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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of **Amicus Invitation No. 16-06-09**	

REQUEST TO APPEAR AS *AMICI CURIAE*

Under Board of Immigration Appeals Practice Manual Chapter 2.10, the National Immigrant Justice Center and the American Immigration Lawyers Association respectfully request leave to file the accompanying amicus brief in response to Amicus Invitation No. 16-06-09.[1] Both organizations have subject-area expertise regarding asylum law and the legal issues surrounding immigrant children and submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation based on their extensive experience representing and advocating for children and youth seeking asylum and other protection-based relief.

Proposed *amicus curiae* the **National Immigrant Justice Center** (NIJC) is a Chicago-based non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,000 pro bono attorneys, NIJC represents approximately 250 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, the Federal Courts of Appeals, and the Supreme Court. In addition to the cases that NIJC accepts for individual representation, it also screens and provides legal orientations to hundreds of additional potential asylum applicants every year. One of the biggest hurdles affecting these asylum applicants is the enforcement of the one year filing deadline. Accordingly, NIJC has relevant subject-matter expertise and is well positioned to assist the Board in its consideration of the present case.

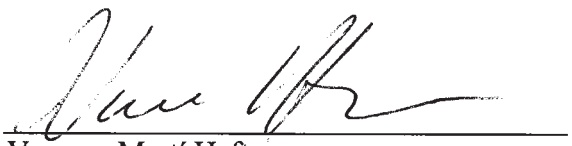
Proposed *amicus curiae* the **American Immigration Lawyers Association** (AILA) is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance administration of law pertaining to the jurisprudence of

[1] NIJC and AILA were granted an extension by the Board to submit this brief by September 1, 2016.

immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

NIJC and AILA therefore respectfully request leave to appear as *amici curiae* and file the following brief. Additionally, given the impact of the Board's decision in this matter and the experience of *amici* in providing and improving legal services to thousands of immigrant minor asylum seekers, *amici* respectfully request that the Board permit them to present oral argument. *See* BIA Practice Manual, Chapter 8.7(e)(xiii) (Nov. 2, 2015).

Dated: September 1, 2016



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Amicus Invitation No. 16-06-09

PROPOSED BRIEF OF *AMICI CURIAE*
NATIONAL IMMIGRANT JUSTICE CENTER AND
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae National Immigrant Justice Center (NIJC) and American Immigration Lawyers Association (AILA) have subject-matter expertise in the areas of immigration law surrounding asylum and immigrant children. Both organizations regularly represent and advocate on behalf of immigrant youth seeking asylum and other immigration relief before the United States Citizenship and Immigration Services (USCIS) and the Executive Office of Immigration Review (EOIR). Both organizations regularly conduct trainings for attorneys representing asylum seekers and immigrant children, author practice advisories, and speak nationally regarding asylum-related matters. NIJC and AILA respectfully submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation informed by their extensive experience representing and advocating on behalf of immigrant children and youth seeking asylum.

STATEMENT OF ISSUES

This brief addresses the three issues identified in the Board's Amicus Invitation No. 16-06-09.

SUMMARY OF ARGUMENT

Congress enacted the "extraordinary circumstances" exception to the one year deadline for filing asylum applications in the Immigration and Nationality Act ("INA") to address the risk that this deadline might otherwise bar legitimate applicants from seeking refuge in this country. In furtherance of that legislative intent, both the Department of Homeland Security and the Department of Justice regulations interpreting this exception expressly include youth—specifically, "unaccompanied minors"—as an example of one such circumstance that should excuse delayed asylum filings. Nevertheless, the difficulties for youth seeking to navigate this

country's complicated asylum system alone have continued. To further remedy this serious problem, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA"), expressly excluding a particular category of unaccompanied youth (an "unaccompanied alien child," defined as those under 18 and who lacked legal status) from the requirements of the one year deadline. But Congress left the existing "extraordinary circumstances" exception intact. As USCIS directs in its training materials, this exception thus remains as a means to excuse delayed filings for other applicants, including youth who do not fall within the scope of the TVPRA's provisions.

Accordingly, in response to the first question posed in the Amicus Invitation, *amici* urge the Board to interpret the term "minor" in 8 C.F.R. § 1208.4(a)(5)(ii)[2] as referring to youth under the age of 21, and therefore find that such minors are under a legal disability excusing them from the one year deadline for filing their asylum applications. Such a holding would be consistent with Congress' definition and use of youth-related terms in the INA, as well as how the Board and Federal Courts have interpreted other provisions of that statute that use the term "minor." This interpretation is also consistent with Congress' intent in enacting the extraordinary circumstances exception to the one year deadline to ensure it did not bar legitimate asylum seekers, as well as the legislative purpose of other related legislation, such as the TVPRA, aimed at protecting youth from onerous and unfair application of the complex immigration process.

[2] Pursuant to the Homeland Security Act's transfer of functions from the Immigration and Naturalization Service ("INS") to the Department of Homeland Security ("DHS"), Title 8 of the Code of Federal Regulations was reorganized, resulting in the creation of parallel provisions related to asylum proceedings before the EOIR. Citations herein are to the regulations set forth in Chapter V, part 1208 of the Code, which are duplicative of and parallel to those contained in Chapter I, part 208 of the Code.

In response to the second question posed in the Invitation, *amici* submit that even if the Board decides to define "minor" as an individual under 18 years of age for purposes of 8 C.F.R. § 1208.4(a)(5)(ii), the status of being under 21 years of age at some point during the year after the date of entry into this country constitutes another "extraordinary circumstance" under Section 208 of the INA and 8 C.F.R. § 1208.4(a)(5) that exempts an asylum seeker from the one year deadline. As scientific studies show and our laws confirm, children between the ages of 18 and 21 are distinct from adults in their psychosocial and neurological maturity. This lack of maturity means that such youth cannot be expected to navigate the asylum process in the same way as adults and thus requires that such youth be excused from the one year deadline. Moreover, the Board should find that the status of being under 21 constitutes a *per se* extraordinary circumstance exception to the one year deadline and should overrule its decision in *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002), which instructed adjudicators to conduct an individualized assessment of minors who seek an extraordinary circumstance exception to the deadline.

Should the Board decline to overturn *Matter of Y-C-*, the Board should, at a minimum, require that adjudicators engage on a case-by-case basis in a broad analysis of all factors impacting youth between the ages of 18 and 21 who file untimely asylum applications, including specifically the lack of development and maturity typical of persons of that age, to determine whether extraordinary circumstances excuse any untimely asylum filings by such youth.

