground—many without a lawyer to represent them and while still in government custody. The proposed rule, particularly by including presumptions that certain harmful acts are “insufficient” for a grant of asylum, discourages the examination of children’s claims through a lens that accounts for their developmental status and unlawfully adds barriers to a vital protection for children that is already difficult to obtain.

b. The Proposed Rule Contradicts International Law, Which Lays Out Specific Considerations for Child Asylum Claims.

International law also provides special protections for children seeking asylum. By acceding to the 1967 Protocol Relating to the Status of Refugees,<sup>9</sup> which binds parties to the United Nations Convention Relating to the Status of Refugees,<sup>10</sup> the United States obligated itself to develop and interpret U.S. refugee law in a manner that complies with the Protocol’s principle of non-refoulement—the commitment not to return refugees to a country where they will face persecution on protected grounds.<sup>11</sup>

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<sup>5</sup> See, e.g., *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

<sup>6</sup> CTR. FOR GENDER & REFUGEE STUDIES, CHILDREN’S ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 11, 18 (2015), [https://cgrs.uchastings.edu/sites/default/files/CGRS\\_Child\\_Asymum\\_Advisory\\_3-31-2015\\_FINAL.pdf](https://cgrs.uchastings.edu/sites/default/files/CGRS_Child_Asymum_Advisory_3-31-2015_FINAL.pdf) (listing gender, family membership, domestic relationships, mental illness, childhood at the time of persecution, and others as immutable and fundamental characteristics).

<sup>7</sup> 8 U.S.C.A. § 1158(b)(1)(B)(i) (Westlaw); 8 C.F.R. § 1240.8(d) (2020).

<sup>8</sup> See Lauren Villagran, Daniel Connolly & Aaron Montes, *Asylum Seekers in U.S. Face Years of Waiting, Little Chance of Winning Their Cases*, USA TODAY (Sept. 25, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-court-asylum-seekers-what-to-expect/2026541001/>.

<sup>9</sup> Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

<sup>10</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 [hereinafter Refugee Convention].

<sup>11</sup> THE IMMIGR. DEFENSE PROJECT & THE HARVARD IMMIGR. & REFUGEE CLINICAL PROGRAM, MISAPPLICATION OF THE PARTICULARLY SERIOUS CRIME BAR TO DENY REFUGEES PROTECTION FROM REMOVAL TO COUNTRIES WHERE THEIR LIFE OR FREEDOM IS THREATENED, 11 (Fall 2019), [https://www.immigrantdefenseproject.org/wp-content/uploads/IDP\\_Harvard\\_Report\\_FINAL.pdf](https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf) (arguing that the U.S. Constitution and Supreme Court case law make clear that federal law must be interpreted to

The United States is also a signatory to the Convention on the Rights of the Child (CRC)<sup>12</sup> and therefore is obligated “to refrain from acts that would defeat the object and purpose of the Convention.”<sup>13</sup> The CRC protects the rights of children seeking asylum.<sup>14</sup> Expounding on that right, the UN Committee on the Rights of the Child has stated:

[T]he refugee definition in [the 1951 Refugee Convention] must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.<sup>15</sup>

Instead of working towards greater congruence with the terms of the Refugee Convention and its obligations under the CRC, the proposed rule would have adjudicators presume that many child-specific forms of persecution do not warrant a grant of asylum by specifically listing grounds for asylum that generally would be denied, resulting in children being returned to danger in violation of the language and spirit of both treaties.

## **II. The Proposed Rule Undermines Children’s Safety and Well-Being—Their Best Interests—by Increasing Barriers for Children Seeking Protection.**

The “best interests of the child” principle has no single definition but encompasses consistently accepted factors. Two of the most significant of these is the child’s health and safety.<sup>16</sup> Resettlement of a child through asylum, to the extent it will prevent serious risks to a child’s safety, is generally in the best interests of the child.<sup>17</sup> Under the CRC, administrative authorities,

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follow the U.S.’s treaty obligations, including the Refugee Convention’s non-refoulement mandate and its limited exception).

<sup>12</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>13</sup> U.S. CITIZENSHIP & IMMIGRATION SERV., RAI0 COMBINED TRAINING PROGRAM: CHILDREN’S CLAIMS § 2.2 (2009),

[https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens_Claims_LP_RAIO.pdf); Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

<sup>14</sup> CRC, *supra* note 12, art. 22.

