No. 12-3268, 12-4173

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Ethel Harmon
A 079-691-042

Petitioner

v.

Eric Holder, U.S. Attorney General and
Department of Homeland Security,
Respondents

Petition for Review of an Order of Removal by the Board of Immigration Appeals

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Brief of Amicus, American Immigration Lawyers Association In Support of Ethel Harmon

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CORPORATE DISCLOSURE STATEMENT

The American Immigration Lawyers Association is a private membership organization for attorneys. It does not issue stock and there is no parent corporation.

AMICUS DISCLOSURE STATEMENT

No person and no party to this appeal, other than amicus AILA authored any part of this brief or provided any funding for the preparation of this brief. *See* Fed.R.App.P. 29(c)(5).

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INTRODUCTION

Like Ethel Harmon, the petitioner in this case, a noncitizen known as Y-C- was young and alone in the United States. When Y-C- came to the United States, he was 15 years old and unaccompanied. He was immediately detained and held in immigration detention. His first application for asylum was rejected because it was improperly filed. Later, after finally submitting his application, an immigration judge denied asylum because the application was filed more than one year after his arrival in the United States. *See Matter of Y-C-*, 23 I&N Dec. 286, 287-88 (BIA 2002). Though the Board of Immigration Appeals fixed the immigration judge's error in Y-C-'s case, *id.* at 288, the fix was an inadequate response to systemically address the problem of noncitizens who arrive in the United States young and alone with meritorious asylum claims. The BIA's solution was a restrictive reading of the regulations that would make it exceedingly difficult for other unaccompanied children to gain access to the asylum program. Our asylum statute, § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, was designed

for adults as its complicated statutory gateway and pathways make clear.

Yet the reality is that noncitizens like Y-C- and Ms. Harmon represent common fact patterns. Some 80,000 juveniles are apprehended at our borders each year. *See* Chad C. Haddal, *Unaccompanied Alien Children: Policies and Issues*, Mar. 1, 2007 (Congressional Research Service) at 1. For years, the United States struggled with formulating a response to unaccompanied and separated children without meaningful success. *Id.* at 1-2; Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, The John D. and Catherine T. MacArthur Foundation, June 2006, at 29-47.[1] Many, like Y-C-, were detained under inappropriate conditions. Others fell through the cracks of a multiple agency, uncoordinated response. All of them, though, were children "struggl[ing] through an immigration system designed for adults." *See* 154 Cong. Rec. S10886, S10886 (daily

[1] Available at http://www.humanrights.harvard.edu/images/pdf_files/Seeking_Asylum_Alone_US_Report.pdf (last visited Aug. 7, 2013)

ed. Dec. 10, 2008) (statement of Senator Feinstein). These minors, were, in the words of a former U.S. immigration judge, "the biggest void in all of immigration law." *Seeking Asylum Alone* at 7.

On December 23, 2008, Congress acted to fill the void, in part, by enacting the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044. The TVPRA created, among other protections, a new provision, INA § 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E), directed at systematically fixing the dilemma of minors and the one-year asylum filing deadline. *See* TVPRA § 235(d)(7). This provision would have fixed permanently the question presented in *Y-C-*.

Here, the court is asked to interpret § 208(a)(2)(E) and decide whether noncitizens who qualify as an unaccompanied alien children at any time in the one year period after last arrival during which an application for asylum would be timely are permanently exempted from the one-year filing requirement for asylum applications. If the petitioner, Ethel Harmon, was an unaccompanied alien child during the one-year period after her

last arrival in the United States, the BIA was legally incorrect in rejecting her asylum claim on the grounds that she was not a minor at the time she filed for asylum. *See* CAR, 3-4, CAR 53. On this point, the BIA was wrong.

Because the issue is important to the numerous noncitizens appearing before the immigration courts in the Sixth Circuit as well as across the nation, AILA proffers this brief to share its views on the interpretation of INA § 208(a)(2)(E). AILA takes no position on any other claim made by the petitioner and takes no position on the merits of her asylum claim.[2]

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is a national association with more than 12,000 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 the administration of law pertaining to immigration, nationality and naturalization; to cultivate the

[2] AILA gratefully acknowledges the writing and research assistance of Bonnie Sailer, a law student at Lewis & Clark Law School in Portland, Oregon, in drafting this brief.

jurisprudence of the 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.