Finally, in response to the third question posed in the Invitation, *amici* urge the Board to consider a broad and holistic set of factors in determining whether the applicant has filed within a "reasonable period" after her legal disability is lifted (*i.e.* after reaching the age of 21), and adopts the arguments raised in support of this section in the contemporaneously filed amicus brief submitted by Public Counsel and Catholic Legal Immigration Network, Inc. (CLINIC).

ARGUMENT

I. The term "minor" in 8 C.F.R. § 1208.4(a)(5)(ii) should be defined to include all children under 21 years of age.

Section 208(a) of the INA generally requires an asylum seeker to have filed an application for asylum within one year after arriving in the United States. *See* 8 U.S.C. 1158(a)(2)(B). This requirement is subject to statutory exceptions if the asylum seeker can demonstrate either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the one year period. *See id.* at § 1158(a)(2)(D).

The regulations interpreting the INA's "extraordinary circumstances" exception provide that "[t]he term 'extraordinary circumstances' in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline" and provide that "[s]uch circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances." 8 C.F.R. § 1208.4(a)(5)(ii). The regulations explain "extraordinary circumstances" are those that "were not intentionally created by the alien through his or her own action or inaction" and were "directly related" to the failure to file by the deadline. *Id.* at § 1208.4(a)(5).

On their face, the regulations do not provide an exhaustive list of all possible extraordinary circumstances, but do offer a list of illustrative examples of such circumstances that should excuse the failure to comply with the one year deadline, including where an asylum applicant was under a legal disability, such as being an "unaccompanied minor," during the year after arriving in the country. 8 C.F.R. § 1208.4(a)(5)(ii) ("Those circumstances *may include but are not limited to*: . . . (ii) *Legal disability* (e.g., the applicant was *an unaccompanied minor* or

suffered from a mental impairment) during the 1-year period after arrival.") (emphasis added). The question addressed herein is how to define the reference to "minor" in these regulations.

To determine the meaning of "minor" in the regulations, the Board should consider **(A)** Congress' definition and use of youth-related terms in the INA; **(B)** how the Board and other courts have interpreted other youth-related provisions of the INA that use the term "minor"; **(C)** the legislative purpose of the one year deadline and the extraordinary circumstances exception to that deadline; and **(D)** Congress' subsequent enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA"), a statute expressly exempting a certain category of youth from the one year deadline and otherwise leaving unaltered the "extraordinary circumstances" exception. This approach will result in an interpretation of the INA and its extraordinary circumstances exception that yields a "symmetrical and coherent regulatory scheme" when the rest of the Act is taken into account. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted).

As set forth below, the term "minor" in the regulations interpreting the INA's "extraordinary circumstances" exception to the one year deadline should be defined as including all asylum applicants who are under 21 years of age at their time of entry to the United States.

A. Congress consistently defines "child" for immigration purposes as including those under the age of 21.

Congress defined "child" in the INA as unmarried youth under the age of 21. *See* INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) ("child" definition for visa petitions and related matters); § 101(c), 8 U.S.C. § 1101(c) (child definition for citizenship and naturalization applications). The INA's asylum and refugee provisions adopt this general definition of child, including for purposes of derivative asylum and refugee claims. *See* INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) and INA § 207(c)(2)(A), 8 U.S.C. § 1157(c)(2)(A)). Other youth-specific

categories of eligibility set forth in the INA, such as the definition of a Special Immigrant Juvenile (*see* INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11(c)(1)), the children of VAWA self-petitioners (*see* INA § 101(a)(51), 8 U.S.C. § 1101(a)(51)), and T and U visa derivative beneficiaries (*see* INA § 101(a)(15)(U)(ii), 8 U.S.C. § 1101(a)(15)(U)(ii) and INA § 101(a)(15)(T)(ii), 8 U.S.C. § 1101(a)(15)(T)(ii)), similarly extend to individuals under 21. As the Board has explained, "the Act distinguishes between children and adult sons and daughters, who are older than 21 and may or may not be married." *See Matter of Le*, 25 I&N Dec. 541, 546 (BIA 2011) (citing INA § 203(a)(1)-(3), 8 U.S.C. § 1153(a)(1)-(3) (2006)). That Congress focused on the age of 21 as the dividing point between child and adult status for purposes of the immigration laws is further evidenced by the provision exempting the parents of *adult* citizen children, defined in the INA as those *over age 21*, from immigration quotas. *See* INA § 201(b)(2)(A), 8 U.S.C. § 1151(b)(2)(A) ("'immediate relatives' means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age"); *Perdido v. Immigration & Naturalization Serv.*, 420 F.2d 1179, 1181 (5th Cir. 1969) (using term "minor child" to describe children under 21 when discussing Section 201; "[s]ince minor children do not ordinarily determine where their own home will be, much less the family home, Congress recognized a rational distinction when it limited the category of those who could confer immigration benefits on their parents to persons over [21].").

Congress further expressed the legislative intent to protect children in the immigration process, broadly defined to include those under 21 years, by enacting the Child Status Protection Act of 2002. In that statute, Congress addressed the problem of children "aging out" of eligibility as derivative beneficiaries of asylum and refugee status granted to parents, as well as

derivative beneficiaries in other categories such as permanent residency and citizenship applications, by extending eligibility for such status to children who were under 21 at the time of filing the application but who subsequently "aged out" during the pendency of agency adjudications. *See* INA § 207(c)(2)(B) and § 208(b)(3)(B), 8 U.S.C. § 1157(c)(2)(B) and § 1158(b)(3)(B).

Thus, for purposes of the immigration laws generally, Congress views children to be those under the age of 21.

B. The Board and other Federal Courts have consistently interpreted references in the INA to "minor child" to refer to children under 21.

The term "minor" is not defined in the INA or its regulations, including those interpreting the "extraordinary circumstances" exception.[3] The term "minor", however, as used in the legislative history of the 1952 Act, explicitly describes children under age 21 as "minors." *See* S. Rep. No. 82-1137, at 46, 49 (1952) (discussing provisions related to the "Loss of nationality by minors" as pertaining to a "child under 21 years of age"; stating, "[u]nder existing law, a *child* does not lose nationality as a result of his parent's naturalization in a foreign country unless he attains the age of 23 years without acquiring permanent residence in the United States. The bill provides that a *minor* shall not lose American nationality while under the age of 21.") (emphasis added). Moreover, legislative history from the Child Status Protection Act similarly reflects Congress' use of the term "minor" to refer to children under 21 years of age. *See, e.g.*, H.R. Rep. No. 107-45 (2002) at 12 ("[T]hese children . . . become over 21, and when they reach that age,