<sup>15</sup> U.N. Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 74, CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter CRC General Comment No. 6], <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

<sup>16</sup> See, e.g., CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2016), [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf) (identifying the “health, safety and/or protection of the child” as a “guiding principle of best interests determinations”).

<sup>17</sup> See U.N. High Comm’r for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* 70 (May 2008), <https://www.unhcr.org/4566b16b2.pdf>.

including those adjudicating asylum claims, must make individual decisions that are “assessed and guided by the best interests of the child.”<sup>18</sup>

However, the proposed rule limits individualized consideration of children’s cases. Rather, the presumptions of ineligibility for asylum based on certain previously accepted grounds and standards put unnecessary and cruel barriers on children seeking asylum. The proposed rule would add to the government’s attempts to impose barriers to asylum in the United States that are breathtaking in scope, such as forcing those seeking safety to wait in dangerous conditions in Mexico and an overlapping web of policies that preclude asylum eligibility for countless migrants simply because of their national origin, manner of entry, or their flight path.<sup>19</sup> Together these policies will make it nearly impossible for children to ask for and receive asylum, even though children have demonstrated that when they have a fair opportunity to seek asylum (including representation by counsel), they are clearly eligible for and deserving of the protection.<sup>20</sup>

#### A. The Proposed Rule Significantly Alters the Substantive Elements of Asylum.

##### 1. *The Proposed Rule Severely Limits Asylum Claims Based on Membership in a “Particular Social Group” and Other Grounds.*

The Immigration and Nationality Act provides for a grant of asylum based on membership in a particular social group.<sup>21</sup> According to UNHCR, “the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>22</sup> This is particularly important for children, whose claims for asylum are often based on child-specific social groups

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<sup>18</sup> U.N. Comm. on the Rts. of the Child, General Comment No. 14 (2013) on the Right of The Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para.1) para. 30, CRC/C/GC/14 (May 29, 2013) [hereinafter CRC General Comment 14], <https://undocs.org/pdf?symbol=en/CRC/C/GC/14>.

<sup>19</sup> The National Immigrant Justice Center maintains a frequently updated timeline providing details of each of the asylum bans and other policies issued and implemented by the Administration that undermine asylum access. See NAT’L IMMIGR. JUST. CTR., <https://www.immigrantjustice.org/issues/asylum-seekers-refugees> (last visited July 9, 2020). For more information on the harms and rights abuses inherent in the Migrant Protection Protocols, or “Return-to-Mexico” program, see *Delivered to Danger*, HUM. RTS. FIRST (May 13, 2020), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

<sup>20</sup> *Representation for Unaccompanied Children in Immigration Court*, TRAC REPORTS, <https://trac.syr.edu/immigration/reports/371/> (last visited July 9, 2020) (showing that in three out of four cases where children have representation, they receive some form of protection).

<sup>21</sup> 8 U.S.C.A. § 1101(a)(42) (Westlaw through Pub. L. 116-146).

<sup>22</sup> U.N. High Comm’r for Refugees, *Guidelines On International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 3 (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

that U.S. courts have historically recognized.<sup>23</sup> The proposed rules would make it almost impossible for children, especially those from Central America or Mexico, to win protection based on membership in a particular social group. The rule includes a “nonexhaustive” list of characteristics that generally would be insufficient to establish membership in a particular social group or ground for asylum, including “being the subject of a recruitment effort” by a persecutory group, “interpersonal disputes of which the governmental authorities were unaware or uninvolved” and “private criminal acts of which governmental authorities were unaware or uninvolved,” “past or present criminal activity,” and “gender.”<sup>24</sup>

As a general matter, the proposed rule’s exclusion of acts “of which governmental authorities are unaware or uninvolved” disproportionately affects children’s ability to seek asylum. For many children, access to state protection in their home country depends on the adults in their lives.<sup>25</sup> Those adults often must act to support children’s access to the state protection system. Not all children have such an adult in their lives. Additionally, some children who go directly to government officials to raise the need for protection may be directly dismissed. Therefore, denying child asylum based on acts where the government is unaware or uninvolved denies the realities of children’s ability to access government protection systems.

