

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CATHOLIC LEGAL IMMIGRATION  
NETWORK, INC., 8757 Georgia Ave., Suite  
850, Silver Spring, MD 20910;

COMMUNITY LEGAL SERVICES IN EAST  
PALO ALTO, 1861 Bay Road, East Palo Alto  
94303;

KIND, INC., d/b/a KIDS IN NEED OF  
DEFENSE, 1201 L St. NW, 2nd Floor,  
Washington, DC 20005; and

COALITION FOR HUMANE IMMIGRANT  
RIGHTS OF LOS ANGELES, 2533 West 3rd  
Street, Suite 101, Los Angeles, California  
90057;

*Plaintiffs,*

**vs.**

EXECUTIVE OFFICE FOR IMMIGRATION  
REVIEW, 20 Massachusetts Ave. NW,  
Washington, DC 20529;

JAMES MCHENRY, in his official capacity as  
DIRECTOR OF THE EXECUTIVE OFFICE  
FOR IMMIGRATION REVIEW; 20  
Massachusetts Ave. NW, Washington, DC  
20529;

U.S. DEPARTMENT OF JUSTICE, 950  
Pennsylvania Ave., NW, Washington, DC  
20530; and

WILLIAM P. BARR, in his official capacity as  
ATTORNEY GENERAL OF THE UNITED  
STATES, U.S. Department of Justice, 950  
Pennsylvania Ave., NW, Washington, DC  
20530,

*Defendants.*

Case No. 20-cv-3812

***AMICI CURIAE* BRIEF IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A STAY, OR  
IN THE ALTERNATIVE, FOR A  
PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION AND INTERESTS OF AMICI..... 1

ARGUMENT ..... 3

    I. Immigrants Contribute Significantly to the States’ Economies, Cultures, and  
    Communities. .... 3

    II. The Rule Will Prevent Eligible Immigrants Who Cannot Afford the Increased Fees from  
    Accessing Critical Safeguards In Deportation and Removal Proceedings. .... 5

        A. The Rule’s Exorbitant Fees Will Prevent the Adjudication of Meritorious Appeals and  
        Motions to Reopen and for Reconsideration ..... 7

        B. The Rule Impedes Access to Family-Based Cancellation of Removal..... 9

        C. The Rule Will Prevent Asylum-Eligible Immigrants from Securing Protection from  
        Persecution..... 10

    III. The Rule Will Harm Amici States and Their Residents ..... 12

        A. The Rule Will Harm State and Local Economies. .... 12

        B. The Rule Will Separate Families ..... 15

        C. The Rule Undermines State Programs and Enforcement of State Laws..... 17

CONCLUSION..... 21

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Cervantes-Gonzalez</i> , 22 I. & N. Dec. 560 (BIA 1999) .....	10
<i>Damaize-Job v. I.N.S.</i> , 787 F.2d 1332 (9th Cir. 1986) .....	11
<i>Damus v. Nielsen</i> , 313 F. Supp. 3d 317 (D.D.C. 2018) .....	11
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977).....	15
<i>INS v. Cardoza-Fonseca</i> (1987) 480 U.S. 421 .....	12
<i>J.E.F.M. v. Lynch</i> , 837 F.3d 1026 (9th Cir. 2016) .....	9
<i>Jennings v. Rodriguez</i> , 138 S. Ct. 830 (2018).....	11
<i>Matter of Lozada</i> , 19 I&N Dec. 637 (BIA 1988) .....	20, 21
<i>Matter of Melgar</i> , 28 I&N Dec. 169 (BIA 2020) .....	21
<i>Matter of Monreal</i> , 23 I. & N. Dec. 56 (BIA 2001) .....	10
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977).....	17
<i>Nken v. Holder</i> , 556 U.D. 418 (2009).....	12
<i>Orantes-Hernandez v. Thornburgh</i> , 919 F.2d 549 (9th Cir. 1990) .....	7
<i>People v. Salcido</i> , 34 Cal. App. 5th 1092 (2019), <i>as modified</i> (May 13, 2019).....	20

*Solis-Espinoza v. Gonzales*,  
401 F.3d 1090 (9th Cir. 2005) .....15

*Viridiana v. Holder*,  
646 F.3d 1230 (9th Cir. 2011) .....20

**Statutes and Regulations**

8 CFR § 208.7 .....11

8 CFR § 1003.8(a)(3).....9

8 CFR §§ 1003.8(a)(3), 1003.24(d), 1103.7(c).....6

8 U.S.C. § 1158(a)(1).....11

8 U.S.C. § 1158(a)(2)(B) .....12

8 U.S.C. § 1522.....19

85 Fed. Reg. 82,750 .....1

85 Fed. Reg. 82,751 .....6, 7

85 Fed. Reg. 82,760 .....9

85 Fed. Reg. 82,762 .....9

85 Fed. Reg. 82,768-82,769 .....6, 12

85 Fed. Reg. 82,774 .....20

85 Fed. Reg. 82,785 .....14

85 Fed. Reg. 82,791 .....14

Cal. Bus. & Prof. Code § 22440 .....20

Cal. Welf. & Inst. Code §§ 13300-303 .....17

D.C. Code § 4-1901 .....17

INA § 240A(b)(1), 8 U.S.C. § 1229b .....10

INA § 241(b)(3) .....12

INA § 242(d)(1) .....9

New York State Immigrant Assistance Services Law, N.Y. Gen. Bus. Law §§  
 460-a – 460-k .....20