[3] Few courts have considered the meaning of "minor" in these regulations, and our research has not turned up any such decisions post-dating *Matter of Le*. *See Al-Mousa v. Mukasey*, 518 F.3d 738, 739 (9th Cir. 2008), *opinion withdrawn on grant of reh'g*, 545 F.3d 694 (9th Cir. 2008), *on reh'g*, 294 Fed. App'x 277 (9th Cir. 2008) (declining to address issue because petitioner had not raised below); *Leyva v. Holder*, 385 Fed. App'x 778, 779 (9th Cir. 2010) (same).

they're automatically put into a preference status, not the immediate relative status granted to *minor children.*"); *id.* at 13 ("...*minor children* are becoming adults while they wait for the INS to act.") (all emphasis added)).[4]

In addition, the INA uses the undefined term "minor child" or "minor children" in various places throughout the statute. The Board has interpreted certain such references to be consistent with the statute's general definition of "child," and thus found "minor child" in those provisions of the INA means unmarried persons under the age of 21. In a precedential decision, the Board held that "[i]n view of the long-standing interpretation by the implementing agency that the undefined term 'minor child' means a 'child,' as defined in section 101(b)(1) of the Act, and the fact that statutory revisions did not alter that interpretation, we conclude that a 'minor child' is an unmarried person under 21 years of age." *Matter of Le*, 25 I. & N. Dec. 541, 550 (BIA 2011) (*id.* at 544, deciding "who may qualify as the 'minor child' of a fiancé(e) visa holder"[5] and, *id.* at 548, noting "it may be presumed that in 1986, when Congress readopted the existing language relating to a 'minor child' that had been subject to years of administrative interpretation, it accepted the common understanding of that term. As noted above, that interpretation had consistently been to treat the term 'minor child' as synonymous with the term 'child,' defined in section 101(b)(1) of the Act as an unmarried person under 21 years of age.")

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[4] *See also Akhtar v. Burzynski*, 384 F.3d 1193, 1201-02 (9th Cir. 2004) (references to "minor children" in legislative history for the Legal Immigration Family Equity Act ("LIFE") Act related to V-2 visas for children of permanent residents referred to children under age 21).

[5] The Board acknowledged that, at the time of the 1970 legislation creating the K visa category, there was a "common understanding of a minor child as a person under the age of 18", but noted that the former INS, "which was charged with implementing regulations to carry out the new statutory provisions for K visas, did not recognize a distinction between a 'child' and a 'minor child'" and "promulgated regulations that defined a fiancé(e) derivative child consistently with the long-standing definition of a 'child' as a person under 21 years of age, rather than crafting a new definition for the term 'minor child.'" *Matter of Le*, 25 I&N Dec. at 547.

(*id.* at 549, citing, among other support, a "2007 memorandum reminding USCIS officers to construe the term "minor child" consistently with the definition of a "child" in section 101(b)(1) of the Act, that is, an unmarried person under 21 years of age", Interoffice Memorandum regarding "Adjustment of Status for K-2 Aliens" from Michael L. Aytes, USCIS Assoc. Dir., Domestic Operations, to DHS officials (Mar. 15, 2007), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/k2adjuststatus031507.pdf.

Federal courts have repeatedly held the Board's interpretation of "minor child" as consistent with the INA's general definition of child (meaning unmarried persons under age 21) is reasonable and entitled to deference.[6] *See, e.g.*, *Regis v. Holder*, 769 F.3d 878, 882 (4th Cir. 2014) ("the Board concluded that the defining age for a 'minor child' determination is age 21, not 18"); *Carpio v. Holder*, 592 F.3d 1091, 1098 (10th Cir. 2010) ("8 U.S.C. § 1255(d) allows the adjustment of status of 'a minor child' who has obtained a K–2 visa. In this context, 'a minor child' is defined as 'an unmarried person under twenty-one years of age.' 8 U.S.C. § 1101(b)(1)."); *Si Min Cen v. Attorney Gen.*, 825 F.3d 177, 189 n.11 (3d Cir. 2016) ("To the extent there is arguably ambiguity as to the meaning of 'minor child' in § 1255(d), . . . we note that the BIA's long-standing interpretation . . . that the undefined term 'minor child' means a 'child,' as defined in section [1101](b)(1) of the [INA], . . . is consistent with the language and purpose of the INA as described below and therefore is entitled to *Chevron* deference.") (internal citations omitted); *id.* at 196 n.15 ("Against the backdrop of the Government's consistent

[6] *Cf. Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196 (2014) (defining "minor child" as "an unmarried child under the age of 21" for purposes of analysis of INA provisions applicable to derivative beneficiaries of visas petitioned for by citizens and lawful permanent residents), *reh'g denied sub nom. Scialabba v. de Osorio*, 135 S. Ct. 22 (2014).

treat[ment] [of] the term 'minor child' as synonymous with the term 'child,' Congress re-enacted 8 U.S.C. § 1101(a)(15)(K) and carried the term 'minor child' over into [§ 1255(d)] in 1986. Under *Lorillard*, we presume that, in including the same term in § 1255(d) in both the ITCA and, twelve years later, the LIFE Act, Congress was aware of and acquiesced to this definition. 434 U.S. at 580-81, 98 S. Ct. 866.") (internal quotation marks and citation omitted).[7]

In light of the legislative history and the Board's prior interpretation of the term "minor child" in the INA, it would be inconsistent with how the term "minor" is used in the INA for the Board to now conclude the regulation's use of that term refers to only youth under age 18.[8] *See, e.g., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'") (citing *United States v. Larionoff*, 431 U.S. 864, 873 (1977)).

C. Congress did not intend the one year deadline to bar legitimate asylum seekers.

The one year deadline for seeking asylum contained in Section 208(a)(2)(B) of the INA was enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act. This deadline and the exceptions to it were the product of two competing Congressional concerns. One concern behind imposing a deadline was that some non-refugees were applying

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[7] In a statutory subsection titled "Minors", the INA provides that, for purposes of determining the period of time in which an alien was unlawfully present in the United States, no such time shall be considered "in which an alien is under 18 years of age. . ." INA § 212(a)(9)(B)(iii)(I), 8 U.S.C. § 1182(a)(9)(B)(iii)(I). Notwithstanding this subsection's title, the clause does not define the term "minor"—indeed, if "minor" was consistently defined as referring to individuals under age 18 throughout the statute, it would be unnecessary and redundant for this clause to specify under 18 as the relevant age. *See Harmon v. Holder*, 758 F.3d 728, 734 (6th Cir. 2014) (rejecting argument that TVPRA's section heading broadened the plain meaning of the underlying statutory provision).