Additionally, the proposed rule’s prohibition against raising a particular social group that was not initially raised in the asylum application (or in the “record” or before the immigration judge), raises serious due process concerns for children. Children who arrive in the United States have suffered immense trauma, and it takes time for them to recover and talk about their experiences. For unaccompanied children in particular, it is difficult for them to discuss persecution they may have faced when they are in government custody, away from family and surrounded by unknown adults. For many children, it is only after release from government custody and after time spent with a trusted adult that they are able to talk about the harm they faced in their home country. For many, the asylum process is the first time they ever discuss their experiences. Thus, the proposed rule’s bar on raising membership in a particular social group after an initial period or an initial attempt to explain their fear of return is unrealistic and an untenable burden for most children.

The proposed rule would also result in denials of asylum for children fleeing gang recruitment or gang violence. The Young Center has been appointed as the independent Child Advocate to many children fleeing gang violence in their home countries. Our own government recognizes that children are often targets for gang recruitment and gang violence in their home countries.<sup>26</sup> A 2015 report issued by the Jesuit Conference of Canada and the United States found: “The

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<sup>23</sup> CHILDREN’S ASYLUM CLAIMS: CGRS PRACTICE ADVISORY, *supra* note 6, at 18.

<sup>24</sup> 85 Fed. Reg. at 36291-92.

<sup>25</sup> U.N. High Comm’r for Refugees, *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(f) of the 1951 Convention or the 1967 Protocol Relating to the Status of Refugees*, ¶ 39 (Dec. 22, 2009) [hereinafter *UNHCR Guidelines on Child Asylum Claims*], <https://www.unhcr.org/en-us/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html>.

<sup>26</sup> *See, e.g.*, U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2019: Guatemala 18 (2020) (stating that street children are often recruited by gangs).

overarching strategy employed [by gangs] involves threatening young and adolescent children with physical violence or death unless they join a local clique. Threats commonly extend from the targeted recruit to their loved ones, resulting in the killing of parents and siblings, as well as the rape of female family members.”<sup>27</sup> The proposed rule includes a presumption that “attempted recruitment” or “private criminal acts” are insufficient grounds for asylum, ignoring the reality that many child asylum seekers flee their home countries precisely because the government is unable or unwilling to control non-state actors like terrorist or gang organizations who would recruit or harm children and families. The proposed rule would thus result in the denial of asylum for a large group of children, sending them back to certain danger in their home countries.

*The Young Center was appointed to Komi\*, a child from an ethnically mixed family in a West African country. The ethnic groups of Komi’s family have been in conflict for the past century. Because of the strategic location of Komi’s family land, both groups repeatedly reached out to Komi to recruit him, but he refused. As a result, Komi was repeatedly tortured and threatened. His reports to the local police were ignored. He had no other option than to flee for safety. Because of the harm Komi faced at the hands of non-state actors, he was granted asylum. Under the proposed rule, Komi would have been returned to harm. \*Pseudonym*

The proposed rule would also deny children asylum if their claim is based on “past or present criminal activity.” The United States has recognized asylum claims from former child soldiers forced to engage in bad acts.<sup>28</sup> The United States has also enacted the Child Soldiers Accountability Act, providing criminal and immigration penalties for individuals who use child soldiers.<sup>29</sup> Children conscripted into other criminal acts, such as gang activity, are not materially different from the children who fight on the front lines of conflicts in other parts of the world. More and more, children “recruited” by drug cartels in Central America are being seen for what they are: child soldiers.<sup>1</sup> In 2016, the spokesperson for the United Nations Secretary General on child soldiers provided crucial guidance on how we should regard child soldiers: “Children associated with armed groups are, above all, victims of these groups.”<sup>1</sup> The U.S. government’s stance against the use of child soldiers should extend to a willingness to protect children fleeing from all types of forced criminal activity.

*Cristina\* was forced to be a lookout for a gang while she was growing up in Central America; a family member threatened to kill her if she didn’t comply. She eventually fled to the United States after threats on her life from individuals who knew she was related to a gang member. Cristina was granted asylum because an immigration judge recognized that she was forced into gang activity and that she would face serious harm if she*

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<sup>27</sup> JESUIT CONFERENCE OF CANADA AND THE UNITED STATES, UNWILLING PARTICIPANTS: THE COERCION OF YOUTH INTO VIOLENT CRIMINAL GROUPS IN CENTRAL AMERICA’S NORTHERN TRIANGLE 7 (2015), [http://jesuits.org/Assets/Publications/File/Report\\_UnwillingParticipants\\_v4.pdf](http://jesuits.org/Assets/Publications/File/Report_UnwillingParticipants_v4.pdf).

