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CILA Children's Immigration Law Academy

Asylum Law Under Attack: What is the Impact on Unaccompanied Children?

With legal updates occurring so frequently, it can be difficult to keep up with the changes. Let CILA help you stay up to date with a recap of recent changes to asylum law and help identify the main changes that impact unaccompanied children. Since in many instances, litigation is currently pending, you will need to keep tabs on the cases to see what is currently happening.

Asylum law in the United States[i] was built on the principle of non-refoulement, found in international law,[ii] "that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm."[iii] Unfortunately, many of these recent changes run afoul of this principle and endanger the lives of individuals who need protection most, including children and youth.

ISSUE	STATUS
Asylum Ban 1.0 EWI on the Southern Border The interim final rule (by the Department of Justice (DOJ) and Department of Homeland Security (DHS)) and Presidential Proclamation entered in November 2018 seek to bar anyone who entered the U.S. from Mexico without inspection from being eligible for asylum. Applies to unaccompanied children.	**Pending Litigation:** *East Bay Sanctuary Covenant v. Trump* • 2/28/20: The U.S. Court of Appeals for the Ninth Circuit (9th Circuit) affirmed the District Court of the Northern District of California's temporary restraining order and grant of a preliminary injunction in *East Bay Sanctuary Covenant v. Trump*. In the summary of the opinion, as part of its rationale, the Court found the "Rule is unreasonable in light of the United States' treaty obligations" and "[s]pecifically, the panel concluded that the Rule runs afoul of three codified rules: 1) the right to seek asylum; 2) the prohibition against penalties for irregular entry; and 3) principles of non-refoulement, which prohibit signatories to the 1951 Convention from returning a refugee to the frontiers of territories where his life or freedom would be threatened." • The rule has not been in effect during litigation because the 9th Circuit also denied the government's emergency motion for a stay pending appeal in an opinion issued in December 2018. • Visit the ACLU's website for case updates and to read case documents. *O.A. v. Trump* • 8/2/19: U.S. District Court for the District of Columbia (D. D. C. Court) vacated the interim final rule, finding it unlawful. **As of publishing on 10/21/20, the Asylum Ban 1.0 is not in effect.**
Migrant Protection Protocols (MPP) a.k.a. "Remain in Mexico" program MPP was implemented in January 2019. Unaccompanied children along with certain other vulnerable groups should not be	**Following implementation of MPP:** • While the MPP program does not directly apply to unaccompanied children, many unaccompanied children are being impacted. This has happened in several ways. As an example, in some cases, a child is separated from their family member at the border, and the child is then processed as an unaccompanied child while their family member waits for court in Mexico, through the MPP program.[vi] Ultimately, this

ISSUE	STATUS
included in the program; however, in reality, the program has impacted unaccompanied children.[iv] The MPP program requires some asylum seekers on the Southern border to wait in Mexico while their claims are adjudicated.[v]	makes reunification much more difficult for this child. There are other instances, where a child will go across the border by herself after her family was placed together in the MPP program, rather than stay in harsh and dangerous conditions. In other cases, a child's parents or the child was harmed while they were together in the MPP program so the child crossed the border alone as an unaccompanied child. Each of these situations creates a difficult situation for the child due to family separation, as well as legal and procedural hurdles in her case.[vii] • Human Rights First has issued a report and published a database[viii] about the human rights abuses occurring as a result of the "Remain in Mexico" program. • The MPP program has been riddled with problems including issues such as lack of access to counsel.[ix] **Pending Litigation:** *Innovation Law Lab v. Wolf* • Innovation Law Lab, eleven individual plaintiffs, and several organizations filed a suit challenging the MPP program. Plaintiffs are represented by the American Civil Liberties Union (ACLU), Southern Poverty Law Center (SPLC) and the Center for Gender and Refugee Studies (CGRS). • 4/8/19: The District Court for the Northern District of California granted a motion for a preliminary injunction in the case, but that was appealed. On 5/7/19, the 9th Circuit granted a stay on the preliminary injunction, allowing MPP to continue while the case is pending appeal in the 9th Circuit. • 2/28/20: The 9th Circuit issued an opinion affirming the District Court for the Northern District of California's injunction against implementation and expansion of MPP. Hours later on 2/28/20, DHS filed an emergency motion for a stay pending disposition of an appeal to the Supreme Court or an immediate administrative stay, and the 9th Circuit granted an administrative stay on its decision and created a briefing schedule regarding the longer stay. • 3/4/20: The 9th Circuit issued an order denying the stay in part and granting it in part. In its order the Court stated, "Because the MPP so clearly violates §§ 1225(b) and 1231(b), and because the harm the MPP causes to plaintiffs is so severe, we decline to stay our opinion pending certiorari proceedings in the Supreme Court, except as noted below with respect to the scope of the injunction." In regards to scope, the 9th Circuit granted the stay pending an appeal to the Supreme Court as it relates to Southern border states outside of the 9th Circuit (Texas–5th Circuit and New Mexico–10th Circuit) and denied the stay as it pertains to 9th Circuit border states (California and Arizona). Additionally, the 9th Circuit extended its administrative stay until 3/11/20 providing time for the Supreme Court to review the issue,