[8] *Cf.* 8 C.F.R. § 1001.1(a) ("The terms defined in section 101 of the Immigration and Nationality Act (66 Stat. 163) shall have the meanings ascribed to them in that section. . .")

for asylum to delay their removal or to fraudulently obtain immigration status or work authorization.[9] *See* 142 Cong. Rec. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson) (explaining the desire to target individuals who apply for asylum "because they know that [the] procedures are interminable"). *See also* H.R. Rep. No. 104-469(1), at 116-17 (1996) (expressing concern about "visa overstayers" and aliens smuggled into the country who file for asylum "as a means of remaining in the United States indefinitely"). The original version of the bill contained only a 30-day deadline for filing an asylum application and included no exceptions. *See* Section 526(a) of the Immigration in the National Interest Act of 1995, H.R. 2202, 104th Cong. (1995).

The opposing concern voiced by many members of Congress was the need to protect access to asylum for bona fide refugees. *Id.* The debate over whether to include a filing deadline and how long that period should be primarily focused on the need to protect legitimate refugees. Senator Kennedy advocated for an extended deadline in order to protect bona fide seekers of asylum:

> [T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted. They have been brutalized by their own governments. They have an inherent reluctance to come forward and to review their own stories before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to be able to do it. It takes a great deal of time for them to develop any kind of confidence in any kind of legal or

[9] By the time the one year rule became law, the then Immigration & Naturalization Service had already taken substantial steps to reduce fraud in the asylum process, including eliminating the practice of issuing a work permit to all individuals with pending asylum claims. *See* Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 696 (2008).

> judicial system, after what they have been through, and to muster the courage to come forward. That conclusion has been reached by a number of those who have been studying this particular problem. The initial proposal of requiring that there be action taken within 30 days of the person's arrival in the United States failed to understand what the real problem is—and fails to understand the remarkable progress that INS has made in this particular area.

142 Cong. Rec. S3282 (daily ed. Apr. 15, 1996) (statement of Sen. Kennedy).

These concerns led to several significant changes in the bill before it was enacted. The proposed 30-day filing deadline contained in the initial version of the bill was extended to one year, and the two exceptions contained in Section 208(a)(2)(D) were added. *See* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 10 (2001). Two Senators instrumental in the passage of the one year deadline, Senator Hatch (one of the conferees) and Senator Abraham, engaged in a colloquy on the floor of the Senate in which they repeatedly described these exceptions as "important" and intended to cover "a broad range of circumstances that may have changed and that affect the applicant's ability to obtain asylum," including "situations that we in Congress may not be able to anticipate at this time." 142 Cong. Rec. S11839-40 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch).

Supporters of the one year filing requirement acknowledged the need for "adequate protections to those with legitimate claims of asylum" 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch), and "to ensur[e] that those with legitimate claims of asylum are not returned to persecution." 142 Cong Rec. S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch). Even Senator Simpson, one of the provision's main proponents, commented that it was not designed to bar legitimate applications. He remarked, "We are not after the person from Iraq, or the Kurd, or those

people. We are after the people gimmicking the system." 142 Cong. Rec. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson).

As a result of these modifications, the balance struck by Congress in Section 208(a) requires a noncitizen to file for asylum within one year of his arrival as the general rule, with an exception for the existence of changed circumstances related to eligibility or extraordinary circumstances that prevented a filing within the year. *See* INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D). Senator Hatch explained that the extraordinary circumstances exception "relates to bona fide reasons excusing the alien's failure to meet the 1-year deadline. Extraordinary circumstances excusing the delay could include, for instance, physical or mental disability, efforts to seek asylum that were thwarted due to technical defects or errors for which the alien was not responsible, or other extenuating circumstances." 142 Cong. Rec. S11491-2 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

Thus, Congress did not intend the one year deadline to be applied to bar legitimate asylum seekers and intended that the statutory exceptions to the deadline be broadly applied to ensure that such applicants were not unfairly barred from seeking relief by circumstances beyond their control.

D. The TVPRA reflects Congress' intent to limit application of the one year deadline and favors a broad view of its exceptions.

Against the backdrop of the regulations interpreting the INA's "extraordinary circumstances" exception as excusing "unaccompanied minors" from the one year deadline, Congress enacted the TVPRA in 2008. The TVPRA was described as "an important step to protecting unaccompanied alien children" who had "been forced to struggle through an immigration system designed for adults", and created new procedures for processing asylum

applications filed by such youth, including that their applications would be reviewed by an USCIS asylum officer. *See* TVPRA § 235(d), codified at 8 U.S.C. § 1158(b)(3)(C); 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein, cosponsor of the original Senate version); *Harmon v. Holder*, 758 F.3d 728, 733-34 (6th Cir. 2014). The TVPRA also provides that the one year deadline "shall not apply to an unaccompanied alien child." TVPRA § 235(d)(7)(A), 8 U.S.C. § 1158(a)(2)(E). The term "unaccompanied alien child" or "UAC" came from the Homeland Security Act, not the INA, and was defined as persons under 18 years of age, who are unaccompanied, and who have no lawful immigration status. *See* INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E)) (using Homeland Security Act's definition of "unaccompanied alien child": "a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody", *see* 6 U.S.C. § 279(g)(2)). The TVPRA is thus a further expression of Congress' intent to limit the application of the one year deadline, as initially evidenced by the legislative history for the deadline and the enactment of the statutory exceptions.

In the TVPRA, Congress also chose not to alter the scope of the "extraordinary circumstances" exception excusing compliance with the one year deadline. "[T]he normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible." *Markham v. Cabell*, 326 U.S. 404, 411 (1945). USCIS training materials note that this exception and the regulations interpreting it remain a viable method of excusing the failure to comply with the deadline by other categories of youth that do not fall within the scope

of the TVPRA. *See* USCIS Asylum Division, Participant Workbook for Asylum Officer Basic Training Course on Guidelines for Children's Asylum Claims, *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf, at 45-46 (Mar. 21, 2009) ("USCIS Children's Guidelines") (recognizing broader applicability of the extraordinary circumstances exception and stating that persons not subject to the TVPRA definition of UAC, such as "[a]ccompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one year filing deadline based on legal disability").[10] Accordingly, the TVPRA does not limit the application of the "extraordinary circumstances" exception, which remains a distinct means for excusing compliance with the one year deadline for those applicants that do not fall within the scope of the UAC definition.