**Other Authorities**

2018 State Bar of California Annual Discipline Report Appendix D (Apr. 30,  
 2019), <https://tinyurl.com/y899kfn4> .....21

2019 State Bar of California Annual Discipline Report (Apr. 30, 2020),  
<https://tinyurl.com/ycu7zg23> .....21

AIC, *Immigrants in New York* (2020), <https://tinyurl.com/y4z7qg4e> .....4

AIC, *Immigrants in the District of Columbia* (2020), <https://tinyurl.com/yd6r6ppz>.....4

AIC, *Immigrants in Maryland* (2020), <https://tinyurl.com/yywapl6h> .....4

AIC, *Immigrants in Vermont*, 1 (2020), <https://tinyurl.com/wgnramk> .....5

Allison Abrams, *LCSW-R, Damage of Separating Families*, *Psychology Today*  
 (June 22, 2018), <https://tinyurl.com/yxewfr9k> .....16

Am. Entrepreneurship, *Immigrant Founders of the 2017 Fortune 500* (Dec. 2017),  
<https://tinyurl.com/y2bslwms>.....3

American Immigration Lawyers Association, *FOIA Reveals EOIR’s Failed Plan  
 for Fixing the Immigration Court Backlog*, AILA Doc. No. 19021900 (Feb.  
 21, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/79301> .....8

Am. Immigration Council (AIC), *Immigrants in California* (2020),  
<https://tinyurl.com/ybe2bdpf>.....1, 4

Appropriations Handbook, State of New Jersey, Fiscal Year 2020-2021,  
<https://tinyurl.com/y7y72jvl> .....18

Cal. Dep’t of Justice, *Immigration Detention in California* (Feb. 2019),  
<https://tinyurl.com/w7m4rb7> .....11

Cal. Dep’t. of Soc. Servs. (CDSS), *Immigration Servs.*,  
<https://tinyurl.com/y4zaxm4m>; .....2, 18

Cal. Emp’t Dev. Dep’t, <https://tinyurl.com/yy2pz2s4> .....14

Cal. State Plan for Refugee Assistance & Servs. (Federal FY 2019) (Aug. 13,  
 2018), <https://tinyurl.com/yxfug4uh> .....19

CDSS, *Immigration Servs. Funding Award Announcement, FY2019-20* (Feb. 14,  
 2020), <https://tinyurl.com/y3f6j2ob> .....2, 18

CDSS, Immigration Servs., Unaccompanied Undocumented Minors,  
<https://tinyurl.com/yhbc9q55>; .....18

CDSS, Immigration Servs. UUM Legal Services Funding Award Announcement,  
 FY2020-21 & 2021-22 (Nov. 6, 2020), <https://tinyurl.com/ybyxewl9>.....18

Colleen K. Vesely, Ph.D., et al, *Immigrant Families across the Life Course: Policy Impacts on Physical and Mental Health* (2019),  
<https://tinyurl.com/y4n2tg92>.....16

*EOIR Performance Plan, Adjudications* (Dec. 12, 2019),  
<https://tinyurl.com/y8ryn9xk> .....8

EOIR Statistical Yearbook FY 2018, <https://tinyurl.com/t3v39le>.....2

Faith Ozbay et al., *Social support and resilience to stress*, *Psychiatry* (2007),  
<https://tinyurl.com/n77ja2b>.....17

*Family Unity*, 5 *Journal on Migration and Human Security* 2 (2017),  
<https://tinyurl.com/y6lcyump>.....15

*Final Report of the Select Commission on Immigration and Refugee Policy* (Mar. 1981) .....17

Franesc Ortega, et al., *Occupational Barriers and the Labor Market Penalty from Lack of Legal Status*, *IZA Inst. of Labor Econ.* (July 2018),  
<http://ftp.iza.org/dp11680.pdf>.....14

Health & Human Servs., Fiscal Year 2020 Administration for Children and Families Justification of Estimates for Appropriations Committees,  
<https://tinyurl.com/y23g6k5s> .....19

Ingrid Eagly and Steven Shager, *Access to Counsel in Immigration Court*, *American Immigration Counsel* (September 2016),  
<https://tinyurl.com/y7hbl2rm> .....7

January 25, 2017 Executive Order, “Border Security and Immigration Enforcement Improvements,” §§ 6 .....11