ISSUE	STATUS
	and stated, "[i]f the Supreme Court has not in the meantime acted to reverse or otherwise modify our decision, our partial grant and partial denial of the Government's request for a stay of the district court's injunction, as described above, will take effect on Thursday, March 12." • 3/11/20: The Supreme Court issued an order granting a stay of the district court's 4/8/19 preliminary injunction pending the filing and disposition of a petition for a writ of certiorari. • 4/11/20: A petition for a writ of certiorari was filed with the Supreme Court. • 10/19/20: The Supreme Court granted the petition for certiorari, and the case will not be heard until 2021.[x] • Visit the ACLU's website for case updates and to read case documents. **The Supreme Court Justices will review *Innovation Law Lab v. Wolf* regarding MPP in 2021. In the meantime, and as of publishing on 10/21/20, the MPP program is in effect.**
USCIS "Lafferty Memo": "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children" The "Lafferty Memo" issued on 5/31/19 reversed the "Kim Memo" (representing USCIS's prior policy from May 2013). The "Lafferty Memo" states USCIS now will make a new factual inquiry, independent of any prior designation by an agency other than EOIR, to determine whether the asylum applicant is an unaccompanied child at the time of filing of the asylum application. Due to litigation, the "Kim Memo" is still in effect.	**Pending Litigation:** *J.O.P. v. DHS* • 8/2/19: The U.S. District Court for the District of Maryland (D. Md. Court) granted a temporary restraining order and enjoined USCIS from applying the "Lafferty Memo," and required USCIS to retract adverse decisions and reinstate consideration of cases applying the "Kim Memo." • 10/15/19: D. Md. Court granted a preliminary injunction enjoining USCIS from applying the Lafferty Memo, ordering USCIS to retract adverse decisions already made, and covering all applicants previously determined to be unaccompanied children. • 6/3/20: D. Md. Court denied DHS's motions to dismiss and denied the plaintiff's motion to enforce the preliminary injunction. • Litigation is ongoing. Plaintiffs have moved for class certification and filed a motion to amend the preliminary injunction. Court documents can be easily viewed on the Catholic Legal Immigration Network, Inc. (CLINIC) website. • Also check the CLINIC website for case updates. • According to USCIS's website, "USCIS is reviewing all asylum applications where USCIS determined that it did not have jurisdiction under the 2019 UAC memorandum." If this applies to one of your clients, check out the USCIS webpage for more information on processing. **As of publishing on 10/21/20, the "Kim Memo" is still in effect.** **BUT Immigration Judges are bound by a different policy regarding jurisdiction in unaccompanied children cases as reflected in *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018)**. "An

ISSUE	STATUS
	Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application."
Asylum Ban 2.0 Transit Bar Through 3rd Country Interim final rule (by DOJ and DHS) bars asylum protection for individuals who cross the Southern border on or after 7/16/19, if they transited through a third country en route to the U.S. unless they sought and were denied asylum in one of the countries through which they traveled on the way to the U.S. The bar also does not apply to victims of severe forms of trafficking as defined in 8 C.F.R. § 214.11 or individuals who "transited en route to the United States through only a country or countries[xi] that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT."[xii] Applies to unaccompanied children.	**Pending Litigation:** *East Bay Sanctuary Covenant v. Barr* • 7/16/19: *East Bay Sanctuary Covenant v. Barr* complaint filed in the U.S. District Court for the Northern District of California (N. D. Cal. Court). • 7/24/19: N. D. Cal. Court granted a preliminary injunction to East Bay. • 8/16/19: 9th Circuit granted government's motion to stay the preliminary injunction. • 9/9/19: 9th Circuit reinstates the preliminary injunction. • 9/11/19: Supreme Court grants government's stay request. • 7/6/20: 9th Circuit upheld the district court's injunction, finding that the transit bar violates the law and is arbitrary. • The government has asked for an extension to decide if they will ask for rehearing. The Supreme Court stay is still in effect until such time as the government decides to file a writ of certiorari. More information regarding the case can be found on the ACLU's website. *CAIR Coalition v. Trump & I.A. v. Barr (cases were ultimately consolidated)* • 7/16/19: *CAIR Coalition v. Trump* complaint filed the D.D.C. Court. • 7/24/19: D.D.C. Court denied the motion for temporary restraining order filed by CAIR Coalition and other organization/firms. • 8/21/19: *I.A. v. Barr* complaint filed in the D.D.C. Court. The case was brought by ACLU D.C., the ACLU Immigrants' Rights Project, and the National Immigrant Justice Center on behalf of a group of asylum seekers and Tahirih Justice Center. • 6/30/20: D.D.C. Court Judge Kelly granted the Plaintiffs' Motions for Summary Judgment in *CAIR Coalition v. Trump* and *I.A. v. Barr*, and "**ORDERED** that the interim final rule, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) is **VACATED**." The Court found that the "Defendants unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements" and that the proper remedy was to vacate the rule. • 8/28/20: Defendants appealed the D.D.C. Court decision to the U.S. Court of Appeals for the District of Columbia Circuit. • More information regarding the cases can be found on ACLU's website and CAIR Coalition's website. Also read CAIR Coalition and Tahirih Justice Center's press releases regarding the win.