Further, Congress' enactment of the TVPRA may be viewed as an implicit rejection of the Board's more restrictive interpretation of the "extraordinary circumstance" regulation. In *Matter of Y-C-*, the Board held that, notwithstanding the regulation's reference to "unaccompanied minor" as an example of an extraordinary circumstance, an unaccompanied applicant's young age at the time of entry into the U.S. did not automatically excuse a failure to

[10] Although USCIS training materials define the term "unaccompanied minor" as referring to applicants under 18, the only support cited for this approach is the Homeland Security Act's definition of "unaccompanied alien child." USCIS Children's Guidelines at 16. The UAC definition is not applicable to the "extraordinary circumstances" regulations because the term used therein, "unaccompanied minor," is different from the "unaccompanied alien child" terminology employed in the TVPRA and the Homeland Security Act, as the USCIS Children's Guidelines acknowledge when it counsels that the "extraordinary circumstances" exception remains applicable to other categories of youth not encompassed by the TVPRA's definition. USCIS Children's Guidelines at 45-46. Moreover, Congress did not address the scope of the INA's "extraordinary circumstances" exception in the TVPRA; as such, there is no basis to adopt a uniquely defined term from the TVPRA to re-define a *different* term used in preexisting regulations interpreting an unchanged exception to the one year deadline in the INA.

meet the one year deadline. 23 I&N Dec. at 287-88. Under the Board's approach in *Matter of Y-C-*, the deadline still applied to unaccompanied youth seeking asylum and only certain asylum seeking children who missed the deadline would be permitted to apply for asylum if they could satisfy additional burdens of proof that extraordinary circumstances justified the filing delay.

In enacting the TVPRA, Congress essentially did away with the approach set forth in *Matter of Y-C-* by eliminating the need for an individualized analysis of circumstances for UAC, who were statutorily removed from the requirements of the one year deadline. The TVPRA makes clear that the one year deadline simply does not apply to certain unaccompanied asylum applicants—those designated as unaccompanied alien children—without need to address burdens of proof or even consider the scope of the "extraordinary circumstance" exception. Congress' creation of a category of youth to which the one year deadline simply does not apply, while otherwise leaving in play the "extraordinary circumstances" exception excusing compliance with that deadline, counsels in favor of a broader view of the regulations interpreting that exception—one that gives substantial and significant meaning to the "unaccompanied minor" category referenced therein. *See Markham*, 326 U.S. at 411; *see also Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal citations and quotations omitted). Indeed, an interpretation of the regulation's reference to "unaccompanied minor" that limits it to youth under age 18 would be largely redundant with the scope of the TVPRA's exemption.[11] At minimum, by not altering the INA's "extraordinary circumstances"

[11] As Congress has already exempted unaccompanied children under 18 from the one year deadline, the reference to "minor" in the regulations cannot be interpreted as referring to any age *younger than* 18 or it would be inconsistent with the legislative scheme enacted by the TVPRA.

exception, Congress made clear its intent that the TVPRA provisions not be viewed as limiting or narrowing the scope of that distinct and separate exception to the one year deadline.

Moreover, in the TVPRA, Congress notably did not change the INA's broader definition of "child," nor did it use or otherwise define "minor."[12] Instead, Congress used a separate definition from the Homeland Security Act, a United States Code title distinct from the one containing both the INA's definition of "child" and the "extraordinary circumstances" exception to the one year deadline. *Compare* 6 U.S.C. § 279(g) (definition of "unaccompanied child" in Title Six) with 8 U.S.C. § 1101(b)(1) (defining "child" for purposes of INA in Title Eight). Congress' use of the unique UAC definition in the TVPRA reflects the intent to leave unchanged interpretations of the defined term "child" in the INA. *See generally Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 783 n.15 (1985) ("So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)) (internal quotation mark omitted)). Congress' decision to employ the unique UAC category for purposes of the TVPRA's exemption from the deadline, while leaving intact the INA's general definition of "child" as under age 21, supports an interpretation of the INA's "extraordinary circumstances" exception as applicable to all child asylum applicants who are under 21 when arriving in the United States.

Consistent with the plain meaning and legislative history of the INA, the Board and court interpretations of that statute, and Congress' legislative purpose in enacting exceptions to protect

[12] Further evidencing Congress' intent to leave intact existing interpretations of youth-related categories in the INA, in TVPRA provisions amending the INA's Special Immigrant Juvenile status, Congress did not change the interpretation of that status as applicable to children under 21, as set forth in regulations. *See* 8 C.F.R. § 204.11(c)(1).

legitimate asylum seekers from having claims barred by the one year deadline, the term "minor" as used in the regulations interpreting the "extraordinary circumstances" exception to the INA's one year deadline should be defined as referring to children under age 21, thereby clarifying that the regulations set forth an exception to the one year deadline for asylum applicants who were under the age of 21 during the one year period after arrival in this country.

II. Being under 21 years of age constitutes an extraordinary circumstance exempting an asylum applicant from the one year deadline.

The plain language, purpose, and structure of the INA along with its amendments and regulations indicate that the term "minor" in 8 C.F.R. § 1208.4(a)(5)(ii) should be defined to include all children under 21 years of age. However, if the Board were to conclude otherwise, it nonetheless should find that being under 21 years of age constitutes another extraordinary circumstance exempting a child from the one year deadline. In support of this proposition, and as explained below, it is relevant for the Board to consider that **(A)** the non-exhaustive list of extraordinary circumstances mentioned in § 1208.4(a)(5)(ii) is not intended to exclude other extraordinary circumstances; and **(B)** scientific studies show that children between the ages of 18 and 21 are distinct from adults in their psychosocial and neurological maturity, which is confirmed by numerous laws in our society.

A. The non-exhaustive list of extraordinary circumstances mentioned in 8 C.F.R. § 1208.4(a)(5)(ii) is not intended to exclude other extraordinary circumstances.

As explained above, Congress created the "extraordinary circumstances" exemption to the one year deadline without expanding upon what constitutes an "extraordinary circumstance." INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D). The regulations, however, provide representative examples of extraordinary circumstances that excuse a late filing, including being an "unaccompanied minor." 8 C.F.R. § 1208.4(a)(5). Importantly, the list of extraordinary

circumstances is non-exhaustive. In fact, § 1208.4(a)(5) specifically provides that the "circumstances may include ***but are not limited to***" the named examples. (emphasis added); Asylum Procedure, 65 Fed. Reg. 76121, 76123-24 (2000) (stating that the "non-exhaustive list" of extraordinary circumstances "merely provide[s] examples"); USCIS One Year Deadline Training at 13, 15 (noting that the list of extraordinary circumstances "is not all-inclusive" and stating "[k]eeping in mind that the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations, the Asylum Division's policy is to find that all minors who have applied for asylum, whether accompanied or unaccompanied, also have a legal disability that constitutes an extraordinary circumstance").[13]

The decision of Congress and USCIS not to limit the circumstances that exempt an individual from the one year deadline reflects the fact that such exemptions were enacted to provide "adequate protections" for legitimate refugees, 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch), and "to ensur[e] that those with legitimate claims of asylum are not returned to persecution," 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch). Thus, the non-exhaustive list of extraordinary circumstances mentioned in § 1208.4(a)(5)(ii) is not intended to exclude other extraordinary circumstances that may exempt legitimate asylum seekers from the one year deadline.