ARGUMENT

Congress intended INA § 208(a)(2)(E) to permanently exempt from the one-year filing deadline any noncitizen who qualified as an unaccompanied alien child at any time in the one-year period after last arrival without regard to the age of the noncitizen at the time of filing the application for asylum.

I. The Asylum Statute – Before and After the TVPRA

Section 208(a) of the INA is the gateway to a merits adjudication of an asylum application. It affords any noncitizen without regard to her status who is physically present or arrives in the United States at any entry point an opportunity to apply for

asylum unless an "exception" applies. *See* INA § 208(a)(1). There are only three exceptions: (A) if a safe third country designation applies to the noncitizen, (B) if the noncitizen seeks asylum more than one-year after her last arrival, and (C) if the noncitizen previously filed for asylum. *See* INA §§ 208(a)(2)(A), (B), (C).

The one-year asylum filing deadline, INA § 208(a)(2)(B), was enacted "against the backdrop of two competing concerns." *See* Penn State Law's Center for Immigrant Rights, et al, *The One-Year Asylum Deadline and the BIA: No Protection, No Process*, Oct. 2010, at 3. The first concern was that some non-refugees applied for asylum to delay their removal or to obtain immigration status fraudulently. The second was protecting access to asylum protection for bona fide refugees. *Id.* Thus, Congress provided that a noncitizen must file for asylum within one year of her last arrival as the general rule with an exception when there are changed circumstances related to eligibility or extraordinary circumstances that prevented a filing within the year. *See* INA §§ 208(a)(2)(B), (D). Regulations later explained that an "extraordinary circumstance" would include a "legal disability"

such as being an unaccompanied minor, among other reasons. *See* 8 C.F.R. § 208.4(a)(5)(ii). This regulation, though, did not systemically fix the refugee child dilemma as *Matter of Y-C-* makes clear. In the BIA's words: "We are not required to excuse [Y-C-'s] tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance." *Matter of Y-C-*, 23 I&N Dec. at 288. The one-year rule still applied and, by operation of the regulation, only certain refugee children might be able to seek asylum if she could satisfy several additional burdens of proof. *Id.* The BIA's restrictive approach towards the one-year filing deadline, as demonstrated by the facts in *Y-C-*, had aggravated the problem of the young and alone who sought asylum. Indeed, one study of the BIA's implementation of the one-year filing deadline characterized the BIA's policy and approach as "inflexible and unnecessarily technical." *The One-Year Asylum Deadline and the BIA* at 8 (analyzing unpublished BIA decisions on asylum filings during the period prior to the TVPRA). Thus, the problem of the young and alone struggling through an adult-centric system remained.

Enter the TVPRA in 2008. Relevant here, Congress made two critical modifications to the asylum program to permanently and systemically remedy the problem of noncitizen children who arrive unaccompanied to the United States with the TVPRA. First, Congress provided that in certain circumstances the USCIS asylum office will have initial jurisdiction over defensive asylum claims, no matter that the noncitizen may be in removal proceedings. *See* TVPRA § 235(d)(7)(B) (creating INA § 208(b)(3)(C)). Second, Congress provided that the time-limitation at INA § 208(a)(2)(B) will not apply to qualified individuals. *See* TVPRA § 235(d)(7)(A) (creating INA § 208(a)(2)(E)). In this brief we focus on the second change, the exemption from the one-year filing deadline and determining who is a qualified individual that would be exempt from the one-year filing deadline. Section 208(a)(2)(E) of the INA provides that,

> APPLICABILITY- Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))).

As the provision makes plain, the time limitation at § 208(a)(2)(B) "shall not apply" to an unaccompanied alien child. Congress defined "unaccompanied alien child" (UAC) to mean:

> (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.