ISSUE	STATUS
	Al Otro Lado, Inc. v. Wolf • 11/19/19: The U.S. District Court for the Southern District of California (S. D. Cal.) granted a motion for a provisional class certification and motion for a preliminary injunction. The judge blocked the bar from being applied to a provisionally certified class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry (POE)] before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process."[xiii] • 12/6/19: Plaintiffs filed a motion for a temporary restraining order prohibiting application of the Asylum Cooperative Agreement (ACA) to provisional class members. Remember the ACAs should not apply to unaccompanied children. See information below chart for more details. • The government appealed to the 9th Circuit. • 12/20/19: The 9th Circuit granted the government's motion for an emergency temporary stay of the district court's order until the 9th Circuit makes a determination on the government's motion for a stay pending appeal. • 3/5/20: The 9th Circuit issued an order denying the stay, lifting the emergency temporary stay, on the preliminary injunction. For now, this leaves the lower court's preliminary injunction in place prohibiting application of the transit bar to the provisionally certified class. • 8/6/20: S. D. Cal Court granted Plaintiff's motion for class certification. American Immigration Council (AIC) explained the win allows "the case to proceed on behalf of all asylum seekers along the U.S.-Mexico border who were or will be prevented from accessing the asylum process at ports of entry as a result of the government's Turnback policy." Read the specific class and sub-class language here. • Visit AIC's website for case updates and for a link to a helpful FAQ regarding this case. **The 6/30/20 ruling in *CAIR Coalition v. Trump & I.A. v. Barr* by Judge Kelly of the D.D.C. Court vacated the underlying interim final rule regarding the Asylum Ban 2.0. The case is being appealed. Therefore, as of publishing on 10/21/20, the rule has been vacated and Asylum Ban 2.0 is not in effect. As all of these cases quickly evolve, it is important to check the current status of litigation.**
***Matter of A-B-* (Attorney General Certified BIA Decision)** *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) – Set back years of progress on domestic violence cases and overruled *Matter of A-*	**Following *Matter of A-B-*:** • 7/11/18: DHS implemented new expedited removal policies based on *Matter of A-B-*. • 12/19/18: The District Court for D.C. issued an opinion and order in *Grace v. Whitaker,* a lawsuit filed by the ACLU and CGRS. The case primarily deals with expedited removal and the credible fear process (which does not apply

ISSUE	STATUS
R-C-G-, 26 I&N Dec. 388 (BIA 2014), which found "married women in Guatemala who are unable to leave their relationship" as a cognizable particular social group (PSG).	to unaccompanied children), but it also rejects some aspects of *Matter of A-B.* Of particular importance in asylum cases for unaccompanied children, the court enjoined any categorical ban on domestic violence and gang-based asylum claims. • CGRS wants advocates to "[r]eport case outcomes post-*A-B-* at all levels of adjudication, as well as any notable developments along the way such as challenges by DHS or IJ briefing orders." • Reach out to CGRS for resources to help you represent your client post *Matter of A-B-.* **Several U.S. Courts of Appeals have issued helpful decisions post-*Matter of A-B-* including:** • In April 2020, the U.S. Court of Appeals for the First Circuit issued a favorable decision in *De Pena-Paniagua v. Barr* for domestic violence survivors seeking asylum. See CGRS's website for more information relating to the case. • In May 2020, the U.S. Court of Appeals for the Sixth Circuit issued a decision in *Juan Antonio v. Barr* with positive language post *Matter of A-B-.* Learn more about this case from CGRS. • In August 2020, the 9th Circuit issued a decision in *Diaz-Reynoso v. Barr* finding that "despite the general and descriptive observations set forth in the opinion, *Matter of A-B-* did not announce a new categorical exception to withholding of removal for victims of domestic violence or other private criminal activity, but rather it reaffirmed the Board's existing framework for analyzing the cognizability of particular social groups, requiring that such determinations be individualized and conducted on a case-by-case basis." Read more from CGRS here. **This case, as well as *Matter of L-E-A-,* has changed the landscape of asylum claims involving PSGs. The case does not categorically ban asylum claims based on domestic violence, but advocates must develop the record and their arguments well to be successful. Asylum claims must be assessed on a case-by-case basis. It is important to keep making domestic violence related PSG arguments for a decision on the particular case and to preserve the record for appeal.**
***Matter of L-E-A-* (Attorney General Certified BIA Decision)** *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) overruled *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) which affirmed that family can be a PSG.	**Following *Matter of L-E-A-*:** • *Pena Oseguera v. Barr,* No. 17-60339 (5th Cir. 2019). ○ *Matter of L-E-A-* "stands for the proposition that families *may* qualify as social groups, but the decision must be reached on a case-by-case basis." The "applicant must establish that his specific family group is defined with sufficient particularity and is socially distinct in his society." This is a "fact-based inquiry made on a case-by-case basis."