James R. McHenry III, Office of the Director, EOIR, Memorandum, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018),  
<https://tinyurl.com/y425gerl>.....8

Joel Rose, *If COVID-19 Vaccines Bring An End To The Pandemic, America Has Immigrants To Thank*, *NPR* (Dec. 18, 2020), <https://tinyurl.com/y8mb66zh> .....5

Lena Afridi, et al., *The Forgotten Tenants: New York City’s Immigrant Small Business Owners*, Ass’n for Neighborhood Hous. & Dev. (Mar. 6, 2019), <https://tinyurl.com/y23s7c5n> .....4

Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention*, <https://tinyurl.com/y4paldng>.....11

Lindsay M. Harris, et al., Op-Ed., *Asylum Seekers Leave Everything Behind. There’s No Way They Can Pay Trump’s Fee*, WASH. POST, May 1, 2019, <https://tinyurl.com/y2tqeykk>.....11

Lisa Christensen Gee, et al., *Undocumented Immigrants’ State & Local Tax Contributions*, Inst. on Taxation & Econ. Policy (Mar. 2017), <https://tinyurl.com/utzgeel> .....14

Lorelei Laird, *Underreporting Makes Notario Fraud Difficult to Fight*, ABA Journal (May 1, 2018).....20

Misty L. Heggeness, et al., *The New Face of U.S. Science*, Nature (Jan. 3 2017), <https://tinyurl.com/yadsyqdt> .....5

Msyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, The Atlantic (Aug. 21, 2018), <https://tinyurl.com/ybrz78zz>.....18

Nadwa Mossad, *Refugees and Asylees: 2018*, DHS Office of Immigration Statistics (Oct. 2019), <https://tinyurl.com/ybg9w54j>.....2

New Am. Econ., *Immigrants and the Economy in Massachusetts* (2020), <https://tinyurl.com/sgbmwpg> .....4

New Am. Econ., *Immigrants and the Economy in New Jersey* (2020), <https://tinyurl.com/y5n669em>.....4

New Am. Econ., *Immigrants and the Economy in United States of America* (2020), <https://tinyurl.com/yxu2fefd>.....3

New Am. Econ., *The Contributions of New Americans in New York* (New York, NY) (Aug. 2016), <https://tinyurl.com/y5z96o5z>.....4

New Am. Econ., *The Contributions of New Americans in California* (Aug. 2016), <https://tinyurl.com/yyyadso3> .....3

Nirita Panchal, *The implications of COVID-19 for Mental Health and Substance Use*, Kaiser Family Foundation (Apr. 21, 2020), <https://tinyurl.com/yctz7nv> .....16

N.Y. Immigration Coal., *Blueprint for an Immigrant New York* (Jan. 2019).....4

Office of the Mayor, Immigrant Justice Legal Services Program Funding  
Announcement, FY2021 (Aug. 24, 2020), <https://tinyurl.com/yadxt4q6>.....2

Office of Refugee Resettlement, <https://www.acf.hhs.gov/orr/about/what-we-do>.....19

*Predators at the Door*, Editorial, N.Y. TIMES (Sept. 25, 2002),  
<https://tinyurl.com/y4nsqwfq> .....20

*Report on The Independence of The Immigration Courts*, New York City Bar  
(Oct. 2020), <https://tinyurl.com/yar8o23e> .....8

Robert Lynch, et al., *The Economic Effects of Granting Legal Status and  
Citizenship to Undocumented Immigrants*, Ctr. for Am. Progress (Mar. 20,  
2013), <https://tinyurl.com/y3cqyxbr> .....14

TRAC Immigration Project, *Crushing Immigration Judge Caseloads and  
Lengthening Hearing Wait Times* (Oct. 25, 2019),  
<https://tinyurl.com/y9jlkhek>;.....8

William Wan, *The coronavirus pandemic is pushing America into a mental health  
crisis*, Washington Post (May 4, 2020).....16

*Written Testimony Respectfully Submitted By the Immigration And Nationality  
Law Committee and the Task Force For The Independence of Lawyers And  
Judges* (Jan. 29, 2020), <https://tinyurl.com/y9ej25qd>.....8

Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel  
ban: data*, Reuters (Feb. 29, 2019), <https://tinyurl.com/y2tsgon7>.....16

## INTRODUCTION AND INTERESTS OF AMICI

The District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington respectfully submit this brief as amicus curiae in support of plaintiffs’ motion for a stay, or in the alternative, for a preliminary injunction suspending the Department of Justice Executive Office for Immigration Review’s (EOIR) Rule increasing the fees imposed for appeals, motions, and other forms of deportation and removal relief available (collectively, “EOIR benefits”) in proceedings before the EOIR. 85 Fed. Reg. 82,750 (Dec. 18, 2020). The Rule’s fee increases will prevent immigrants from appealing deportation orders or asserting valid bases to remain in the United States, such as family-based cancellation of removal or asylum, simply because they cannot afford to pay the filing fee. Such a result conflicts with Congress’s objectives of keeping families together, promoting economic prosperity, and upholding the United States’ international treaty obligations to protect those fleeing persecution or torture.