6 U.S.C. § 279.

By completely eliminating the one-year filing deadline for unaccompanied alien children, Congress did away with the case-by-case adjudication and burdensome process demanded by the BIA in *Matter of Y-C-*. No more would a child be forced to run the gauntlet of the asylum program's adult-centered requirements. The deadline in § 208(a)(2)(B) simply does not apply to those noncitizens who qualify for subparagraph (E)'s exemption.

II. Unaccompanied Alien Child Status During The Year After Last Arrival.

Under the only permissible reading of the statute – the only one that follows the plain text, the context of other TVPRA and INA provisions, and implement's Congress's intent – an applicant

is eligible for benefits under INA § 208(a)(2)(E) if she qualifies as a UAC at any time during the one-year period after last arrival during which an application for asylum would be timely. It is irrelevant whether an applicant is *now* an unaccompanied alien child or *when* she filed for asylum.

Section 208(a)(2)(E)'s language is plain. The provision states that "Subparagraph[ ](B) shall not apply to an unaccompanied alien child[.]" To interpret this language requires interpreting its text in light of the cross-referenced statutory section, INA § 208(a)(2)(B).

Subparagraph (B) creates a one-year clock that, when it strikes, ends a noncitizen's eligibility to file for asylum. The clock starts to run "after the date of the alien's arrival" in the United States and strikes at one year. *Matter of F-P-R-*, 24 I&N Dec. 681, 682 (BIA 2008). Importantly, § 208(a)(2)(B)'s clock is not subject to tolling: once it starts, the clock runs until one year is reached.[3] If a noncitizen falls within § 208(a)(2)(B)'s prohibition, then the

[3] As we explain below in more detail, subparagraph (D) does not toll the clock, rather it provides an excuse for late filing.

noncitizen cannot take advantage of § 208(a)(1)'s right to file for asylum. *Id.*

Subparagraph (E) does not alter the starting and stopping of the clock. It does not modify any of § (B)'s terms: alien, arrival, and one year – these all mean the same thing now as they did before the TVPRA. The clock starts after the day of the alien's last arrival. 8 C.F.R. § 208.4(a)(2)(B)(ii). "Last arrival" refers to "an alien's most recent coming or crossing into the United States after having traveled from somewhere outside of the country." *Matter of F-P-R-*, 24 I&N Dec. at 684. A physical coming or crossing into the United States triggers the § (B) clock and that is the *only* thing that triggers the § (B) clock.

What subparagraph (E) does is remove a noncitizen who is an unaccompanied alien child from § (B) entirely. Even though an unaccompanied alien child has physically crossed into the United States, the asylum clock never starts because § 208(a)(2)(B) does not apply to unaccompanied alien children.

The BIA's unpublished (and therefore *Chevron*-ineligible decision, *Japarkulova v. Holder*, 615 F.3d 696, 700-01 (CA6 2010))

in Ms. Harmon's case is incorrect because it misreads the statute. Even though Ms. Harmon was no longer an unaccompanied alien child (because she was no longer under 18) when she filed for asylum, CAR 53, if Ms. Harmon were an unaccompanied alien child at any time during the one year after her last arrival, subparagraph (B) would never apply to her because it is only triggered on a physical coming into the United States, not on her age.[4]

The BIA's unpublished disposition would have subparagraph (B)'s asylum clock begin to run after Ms. Harmon turned 18 but there is no language of any kind in INA § 208(a)(2)(B) that would support that interpretation. *Matter of F-P-R-*, 24 I&N Dec. at 684. "[T]he identification and use of the date of the alien's last arrival in the United States for purposes of calculating the 1-year filing period is mandatory, not discretionary or conditional." *Id.* Subparagraph (B)'s clock has never started running in Ms. Harmon's case and, therefore, it has never struck one year. In

[4] Our reading of the record indicates that Ms. Harmon's status as a UAC was acknowledged by the BIA. Rather, the BIA rejected her claim because her UAC status ended after Ms. Harmon turned 18.

other words, the one-year asylum clock that starts on a noncitizens entering the United States did not, in fact, start for Ms. Harmon because she was an unaccompanied alien child during the critical period. Neither did the asylum clock start when she turned 18. Because her arrival date was not a triggering event for the asylum clock (by operation of INA § 208(a)(2)(E)), the asylum clock has never run (and will never run, unless she departs the United States and re-enters).