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[13] As with the USCIS Children's Guidelines, the USCIS One-Year Deadline Training defines a "minor applicant" as "someone under the age of eighteen at the time of filing." USCIS One Year Deadline Training (citing the USCIS Memorandum, "Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS," Aug. 14, 2007, p.5, *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/procedures-minor-children-raps.pdf). But the cited USCIS Memorandum refers to the Homeland Security Act's definition of "unaccompanied alien child", and does not identify any sources relevant to interpreting the INA or the regulations interpreting the extraordinary circumstances exception to the one year deadline.

B. Being under the age of 21 constitutes an extraordinary circumstance warranting an exemption from the one year deadline because children between the ages of 18 and 21 are distinct from adults in their psychosocial and neurological maturity.

It is well-established that children between the ages of 18 and 21 are distinct from adults in their psychosocial and neurological maturity. A plethora of studies have confirmed that children of that age are still developing their psychosocial and neurological functions. *See, e.g.*, Tracy Velázquez, *Young Adult Justice: A new frontier worth exploring*, Chronicle of Social Change, at 4 (2013);[14] Laurence Steinberg, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, and Marie Banich, *Are Adolescents Less Mature Than Adults?*, America Psychologist, Vol. 64, No. 7, 583, 587, 592 (2009) ("Steinberg");[15] Massachusetts Institute of Technology, Young Adult Development Project, at 11 (2008) ("MIT Project");[16] MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Less Guilty by Reason of Adolescence*, Issue Brief 3 at 2 (2007) ("MacArthur Foundation");[17] Jay Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, Ann. N.Y. Acade. Sci. 1021: 77-85 (2004) ("J. Giedd").[18]

Notably, researchers at the MacArthur Foundation studied the psychosocial maturity levels of adolescents and young adults by examining age differences in relation to a number of characteristics that undergird decision-making—including impulsivity, risk processing, future orientation, sensation-seeking, and resistance to peer pressure—and found that psychosocial

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[14] https://chronicleofsocialchange.org/wp-content/uploads/2013/05/Young-Adult-Justice-FINAL1.pdf.

[15] http://psych.colorado.edu/~mbanich/p/steinberg2009_are_adolescents.pdf.

[16] http://hrweb.mit.edu/worklife/youngadult/youngadult.pdf.

[17] http://www.newhaven.edu/990483.pdf.

[18] http://thesciencenetwork.org/docs/BrainsRUs/ANYAS_2004_Giedd.pdf.

capability continues to develop well beyond the age of 18. *See* MacArthur Foundation at 2; Steinberg at 587 ("[T]he literature on age differences in psychosocial characteristics such as impulsivity, sensation seeking, future orientation, and susceptibility to peer pressure shows continued development well beyond middle adolescence and even into young adulthood.").

Neurological studies line up well with psychosocial research and show that brain maturation is a process that continues through adolescence and into an individual's 20s. *See* MacArthur Foundation at 3; MIT Project at 11; J. Giedd at 83. Notably, longitudinal studies of brain morphometry made possible through magnetic resonance imaging have shown dynamic changes in brain anatomy throughout adolescence, with the brain's dorsal lateral prefrontal cortex ("DLPFC")—which is important for controlling impulses, weighing consequences of decisions, prioritizing, and strategizing—not maturing to adult levels until an individual reaches their 20s. J. Giedd at 83. The DLPFC is thus still under construction for a decade after puberty. *Id.* The Young Adult Development Project at MIT framed the situation this way:

> As a number of researchers have put it, "the rental car companies have it right." The brain isn't fully mature at 16, when we are allowed to drive, or at 18 when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.

MIT Project at 11.

As is evident from this statement, state and federal laws permit children to undertake some adult activities before reaching the age of 21. Nonetheless, our laws also reflect the fact that children under the age of 21 are not mature enough to hold certain responsibilities and be held accountable for failing to live up to those responsibilities. For example, Congress—with the Omnibus Crime Control and Safe Streets Act of 1968—referred to "emotionally immature, or thrill-bent juveniles and minors" in restricting the sale of firearms to individuals under 21 years of age. Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 226 (1968). The law now provides that it

is unlawful for "any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver":

> (1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is ***less than twenty-one years of age***.

18 U.S.C. § 922(b) (emphasis added). Addressing this law, the Fifth Circuit held that Congress's power to restrict "the ability of 18-to-20-year-olds to purchase handguns from [federal firearms licensees] [was] consistent with a longstanding, historical tradition" and reasoned that "Congress restricted the ability of minors under 21 to purchase handguns because Congress found that they tend to be relatively immature . . . ." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012).

State legislatures also have recognized the immaturity of children under 21. State alcohol laws have been enacted in a manner that reflects the relative immaturity of children under 21. *See, e.g.*, *Rowe v. State*, 867 N.E.2d 262, 267-68 (Ind. Ct. App. 2007) (accepting the State's position that "[a] rational distinction for treating [persons over twenty-one] differently than those under twenty-one years of age is the legislative determination that those who are twenty-one or older are more mature than those under twenty-one and should therefore be more accountable for their actions"); *Mueller v. McMillan Warner Ins. Co.*, 2005 WI App 210, ¶ 15, 287 Wis. 2d 154, 165, 704 N.W.2d 613, 618 ("[T]he legislature has decided that those under twenty-one cannot buy or consume alcohol legally because it is a dangerous instrumentality that most people under twenty-one are too immature to handle."); *State v. Campbell*, 633 N.W.2d 302, 304 (Iowa 2001) ("The underlying premise of the prohibition on underage drinking is that a person under the age of twenty-one is not mature enough to drink responsibly.").

Courts, as well, in developing their precedents, have recognized the realities of immaturity when it comes to children under 21. Recently, in *Sanchez v. Roden*, a U.S. District Court addressed a prisoner's habeas contention that the prosecution inappropriately exercised peremptory challenges to strike young people from the jury. No. 12-10931, 2015 WL 461917, at *9 (D. Mass. Feb. 4, 2015). The court denied the habeas petition and—in an opinion affirmed by the First Circuit, 808 F.3d 85 (1st Cir. 2015)—concluded that generalizations regarding the quality of older jurors "are deeply rooted in experience and common sense, particularly the basic proposition that as people grow older they are more likely to mature and gain experience, and that with maturity and experience they are more likely to exercise their duties and privileges responsibly" and that "there is commonly a vast gulf between the experience and maturity levels of very young adults and those even a few years older." 2015 WL 461917, at *9-10.

