

# EXHIBIT 1

1 NATASHA E. DAUGHTREY (SBN 319975)

2 *NDaughtrey@goodwinlaw.com*

3 **GOODWIN PROCTER LLP**

4 601 South Figueroa Street

5 41st Floor

6 Los Angeles, California 90017

7 Tel.: +1 213 426 2500

8 Fax: +1 213 623 1673

9 Attorneys for *Amicus*

10 Kids in Need of Defense

11 *[Additional counsel listed on signature page]*

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 WESTERN DIVISION

15  
16 JENNY FLORES, et al.,

17 Plaintiffs,

18  
19 v.

20 WILLIAM BARR,

21 Defendant.  
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Case No. 2:85-CV-04544-DMG-AGR

**BRIEF OF *AMICI CURIAE* OF  
KIDS IN NEED OF DEFENSE ET  
AL. IN SUPPORT OF  
PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN SUPPORT  
OF MOTION TO ENFORCE  
SETTLEMENT**

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1 **INTEREST OF AMICI CURIAE**

2 The Amici Curiae (“Amici”), *see* Ex. A, serve immigrant and refugee  
3 children who are or have been in the custody of the Department of Homeland  
4 Security (DHS), the Department of Health and Human Services (HHS), or both.  
5 The manner in which DHS and HHS detain, process, treat, and release minors has a  
6 profound impact on children’s abilities to access needed social services, legal  
7 representation, and humanitarian protection. Accordingly, Amici have a  
8 compelling interest in ensuring that the Flores Settlement Agreement (the  
9 “Settlement,” or “FSA”) remains in effect until it is fully and faithfully  
10 implemented by regulations. The final rule at issue not only fails to implement the  
11 FSA, but actively undermines its purposes and those of other critical federal laws  
12 and policies pertaining to children in the US immigration system.

13 **INTRODUCTION**

14 Children who have fled violence, persecution, abandonment, and other harm  
15 face enormous challenges upon arriving to the U.S., including healing from a  
16 history of trauma while navigating the U.S. immigration system. Protections that  
17 recognize the profound vulnerability and distinct needs of children, particularly  
18 unaccompanied children, are embodied in the FSA, the William Wilberforce  
19 Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),<sup>1</sup> the  
20 Homeland Security Act of 2002 (HSA),<sup>2</sup> regulations, longstanding agency policies,  
21 and the principle of the best interests of the child enshrined in state child welfare  
22 law.

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26 <sup>1</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L.  
110-457 122 Stat. 5044 (2008) (“TVPRA”).

27 <sup>2</sup> Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002)  
28 (“HSA”).

1 The Settlement calls for the promulgation of final regulations that implement  
2 its “relevant and substantive” terms and are “not inconsistent” with its terms.<sup>3</sup>  
3 Twenty years after its implementation, and following the enactment of laws and  
4 policies consistent with the Settlement’s goals, Defendants have proposed a final  
5 rule that purports to provide “similar” substantive protections and standards and  
6 satisfy the Settlement’s “basic purpose,”<sup>4</sup> while simultaneously calling the  
7 Settlement a “loophole” that needs to be “closed.”<sup>5</sup>

8 In fact, the Final Rule contravenes the substance and purpose of the FSA,  
9 while also rolling back protections enshrined in the TVPRA and other substantive  
10 policies. Amici will discuss some components of the Final Rule that contradict the  
11 Settlement’s language and expose children to harm, contrary to the Settlement’s  
12 intent, including: (1) rolling back Congressionally mandated basic protections  
13 based on repeated redeterminations of children’s status as “unaccompanied alien  
14 children”; (2) the modification and relaxation of standards under which children are  
15 held and transferred; (3) the reassignment of bond redetermination hearings from  
16 neutral immigration judges to hearing officers within HHS; (4) the erosion of third-  
17 party monitoring and oversight; and (5) the erroneous reliance on expanded  
18 detention as a means of deterring child migration.

19 In these and other areas, Defendants unilaterally substitute their judgment for  
20 that of the Settlement’s drafters and the Court. Tellingly, Defendants view certain  
21 public comments expressing concern about inconsistency with the FSA as a reading  
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23 <sup>3</sup> FSA ¶ 9; Dkt. No. 101, Ex. E.

24 <sup>4</sup> Apprehension, Processing, Care, and Custody of Alien Minors and  
25 Unaccompanied Alien Children, 84 Fed. Reg. 44392 (Aug. 23, 2019) (to be  
26 codified at 45 C.F.R. § 410) (“Final Rule”) (emphasis added)

27 <sup>5</sup> “Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS  
28 Federal Rule on Flores Agreement” (Aug. 21, 2019),  
<https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement>.



1 of the FSA that “would mean that the Government is indefinitely bound by a  
2 decades-old consent decree—a consent decree signed by an Administration no  
3 longer in office, that can never be altered, even through Congress’ sanctioned  
4 method of adopting binding policies through notice and comment rulemaking under  
5 the Administrative Procedure Act.”<sup>6</sup> Yet the sanctioned method for departing from  
6 the binding terms of a settlement agreement is not rulemaking, but a motion to this  
7 Court for relief from judgment.<sup>7</sup>

8 The discussion that follows reflects only some of the ways in which the Final  
9 Rule not only fails to support termination of the Settlement, but also runs counter to  
10 the best interests – in particular, the safety – of unaccompanied children.

### 11 **ARGUMENT**

#### 12 **I. Congressionally Mandated Basic Protections for Unaccompanied** 13 **Children Must Not Be Negated Through Repeated Redeterminations** 14 **Under the UAC Definition.**

15 The term “unaccompanied alien child” does not appear in the FSA, but was  
16 first defined in the HSA, signaling Congress’ concern for minors who enter the U.S.  
17 immigration system in that vulnerable status. The term appears in the Final Rule  
18 “[b]ecause the HSA and the TVPRA specifically define UACs and impose certain  
19 requirements related only to UACs”.<sup>8</sup> In 2002, Congress assigned the care and  
20 custody of unaccompanied children not to DHS, but to HHS.<sup>9</sup> Remarks in the  
21 Congressional Record reflect a protective intent: “It would not be appropriate to

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22 <sup>6</sup> See Final Rule *supra* n.4 at 44483.