<sup>28</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 178-180 (3d Cir. 2003) (finding there was a likely case of future persecution based on PSG of former child soldiers who have escaped).

<sup>29</sup> 18 U.S.C.A. § 2442 (Westlaw through Pub. L. No. 110-340).

*returned to her home country. However, under the Proposed rule, threats to Cristina's life would not have been considered a ground for asylum because they came from non-state actors, and she would have been returned to danger. \*Pseudonym*

The proposed rule would also explicitly exclude from asylum eligibility those who suffer persecution on account of “gender” such as female genital mutilation/cutting, forced marriage, rape, domestic violence, femicide, and human trafficking. Additionally, the proposed rule states that, generally, asylum claims will not be successful where the persecution is based on “interpersonal animus or retribution,” and specifically excludes persecution “where the persecutor has not targeted or manifested an animus against other members of the particular social group,”<sup>30</sup> making it nearly impossible for children who face domestic violence, intimate partner violence, sex or labor trafficking by a family member, or other forms of gender-based persecution to receive a grant of asylum.

U.S. case law has long affirmed gender-based asylum claims,<sup>31</sup> evolving from the dark ages when some forms of gender-based violence were dismissed as “private disputes” and victims were made to suffer in silence. Though the Refugee Convention does not explicitly mention sex or gender as a protected ground, UNHCR has confirmed that people fleeing gender-based persecution meet the definition of a refugee.<sup>32</sup> Furthermore, the UNHCR guidance on child asylum claims calls on States to “give utmost attention to such child-specific forms and manifestations of . . . gender-based violence” in making asylum determinations.<sup>33</sup>

The Young Center has served many children who have fled gender-based violence. These children often endure persecution and ostracization by their family members, communities, and government actors. As mentioned earlier, many children are unable to access state child protection systems, and children who have survived gender-based violence are even more afraid to do so. Children should be granted protection for such persecution, not expected to stay in or be returned to dangerous situations.

*Andrea\* is an indigenous child from Central America who grew up with an abusive father. When she was 16, Andrea was raped by a man in her community. A short time later, the same man raped her again. Andrea confided in a relative about the rapes. Her relative confronted her rapist, who then murdered her relative and threatened to kill her. When Andrea fled to the United States, she discovered she was pregnant and terminated her pregnancy against her parents' wishes. If she returned to her country of origin, Andrea would have faced imminent harm not only from her rapist, but also from her*

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<sup>30</sup> 85 Fed. Reg. at 36300.

<sup>31</sup> See, e.g., *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

<sup>32</sup> U.N. High Comm'r for Refugees, *Guidelines On International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 6 (May 7, 2002), <https://www.unhcr.org/3d58ddef4.pdf>.

<sup>33</sup> *UNHCR Guidelines on Child Asylum Claims*, *supra* note 25, ¶ 4 (quoting General Comment No. 6, *supra* note 15, ¶ 74).

*parents. An asylum officer recognized the gender-based persecution Andrea faced and granted her asylum. \*Pseudonym*

The proposed rule's narrow view of membership in a particular social group would disproportionately affect children seeking asylum based on their gender identity. U.S. courts have found that one's gender identity can qualify as a particular social group,<sup>34</sup> recognizing that transgender and gender non-confirming individuals face serious harm in many countries.<sup>35</sup> Many transgender or gender non-confirming individuals explore or come to understand their identity during childhood or adolescence.<sup>36</sup> In families and communities that are not accepting of a child's gender identity, these children face stigma, "corrective violence," and abuse.<sup>37</sup>

The proposed rule denies lesbian, gay, or bi-sexual children protection from danger as well. In many cases, violence against LGBTQ children begins at a young age.<sup>38</sup> In communities who lack knowledge about or reject different sexualities and gender identities, children face rejection from their families and communities, as well as abuse and violence.<sup>39</sup> In many cases, LGBTQ children are expelled from their homes as early as 12 or 13 years old.<sup>40</sup> Anti-LGBTQ bias in many countries is so strong that even a perception of LGBTQ identity can put a child at risk of serious harm. These children would be even less likely to receive asylum under the proposed rule, given that many children face persecution from private actors like family or community members and cannot report abuse to authorities without risking further persecution.<sup>41</sup>

*Raul\* grew up in a religious family. His father was the leader in the local Muslim community. When Raul was 16, he began taking lessons with a man in the community. One day, Raul saw his teacher being beaten and learned that his teacher was gay. Though Raul's father forbade him from visiting the teacher, Raul continued his lessons. In response, Raul's father beat him. Raul believes that his father thought he too was gay, though he never identified as gay. Not long after, the teacher was killed, and Raul's*

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<sup>34</sup> See, e.g., *Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (recognizing that transgender individuals are members of a particular social group).