ISSUE	STATUS
	○ "We recognize that *Matter of L-E-A-* is at odds with the precedent of several circuits. *Matter of L-E-A-*, 27 I&N Dec. at 589-91 (analyzing precedent from the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits.) However, it is not at odds with any precedent in the Fifth Circuit." • 9/30/19: USCIS released its policy guidance to USCIS officers regarding *Matter of L-E-A-*. • 11/22/19: CLINIC along with Crowell & Moring LLP filed a lawsuit in a District Court for D.C. challenging policy guidance following the A.G. decision in the expedited removal context. CLINIC "is monitoring how government officials and immigration judges are interpreting the attorney general's opinion. To that end, please share with CLINIC redacted copies of any decisions that rely on the attorney general's opinion." If you have a case in which an adjudicator relies on the attorney general's opinion, check out their webpage and contact CLINIC. • CLINIC also has a practice pointer available for representation post *Matter of L-E-A-*. Additionally available on CLINIC's website, "CLINIC has translated Title II of the Salvadoran Civil Code entitled 'Rules Relative to Intestate Succession,' which may help practitioners establish a cognizable family-based particular social group on behalf of Salvadoran clients." • Reach out to CGRS for resources to help you represent your client post *Matter of L-E-A-*. **This case, as well as *Matter of A-B-*, has changed the landscape of asylum claims involving PSGs. The case does not categorically ban asylum claims based on family PSGs, but advocates must develop the record and their arguments well to be successful. Asylum claims must be assessed on a case-by-case basis. It is important to keep making family-based PSG arguments for a decision on the particular case and to preserve the record for appeal.**
***Matter of W-Y-C- & H-O-B-* BIA Decision** *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) holds that "(1) [a]n applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the Immigration Judge the exact delineation of any proposed particular social group. (2) The Board of Immigration	**Following *Matter of W-Y-C- & H-O-B-*:** • *Cantarero-Lagos v. Barr*, No. 18-60115 (5th Cir. 2019) - Affirmed BIA's decision to not consider "a PSG on appeal that was never presented to the immigration judge ('IJ')."

ISSUE	STATUS
Appeals generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge."	
Updated Form I-589 Current Edition date: **08/25/20**.	• Heed the advice on USCIS's website, the Ombudsman Alert, and in the instructions: Don't leave any field blank even if the response is "none," "unknown," or "n/a," and do not forget to attach any addendums! Otherwise, the application may be returned as incomplete.
New Final Rule: Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications DHS published a new final rule in the Federal Register on 6/21/20 relating to processing asylum-based employment authorization documents.	• The rule's summary states "[t]he final rule removes a Department of Homeland Security (DHS) regulatory provision that U.S. Citizenship and Immigration Services (USCIS) has 30 days from the date an asylum applicant files the initial Form I-765, Application for Employment Authorization, (EAD application) to grant or deny that initial employment authorization application. This rule also removes the provision requiring that the application for renewal must be received by USCIS 90 days prior to the expiration of the employment authorization." • **The final rule is effective as of 8/21/20.**
New Final Rule: Asylum Application, Interview, and Employment Authorization for Applicants DHS published a new final rule in the Federal Register on 6/26/20 to "modify DHS's regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application. [The] final rule implements the proposed rule, with some amendments based on public comments received."	• The new final rule issued on 6/26/20 made several changes. • USCIS's press release states, "[t]he rule prevents aliens who, absent good cause, illegally entered the United States from obtaining employment authorization based on a pending asylum application. Additionally, the rule defines new bars and denials for employment authorization, such as for certain criminal behavior; extends the wait time before an asylum applicant can apply for employment authorization from 150 days to 365 calendar days; limits the employment authorization validity period to a maximum of two years; and automatically terminates employment authorization when an applicant's asylum denial is administratively final." • There is now also a discretionary component to adjudication of asylum seekers' employment authorization document so advocates may want to provide evidence of positive discretionary factors. • CLINIC has a FAQ available on the new rule. Also, contact CGRS for their Practice Advisory. • **The final rule is effective as of 8/25/20.** **Pending Litigation:** *Casa de Maryland v. Wolf* • 9/11/20: U.S. District Court for the District of Maryland issued a preliminary injunction enjoining provisions of the two new rules relating to asylum seekers' ability to obtain an employment authorization document as the rules pertain to