23 <sup>7</sup> See, e.g., *Horne v. Flores*, 557 U.S. 433, 488 (2009) (discussing Federal Rule of  
24 Civil Procedure 60(b)(5) as the proper mechanism for the government to seek to  
25 modify a consent decree); see also *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S.  
26 367, 388 (1992) (stating that if the request rests on changes in law, the movant must  
27 demonstrate that such changes in law have made “one or more of the obligations  
28 placed upon the parties . . . impermissible,” or “make legal what the decree was  
designed to prevent.”)

<sup>8</sup> See Final Rule *supra* n.4 at 44412.

<sup>9</sup> See HSA *supra* n.2 at § 462 (b)(1); see also 6 U.S.C. § 279(b)(1).

1 transfer this responsibility to a Department of Homeland Security. . . ORR has  
2 decades of experience working with foreign-born children, and ORR administers a  
3 specialized resettlement program for unaccompanied refugee children.”<sup>10</sup>

4 Building on this foundation, the TVPRA mandated a set of basic safeguards  
5 relating to children’s apprehension, screening, custody, processing, adjudication,  
6 and services during and after federal custody – all keyed to the statutory UAC  
7 definition, as Defendants repeatedly note (e.g., 84 Fed. Reg. 4412, 4427, 44491).  
8 Defendants emphasize that “[UAC] status could change if an individual turns  
9 18...or is placed with a legal guardian”,<sup>11</sup> but the fact of having arrived in the U.S.  
10 at a given time in a vulnerable status does not change. This Court must presume  
11 that Congress, too, understood that a child’s age advances, and that the care of a  
12 parent or legal guardian is not only possible, but a desirable goal. It does not follow  
13 therefrom that Congress contemplated interruption of the protections it conferred on  
14 UAC. In decreeing that “[a]n alien who is no longer a UAC is not eligible to  
15 receive legal protections *limited* to UACs”<sup>12</sup>, the presumption that such a limitation  
16 exists is unwarranted.

17 Fundamental to its statutory scheme, Congress commanded every federal  
18 agency (DHS included) to notify HHS of the presence or suspected presence of a  
19 UAC within 48 hours, and transfer UACs to HHS within 72 hours.<sup>13</sup> Congress  
20 thereby charged DHS with the duty to determine whether a child the Department  
21 encounters is or *may be* a UAC, but did not specify any authority to rescind such a  
22 determination. Thus, by congressional design, a vast majority of UAC who  
23 encounter DHS are promptly identified as such,<sup>14</sup> triggering measures to enhance

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25 <sup>10</sup> 148 Cong. Rec. S8180 (2002) (letter from Sen. Lieberman & Sen. Thompson).

26 <sup>11</sup> See Final Rule *supra* n.4 at 44491.

27 <sup>12</sup> See 8 C.F.R. § 236.3(d); Final Rule *supra* n.4 at 44526, 44531 (emphasis added).

28 <sup>13</sup> See TVPRA *supra* n.1 at § 235(b)(2)(3); 8 U.S.C. § 1232(b)(2), (3).

<sup>14</sup> See ACF, *Fact Sheet: Unaccompanied Alien Children (UAC) Program* (Aug. 8, 2019) <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children->

1 child safety and reduce some of the barriers to a child’s meaningful participation in  
2 the immigration system. Among these measures are the right to removal  
3 proceedings under INA § 240,<sup>15</sup> access to counsel “to the greatest extent  
4 practicable,”<sup>16</sup> safety assessments by ORR before UACs are released from federal  
5 custody,<sup>17</sup> availability of child advocates,<sup>18</sup> and voluntary departure at no cost to the  
6 UAC.<sup>19</sup>

7 That these and other TVPRA protections must persist beyond a change in  
8 UAC status is evident in multiple ways:

- 9 • The simplest example is that several TVPRA protections for UAC were  
10 enacted and/or codified under the heading “Permanent protection for  
11 certain at-risk children.”<sup>20</sup>
- 12 • Some UAC protections, by their nature, would be of little or no value if  
13 interrupted prematurely. It is impermissible to construe a statute in a way  
14 that renders any of its terms ineffective.<sup>21</sup> Thus, for example, the statutory  
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16 Program-Fact-Sheet.pdf (“UAC are referred to ORR by another federal agency,  
17 usually the Department of Homeland Security (DHS). Most children are placed into  
18 ORR care because they were apprehended by immigration authorities while trying  
19 to cross the border...”).

20 <sup>15</sup> See TVPRA *supra* n.1 at § 235(a)(5)(D), 8 U.S.C. § 1232(a)(5)(D). This allows  
21 children who may otherwise be subject to expedited removal to pursue relief from  
22 removal before an immigration judge.

23 <sup>16</sup> *Id.* at § 235(c)(5).

24 <sup>17</sup> *Id.* at § 235(c)(3).

25 <sup>18</sup> *Id.* at § 235(c)(6).

26 <sup>19</sup> *Id.* at § 235(a)(5).

27 <sup>20</sup> *Id.* at § 235(d). See *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015)

28 (recognizing that although statutory “headings are not commanding,” they may  
provide important “cues” about congressional intent).

<sup>21</sup> See *United States v. Powers*, 307 U.S. 214, 217 (1939) (“There is a presumption  
against a construction which would render a statute ineffective or inefficient, or  
which would cause grave public injury or even inconvenience.”); *First Charter Fin.  
Corp. v. United States*, 669 F.2d 1342, 1350 (9th Cir. 1982) (“Construction which  
gives effect to all of the words of a statute or regulation is preferred over an

1 exemption for UAC from the one-year filing deadline for asylum<sup>22</sup> must  
2 not be read in such a way that the one-year bar could be reinstated against  
3 a child later determined to be “no longer a UAC” on the eve of expiration  
4 of the one-year time limit, or even after.