<sup>35</sup> See *Map of Countries That Criminalise LGBT People*, HUMAN DIGNITY TRUST, <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (last visited July 2, 2020) (noting that twelve countries target gender identity through "cross-dressing" or "impersonation" laws).

<sup>36</sup> U.N. High Comm'r for Refugees, *Guidelines On International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 63(ii) (Oct. 23, 2012), <https://www.unhcr.org/509136ca9.pdf>.

<sup>37</sup> *The Impact of Violence on LGBTI People in the North of Central America*, REDLAC 7 (Sept. 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/Protection%20Snapshot%206%20-%20English%20-%20September%202019.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Ivette Feliciano & Zachary Green, *LGBTQ Asylum Seekers Persecuted at Home and in U.S. Custody*, PBS NEWS HOUR (Aug. 10, 2019), <https://www.pbs.org/newshour/show/lgbtq-asylum-seekers-persecuted-at-home-and-in-u-s-custody>.

*father expressed that he would be happy if Raul suffered the same fate. Raul was then attacked by the men who killed his teacher, and they told him they would kill him as well. Fearing for his life, Raul fled to the United States. Raul was granted asylum based on his perceived sexual orientation, and now has safety in the United States. \*Pseudonym*

2. *The Proposed Rule Redefines Political Opinion, Contravening Long-Established Principles.*

The proposed rule would redefine “political opinion” in contravention of existing law by limiting political opinion claims to those based on “furtherance of a discrete cause related to political control of a state or a unit thereof,” and rejecting claims based on expressed opposition to a non-state actor unless it relates to government control. This restriction utterly fails to recognize that many child asylum seekers flee their home countries precisely because the government is unable or unwilling to control non-state actors like terrorist or gang organizations, or face harm based on more general opposition to government policies. Additionally, a child may be eligible for asylum based on imputed political opinion, either because of the opinions held by their family or some other group with which they are associated<sup>42</sup>—U.S. case law recognizes claims based on imputed political opinion.<sup>43</sup> Rather than following precedent that recognizes political opinion in such circumstances, the agencies seek to erase all precedent that is favorable to asylum seekers through this rule. Instead, many children who face serious harm would be denied asylum and returned to persecution.

*Erin\* is a child from an African country whose father openly opposed the country’s leader. Because of his opposition, Erin’s father was killed and her family had to flee the country. After fleeing to a neighboring country, Erin learned that the government was looking for her. She then fled to the United States. Under the proposed rule, an asylum officer would have denied Erin asylum because she didn’t hold her father’s political opinions herself, or because her father’s opposition to the government was general and not for a “discrete cause.” Instead, when looking at Erin’s case, an asylum officer saw the serious harm that Erin faced upon return because of her father’s political opinion and granted her asylum. \*Pseudonym*

3. *The Proposed Rule Redefines Persecution to Exclude Many Serious Harms.*

The proposed rule would, for the first time, provide a regulatory definition of persecution—a definition that excludes fact-specific analysis and would unduly restrict what qualifies as persecution. The proposed rule emphasizes that harm must be “extreme” and that threats must be “exigent,” and lists certain harms that would summarily be found to not rise to the level of persecution. This greatly prejudices children, as child asylum claims must be examined in a child-sensitive manner and on a case-by-case basis to appropriately adapt the threshold of persecution to each child.<sup>44</sup>

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<sup>42</sup> CHILDREN’S ASYLUM CLAIMS: CGRS PRACTICE ADVISORY, *supra* note 6, at 22.

<sup>43</sup> See *In re S-P-*, 21 I. & N. Dec. 486, 486 (BIA 1996); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004).

<sup>44</sup> *UNHCR Guidelines on Child Asylum Claims*, *supra* note 25, ¶ 15.