ISSUE	STATUS
	members of the Asylum Seeker Advocacy Project (ASAP) and CASA de Maryland (CASA). • Read more information about the case from ASAP and how the ruling affects its members. Additional information is also on USCIS's website. **As of publishing on 10/21/20, the final rule is in effect for everyone except ASAP and CASA members.**
Filing Fee for Form I-589 in New Final Rule: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements DHS published a new final rule in the Federal Register to introduce a non-waivable $50 fee for asylum applications, when filed with USCIS. The proposed rule also impacts several other types of cases such as adjustment of status, DACA renewals, and naturalization.[xiv]	• The final rule was published on 8/3/2020, and the rule was set to go into effect on 10/2/2020; however, because of litigation, USCIS is temporarily halted from implementing the final rule. • According to the new rule, there is a $50 filing fee for Form I-589, but "[t]here is no fee for applications filed by unaccompanied alien children who are in removal proceedings." • The rule also requires asylum applicants to pay the initial filing fee for the I-765. **Pending Litigation:** *ILRC, et al., v. Wolf, et al.* • 8/21/2020: Eight immigrants' rights organizations filed a lawsuit challenging the new rule on fees. • 9/29/2020: N. D. Cal. Court granted a preliminary injunction and stay halting the implementation of USCIS' final fee rule in its entirety nationally pending a final adjudication. • CLINIC has set up a webpage to follow the issue that features multiple resources. Also, read AILA's update on the issue here. **As of publishing on 10/21/20, this rule is not in effect because of a preliminary injunction.**
Final Rule for Procedures for Asylum and Bars to Asylum Eligibility DHS and EOIR published the final rule in the Federal Register on 10/21/20 to announce several changes to asylum bars and eligibility.	• The proposed rule was published on 12/19/19, and the final rule was published on 10/21/20. • The rule presents several changes and barriers to asylum law including new bars of eligibility for asylum, clarify effect of criminal convictions, remove current regulatory provision regarding reconsideration of discretionary asylum denials. • Many spoke out against the proposed rules, and you can read several organizations' comments to learn more: Human Rights Watch, American Immigration Council, and Tahirih Justice Center. • Read EOIR's press release for a summary of changes. **As of publishing on 10/21/20, this proposed rule is not yet in effect. The final rule was published in the Federal Register on 10/21/20, and the rule is scheduled to go into effect on 11/20/20.**

ISSUE	STATUS
Impact of COVID-19 on the Border and Asylum Seekers Following the rise of the COVID-19 pandemic, the U.S. effectively closed its borders to unaccompanied children and asylum-seekers in mid-March 2020 considering their travel *non-essential*. In total, the U.S. has expelled over 159,000 individuals as a result. This includes over 8,800 unaccompanied children, who have been expelled since March rather than being processed under the protections of the TVPRA.[xv] For example, in May 2020, over 1,000 unaccompanied children were encountered at the Southwest border, but only 39 unaccompanied children were transferred to the Office of Refugee Resettlement.[xvi]	• The Centers for Disease Control and Prevention (CDC) issued an interim final rule and an order, effective on March 20, 2020, limiting entry to the U.S. for public health reasons. In April, the CDC extended the order and then again on 5/19/20, CDC extended the order without providing an end date. • 3/20/20: The U.S. reached agreements with Canada and Mexico to limit all non-essential travel across land borders, both with multiple extensions. • 3/20/20: DHS issued a rule limiting travel of individuals from Mexico to the U.S. along the U.S.-Mexico border to only "essential travel." • 5/24/20: Trump issues Presidential Proclamation limiting entry from Brazil. • Leaked guidance from Customs and Border Protection shows that only migrants who "make an affirmative, spontaneous, and reasonably believable claim that they fear being tortured in the country they are being sent back to" and subject to supervisory input will be allowed in the U.S. and referred to USCIS to evaluate further. All other asylum seekers are expelled. • UNHCR has stated on the issue, "while States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement." • You can read more about the impact on asylum seekers and unaccompanied children in the National Immigrant Justice Center's *The Latest Brick in the Wall: How the Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children in the Name of Public Health,* CGRS's *Factsheet: The COVID-19 Pandemic and Closing the Border to Asylum Seekers*, and KIND's *Sending Children Back to Danger* Policy Brief. **Pending Litigation:** *J.B.B.C. v. Wolf* • ACLU, CGRS, and Oxfam are challenging the restrictions on immigration based on the use of the Public Health Service Act, in Title 42 of the U.S. Code. The challenge was filed in federal court in Washington, D.C. ACLU states, "Title 42 does not permit expulsions of non-citizens who are in the United States, nor does it legally allow the removal of children." The case was filed on behalf of a 16-year-old Honduran boy. • 6/24/20: The presiding judge prohibited removal of the boy as the lawsuit continues. • Follow the case by checking the ACLU's website. *G.Y.J.P. v. Wolf* • The ACLU of Texas, CGRS, Texas Civil Rights Project, ACLU of D.C., ACLU National, and Oxfam additionally challenge the