The States have strong interests in keeping EOIR benefits affordable until the Court can assess the Rule’s legality. Amici States are home to millions of immigrants and together host the most refugees in the nation. California alone is home to 10.6 million immigrants, who comprise 27% of its population.<sup>1</sup> In 2017, California, in particular, was home to nearly 33% of those

---

<sup>1</sup> Am. Immigration Council (AIC), *Immigrants in California*, 1 (2020), <https://tinyurl.com/ybe2bdpf>.

granted affirmative asylum<sup>2</sup>, amounting to 8,348 asylees.<sup>3</sup> As of 2018 immigration courts in California received close to 10,000 defensive asylum applications in 2018.<sup>4</sup>

Maintaining affordable access to EOIR benefits is particularly important because immigrants and their families are vital contributors to the States' economies as essential employees, business owners, job-creators, consumers, and taxpayers. Preserving affordable access to legalizing and improving immigration status also benefits the States by keeping families intact, economically secure, and independent. Recognizing the many benefits that immigrants confer upon our economies and communities, California has developed policies and programs that provide support to organizations like the Coalition for Humane Immigrant Rights (CHIRLA), Catholic Legal Immigration Network, Inc. (CLINIC), Community Legal Services in East Palo Alto (CLSEPA), and Kids in Need of Defense (KIND)—all plaintiffs in this action—that provide affordable or no-cost immigration services including removal defense, asylum assistance, and legal training, education and outreach.<sup>5</sup> Similarly, the District of Columbia's Immigrant Justice Legal Services program funds community and private organizations that offer both affirmative and defensive legal services to immigrants living in Washington, DC.<sup>6</sup>

---

<sup>2</sup> “There are two types of asylum processes – defensive and affirmative. The defensive asylum process applies to aliens who appear before EOIR and who request asylum before an [immigration judge]. The affirmative asylum process applies to aliens who initially file an asylum application with [United States Citizenship and Immigration Services (USCIS)] and, subsequently, have that application referred by USCIS to EOIR.” EOIR Statistical Yearbook FY 2018, <https://tinyurl.com/t3v39le>.

<sup>3</sup> Nadwa Mossad, *Refugees and Asylees: 2018*, DHS Office of Immigration Statistics, 5 (Oct. 2019), <https://tinyurl.com/ybg9w54j>.

<sup>4</sup> *Id.*

<sup>5</sup> See Cal. Dep't. of Soc. Servs. (CDSS), Immigration Servs., <https://tinyurl.com/y4zaxm4m>; CDSS, Immigration Servs. Funding Award Announcement, FY2019-20 (Feb. 14, 2020), <https://tinyurl.com/y3f6j2ob>; see also CDSS <https://tinyurl.com/ybzyzwtj>.

<sup>6</sup> See Office of the Mayor, Immigrant Justice Legal Services Program Funding Announcement, FY2021 (Aug. 24, 2020), <https://tinyurl.com/yadxt4q6>.

Absent an injunction, fewer immigrants will have affordable access to the EOIR procedures they rely on to assert valid bases to remain in the United States and secure their immigration status. As a result, the Rule will harm the States by diminishing immigrants' economic contributions, forcing States to bear a heavier social welfare and public health burden, and undermining state programs and laws. For these reasons, the public interest strongly favors granting plaintiffs' motion.

## ARGUMENT

### I. IMMIGRANTS CONTRIBUTE SIGNIFICANTLY TO THE STATES' ECONOMIES, CULTURES, AND COMMUNITIES.

The Rule's fee increases—which EOIR attempts to justify as recouping the costs of running immigration courts—is based in part on the erroneous and counterproductive assumption that the benefits of immigration are conferred to immigrants alone. In Amici's experience, however, the advantages of immigration are profound and reciprocal. Not only do immigrants benefit from the opportunities associated with living in the United States, but cities, states, and the country as a whole benefit from immigrants' contributions to our communities, economies, and workforce.

Immigrants power the nation's economy, generating wealth and revenue for businesses, workers, and state and local governments. As of 2017, at least 43% of Fortune 500 companies were founded by first or second-generation immigrants.<sup>7</sup> Immigrant-owned companies in the United States employ over 7.9 million workers across a variety of sectors.<sup>8</sup> In California, one of every six business owners is an immigrant, and California's 937,000 immigrant business owners

---

<sup>7</sup> See Ctr. for Am. Entrepreneurship, *Immigrant Founders of the 2017 Fortune 500* (Dec. 2017), <https://tinyurl.com/y2bslwms>. Eleven California-based Fortune 500 firms—including EBay, Google, and Qualcomm—were founded or co-founded by immigrants. New Am. Econ., *The Contributions of New Americans in California*, 3 (Aug. 2016), <https://tinyurl.com/yyadso3>.