There are a few more points that further elucidate the correctness of AILA's interpretation. *First*, Congress unmistakably signaled that the TVPRA's additions to the asylum statute were to create permanent access to the asylum program. While the text of the statute speaks for itself, the title and subtitle of the relevant TVPRA portions leaves nothing to the imagination. The subparagraph of the TVPRA that created § 208(a)(2)(E) of the Act is entitled "Access to Asylum Protections". *See* TVPRA § 235(d)(7). This subparagraph is located with the larger TVPRA paragraph titled, "Permanent Protection for Certain At-Risk Children." *See* TVPRA § 235(d); *e.g. In Re Quality Stores*, 693 F.3d 605, 612 (CA6

2012) (using title of statute to discern meaning). The protections that the TVPRA affords do not place a temporal restriction on when individuals qualify for relief — rather such assistance is "permanent" and meant to provide "access to asylum protections." Section 208(a)(2)(E) of the INA doesn't temporarily suspend the timely filing requirement imposed by § 208(a)(2)(B); it simply eliminates it.

The framework for this interpretation is, of course, Congress's understanding that being young and alone in a foreign country requires a more commonsense approach than that adopted by the BIA in *Matter of Y-C-*. We illustrate this proposition with a common fact pattern: an unaccompanied alien child is trafficked into the United States. The child is a 15-year old male, does not speak English, has limited education and only a vague understanding of the existence of any particular legal process let alone the complexities of the U.S. asylum program. *See Seeking Asylum Alone* at 15-23 (collecting stories and analyzing demographics of unaccompanied alien children). Our hypothetical 15-year old, like his peers, focuses on the immediate needs of life:

shelter, clothing, food, employment, school. It is difficult to imagine that the existence of an asylum program, let alone the intricacies of the one-year filing deadline, are within his field of vision. Many youth are unaware of their immigration status in all regards until much later in life. By the time our 15-year old has turned 17, the one-year filing period calculated in § 208(a)(2)(B) has long elapsed.

Fast-forward several years and the child is now an adult. He is seeking employment or applying to college or, perhaps something more dramatic has happened, such as he escapes the oppression of his traffickers or he begins to experience symptoms of post-traumatic stress disorder.[5] Whatever the life event is, it forces a realization and confrontation with his immigration status. As one experienced child's asylum attorney has explained, "it's very difficult to explain to the kids what asylum is. It's very hard

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[5] Trauma is a widely-shared characteristic of the unaccompanied child and trauma experienced as a child has long-lasting permanent impacts. "Children with PTSD may exhibit a variety of problems such as impulsivity, distractibility and attention problems (due to hyper-vigilance), emotional numbing, social avoidance, dissociation, sleep problems, aggressive play (often re-enacting a traumatic event), school failure, and regressed or delayed development." *Seeking Asylum Alone* at 115.

for kids to give enough facts for us to identify they have asylum claims... One of the big issues is that they are unaware of the fact that they can apply." *Seeking Asylum Alone* at 38.

Subparagraph (E) is intended to protect our hypothetical 15-year old's access to asylum. The only way for the protection to be "permanent" in the ordinary sense of the word is if the one-year bar never starts to run for people who are UACs during the one year after last arrival. This reading makes sense because the point of the statute is to protect an extremely vulnerable population: unaccompanied children, a population that cannot – and Congress now says shall not – be expected to ascertain the intricacies of our complex asylum system until much later in life.