International law and U.S. law acknowledge that children are different from adults, and perceive and experience harm differently than adults.<sup>45</sup> A child's age, maturity, vulnerability, and stage of development all impact how a child experiences and fears harm.<sup>46</sup> Both international and U.S. law require harm to be assessed from a child's perspective and acknowledge ill treatment may rise to the level of persecution for a child even if it does not for an adult.<sup>47</sup> Additionally, indirect harm, including harm to a child's parent or family members, qualifies as persecution to a child under U.S. law.<sup>48</sup> The proposed rules' explicit exclusion of certain acts as persecution, such as "repeated threats with no actions taken to carry out the threats,"<sup>49</sup> does not allow adjudicators to take these particularities of children's cases into account, and would instead result in the denial of protection for children who face serious harm upon return to their home country.

*One day, Evelin\* and Cindy's\* mother left the girls at home while she ran errands. The sisters waited hours for their mother to return, but she never came back. Evelin and Cindy later learned that several family members—including their mother—had been kidnapped by non-state actors and were presumed dead. The sisters, fearing for their lives, sought safety in the United States. Evelin and Cindy faced significant hurdles after they arrived. Family members, former neighbors, and family friends refused to help the sisters because they feared retaliation if they did. It was clear that Evelin and Cindy faced real danger if they were returned to their home country. Although Evelin and Cindy were only children, they were persecuted based on their familial ties and they were granted asylum because of a case-specific evaluation of the harm they faced as children.*  
\*Pseudonym

#### 4. *The Proposed Rule Redefines "Firm Resettlement" to Include Those Who Are Not Firmly Resettled.*

The proposed rule would expand the definition of firm resettlement. Under the new rule, if the asylum seeker has resided in another country for a year or more, even if there is no offer or pathway to permanent status, the asylum seeker would be considered firmly resettled and barred from asylum. In the same way that a child's journey to the United States or location of entry into the United States is outside of their control, so is whether or not the child remains in another country for an extended period of time. For example, families currently forced to wait for their immigration proceedings in Mexico under the so-called "Migrant Protection Protocols" (MPP)

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, ¶ 10; see also *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

<sup>48</sup> See, e.g., *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012); *Hernandez-Ortiz*, 496 F.3d at 1046; *Wang v. Gonzales*, 405 F.3d 134, 143-144 (3d Cir. 2005) ("We also are assuming without deciding that in an appropriate case persecution of parents can be persecution of a child even though the effect on the child is only a collateral consequence of his parents' persecution.").

<sup>49</sup> 85 Fed. Reg. at 36281.

are required to remain there by the U.S. government. The children in these families have no control over how long they will remain in Mexico. Furthermore, children in MPP have no path to status in Mexico and are often in dangerous circumstances in makeshift encampments along or close to the U.S. border.<sup>50</sup> Children and adults in these situations must not be considered firmly resettled for the purposes of asylum law and must still have an opportunity to seek asylum in the United States.

Additionally, the proposed rule allows the firm resettlement of the parent to be imputed to the child, which deprives children their right to be viewed as individual rights holders. Children are “active subjects of rights,”<sup>51</sup> including the right to seek asylum. Children’s cases should be examined independently of the parent(s), and a bar to asylum should not be inferred.

5. *The Proposed Rule Uses “Discretion” to Add New De Facto Bars to Asylum.*

The proposed rule includes multiple adverse factors that adjudicators must consider when determining whether to grant asylum, including unlawful entry to the United States, transit through or stay in a country or countries en route to the United States, and past criminal convictions, even convictions that maybe have been expunged, vacated, or modified. Those adverse factors are not only unlawful, but they also limit adjudicators’ discretion and would negatively impact children seeking asylum.

The agencies have already put forward regulations that would deny asylum based on where an asylum seeker enters the United States or based on their transit through another country en route to the United States. As the Young Center has explained in comments opposing those regulations, denying children asylum because of how they enter or seek to enter the United States, or because of their path to the United States, is clearly unlawful under U.S. law and international law.<sup>52</sup> Additionally, a federal court recently vacated the interim final rule that would have instituted a third-country transit asylum ban.<sup>53</sup>

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<sup>50</sup> *Conditions in Matamoros Refugee Camp Put Children’s Health and Safety at Risk*, YOUNG CTR. FOR IMMIGRANT CHILDREN’S RTS. (Jan. 28, 2020), <https://www.theyoungcenter.org/stories/2020/1/28/conditions-at-matamoros-refugee-camps-put-children-at-risk>.

<sup>51</sup> *UNHCR Guidelines on Child Asylum Claims*, *supra* note 25, ¶ 3.