- 5 • Other TVPRA provisions protect children over a period of time that may  
6 extend past release to a parent or the child’s 18th birthday. The TVPRA  
7 states that HHS “shall conduct follow-up services, during the pendency of  
8 removal proceedings, on children for whom a home study was conducted  
9 and is authorized to conduct follow-up services in cases involving  
10 children . . . who could benefit from ongoing assistance” – but does not  
11 specify that residing with a parent severs such services.<sup>23</sup>
- 12 • Stripping away UAC protections when UAC status changes would create  
13 counterproductive incentives. For example, a child applying for asylum  
14 after a “redetermination” would face an adversarial hearing in  
15 immigration court.<sup>24</sup> This is not conducive to the child’s participation in  
16 the process and may compound past trauma. The pressure of an  
17 impending “redetermination” could thus incentivize a UAC to hurriedly  
18 file an asylum application, narrating painful and traumatic events in detail,  
19 but without assistance and adequate social services support. This lack of  
20 support and preparation will diminish the child’s claim and increase  
21 system inefficiencies.

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24 interpretation which renders some of the statute or regulation ineffective.”); 73 Am.  
25 Jur. 2d Statutes § 156 (“A statute should not be construed in such manner as to  
26 render it partly ineffective or inefficient if another construction will make it  
27 effective.”).

28 <sup>22</sup> See TVPRA *supra* n.1 at § 235(d)(7).

<sup>23</sup> *Id.* at § 235(c)(3)(B).

<sup>24</sup> *Cf.* 8 U.S.C. § 1158(b)(3)(C) (USCIS has initial jurisdiction over an asylum application filed by a UAC).

1 The TVPRA protections were adopted “to protect children . . . who have  
2 escaped traumatic situations such as armed conflict, sweatshop labor, human  
3 trafficking, forced prostitution and other life threatening circumstances” and to  
4 fulfill “a special obligation to ensure that these children are treated humanely and  
5 fairly.”<sup>25</sup> The corresponding vulnerabilities do not end when a child turns 18 or  
6 reunites with a parent -- and most often persist throughout the long trajectory of an  
7 immigration case. As explained in 2012 by the CIS Ombudsman, the “TVPRA’s  
8 procedural and substantive protections were designed to remain available to UACs  
9 throughout removal proceedings, housing placement, and the pursuit of any  
10 available relief.”<sup>26</sup>

11 In the asylum context, DHS initiated a practice of multiple redeterminations  
12 under the UAC definition soon after the TVPRA took effect.<sup>27</sup> That approach  
13 undermined efficiency, uniformity, and predictability, and forced asylum officers to  
14 make assessments not within their expertise, as reported by the CIS Ombudsman  
15 following a study and extensive stakeholder input.<sup>28</sup> The agency reversed the  
16 practice after four years.<sup>29</sup> Yet in the Final Rule, both agencies adopt a policy of  
17 multiple redeterminations.<sup>30</sup> Such serial redeterminations would entail repetitive  
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19 <sup>25</sup> 154 Cong. Rec. S10886 (2008).

20 <sup>26</sup> Office of the Citizenship and Immigration Services Ombudsman, “Ensuring a  
21 Fair and Effective Asylum Process for Unaccompanied Children” (Sept. 20, 2012),  
22 [https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-  
process-for-uac.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf) .

23 <sup>27</sup> See Joseph E. Langlois, Implementation of Statutory Change Providing USCIS  
24 with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien  
Children” (March 25, 2009) at 4-5.

25 <sup>28</sup> See Office of the Citizenship and Immigration Services Ombudsman *supra* n.26.

26 <sup>29</sup> Lori Sciallaba, Responses to Citizenship and Immigration Services Ombudsman  
27 Recommendations, “Ensuring a Fair and Effective Asylum Process for  
Unaccompanied Children” (Apr. 28, 2013).

28 <sup>30</sup> 8 C.F.R. § 236.3(d)(1) (DHS will determine status “at the time of encounter or  
apprehension and prior to the detention or release of such alien”); see Final Rule

1 questioning of children during a time when they are detained and vulnerable.  
2 Children could be reclassified one or more times, potentially leading to changes in  
3 custody and sowing uncertainty in case timelines and legal decision-making. These  
4 consequences are contrary to the goals of the FSA and violate well-accepted  
5 principles of child protection which prioritize stability and permanency.<sup>31</sup>

6 DHS states that its Final Rule on UAC determinations offers “greater fidelity  
7 to the laws affording special legal protections to UACs.”<sup>32</sup> Yet the rule utilizes  
8 redeterminations under the UAC definition in a manner that would strip children of  
9 critical protections, including the right to hearings better suited to their age and  
10 capacities. Instead of deploying a new rule to “allow immigration officers to re-  
11 evaluate a child’s UAC status at each encounter,”<sup>33</sup> Defendants should implement  
12 the durable protections Congress offered.

## 13 **II. Expansive Exceptions for Emergencies and Influxes Create** 14 **Loopholes in the Final Rule’s Custody Standards.**

15 Regarding the treatment of children immediately following apprehension, the  
16 FSA directs the Government to transfer minors from initial custody to a licensed  
17 program within three to five days of apprehension.<sup>34</sup> Among the limited  
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19 *supra* n.4 at 44455 (“HHS will continuously evaluate whether an individual is a  
20 UAC”).

21 <sup>31</sup> See, e.g., Children’s Bureau, Admin. for Children & Families, U.S. DEP’T OF  
22 HEALTH & HUMAN SERVS., *Concept and History of Permanency in U.S. Child*  
23 *Welfare*, <https://www.childwelfare.gov/topics/permanency/overview/history/>  
24 (noting that “issues related to permanency” were explicitly included in federal  
25 legislation for the first time in the 1997 Adoption and Safe Families Act, which  
26 “connected safety and permanency by demonstrating how each factor was  
27 necessary in achieving overall child well-being”).