Because science and law confirm that children between 18 and 21 are distinct from adults in their psychosocial and neurological maturity, being under 21 constitutes an "extraordinary circumstance" warranting an exemption to the one year deadline. Just as USCIS reasoned when concluding that a "legal disability" status should also apply to accompanied children, "[t]he same logic underlying the legal disability ground listed in the regulations also is relevant to" children between the ages of 18 and 21, who are similarly "generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults." *See* USCIS Children's Guidelines at 46; USCIS One Year Deadline Training at 14-15.[19]

Accordingly, because children between 18 and 21 are consistently less mature than adults

[19] USCIS applies its Guidelines for Children's Asylum Claims, issued to address the "unique vulnerability and circumstances of children," to youth under 21 when making derivative determinations for children whose parents filed for asylum. Children's Guidelines at 7, 15.

in their psychosocial and neurological capacities and therefore cannot be expected to navigate the adjudicatory process in the same manner as adults, asylum applicants of that age during the year after the date of entry should be excused from a lack of compliance with the one year deadline due to the extraordinary circumstance of their age.

III. The Board should find that being under 21 constitutes a *per se* extraordinary circumstance exception to the one year deadline and overrule *Matter of Y-C.*

Because of the recognized differences in maturity and development between an under 21 year old minor and an older adult, the Board should find that the status of being under 21 years old constitutes a *per se* extraordinary circumstances exception to the one year deadline, whether pursuant to the current exception in 8 C.F.R. § 1208.4(a)(5)(ii) or as a separate type of extraordinary circumstance exception. Although *Matter of Y-C-* called for "an individualized analysis of the facts of the particular case" to determine whether "extraordinary circumstances exist to excuse" a minor asylum seeker's failure to meet the one year deadline, the Board's reasoning was premised on its view that it was not "required" to find the exception "merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance." 23 I&N Dec. at 288. The Board, however, did not provide a rationale for this view, which is inconsistent with the categorical way that other extraordinary circumstance exceptions are treated. *See, e.g.*, USCIS One Year Deadline Training at 16 (to meet the ineffective assistance of counsel exception to the one year deadline, the asylum seeker must simply show that she has met the regulatory elements of 8 C.F.R. § 208.4(a)(5)(iii) and that counsel's actions were related to the filing delay); at 17 (asserting that maintaining lawful status relates to the asylum seeker's failure to timely file even where the asylum seeker does not articulate her lawful status as a reason for the filing delay). Furthermore, at the time it published *Y-C-*, the Board also did not have the benefit of current research, as noted *supra*, that has made it

increasingly clear that children between 18 and 21 are less developed and mature and cannot be held accountable in the same way as adults.

For these reasons, the Board should now overturn its decision in *Y-C-* in favor of an approach to asylum-seeking youth that is more in line with Congressional intent and the current approach that science and law take towards youth between 18 and 21. The Board's analysis in *Y-C-* has largely been eviscerated by Congress' passage of the TVPRA and its creation of a statutory exemption from the one year deadline for UAC. Retaining an individualized assessment approach to the analysis of whether other minors meet an extraordinary circumstances exception to the deadline is inconsistent with the TVPRA's treatment of UAC and draws a distinction between these two groups that has no basis in science or law.

Overturning *Matter of Y-C-* and establishing a *per se* extraordinary circumstances exception to the one year deadline for asylum seekers under age 21 not only brings the agency's interpretation of the exception more in line with the TVPRA, but also establishes a simpler and fair test for establishing an exception to the one year deadline that maintains the focus on the child's asylum eligibility, rather than a complicated analysis of the minor's development and psychology that will further tax already overburdened immigration judges and asylum officers, as well as this Board. In light of the growing evidence that children under 21 are developmentally and neurologically different than older adults, the individualized analysis that the Board asserts in *Y-C-* will require adjudicators to opine on psychological and sociological matters in cases which will commonly lack any kind of expert opinion which might enable adjudicators to make such findings. Adjudicators are tasked with arriving at conclusions based on evidence in the record, but there does not currently exist any way to competently do so when making an individualized assessment of a child's eligibility for an exception to the one year

deadline based on her age and development, particularly when the child is *pro se*. The Board should therefore overturn *Matter of Y-C-* and find that the status of being under 21 constitutes a *per se* exception to the one year deadline, whether pursuant to the current exception in 8 C.F.R. § 1208.4(a)(5)(ii) or as a separate extraordinary circumstance exception.

IV. At a minimum, children between the ages of 18 and 21 should be evaluated on a case-by-case basis, with age treated as an important factor in the assessment of extraordinary circumstance.

Even if the Board declines to excuse all asylum applicants between the age of 18 and 21 from the one year deadline, it should nonetheless require that adjudicators consider whether a child's individualized circumstances, including the development- and maturity-related issues unique to youth of that age, qualify as an extraordinary circumstance

Age is often used as a metric to indicate when an individual is mature enough to account for their actions and be expected to, for example, file an application for asylum within the time period required for adults. However, "age is not a binary metric." *Sanchez*, 2015 WL 461917, at *10. "A person is not 'young' at one point and suddenly 'not young' at another." *Id.* "While it is common to use somewhat arbitrary age cut-offs in a variety of contexts, in reality no such bright lines exist." *Id.*; *see also* Jason Ziedenberg, U.S. DOJ, National Institute of Corrections, *You're An Adult Now: Youth in Adult Criminal Justice Systems*, at 4 (2011) ("[T]he research on adolescent development that has driven so many recent changes to juvenile justice statutes also doesn't provide a 'bright line' for drawing when a 15, 16 or 17 youth may have the mixture of impulse control and reason to be considered an adult, with some researchers calling to include older youth their 20s in the juvenile justice system.")[20] (citing MacArthur Foundation).

[20] http://static.nicic.gov/Library/025555.pdf.

USCIS has stated that "[t]he needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum-seeker second" because "[c]hild asylum seekers approach the task before them as children, and not necessarily as individuals with legal matters before a State." USCIS Children's Guidelines at 12-13. Indeed, USCIS expressly trains its asylum officers to apply its Guidelines for Children's Asylum Claims to derivative asylum applicants (those filing with a parent or guardian), *including those who are between the ages of 18 and 21*, recognizing that the Guidelines "may be useful for all cases involving children and young adults" and cautioning that "asylum officers should bear in mind that an applicant whose claim is based on events that occurred while under the age of eighteen may exhibit a minor's recollection of the past experiences and events." USCIS Children's Guidelines at 15.