<sup>8</sup> New Am. Econ., *Immigrants and the Economy in United States of America* (2020), <https://tinyurl.com/yxu2fefd>.

have generated \$24.5 billion in revenue to the state's economy.<sup>9</sup> The District of Columbia is home to 5,452 immigrant business owners who generated \$145 million in business income in 2018.<sup>10</sup> In New York, immigrants own more than 30% of all small businesses, and nearly half of all small businesses in New York City.<sup>11</sup> As of 2014, immigrant-owned businesses employed approximately 500,000 New Yorkers, and as of 2018, those businesses generated nearly \$8 billion in income.<sup>12</sup> In Massachusetts, over 70,000 immigrant entrepreneurs provide nearly 169,000 jobs, generating over \$27 billion in sales.<sup>13</sup> In New Jersey, nearly 390,000 people are employed by over 128,000 immigrant business owners.<sup>14</sup> In Maryland, immigrant entrepreneurs represent almost 20% of the State's business owners and have generated \$1.7 billion in combined annual revenue.<sup>15</sup> Immigrants also fill important service sector jobs that support others' ability to remain in the workforce, including child care, domestic work, and home health work. In New York, immigrants account for 71.4% of taxi drivers and chauffeurs; 68.3% of workers in private households, including maids, housekeepers, and nannies; 57.9% of those working as chefs and head cooks; and 57.3% of nursing, psychiatric, and home health aides.<sup>16</sup> Immigrants are also an indispensable part of

---

<sup>9</sup> Am. Immigration Council (AIC), *Immigrants in California* (2020), <https://tinyurl.com/ybe2bdpf>.

<sup>10</sup> AIC, *Immigrants in the District of Columbia* (2020), <https://tinyurl.com/yd6r6ppz>.

<sup>11</sup> AIC, *Immigrants in New York*, 4 (2020), <https://tinyurl.com/y4z7qg4e>; Lena Afridi, et al., *The Forgotten Tenants: New York City's Immigrant Small Business Owners*, Ass'n for Neighborhood Hous. & Dev. (Mar. 6, 2019), <https://tinyurl.com/y23s7c5n>.

<sup>12</sup> N.Y. Immigration Coal., *Blueprint for an Immigrant New York*, 3 (Jan. 2019); AIC, *Immigrants in New York*, 4 (2020), <https://tinyurl.com/y4z7qg4e>.

<sup>13</sup> New Am. Econ., *Immigrants and the Economy in Massachusetts* (2020), <https://tinyurl.com/sgbmwpg>.

<sup>14</sup> New Am. Econ., *Immigrants and the Economy in New Jersey* (2020), <https://tinyurl.com/y5n669em>.

<sup>15</sup> AIC, *Immigrants in Maryland* (2020), <https://tinyurl.com/yywapl6h>.

<sup>16</sup> New Am. Econ., *The Contributions of New Americans in New York* (New York, NY), 9-10 (Aug. 2016) <https://tinyurl.com/y5z96o5z>.

Vermont's economy. For example, about 10% of agricultural workers in Vermont are immigrants, as are 16% of all workers in computer- and math-based occupations.<sup>17</sup>

In addition to these economic contributions, immigrants enrich our country's social and cultural life, injecting new ideas into our intellectual fabric and making path-breaking contributions in science, technology, and other fields that improve the quality of life and make our diverse communities more desirable places to live. As of 2014, 52% of the 69,000 biomedical researchers in the United States were foreign born.<sup>18</sup> In fact, the development of the first COVID-19 vaccines approved for use in the United States is largely due to research and contributions from immigrant scientists like Katalin Kariko, who immigrated to the United States from Hungary in 1985.<sup>19</sup> Yet by erecting prohibitively expensive barriers to legal immigration, the Rule will dim the economic and societal prosperity that legal status delivers to immigrants and Amici States alike.

## **II. THE RULE WILL PREVENT ELIGIBLE IMMIGRANTS WHO CANNOT AFFORD THE INCREASED FEES FROM ACCESSING CRITICAL SAFEGUARDS IN DEPORTATION AND REMOVAL PROCEEDINGS.**

The Rule dramatically increases the filing fees for EOIR benefits and proceedings that immigrants depend on to legally challenge or obtain relief from deportation and removal, including appeals to the Board of Immigration Appeals (BIA), applications for cancellation of removal or suspension of deportation, applications for asylum, and motions to reopen or reconsider before the immigration courts or the BIA. Specifically, the Rule proposes the following fee increases:

---

<sup>17</sup> AIC, *Immigrants in Vermont*, 1 (2020), <https://tinyurl.com/wgnramk>.

<sup>18</sup> Misty L. Heggeness, et al., *The New Face of U.S. Science*, *Nature* (Jan. 3 2017), <https://tinyurl.com/yadsyqdt>.