28 <sup>32</sup> See Final Rule *supra* n.4.

<sup>33</sup> *Id.* at 44426.

<sup>34</sup> This transfer must be made within three days, if a licensed program is available  
in the district in which the child was apprehended, and within five days, if not. See  
FSA *supra* n.3 at ¶ 12.



1 exceptions to this FSA requirement are cases of “influx” or “emergency,” during  
2 which the time limits are relaxed and children must be transferred to a licensed  
3 program “as expeditiously as possible.”<sup>35</sup>

4 With respect to “unaccompanied alien children,” the TVPRA requires  
5 transfer from DHS to HHS within 72 hours, barring “exceptional circumstances.”<sup>36</sup>  
6 HHS must then “promptly” place the child “in the least restrictive setting that is in  
7 the best interest of the child.”<sup>37</sup> Thus, in transferring an unaccompanied child, DHS  
8 and HHS must meet the TVPRA’s more rigorous timelines, rather than those of the  
9 FSA.

10 **a. The Final Rule’s Outdated Definition of Influx Allows**  
11 **Defendants to Continuously Operate Under Relaxed Standards,**  
12 **Contrary to the Best Interests of Children.**

13 The Final Rule justifies departures from various FSA provisions as  
14 “respond[ing] to changed factual and operational circumstances,”<sup>38</sup> yet selectively  
15 retains the FSA’s fixed definition of “influx,” defined as having “more than 130  
16 minors eligible for placement in a licensed program . . . including those who have  
17 been so placed or are awaiting such placement.”<sup>39</sup> We urge the Court to consider  
18 the number 130 in relation to the number of unaccompanied children in custody at  
19 the time of the FSA’s approval, when contemplating what number would constitute  
20 an influx today.

21 Since 1997, arrivals of unaccompanied minors and families have increased,  
22 and the Government’s operations and capacity have grown dramatically in  
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25 <sup>35</sup> *Id.* at ¶ 12A(3).

26 <sup>36</sup> *See* TVPRA *supra* n.1, 8 U.S.C. § 1232(b)(3).

27 <sup>37</sup> *Id.*, 8 U.S.C. § 1232(c)(2)(A).

28 <sup>38</sup> *See, e.g.,* Final Rule *supra* n.4 at 44397, 44393.

<sup>39</sup> *See* FSA *supra* n.3 at ¶ 12B; *see also* Final Rule *supra* n.4 at §§ 236.3(b)(10),  
410.101, 410.202(a)(3), 410.202.

1 response.<sup>40</sup> CBP has created several centralized processing centers for migrants,  
2 including two facilities in Texas for unaccompanied children and families.<sup>41</sup> HHS  
3 notes that it “maintains the ability to rapidly set-up, expand, or contract influx  
4 infrastructure and services as needed.”<sup>42</sup>

5 Despite these developments, the Final Rule relieves both Departments from  
6 strict compliance with the FSA’s time periods, effectively permitting Defendants to  
7 operate under the FSA’s more flexible standards for influx continuously.  
8 Consequently, the agencies may delay the transfer of children to licensed facilities  
9 better suited to provide appropriate care.

10 DHS asserts that it “makes sense” to retain the fixed “influx” definition,  
11 given its inclusion in the FSA, that it “remains relevant to current operational  
12 realities,” and in light of “the need for DHS to have additional flexibility when it is  
13 dealing with anything other than a very small and manageable number of minors in  
14 its care.”<sup>43</sup> Yet elsewhere in the Final Rule, DHS repeatedly emphasizes the need to  
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21 <sup>40</sup> See Final Rule *supra* n. 4 at 44423 (“CBP encountered 107,498 minors and  
22 UACs in FY 2018. Additionally, in May of 2019, the USBP apprehended 11,507  
23 UACs along the southwest border along with 84,532 family units (accompanied  
24 minors and their parents). . . . Thus, these numbers show that CBP regularly has  
more than 130 minors and UACs in custody eligible for placement in a licensed  
facility.”).

25 <sup>41</sup> See Dkt. No. 625 at 13-14 (Second Report of the Independent Monitor discussing  
26 the central processing center known as Ursula and a new processing center near the  
27 Donna port of entry that is specifically designed for children and families and  
became operational on May 2, 2019).

28 <sup>42</sup> See Final Rule *supra* n.4 at 44453.

<sup>43</sup> *Id.* at 44423.



1 *modify* the FSA, for example, to allow longer detention of children with families,<sup>44</sup>  
2 again citing “operational realities.”<sup>45</sup> DHS cannot have it both ways.

3 In both examples, DHS interprets the FSA’s terms to accord with the  
4 Government’s policy priorities, preferences, and convenience.<sup>46</sup> From authority to  
5 self-license family detention facilities to the codification of a continuous influx, the  
6 Final Rule provides Defendants with broad discretion to dispense with the FSA’s  
7 requirements as they see fit.

8 Assurances that “CBP makes efforts to transfer all individuals, especially  
9 minors, out of CBP facilities as expeditiously as possible, and generally within 72  
10 hours”<sup>47</sup> are aspirational statements that lack binding force. They pale in light of  
11 Plaintiffs’ counsel’s recent motion documenting children spending weeks in CBP  
12 custody in unsanitary conditions, without access to adequate food, water,  
13 toothbrushes, and soap.<sup>48</sup> The Final Rule grants HHS greater flexibility to hold  
14 children for longer periods in large-scale influx facilities rather than licensed  
15 shelters. This rule change follows inadequate efforts to prepare for large numbers of  
16 unaccompanied children over several years.

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19 <sup>44</sup> *See id.* at 44398 (“[B]y modifying the literal text of the FSA (to the extent it has  
20 been interpreted to apply to accompanied minors) in limited cases to reflect and  
21 respond to intervening statutory and operational changes, DHS ensures that it  
22 retains discretion to detain families, as appropriate and pursuant to its statutory and  
23 regulatory authorities, to meet its enforcement needs, while still providing  
24 protections to minors that the FSA intended.”).