<sup>52</sup> See Young Ctr. For Immigrant Children’s Rts., Comment Letter on the Executive Office for Immigration Review (EOIR) Rule: Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims 2-3 (Jan. 8, 2019) <https://www.regulations.gov/document?D=EOIR-2018-0001-2814>; Young Ctr. For Immigrant Children’s Rts., Comment Letter on the Executive Office for Immigration Review (EOIR) Rule: Asylum Eligibility and Procedural Modifications (Aug. 15, 2019), <https://www.regulations.gov/document?D=EOIR-2019-0002-1212>.

<sup>53</sup> *Cap. Area Immigrants’ Rts. Coal. v. Trump*, No. 1:19-cv-02117-TJK (June 30, 2020) (memorandum opinion), <https://www.humanrightsfirst.org/sites/default/files/CAIR%20Coalition%20Order%5B3%5D.pdf>.

Denying children the ability to seek asylum based on their path to the United States or the location at which they enter or seek to enter the United States ignores the realities of childhood. Few children control precisely where they will enter a country when they are fleeing on their own. Children who travel with adults are subject to the decision-making of those adults—including how they come to the U.S. border and when, where, and how they cross it. Those adults may be well-intentioned parents or adult family members. But children also travel to the United States under the control of smugglers or traffickers. Children traveling alone are even more unlikely to know or control just how or when they will journey to a new country. Rather than take those realities into account, the proposed rule would likely deny children asylum—including those who have legitimate claims of persecution or fear persecution upon return to their country of origin—simply because of the route or manner of arrival into the United States, factors that are rarely under their control.

The proposed rule also requires adjudicators to consider past criminal convictions, including those expunged, vacated, or modified, as an adverse factor to granting of asylum. To begin with, criminal convictions encompass a wide range of acts unrelated to public safety and which could go beyond the standards for criminal bars that already exist in immigration law. As written, the proposed rule could permit the denial of asylum for non-serious charges, which are not what Congress had in mind as crimes that would be a bar to the grant of asylum. We note that per the Immigration and Nationality Act and *Matter of Devinson*,<sup>54</sup> juvenile charges or convictions are not considered criminal convictions, and therefore could not and should not be considered under the proposed rule.

In those rare cases when immigrant children have a confirmed or verified criminal conviction, they should not be unduly penalized for actions taken when they were young. Research shows that, given children's ages and development, they do not fully understand the consequences of decisions to engage in criminal activity.<sup>55</sup> The U.S. Supreme Court has cautioned that "children cannot be viewed simply as miniature adults."<sup>56</sup> As the Court has explained: "The law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around

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<sup>54</sup> 22 I&N Dec. 1362 (BIA 2000).

<sup>55</sup> See, e.g., Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742-43 (2000), [http://www2.law.columbia.edu/fagan/courses/law\\_socialscience/juvenile\\_justice/documents/Cauffman\\_and\\_Steinberg.pdf](http://www2.law.columbia.edu/fagan/courses/law_socialscience/juvenile_justice/documents/Cauffman_and_Steinberg.pdf). Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 JUVENILE CTR. CHILD & COURTS 151, 155 (1999) (concluding that "research supports the notion that adolescents' failure to consider long-term consequences may compromise youthful decision making" and that "[a] failure to consider consequences may be due to a lack of understanding of the consequences as well as a failure to consider them."). Thomas Grisso, *What We Know About Youth's Capacities*, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267-269 (Thomas Grisso and Robert G. Schwartz, eds.) (2000) (reviewing literature on effects of emotion on children's cognitive capacities).

<sup>56</sup> *JDB v. North Carolina*, 564 U.S. 261, 274 (2011).

them.”<sup>57</sup> The Supreme Court also has observed that children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>58</sup>

Under our nation’s jurisprudence, guided by firmly-established principles of child development, it would be illogical to have a rule assuming that all children knowingly and willingly participate in criminal activity and should therefore be barred from asylum without consideration for their maturity, vulnerability, and trauma, or coercion or desperation that led to certain acts. Rather than allowing adjudicators to look at children differently from adults, the proposed rule would inappropriately penalize children with criminal convictions from receiving asylum—a result with life or death consequences for those sent back to persecutors.