<sup>19</sup> Joel Rose, *If COVID-19 Vaccines Bring An End To The Pandemic, America Has Immigrants To Thank*, NPR (Dec. 18, 2020), <https://tinyurl.com/y8mb66zh>.

- Application for Suspension of Deportation and Cancellation of Removal of Certain Permanent Residents<sup>20</sup> will rise from \$100 to \$305 – an increase of 205%. For Nonpermanent Residents the fee will rise from \$100 to \$360 – an increase of 260%.
- The fee for filing a motion to reopen or reconsider will rise from \$110 to \$145 – an increase of 31.8%, if filed before an immigration judge, and to \$895 – an increase of approximately 714%, if filed before the BIA.
- The fee for filing a Notice of Appeal to the BIA from a Decision of a DHS Officer will rise from \$110 to \$705 – an increase of nearly 541%.
- The fee to file a Notice of Appeal from a Decision of an Immigration Judge will increase by nearly 800% from \$110 to \$975.<sup>21</sup>

The Rule also adopts the United States Citizenship and Immigration Services' (USCIS) unprecedented \$50 fee for immigrants who request asylum relief in immigration court proceedings. *Id.* Unlike other EOIR benefit fees, which an immigration court can waive based on an immigrant's inability to pay (*see* 8 CFR §§ 1003.8(a)(3), 1003.24(d), 1103.7(c)), the asylum application fee provides no such fee waiver.<sup>22</sup> For people fleeing torture or persecution in their home countries who arrive in the United States with limited financial means, no family support networks or permission to work, or are detained, this \$50 fee alone may impose an insurmountable financial barrier to the asylum process.

Combined, the Rule's increased filing fees erect wealth-based barriers to accessing critical safeguards designed to protect immigrants from being improperly removed, preserve families, and

---

<sup>20</sup> "Cancellation of removal" is an immigration benefit whereby permanent residents and nonpermanent residents may apply to an immigration judge to adjust their status from that of deportable alien to one lawfully admitted for permanent residence, provided certain conditions are met.

<sup>21</sup> 85 Fed. Reg. 82,751.

<sup>22</sup> Under the Rule, immigrants may avoid paying the asylum application fee if they waive asylum and instead seek withholding of removal or protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). 85 Fed. Reg. 82,768-82,769.

protect individuals and facilitate the United States' international treaty obligations to protect individuals and families fleeing persecution and torture.

**A. The Rule's Exorbitant Fees Will Prevent the Adjudication of Meritorious Appeals and Motions to Reopen and for Reconsideration**

Appellate review is a fundamental due process safeguard that promotes judicial accountability, the development of legal precedent, and fair, accurate, and consistent application of the law. Meaningful access to appeals and motions to reopen and reconsider removal orders are particularly critical in EOIR proceedings given the pressures and processes that make it difficult for respondents to fully present their cases in front of immigration judges. The Rule's application fee increases—which include a nearly \$800 increase (from \$110 to \$975) of the fee charged in order to appeal the decision of an immigration judge, and a more than 700% increase (from \$110 to \$895) for motions to reopen or reconsider before the BIA—make such review prohibitively expensive to those with even moderate incomes. 85 Fed. Reg. 82,751.

For example, there is no right to appointed counsel for immigrants facing removal charges, despite evidence showing that having counsel leads to higher rates of success in defending against removal actions. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (holding that immigrants have a due process right to obtain counsel of their choice at their own expense).<sup>23</sup> Therefore, appeals—as well as motions to reconsider or reopen—are especially important procedures for immigrants to correct errors or omissions that may have arisen in a proceeding for which they were unable to afford counsel or were victims of ineffective assistance of counsel.

---

<sup>23</sup> Ingrid Eagly and Steven Shager, *Access to Counsel in Immigration Court*, American Immigration Counsel (September 2016), pp. 18-22, <https://tinyurl.com/y7hbl2rm>.

Maintaining affordable access to judicial review is especially important in light of recent EOIR policies, which pressure immigration judges to decide cases faster against an expanding backlog, and which could reduce immigrants' access to due process and increase the likelihood of error.<sup>24</sup> Specifically, EOIR's recently-imposed Immigration Court Performance Measures tie immigration court judges' performance reviews to adherence to case-completion quotas.<sup>25</sup> Such productivity requirements for immigration judges create time pressures that can impact the presentation of witnesses and evidence.<sup>26</sup> For instance, under EOIR's Case Completion Quota, immigration judges are required to complete 700 cases per year, or almost three cases a day.<sup>27</sup> In addition, immigration judges are expected to issue hearing decisions within three days of completing merits hearings in 85% of cases, decide motions within 20 days of receipt in 85% of cases, decide bond hearings on the same day in 90% of cases, complete hearings on the initial scheduled hearing date in 95% of cases, and make decisions on credible and reasonable fear reviews on the initial hearing day in 100% of cases.<sup>28</sup> Under these circumstances, even the most careful and conscientious immigration judges are capable of making mistakes. Yet the Rule's financial barriers to judicial review will deny immigrants that opportunity to correct error adversely impacting their right to remain in the United States.