Second, other enactments within the TVPRA contain temporal limitations demonstrating that the absence of such a limitation in INA § 208(a)(2)(E) was quite purposeful. For example, under INA § 208(b)(3)(C) an asylum officer has "initial jurisdiction over any asylum application *filed by* an unaccompanied alien child[.]" It imposes a temporal qualification in order to obtain initial jurisdiction benefits by requiring that at

the time of filing, the non-citizen is an unaccompanied alien child. When contrasted with the broad "shall not apply" language of the amendment to INA § 208(a)(2)(E), it is clear that Congress meant to accomplish a total and permanent exemption in this context.[6]

Likewise, in outlining eligibility for Special Immigrant Juvenile Status, Congress set explicit parameters based on the age of the children at various stages of the process. *See* TVPRA § 235(d)(5). Subparagraph (B) includes no such language.

Concerns that reading the exemption to be permanent, without temporal limitations, would allow for indefinite qualification for asylum are unfounded. Such arguments ignore the fact that any applicant for asylum – unaccompanied or not – must still actually qualify as a refugee. Section 208(a)(2)(E) removes the artificial time limitation, not the requirements of asylum eligibility.

Third, because every provision enacted by Congress must have meaning, any interpretation that merely tolls, suspends, or

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[6] We recognize that Ms. Harmon has proffered an interpretation contrary to AILA's in this regard. She does not need to prevail on her INA § 208(b)(3)(C) argument to prevail however.

treats INA § 208(a)(2)(E) as temporary until the noncitizen turns 18 would result in rendering it superfluous. Congress already provides for such temporary protection at INA § 208(a)(2)(D) in granting statutory excuses to filing past the one-year deadline. If asylum applicants can demonstrate that they experienced "changed circumstances" or "extraordinary circumstances" then a late-filing is accepted. An example of "extraordinary circumstances" provided by the corresponding regulation is a "legal disability," including where an "applicant was an unaccompanied minor during the 1-year period after arrival." 8 C.F.R. § 208.4(a)(5)(ii). Thus it is clear that an excuse for an out-of-time filing already existed in the INA before the enactment of the TVPRA for unaccompanied minors who file for asylum while they are minors. *See* Lee Berger and Davina Figeroux, *Protecting Accompanied Child Refugees from the One-Year Deadline: Minority As A Legal Disability*, 16 Geo. Immigr. L.J. 855, 857 (2002) (noting existence of exception for unaccompanied minors). Subparagraph (B) was intended to do something more.

If the exemption from the one-year time bar for UACs only attached when they filed for asylum as UACs, this would provide no more protection than the asylum rules already provided pre-TVPRA. In fact, it might even be read to provide less, because the existing regulations allow for a reasonable time for filing the application following the resolution of the extraordinary circumstances; the newly codified exemption does not include such language. 8 C.F.R. § 208.4(a)(5).

Because statutes are to be interpreted to give each provision independent meaning, the Court should conclude that INA § 208(a)(2)(E) is intended to provide a permanent waiver of the one-year asylum filing requirement for those who arrive in the country as UACs. *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 omitted).

Congress enacted INA § 208(a)(2)(E) to provide an independent form of relief specifically for UACs. It expressly states that the time limit "shall not apply" and does not impose

any type of limiting factor. If Congress meant to except UACs from the time bar only during their childhood, then it would not have amended the statute to create a separate section dedicated to the protection of UACs. Instead, the "changed circumstance" section of the statute already afforded such protections, making § 208(a)(2)(E) redundant. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (noting courts must analyze statutory provision in the context of the government statute as a whole, and "fit, if possible, all parts into an harmonious whole") (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Court should find the statute permanently exempts individuals who enter the country as unaccompanied children from the one-year filing requirement for asylum applications.

CERTIFICATE OF SERVICE

I, Russell Abrutyn, certify that on August 7, 2013, I electronically filed the Brief of Amicus, American Immigration Lawyers Association, with the Clerk of Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Russell Abrutyn

RUSSELL ABRUTYN

Attorney for Amicus

CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Russell Abrutyn, certify that, pursuant to Fed. R. App. P. 29, this brief is double spaced, using 14-point proportional font and contains 3603 words (not including the required disclosures, table of contents, table of citations, certificate of service, certificate of compliance).

s/ Russell Abrutyn

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