25 <sup>45</sup> *See, e.g., id.* at 44423, 44428, 44502, 44504, 44520, 44525.

26 <sup>46</sup> HHS states that “[f]or the purposes of continuity of joint operations and for the  
27 reasons DHS explains above, HHS adopts the same definition of influx.” *Id.* at  
28 44453.

<sup>47</sup> *Id.* at 44464.

<sup>48</sup> *See generally* Dkt. No. 572-1 (Plaintiffs’ Mem. of Points & Auths. in Support of  
Plaintiffs’ Ex Parte Application for a Temporary Restraining Order and Order to  
Show Cause).

**b. The Final Rule’s Broad Definition of “Emergency” Provides  
Undue Discretion to Relax FSA Standards.**

The Final Rule broadens the FSA’s definition of “emergency” from an act or event that prevents placement in a licensed program in the given time period to encompass an act or event “that prevents timely transport . . . of minors or *impacts other conditions provided by*” the Final Rule.<sup>49</sup> Despite this change, DHS contends that its definition “does not depart from how the FSA defines an emergency act or event,” but “recognizes that, in rare circumstances, an emergency may arise, *generally unanticipated*, that affects more than just the transfer of a minor from one facility to another.”<sup>50</sup> Yet the modified exception provides little clarity about the circumstances that might trigger a departure from the FSA’s requirements and the ways in which conditions for children may be affected.<sup>51</sup> Indeed, in describing the change DHS concedes that “the rule’s definition of ‘emergency’ . . . may create adequate cause to depart from any provision of § 236.3, not just the transfer timeline.”<sup>52</sup>

As with the exception for influx, Defendants provide themselves great latitude to depart from the FSA’s minimum standards.<sup>53</sup> In so doing, they prioritize operational efficiency above the safety of children. The FSA, with its core focus on

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<sup>49</sup> See Final Rule *supra* n.4 at 44526 §§ 236.3(b)(5), 410.101 (emphasis added).

<sup>50</sup> *Id.* at 44413 (emphasis added).

<sup>51</sup> DHS provides as examples an electrical failure, during which air conditioning may break and temperature might temporarily be affected, or a medical emergency, during which meals for minors may be temporarily delayed while urgent medical care is provided to a child. Final Rule *supra* n.4 at 44413-14.

<sup>52</sup> *Id.* at 44512.

<sup>53</sup> For example, the Final Rule states that CBP records any emergency situations requiring the temporary suspension of FSA requirements in its electronic systems of records and “[t]o the extent it is able, CBP also maintains a sufficient stockpile of supplies, such as snacks, at its facilities to ensure that there are sufficient supplies available in an emergency situation.” *Id.* at 44414.

1 ensuring all minors in government custody are treated with “dignity, respect and  
2 special concern for their particular vulnerability as minors,” demands far more.<sup>54</sup>

3 **III. The Final Rule Contravenes UACs’ Right to a Bond Redetermination**  
4 **Hearing by an Immigration Judge and Undermines Critical Due**  
5 **Process Protections Afforded in Such Hearings.**

6 The FSA provides that “[a] minor in deportation proceedings shall be  
7 afforded a bond redetermination hearing *before an immigration judge* in every case,  
8 unless the minor indicates on the Notice of Custody Determination form that he or  
9 she refuses such a hearing.”<sup>55</sup> Minors can appeal adverse bond redetermination  
10 decisions to the Board of Immigration Appeals and then to a federal Court of  
11 Appeals.

12 Final Rule § 410.810 removes bond redetermination hearings for UAC from  
13 the purview of an immigration judge and vests responsibility for the hearings with  
14 “an independent hearing officer employed by HHS.”<sup>56</sup> As discussed below, HHS’  
15 justifications for this departure from the Settlement are unsound.<sup>57</sup>

16 First and foremost, the Ninth Circuit held that the right to a bond hearing  
17 before an immigration judge as articulated in the FSA is consistent with and  
18 authorized by INA § 236, which gives the Attorney General authority (delegated to  
19 immigration judges in the regulations) to exercise discretion to release a detained  
20 alien on bond.<sup>58</sup> Neither the bond authority vested in immigration judges pursuant  
21 to INA § 236 nor a UAC’s right to a bond hearing before an immigration judge was  
22 revoked when the HSA assigned HHS responsibility for the care and placement of  
23

24 <sup>54</sup> See FSA *supra* n.3 at ¶ 11.

25 <sup>55</sup> *Id.* at ¶ 24A (emphasis added).

26 <sup>56</sup> See 45 CFR § 410.810.

27 <sup>57</sup> See Final Rule *supra* n. 4 at 44476, 44478.

28 <sup>58</sup> See *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017) (affirming the district court’s opinion in *Flores v. Lynch*, No. CV 85-4544-DMG-AGRx, 2017 WL 6049373 (C.D. Cal. Jan. 20, 2017)).

1 UACs.<sup>59</sup> Furthermore, “nothing in the TVPRA specifically states that it intended to  
2 cover the whole immigration scheme for unaccompanied minors” and the threshold  
3 question of “whether the child should be detained in the first place [...] is for an  
4 immigration judge at a bond hearing to decide.”<sup>60</sup> Furthermore, “the HSA and the  
5 TVPRA contain no indication that they are intended to encompass the entire  
6 immigration framework for unaccompanied minors” and the threshold question of  
7 “whether the child should be detained in the first place [...] is for an immigration  
8 judge at a bond hearing to decide.”<sup>61</sup> Reassigning it to HHS is an impermissible  
9 departure from FSA ¶ 24A.

10 **a. HHS’ Child Welfare Expertise Does Not in Itself Eliminate the**  
11 **Risk of Prolonged Detention of UACs in HHS Custody.**

12 HHS asserts that as a policy matter it should assume responsibility over bond  
13 hearings for children in its custody because it is an agency with expertise in child  
14 welfare best practices.