USCIS also acknowledges that "[s]ome children may seem to be much older or much younger than their chronological age" and has explained that a number of environmental and experiential factors can stunt or accelerate dramatically the development of a child, including: a. chaotic social conditions; b. experience with forms of violence; c. lack of protection and caring by significant adults; d. nutritional deficits; e. physical disabilities; and f. mental disabilities. *Id.* at 13, 14. Indeed, USCIS recognizes that a "child's ability to participate in the asylum interview will vary based on a number of factors in the child's development." *Id.* at 13. As noted above, USCIS has acknowledged that such developmental factors may similarly impact the ability of a child to navigate the asylum application process: "*minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.*" USCIS Children's Guidelines at 46.

Thus, the Board should at minimum require adjudicators to evaluate on a case-by-case basis whether a child between the ages of 18 and 21 qualifies for the extraordinary circumstances

exemption. In undertaking this case-by-case analysis, this Board should require adjudicators to account for the immaturity of youth between the ages of 18 and 21 and further evaluate the child based on the environmental and experiential factors identified by USCIS, including:

(a) chaotic social conditions;
(b) experience with forms of violence;
(c) lack of protection and caring by significant adults;
(d) nutritional deficits;
(e) physical disabilities; and
(f) mental disabilities.

Id. at 14. Such an analysis falls squarely within the scope of the regulation, which defines "extraordinary circumstances" as "events or factors directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his own action or inaction. . ." 8 C.F.R. § 1208.4(a)(5)(2001); *see also Matter of Y-C-*, 23 I&N Dec. at 289-90 (concurring opinion) (concluding that applicant satisfied the extraordinary circumstances exception because due to the "combination of the respondent's youth, his detention, and the unexplained failure of the Service to produce him for a hearing during the 1-year period for filing an asylum application"). Thus, at minimum, the immaturity of youth between the ages of 18 and 21 should presumptively be considered as a relevant factor in the case-by-case analysis of whether an asylum applicant's development and other experiences constitutes an extraordinary circumstance excusing compliance with the one year deadline.

V. If a youth files before she turns 21, she has *per se* filed within a "reasonable period," and once she turns 21, the Board should conduct a holistic assessment of her individualized circumstances to determine whether she has filed within a "reasonable period."

Once the "extraordinary circumstance" of a legal disability has ceased to exist, the applicant must file within a "reasonable period" of the lifting of the disability. *See* 8 C.F.R. § 1208.4. This determination should be made based on the "particular circumstances involved in

the delay." *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 196 (BIA 2010).

If the Board holds that either all youth under age 21 are minors and are exempted from the one year deadline pursuant to 8 C.F.R. § 1208.4(a)(5)(ii) or that all youth under age 21 constitute a separate extraordinary circumstance exception, then a child who filed for asylum before turning 21 has *per se* filed within a "reasonable period," because she applied for asylum while her legal disability was still in effect. If the child files for asylum after turning 21, the Board should hold that the adjudicator must analyze her individualized circumstances cumulatively to determine whether she has filed within a "reasonable period." Because immigrant children are likely to encounter numerous challenges when attempting to seek asylum, the Board should refrain from deeming a certain period of time as presumptively unreasonable.

Amici curiae adopt herein the arguments raised in support of this section in the contemporaneously filed amicus brief submitted by Public Counsel and Catholic Legal Immigration Network, Inc. (CLINIC), but write further to emphasize that the Board should caution adjudicators against requiring evidence to establish filing within a "reasonable period" that is not possible for the asylum seeker to obtain. The very same factors that may make it impossible for an under 21-year old child to file for asylum within one year of her date of entry may also prevent the child from gathering evidence to establish the reasonableness of her filing timeline. These factors are exacerbated with the child is *pro se*.[21]

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[21] In FY2014 alone, 68,541 unaccompanied immigrant children crossed the Southwestern border and were apprehended by Customs and Border Protection. "Southwest Border Unaccompanied Alien Children Statistics FY 2015," U.S. Customs and Border Protection, *available at* https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015. Surveys by the United Nations High Commissioner for Refugees found that the majority of these children may be in need of asylum protection. "Children on the Run," UNHCR, March 2014, *available at* http://www.unhcr.org/en-us/news/latest/2014/3/53206a3d9/

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CONCLUSION

For the reasons set forth above, *amici curiae* urge the Board to interpret "minor" in the regulations as extending the "extraordinary circumstances" exception to the one year deadline to all children under 21 within the year after their date of entry. *Amici curiae* further argue that an asylum seeker between 18 and 21 lacks the psychological and social maturity of an adult and therefore being of that age during the year after entry should be considered a *per se* "extraordinary circumstance" excusing compliance with the deadline and furthermore, that the Board should overturn its decision in *Matter of Y-C-* requiring an individualized assessment of a child to determine eligibility for the extraordinary circumstance exception. In the alternative, *amici curiae* urge that the immaturity of children between 18 and 21 should be considered as a relevant factor to an individualized analysis of whether an asylum applicant has set forth extraordinary circumstances to excuse an untimely application. Finally, *amici curiae* urge that a broad and holistic set of factors be considered in determining whether an asylum seeker has filed within a "reasonable period" after her legal disability is lifted (*i.e.* after reaching the age of 21).

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unhcr-calls-americas-keep-children-run-safe-violence.html. However, most unaccompanied children depend on pro bono attorneys and non-profit legal service providers are not able to meet this overwhelming need for representation. *See* Kathleen Newland, "What is the Right Policy Toward Unaccompanied Children at U.S. Borders," Migration Policy Institute, June 2014, *available at* http://www.migrationpolicy.org/news/what-right-policy-toward-unaccompanied-children-us-borders (explaining that most children in removal proceedings rely on pro bono lawyers); "Due Process Denied: Central American Seeking Asylum and Legal Protection in the United States," American Immigration Lawyers Association, June 2016 at 18, *available at* http://www.aila.org/infonet/report-due-process-denied (explaining that these cases have overwhelmed nonprofit legal service providers and pro bono attorneys). Without competent counsel, it will be difficult for most—if not all—immigrant youth to obtain evidence demonstrating that they filed for asylum within a reasonable period, or to even understand what type of evidence might be useful to provide.

Respectfully submitted,

Dated: September 1, 2016

Vanessa Martí Heftman
(EOIR ID: 00552134)

PROOF OF SERVICE

I, Vanessa Martí Heftman, certify that I caused three copies of the foregoing to be delivered to the Board of Immigration Appeals at the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

I further certify that I mailed a copy of the foregoing to the Department of Homeland Security via UPS Next Day Air at the following address:

Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

Dated: September 1, 2016

Vanessa Martí Heftman
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