B. The Proposed Rule Eliminates Important Procedural Protections for Children’s Asylum Claims.

1. *The Proposed Rule Denies Children Their Day in Court by Allowing “Pretermission.”*

The proposed rule would allow an immigration judge to deny asylum to child asylum seekers without even seeing or hearing from the child, on the judge’s initiative or at the request of a DHS attorney, if the judge determines that an application does not adequately present a claim. This would deny children due process and would upend decades of precedent and practice before the immigration courts.<sup>59</sup>

More than half of children who appear in immigration court do not have an attorney.<sup>60</sup> Many children come from countries where access to education is limited or was unavailable due to the circumstances that caused them to flee, making it unlikely that they can fully understand the forms required to make an asylum claim. It is unreasonable to expect any child to understand the complexities of U.S. asylum law and lay out every element of their asylum claim by themselves without representation. Additionally, because of administration policies, many children must pursue their claim for asylum while still in government custody and separated from family.<sup>61</sup> In an institutionalized environment away from family, many children are unwilling to share intimate details of their story and the type of violence they fled.

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<sup>57</sup> *Id.* at 273.

<sup>58</sup> *Id.* at 272 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

<sup>59</sup> *See In re Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (“In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”)

<sup>60</sup> *Children: Amid a Growing Court Backlog Many Still Unrepresented*, TRACIMMIGRATION (Sept. 28, 2017) (showing that three out of four children whose cases began in 2017 were unrepresented), <https://trac.syr.edu/immigration/reports/482/>.

<sup>61</sup> Lomi Kriel, *New Trump Administration Policies Fast-Track Some Children’s Immigration Court Hearings, Including Video Pilot in Houston*, HOUSTON CHRONICLE (Mar. 3, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/New-Trump-administration-policies-fast-track-some-15105573.php>.

Ultimately, every child has a unique story to tell. These stories are often traumatic, and children exhibit great courage when speaking about what happened to them. A child's presence in immigration court, in the same room as the decision maker, ensures that their humanity, individuality, and status as a child is front and center in their case. Without ever seeing or hearing from a child, immigration judges would not have the opportunity see the child whose future they are deciding. As a result, children's meritorious cases could be denied before they have any opportunity to tell their story, much less a fair opportunity, and those children would be returned to the persecution that they fled.

*In the case of Evelin\* and Cindy\* mentioned above, one of the sisters testified about the harm she and her sister would face if they returned to their home country. The adjudicator noted that the testimony demonstrated how deeply affected Evelin and Cindy were by the harm to their family. The adjudicator recognized this testimony as important to the determination that from Evelin's and Cindy's perspectives, they suffered persecution and should be granted asylum. Under the proposed rule, the adjudicator could have missed the opportunity to hear Evelin and Cindy's important testimony and denied them asylum.*  
\*Pseudonym

Rather than deny children the opportunity to appear in court, the agencies should ensure children a full and fair opportunity to present an asylum claim, including the opportunity to appear in person before an immigration judge.

2. *The Proposed Rule Radically Redefines the Definition of "Frivolous" and Permits Asylum Officers to Refer Claims Determined Frivolous to Immigration Court.*

As discussed above, the TVPRA requires that unaccompanied children's asylum claims be heard by asylum officers, rather than immigration judges. However, the proposed rule expands the definition of a "frivolous" claim and allows adjudicators to impose one of the harshest bars in immigration law where they determine a claim lacks "merit" or is "foreclosed by applicable law."<sup>62</sup> As explained earlier, many children do not have an attorney to support their asylum claim, which would permit adjudicators to deny meritorious claims because a child was unable to decipher complex immigration law. The proposed rule would also allow asylum officers who determine that a child's claim is "frivolous" to refer children's cases to immigration court without first examining the merits of the claim. Under the rule, unaccompanied children, who may now be forced to seek other forms of protection, would be forced into adversarial proceedings before an immigration judge in clear violation of the TVPRA and in a manner that would subject them to all of the harms attendant to adversarial hearings where there is no guarantee of representation.

### **III. Conclusion**

The Young Center opposes the adoption of any rule that would add to the already burdensome barriers that children must overcome to seek protection in the United States. U.S. and

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<sup>62</sup> 85 Fed. Reg. at 36295.



international law codify the right to seek asylum and lay out specific considerations for child asylum claims that take into account a child's age, maturity, and best interests. The proposed rule would directly contradict those protections and eviscerate asylum protections that have been in U.S. law for decades, denying safety for many child asylum seekers. We therefore urge DOJ and DHS to rescind the proposed rule in its entirety.

Respectfully submitted,

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