ISSUE	STATUS
	Trump administrations' restriction of immigration based on the Public Health Service Act. The case was filed on 6/10/20 in the District Court for D.C. on behalf a 13-year-old girl from El Salvador. • According to ACLU Texas, "[u]nder longstanding immigration statutes protecting children, G.Y.J.P. should have been given shelter in a children's facility until she could be released to her mother, already lawfully residing in the U.S. G.Y.J.P. should have had a full and fair proceeding to determine her right to protection in the U.S." *P.J.E.S. v. Wolf* • U.S. District Court for DC Magistrate Judge's Report and Recommendation recommended provisionally granting certification of a class "consisting of all unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to expulsion from the United States under the Title 42 Process . . . ." and recommends granting a preliminary injunction to enjoin DHS from expelling class members under the Title 42 Process. A District Court Judge will review the Report and Recommendation before issuing a final order. • Visit the ACLU's website for case updates. **As of publishing on 10/21/20, the U.S.'s borders are effectively closed to asylum seekers and unaccompanied children in actions taken by the U.S. government after the rise of COVID-19.**

Proposed Rule: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review
 	
DHS and DOJ published a proposed rule in the Federal Register on 6/15/20 that proposes multiple changes to regulations governing asylum, withholding of removal, and protection under the Convention Against Torture. The proposed rule seeks to vastly change these protections and will greatly limit those who will be able to succeed in their cases for protection and safety.
 	
The proposed rule largely applies to unaccompanied children. There are some portions of the
	• The proposed rule was published on 6/15/20, and the comment period is closed.
	• The proposed rule includes multiple changes to asylum and withholding of removal including:
	  ○ Changing the definition of *frivolous* to broaden the definition and "discourage applications that make patently meritless or false claims." The proposed rule would also allow asylum officers adjudicating affirmative asylum applications to make findings that individuals have knowingly filed a frivolous application.
	  ○ Adding regulatory language "to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations" if the individual has not shown a prima facie claim for relief.
	  ○ Codifying PSG requirements and outlining several non-exhaustive bases that would "generally be insufficient" to establish a PSG including, for example "presence in a country with generalized violence or a high crime rate" and "the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups."

ISSUE	STATUS
proposed rule that relate to credible and reasonable fear interviews; these portions are not relevant to unaccompanied children since unaccompanied children are not subject to expedited removal.	○ Changing the definition of *political opinion* "as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." The proposed rule states several bases that would not generally lend to a favorable adjudication including opposition to gangs. ○ Changing the definition of *persecution* for asylum and withholding of removal claims ○ Providing a list of eight non-exhaustive situations relating to nexus that generally will not favorably result in a grant of asylum or withholding of removal including claims including "gender," "interpersonal animus in which the alleged persecutor has not targeted or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue . . .," "resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations . . . ." ○ Changing standards related to internal relocation–"the Departments propose to amend the regulations to presume that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a preponderance of the evidence that it would not be." ○ Outlining positive and negative factors adjudicators must consider when determining whether an individual merits asylum as a matter of discretion ○ Changing the definition of *firm resettlement*. Additionally, the "Departments propose that the firm resettlement of a parent or parents with whom a child was residing at the time shall be imputed to the child." ○ Changing standards in CAT claims regarding rogue officials and *acquiescence* of a public official or other person acting in an official capacity ○ Changing confidentiality provisions regarding asylum applications • The above list captures only a few of the expansive changes included in the proposed rule. As CGRS stated, "the Administration is now attempting to write their vast array of anti-asylum policies, procedures, and legal opinions into law – by proposing a behemoth rule that would codify their hatred in the form of binding federal regulations." • CILA's blog post on the matter provides multiple sources to confer to learn more about the proposed changes. For instance, the American Bar Association (ABA) provided a webinar summarizing many of the proposed changes. Over 88,000 comments were submitted. For example, read the

ISSUE	STATUS
	ABA's comments, The Young Center's comments, and CLINIC's comments. **As of publishing on 10/21/20, this proposed rule is not in effect.**
Proposed Rule: Security Bars and Processing DHS and EOIR published a proposed rule in the Federal Register on 7/9/20. The proposed rule seeks to amend regulations to reflect that "emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics" when considering the national security bar to asylum and withholding of removal.	• The proposed rule was published on 7/9/20, and the comment period is closed. • CLINIC states in their summary, "[t]he proposed rule seeks to bar entry of asylum applicants who have tested positive for COVID-19, come from a country where COVID-19 is prevalent, and/or exhibit COVID-19 symptoms." Read more from CLINIC here. • Read Human Rights Watch's comments to the proposed rule. **As of publishing on 10/21/20, this proposed rule is not in effect.**

Proposed Rule: Collection and Use of Biometrics by USCIS
 	
DHS published a proposed rule in the Federal Register on 9/11/20 that would make several changes to biometrics procedures.
	• The proposed rule was published on 9/11/20, and the comment period is closed.
	• The proposed rule includes several changes including:
	  ○ Removing all age restrictions for biometrics collection which is generally restricted for children under age 14
	  ○ Proposing that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit request including U.S. citizens would have to appear for biometrics collection and regardless of age
	  ○ Providing authority to use new biometric technologies including palm prints, facial photos, iris scans, voiceprints, etc.
	  ○ Allowing for DNA testing to prove a claimed genetic relationship
	  ○ Modifying how VAWA and T visa petitioners demonstrate good moral character including removing the presumption for good moral character for those under age 14
	• Read CLINIC's and the ACLU's comments to the proposed rule.
	