---

<sup>24</sup> See TRAC Immigration Project, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), <https://tinyurl.com/y9jlkhek>; American Immigration Lawyers Association, *FOIA Reveals EOIR's Failed Plan for Fixing the Immigration Court Backlog*, AILA Doc. No. 19021900 (Feb. 21, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/79301>.

<sup>25</sup> James R. McHenry III, Office of the Director, EOIR, Memorandum, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), <https://tinyurl.com/y425gerl>.

<sup>26</sup> *Written Testimony Respectfully Submitted By the Immigration And Nationality Law Committee and the Task Force For The Independence of Lawyers And Judges* (Jan. 29, 2020), at 2, <https://tinyurl.com/y9ej25qd>.

<sup>27</sup> *EOIR Performance Plan, Adjudications* (Dec. 12, 2019), <https://tinyurl.com/y8ryn9xk>.

<sup>28</sup> *Id.* See also *Report on The Independence of The Immigration Courts*, New York City Bar (Oct. 2020) at 3, <https://tinyurl.com/yar8o23e>.

The Rule's exorbitantly expensive fees for appeals will not only deprive immigrants of access to appellate review before the BIA but will also deprive them of access to appellate review in federal court, because immigrants are required to exhaust the administrative process before accessing federal courts. *See* INA § 242(d)(1) (respondents must exhaust "all administrative remedies" before pursuing appeals of individual cases before federal court.); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016). Under these circumstances, even systemically erroneous adjudications and practices within EOIR could evade federal oversight and correction.

EOIR claims that the Rule's increased fees do not bar access to appellate review or review via motion practice because immigrants may request a fee waiver if they are unable to pay the fee. 85 Fed. Reg. 82,762 (citing 8 CFR § 1003.8(a)(3)). But the availability of fee waivers provides relief that is, at best, uncertain since the decision to grant or withhold a waiver based on an immigrant's inability to pay is discretionary and there is no guidance on how to apply such discretion beyond the applicant's ability to pay. 8 CFR § 1003.8(a)(3). Nor does the Rule recognize that its exorbitant fee increases should trigger revised criteria for an applicant's ability to pay those fees. Instead, the Department maintains the pre-existing criteria in full. 85 Fed. Reg. 82,760. Moreover, the Rule effectively concludes that the possibility of a fee waiver justifies *any* increase in fees. That flawed logic cannot support the regulation's drastic changes, particularly when there are serious, unanswered questions about the Department's ability to equitably grant and effectively administer waivers with the fee increases in effect.

#### **B. The Rule Impedes Access to Family-Based Cancellation of Removal**

The Rule's increased fees for seeking cancellation of removal from \$100 to \$305 for permanent residents, and \$360 for nonpermanent residents, imposes financial burdens on families who are least able to bear the added expense. Under cancellation of removal, noncitizens may avoid removal if they can show that removal would inflict "exceptional and extremely unusual

hardship to a legal permanent resident (LPR) or U.S. citizen spouse, child, or parent.” INA § 240A(b)(1), 8 U.S.C. § 1229b.

Applicants who qualify for cancellation of removal tend to be people who already have great responsibilities as caretakers for their citizen and LPR family members.<sup>29</sup> The Rule will make hardships even greater on their families by having to come up with the money to present their application. For instance, immigrants who are eligible for removal relief because of a family member’s significant illness may not be able to afford the increased fee while also paying for medical treatment.<sup>30</sup> As a result, families who lack the discretionary income to afford the increased fee may be forced to choose between paying EOIR for the opportunity to seek relief through cancellation of removal, or paying for necessities such as food, shelter, and essential medical care.

### **C. The Rule Will Prevent Asylum-Eligible Immigrants from Securing Protection from Persecution**

Congress passed the Refugee Act of 1980, including provisions governing asylum applications, “with the intent of bringing United States statutory provisions concerning refugees into conformity with the provisions of the United Nations Convention Relating to the Status of

---

<sup>29</sup> See *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001) (“For cancellation of removal, we consider the ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.”).

<sup>30</sup> See *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 565-66 (BIA 1999) (“The factors deemed relevant in determining extreme hardship to a qualifying relative include, but are not limited to, the following: the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.”).