15 In practice and as contemplated in the Final Rule, § 410.810 is primarily  
16 applicable to children held in more restrictive secure or “medium-secure” settings,  
17 who have been found to present a flight risk or danger to self or others.<sup>62</sup> Last year,  
18 the Ninth Circuit found that certain HHS practices applicable to children in staff-  
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20 <sup>59</sup> *Id.*

21 <sup>60</sup> *Flores v. Lynch*, No. CV 85-4544-DMG-(AGRx), 2017 WL 6049373, at \*4 (C.D.  
Cal. Jan. 20, 2017).

22 <sup>61</sup> *Flores v. Sessions*, 862 F.3d at 876; *Flores v. Lynch*, No. CV 85-4544-DMG-  
23 AGRx, 2017 WL 6049373 (C.D. Cal. Jan. 20, 2017) \*12.

24 <sup>62</sup> See Final Rule *supra* n.4 at 44477. HHS’ assertion that “ORR custody of UACs  
25 is not the equivalent of civil detention or immigration detention” is misleading.  
26 The conditions and restrictions imposed on a child’s liberty in secure facilities and  
27 some medium-secure facilities mirror those of other civil, immigration and juvenile  
28 detention contexts. For example, the secure facilities currently contracted by HHS  
are also contracted by state juvenile detention authorities to detain juveniles  
adjudicated of offenses by state authorities, and share programming, security  
procedures, and staff.

1 secure and secure placements prolonged children’s detention and violated the FSA -  
2 -for example, making such placements for reasons not permitted by the FSA; failure  
3 to provide written notice of the reasons for such a placement; failure to comply with  
4 state child welfare laws regarding the administration of psychotropic medications;  
5 and failure to make and record prompt and continuous efforts to release children  
6 found not to present a danger or flight risk.<sup>63</sup>

7 Amici regularly provide legal services to UACs who are or have been held in  
8 restrictive placements including staff-secure or secure facilities, in some cases for  
9 many months or over a year. They witness first-hand the deleterious effects on  
10 children of restrictive placement for *any* period of time – which worsen when  
11 custody is prolonged. For many children in secure and staff-secure detention, past  
12 trauma is compounded by the conditions of restrictive custody. Detention fatigue  
13 can negatively impact functions like memory and decision-making, which in turn  
14 can impede the progression of their legal immigration case.

15 HHS’ social and child welfare expertise does not in itself adequately protect  
16 against the risk that children in custody may be subject to prolonged detention in  
17 violation of the FSA. As the Ninth Circuit held, the bond hearing provision at  
18 FSA ¶ 24A ensuring that children can challenge their detention before an  
19 immigration judge is a “fundamental protection guaranteed to unaccompanied  
20 minors.”<sup>64</sup> Departing from this fundamental protection unequivocally violates the  
21 FSA.

22 **b. The Final Rule Erodes Due Process Protections Required by**  
23 **the FSA, Including UACs’ Right to Have Their Detention**  
24 **Reviewed by a Neutral Adjudicator Outside HHS.**

25 Defendants assert that the new hearings before an independent hearing  
26 officer would provide “substantively the same functions as bond hearings under

27 <sup>63</sup> See <https://youthlaw.org/wp-content/uploads/1997/05/Flores-MTE-order.pdf>.

28 <sup>64</sup> *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017).

1 paragraph 24A of the FSA[.]”<sup>65</sup> The Final Rule accommodates just one of the  
2 numerous concerns of commenters by placing the initial burden of production on  
3 HHS to show that a child presents a danger to the community or is a flight risk,  
4 before the burden shifts to the child to show otherwise by a preponderance of the  
5 evidence.<sup>66</sup> But of particular concern is that the rule is devoid of any burden on  
6 HHS to also establish in the context of such hearings that the designated placement  
7 is in fact the least restrictive setting in the child’s best interest, which the FSA  
8 mandates when a child is placed or remains in secure detention.<sup>67</sup> The Ninth Circuit  
9 emphasized that in addition to providing children the right to challenge the basis of  
10 HHS’ denial of release, a critical function of bond hearings is also to provide  
11 children the right to challenge the basis for their *continued placement* in secure  
12 detention.<sup>68</sup>

13 The Final Rule also fails to adequately address the due process concerns that  
14 arise when the same agency that denies a child’s release due to a finding that he or  
15 she presents a danger to the community or is a flight risk is the agency charged with  
16 reviewing that decision. Supplanting the right to a bond hearing before an  
17 immigration judge with an internal agency hearing process provides HHS undue  
18 latitude to erode children’s rights as both the decision-maker and adjudicator.

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21 <sup>65</sup> See Final Rule *supra* n.4 at 44478.

22 <sup>66</sup> Final Rule *supra* n.4 at §410.810(b); in contrast, the Proposed Rule placed the  
23 sole burden on the UAC to show by a preponderance of the evidence that he or she  
24 will not be a danger to the community or flight-risk.

25 <sup>67</sup> See FSA *supra* n.3 at ¶ 21, 23; Exhibit E(2)(i).

26 <sup>68</sup> See *Flores v. Sessions*, 862 F.3d at 868 (“For those minors in secure detention,  
27 bond hearings additionally provide an opportunity to contest the basis of such  
28 confinement. For example, the TVPRA allows children to be placed in secure  
detention facilities only if they pose a safety risk to themselves or others, or have  
committed a criminal offense. Providing unaccompanied minors with the right to a  
hearing under Paragraph 24A therefore ensures that they are not held in secure  
detention without cause.”)



1        Additionally, § 410.810 significantly hinders UACs' access to appellate  
2 review of adverse agency decisions. Under that section, a UAC will be able to seek  
3 judicial review of an adverse hearing decision only after he or she has exhausted  
4 HHS' internal administrative appeals process,<sup>69</sup> but notably, there is no time period  
5 within which the agency must issue a final decision. It is foreseeable that a UAC  
6 who appeals to the Assistant Secretary may wait many weeks or months for a  
7 decision, thereby extending his or her stay in restrictive custody before he or she is  
8 able to seek judicial review.<sup>70</sup>

9        Replacing bond hearings with an internal HHS hearing process also may  
10 limit UACs' access to counsel in those proceedings. Under the current framework  
11 of legal services for UACs in HHS custody, HHS funds legal service providers for  
12 representation of children before the Department of Justice. But representation by  
13 HHS-funded legal service providers in internal HHS proceedings may present  
14 inherent conflicts and interfere with UAC's ability to obtain counsel.