	As of publishing on 10/21/20, this proposed rule is not in effect.

Proposed Rule: Procedures for Asylum and Withholding of Removal EOIR published a proposed rule on 9/23/20 seeking to make	• The proposed rule was published on 9/23/20. **Written or electronic comments must be submitted on or before 10/23/20**. • The proposed rule includes several changes including: ○ Creating a 15-day deadline to file asylum applications after a first MCH

ISSUE	STATUS
multiple changes for asylum seekers.	○ Court can reject incomplete applications if there are any blank areas, unsigned, or lacks supporting attachments ○ Allowing IJ to submit evidence into the record and changing how supporting evidence is reviewed ○ Restricting continuance timeframes **As of publishing on 10/21/20, this proposed rule is not in effect, and the comment period is open until 10/23/20. CILA recommends commenting.**

There have also been several additional changes to asylum law that are not directly applicable to unaccompanied children, such as changes to credible fear interview procedures[xvii] and expedited removal processes,[xviii] as well as litigation challenging the changes. As a result of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, unaccompanied children are not subject to expedited removal because they have a right to go through removal proceedings.

Additionally, the U.S. has worked on safe third country agreements (or "Asylum Cooperation Agreements" – ACAs) with Guatemala[xix], El Salvador, and Honduras.[xx] Generally, an individual cannot apply for asylum if there is a safe third country, where the individual could be removed; however, this does not apply to unaccompanied children.[xxi] USCIS and EOIR published a joint interim final rule on November 19, 2019 in the Federal Register "to provide for the implementation" of the ACAs the U.S. has entered into, except the agreement with Canada.[xxii] The rule applies to immigrants who enter the U.S. on or after November 19, 2019. EOIR additionally issued guidelines for immigration courts regarding the new regulations, and USCIS created guidance for Asylum Officers. The U.S. began transferring individuals to Guatemala as a result of the agreement, but the transfers stopped in mid-March as a result of COVID-19.[xxiii] Read Human Rights Watch's *Deportation with a Layover, Failure of Protection under the US-Guatemala Asylum Cooperative Agreement* to learn more about how the ACA with Guatemala has worked thus far and how those who have been transferred under this agreement have been impacted. Litigation is pending regarding the legality of the rule and guidance implementing the ACAs.[xxiv] The United States has had a Safe Third Country Agreement with Canada since 2002 and implemented since 2004; however, the agreement is currently the subject of litigation.[xxv]

If you want to read more about recent changes to asylum law, here are a few articles that provide helpful explanations. These articles were also consulted when drafting this resource.

- AIC, Fact Sheet: *Policies Affecting Asylum Seekers at the Border*, January 29, 2020.
- AILA, *Featured Issue: Border Processing and Asylum*, *AILA Doc. No. 19032731*, October 12, 2020.
- National Immigrant Justice Center, *A Timeline of The Trump Administration's Efforts To End Asylum*, September 2020.
- CLINIC, *Recent Updates on the Administration's Assault on Asylum*, Reena Arya and Lolita Brayman, September 30, 2019.
- The New Yorker, *An Immigration Attorney at the A.C.L.U. On Fighting Trump's Asylum Ban*, Jonathan Blitzer, September 17, 2019.

[i] Congressional Research Service, "Immigration: U.S. Asylum Policy," Andorra Bruno, Feb. 19, 2019.
[ii] "In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). The Protocol incorporated the 1951 United Nations Convention Relating to the Status of Refugees (Convention) . . ." *Id*. at 8. "The Protocol retained other elements of the Convention, including the latter's prohibition on *refoulement* (or forcible return), a fundamental asylum concept." *Id*. "Despite the U.S. accession to

the 1967 U.N. Protocol, the INA did not include a conforming definition of a refugee or a mandatory nonrefoulement provision until the enactment of the Refugee Act of 1980." *Id*. at 9.

[iii] Non-refoulement explained by the United Nations Human Rights Office of the High Commissioner.

[iv] Learn more about the MPP program in American Immigration Council's Fact Sheet, as well as what the DHS says in CBP's MPP Guiding Principles.

[v] Laura Peña, with the American Bar Association (ABA), along with other experts presented testimony before Congress regarding the MPP program in November 2019. ABA, *ABA counsel testifies about concerns with Remain in Mexico immigration policy*, Nov. 19, 2019. *See also* Chicago Tribune, *'Remain in Mexico' policy faces internal critiques at House hearing*, CQ Roll Call, Tanvi Misra, Nov. 19, 2019.