15        In sum, § 410.810 impermissibly dilutes the critical protection of a bond  
16 hearing before an immigration judge, as provided by FSA ¶ 24A. HHS'  
17 justifications for supplanting this right with an internal agency process are deficient,  
18 and the Final Rule does not adequately safeguard against the risk that UACs in  
19 HHS' most restrictive placements will be subject to prolonged detention.

20        **IV. The Final Rule Eliminates Critical Terms Providing Third-Party**  
21        **Oversight and Monitoring and Fails to Ensure Compliance with FSA**  
22        **Standards and Protections.**

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24        <sup>69</sup> The Final Rule allows a UAC to lodge an appeal within 30 days to the Assistant  
25 Secretary of the Administration for Children and Families. *See* Final Rule *supra*  
n.4 at § 410.810 (e).

26        <sup>70</sup> In cases involving children who are close to aging out of HHS custody, judicial  
27 review of an HHS determination that he or she presents a danger to the community  
28 or is a flight risk is time-sensitive because it generally impacts consideration by  
DHS of a child's eligibility release on recognizance by DHS upon turning 18.

1 In the Final Rule, DHS purports to implement a policy to “help ensure that  
2 all DHS facilities satisfy applicable standards at all times,” but states that the  
3 Monitoring procedures codified in § 236.3(o) are intended “to assist in its own  
4 internal monitoring” and refer to “an internal agency practice.”<sup>71</sup> Problematically,  
5 the Final Rule dispenses with many of the FSA’s third-party monitoring and  
6 oversight provisions on the dubious grounds that “they were included to guide the  
7 operation of the agreement itself and, as such, are not relevant or substantive terms  
8 of the FSA.”<sup>72</sup> This argument is unavailing.

9 Contrary to Defendants’ assertions, the FSA’s monitoring provisions are at  
10 the very heart of the Parties’ Agreement. As evidenced by the history of the case,  
11 Plaintiffs’ repeated motions to enforce compliance with the Agreement, and the  
12 recent appointment of an Independent Monitor to oversee compliance with this  
13 Court’s orders, the FSA’s monitoring provisions are both plainly substantive and of  
14 enduring relevance and importance. The omission of these important safeguards in  
15 the Final Rule is fatal to Defendants’ effort to terminate the FSA.

16 As recently as June of this year, this Court ordered an Independent Monitor  
17 to take action to remediate conditions at Border Patrol facilities in Texas, where  
18 Plaintiffs’ counsel had reported children being held in unsanitary and frigid  
19 conditions, with insufficient food and clothing, and no access to soap, showers, or  
20 toothbrushes.<sup>73</sup> These circumstances are particularly troubling in light of the death  
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22 <sup>71</sup> See Final Rule *supra* n.4 at 44450.

23 <sup>72</sup> *Id.* at 44449. Although the Final Rule provides for third-party auditing of DHS’  
24 family detention facilities where state licensing is unavailable, audits would be  
25 limited to an evaluation of DHS’ compliance with its own standards, and DHS  
would select and employ the auditor evaluating the agency’s compliance.

26 <sup>73</sup> Miriam Jordan, *Judge Orders Swift Action to Improve Conditions for Migrant*  
27 *Children in Texas*, N.Y. TIMES (June 29, 2019),  
28 <https://www.nytimes.com/2019/06/29/us/migrant-children-detention-texas.html>;  
Dkt. No. 572-1 (Plaintiffs’ Ex Parte application for Temporary Restraining Order as  
to Why a Preliminary Injunction and Contempt Order Should not Issue)



1 of seven children while in or after being in the Government’s custody since Spring  
2 2018.<sup>74</sup>

3 The ability of Plaintiffs’ counsel to interview children in the Government’s  
4 custody in a confidential manner has been critical to identifying violations of the  
5 FSA and to seeking remedial action to ensure children are afforded the rights and  
6 treatment that the FSA requires. Internal monitoring, as provided by the Final Rule,  
7 is wholly inadequate to ensure compliance with the FSA’s terms, and moreover,  
8 fails to acknowledge the natural difficulty children would face in expressing  
9 concerns to Government officials—while detained and without counsel--about their  
10 treatment by the very authorities detaining them. Faithful implementation of the  
11 FSA’s terms demands that the Agreement’s third-party monitoring provisions be  
12 given full effect.

13 **V. The Final Rule Advances Incorrect Assumptions about Deterrence to**  
14 **Support the Expanded Detention of Children and Families.**

15 To deter the migration of children and families, the Final Rule allows for the  
16 detention of families, including minor children, together for the duration of their  
17 immigration proceedings. The Final Rule argues that family detention is important  
18 in part “due to the significant and ongoing influx of adults who have made the  
19 choice to enter the United States illegally with juveniles or make the dangerous  
20 overland journey to the border with juveniles, a practice that puts juveniles at  
21 significant risk of harm. The expectation that adults with juveniles will remain in  
22 the United States outside of immigration detention may incentivize these risky  
23 practices.”<sup>75</sup> Pointing to the Defendants’ detention of families throughout their  
24 proceedings in 2014, the Final Rule argues that “[a]lthough it is difficult to  
25 definitely prove a causal link . . . , DHS’ assessment is that this change helped stem  
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27 <sup>74</sup> See Dkt No. 625 at 36-41.

28 <sup>75</sup> See Final Rule, *supra* n.4 at 44403-44404.

1 the border crisis, as it correlated with a significant drop in family migration.”<sup>76</sup> By  
2 embracing expanded family detention for purposes of deterring future migration,  
3 Defendants overlook and miscast the factors, including extreme violence, that are  
4 driving migration of children with or without their parents and families to the U.S.’  
5 Southern border.