[vi] Reuters, *When the U.S. puts a border between migrant kids and their caretakers*, Kristina Cooke, Nov. 11, 2019.

[vii] CILA co-hosted two webinars with CLINIC in 2020 focused on working with children affected by MPP, which are available to view for free on CILA's website. The webinars are entitled *Strategies for Working with Children Affected by MPP* and *Strategies for Working with Children Affected by MPP, Part 2: Equitable Tolling, Motions to Reopen, Motions to Stay*.

[viii] According to Human Rights First's website, "Human Rights First has published for the first time its running database tracking kidnappings, attacks and other violence against asylum seekers under the 'Remain in Mexico' policy." The press release goes on to say, "[t]he tracker invites asylum seekers, attorneys, human rights researchers and others to provide information about abuses that researchers can investigate, assess and potentially add to the database. It also has a feature to assist asylum seekers or attorneys to file a formal complaint to the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties."

[ix] The ACLU of San Diego and Imperial Counties filed *Doe v. Wolf* regarding the right to counsel in MPP non-refoulement interviews. On January 14, 2020 the Southern District of California federal court certified a proposed class and issued a preliminary injunction in the matter. Read the ACLU of San Diego and Imperial County's Practice Advisory about the case.

[x] Associated Press, *High court to review two cases involving Trump border policy*, Jessica Gresko and Mark Sherman, Oct. 19, 2020.

[xi] United Nations High Commissioner for Refugees (UNHCR), *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, April 2015. *See also* United Nations Treaty Collection to see participants to the Convention against Torture (CAT) and other Cruel Inhuman or Degrading Treatment or Punishment. Unaccompanied children commonly come to the U.S. from Honduras, Guatemala, and El Salvador. All three countries are participants to the Convention, Protocol, and CAT.

[xii] 84 FR 33829, 33835.

[xiii] *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.).

[xiv] The Washington Post, *The cost to become a U.S. citizen is going up 61 percent*, Christopher Ingraham, Nov. 13, 2019. *See also* Forbes, *Judge Blocks USCIS Fee Increases: Here's Why it Happened*, Stuart Anderson, Sept. 30, 2020.

[xv] *See* El Paso Times, *The Trump administration is turning away unaccompanied children at the border because of coronavirus*, Lauren Villagran, June 10, 2020. *See also* CBS News, *U.S. stops holding migrant children in hotels, but says they can still be expelled*, Camilo Montoya-Galvez, Oct. 2, 2020.

[xvi] *See also* USA Today, *The Trump administration is turning away unaccompanied children at the border because of coronavirus*, Lauren Villagran, June 10, 2020.

[xvii] On April 29, 2019, there was a Presidential Memorandum directing DHS to change how the agency administers Credible Fear Interviews. The following day, on April 30, 2019, the USCIS Asylum Division updated Lessons Plans making it more difficult to pass Credible Fear Screenings. In July 2019, USCIS issued new guidance to asylum officers regarding internal relocation during Credible Fear screenings. News outlets have also reported on pilot projects Prompt Asylum Case Review (PACR) and Humanitarian Asylum Review Process (HARP)which began in October 2019 in El Paso. The ACLU has filed a lawsuit against these programs. Check out the Congressional Research Service's flowchart showing the process adults and families now go through when arriving at the Southern border.

[xviii] AILA, *Featured Issue: Expedited Removal, AILA Doc. No. 19073000*, Nov. 6, 2019.

[xix] News outlets report the U.S. deported the first individual, a Honduran man, through its agreement with Guatemala on November 22, 2019. DHS also published the July 26, 2019 agreement between the U.S. and Guatemala in the Federal Register on November 20, 2019. *See also* Reuters' *Trump administration prepares to send asylum seekers to Guatemala*, Nov. 20, 2019.

[xx] *See also* BBC News, *Trump immigration plans: US signs deal to deport migrants to Honduras*, Sept. 26, 2019.

[xxi] 8 U.S.C. § 1158(a)(2)(E).

[xxii] UNHCR, "Statement on new U.S. asylum policy," Nov. 19, 2019.

[xxiii] CQ Roll Call, *Guatemala suspends US flights carrying asylum-seekers*, Camila DeChalus, Mar. 17, 2020.
[xxiv] *UT v. Barr* was filed on January 15, 2020 in the U.S. District Court in Washington, D.C. Read more information about the case on the ACLU's website.
[xxv] A lawsuit, filed in part by Amnesty International, challenges the U.S.'s Safe Third Country Agreement with Canada. In July 2020, a Canadian Federal Court judge found that the agreement violated the Canadian Charter of Rights and Freedoms but suspended the effect of the decision for six months (until January 22, 2021). In the meantime, the Canadian government appealed the court ruling. *See* Forbes, *Possible New Prospects In Canada For U.S. Refugee Claimants Post Covid-19*, Andy J. Semotiuk, Sept. 18, 2020. *See also* Amnesty International, Organizations welcome Federal Court decision confirming that sending refugees back to the US is not safe, July 22, 2020.