6 Many of the unaccompanied children Amici serve come from El Salvador,  
7 Guatemala, and Honduras. These countries are currently among the most dangerous  
8 in the world, and children are particularly frequently targeted for violence, sexual  
9 abuse, extortion, forced recruitment by gangs and narco-traffickers, and human  
10 trafficking.<sup>77</sup> Sexual and gender-based violence against women, children and  
11 LGBTI individuals is pervasive, and gangs frequently use such violence as a means  
12 of controlling territories or ensuring compliance with the gang’s demands.<sup>78</sup>

13 While the Final Rule frames migration as a choice, the reality is that many  
14 children and families in the region are forced from their homes, communities, and  
15 countries in search of protection that their own governments are either unable or  
16 unwilling to provide. High impunity rates for crimes and corruption leave many  
17 children and families without a means of securing safety within their countries of  
18 origin. In the face of prevailing conditions, the Defendants’ Final Rule retooling the  
19 FSA to justify prolonged detention of children is unlikely to effectively deter  
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21 <sup>76</sup> The Final Rule references a drop in family unit apprehensions at the Southwest  
22 Border from 68,445 in FY 2014 to 39,838 in FY 2015. *See* Final Rule *supra* n.4 at  
23 44405.

24 <sup>77</sup> *See* UNHCR, Children on the Run: Unaccompanied Children Leaving Central  
25 American and Mexico and the Need for International Protection (2014),  
<http://www.unhcr.org/56fc266f4.html>.

26 <sup>78</sup> Kids in Need of Defense & Human Rights Center Fray Matías de Córdova,  
27 *Childhood Cut Short: Sexual and Gender-based Violence Against Central*  
28 *American Migrant and Refugee Children* (June 2017), [https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report\\_June2017.pdf](https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report_June2017.pdf).

1 migration<sup>79</sup> yet will make families increasingly vulnerable. It also may prove  
2 unlawful, as the Defendants’ previous attempt to detain mothers and children for  
3 the general purpose of deterring immigration was enjoined by a federal court.<sup>80</sup>

4 Defendants state that “the primary objective of the rule is to implement the  
5 FSA in regulations, thereby terminating the FSA; it is not to utilize detention as a  
6 deterrent to migration.”<sup>81</sup> However, Acting DHS Secretary McAleenan’s own  
7 statements introducing the Final Rule belie Defendants’ motivations: “By  
8 eliminating the incentive to make the journey to the United States as a family, the  
9 new rule will reduce the unprecedented volume of family units that has strained the  
10 already limited resources of our Department components.”<sup>82</sup>

11 Rather than positing family detention as a deterrent to migration, the  
12 Defendants should re-double efforts to address the root causes of child and family  
13 migration from Central America and provide additional assistance to strengthen  
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17 <sup>79</sup> Muzaffar Chishti and Sarah Pierce, Migration Policy Institute, Policy Beat,  
18 *Trump Administration’s New Indefinite Family Detention Policy: Deterrence Not*  
19 *Guaranteed* (Sept. 26, 2018) (“While both detention and prosecution have been  
20 used by past administrations with some success to deter unauthorized flows of  
21 economic migrants, there is scant evidence that these would achieve similar  
22 outcomes with respect to today’s arrivals of families and children from Central  
23 America, often driven by the desire to escape violence.”); Tom K. Wong, Center for  
24 American Progress, *Do Family Separation and Detention Deter Immigration?* (July  
25 24, 2018), <https://www.americanprogress.org/issues/immigration/reports/>.

26 <sup>80</sup> *RIL-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (“Defendants have  
27 presented little empirical evidence, moreover, that their detention policy even  
28 achieves its only desired effect – i.e., that it actually deters potential immigrants  
from Central America.” at 189.)

<sup>81</sup> See Final Rule *supra* n.4 at 44484.

<sup>82</sup> DHS Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-  
HHS Federal Rule on Flores Agreement (August 21, 2019),  
[https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-  
rule-flores-agreement](https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement)

1 protection systems in the region. The Central American Minors Program (CAM),<sup>83</sup>  
2 for example, enabled certain children to apply for protection in the United States  
3 while still in their countries of origin. Yet in 2017, the Government shuttered this  
4 small and narrowly tailored program, which allowed children to avoid having to  
5 undertake dangerous journeys—a concern the Final Rule purports to address.  
6 Defendants can better address the root causes of migration through support for  
7 asylum and other protection systems in the region, and programming and support to  
8 prevent and prosecute violence, and increase access to services for survivors.

### 9 CONCLUSION

10 The foregoing discussion highlights only selected examples of how the Final  
11 Rule fails to give effect to Settlement in a way that is consistent with other legal  
12 requirements. Because the Final Rule is inconsistent with the terms and principles  
13 of the Settlement, Amici respectfully ask the Court to maintain the Settlement in  
14 force and enjoin implementation of the Final Rule.

15  
16 Dated: August 30, 2019

GOODWIN PROCTER LLP

17  
18 By: /s/ Natasha E. Daughtrey

19 Natasha E. Daughtrey  
20 Goodwin Procter LLP  
21 601 S. Figueroa St.  
22 Los Angeles, CA 90017

23 Attorney for *Amici*

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25  
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27 <sup>83</sup> USCIS, In-Country Refugee/Parole Processing for Minors in Honduras, El  
28 Salvador and Guatemala (Central American Minors – CAM),  
<https://www.uscis.gov/CAM>.

1 Dated: August 30, 2019

KIDS IN NEED OF DEFENSE

2  
3 By: Wendy Wylegala, Esq.  
4 Wendy Wylegala  
5 Kids in Need of Defense (KIND)  
6 1251 Ave. of the Americas (c/o  
7 Lowenstein Sandler LLP)  
8 New York, NY 10020  
9 Tel: 862-926-2069  
10 Fax: 202-824-0702

11 Attorney for *Amicus* KIND  
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