Refugees.” *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1336, n.5 (9th Cir. 1986). But the Rule moves the United States away from the Convention. By adopting the USCIS’s unprecedented application fee for asylum, the United States will become one of only four countries that charge a fee for immigrants seeking protection from persecution, and the only country to offer *no* waivers or exemptions for this fee.<sup>31</sup>

Under U.S. law, any person “physically present in the United States or who arrives in the United States . . . irrespective of such [person’s] status, may apply for asylum.” 8 U.S.C. § 1158(a)(1). But given the realities involved in fleeing persecution, even a \$50 fee can render the right to apply for asylum illusory.<sup>32</sup> This is obviously true for asylum seekers who are detained without the possibility of release on bond immediately upon arrival, as is common under the current administration’s approach. *See* January 25, 2017 Executive Order, “Border Security and Immigration Enforcement Improvements,” §§ 6 (ordering detention of all noncitizens apprehended violating immigration law) and 11 (ordering end to “abuse” of parole for asylum seekers); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339 (D.D.C. 2018) (issuing preliminary injunction based on data showing 92-100% parole denial rates at five field offices compared to parole grant rates of about 90% in previous years).<sup>33</sup> Additionally, asylum seekers cannot apply for employment authorization until one year after they apply for asylum. 8 CFR § 208.7.

---

<sup>31</sup> *See* Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention*, <https://tinyurl.com/y4paldng> (only Iran, Fiji, and Australia charge fees to apply for asylum; Iran and Fiji offer exemptions, Australia charges no fee to detained applicants).

<sup>32</sup> Lindsay M. Harris, et al., Op-Ed., *Asylum Seekers Leave Everything Behind. There’s No Way They Can Pay Trump’s Fee*, WASH. POST, May 1, 2019, <https://tinyurl.com/y2tqeykk>.

<sup>33</sup> *See also* Cal. Dep’t of Justice, *Immigration Detention in California*, 24 (Feb. 2019), <https://tinyurl.com/w7m4rb7> (according to facility staff, about 80% of detainees at Imperial Regional Detention Center were asylum seekers). Even under previous administrations, lengthy detention of asylum seekers is common. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting) (in 2015 over 7,500 asylum seekers taken into custody upon arrival were detained more than six months).

Whether or not an applicant is detained, delays caused by inability to pay the application fee can have life-altering consequences, because the right to apply for asylum expires one year after entry. 8 U.S.C. § 1158(a)(2)(B). Those who cannot afford the fee face the risk of being improperly repatriated to a country in which they face torture, death, or persecution in violation of international law. *See Nken v. Holder*, 556 U.D. 418, 436 (2009) (“There is a public interest in preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm.”)

EOIR suggests that the \$50 asylum fee will not place eligible asylum seekers at risk of being returned to face persecution or torture because applicants may still seek relief from removal under INA § 241(b)(3) or the Convention against Torture (CAT) if they do not request asylum. 85 Fed. Reg. 82,768-82,769. But these alternative forms of relief offer less protection than asylum and are more difficult to obtain. First, relief under CAT is more difficult to obtain than asylum because it imposes a far more stringent burden of proof on the applicant. While an asylum applicant must demonstrate only a “well-founded fear of persecution” (a one-in-ten chance of future persecution), CAT relief applicants must show that there is a more than 50% chance that they will be persecuted or tortured if returned to their country of origin. (*INS v. Cardoza-Fonseca* (1987) 480 U.S. 421, 430-431.) Second, unlike asylum, relief from removal under CAT and INA § 241(b)(3) does not offer a pathway to legal permanent residence or citizenship and provides no derivative benefits to the applicant’s children and spouse.

### **III. THE RULE WILL HARM AMICI STATES AND THEIR RESIDENTS**

#### **A. The Rule Will Harm State and Local Economies.**

The Rule’s financial barriers to securing and improving immigration status will harm Amici States by inhibiting economic growth and depriving them of substantial tax revenue. In addition to the contributions that immigrants make as entrepreneurs, innovators, and job creators,

immigrants enrich their communities by paying taxes and promoting the success of other businesses with their purchasing power. In 2014, for example, immigrants in the United States exercised a staggering \$927 billion in spending power, generating demand for goods and services and in turn creating more jobs. Immigrants pay over \$458 billion in taxes annually and account for approximately \$2 trillion in national gross domestic product.

In New York City alone, immigrants contributed \$232 billion—or approximately 25%—of the city’s gross domestic product in 2018. In 2018, immigrant-led households paid \$150 million in state and local taxes—payments that support important public services such as public schools and public safety—and exercised \$1.2 trillion in spending power nationwide. California’s immigrant-led households paid over \$38 billion in state and local taxes and exercised almost \$291 billion in spending power in 2018. Refugees in California alone paid over \$1.9 billion in state and local taxes and exercised \$17.2 billion in spending power in 2015. In 2018, New York’s immigrant-led households paid \$21.8 billion in state and local taxes and exercised \$120.5 billion in spending power, and their 314,439 immigrant entrepreneurs generated \$135.1 billion in sales and employed over 825,000. In New Jersey, immigrants paid \$9.5 billion in state and local taxes and exercised nearly \$66 billion in spending power. Immigrants in Virginia contributed \$3.8 billion in state and local taxes and exercised \$31.2 billion in spending power; with refugees paying \$260 million in state and local taxes and exercising \$2.6 billion in spending power.

By reducing access to the legal pathways to securing legal immigration status or obtaining asylum, the Rule will diminish the essential contributions immigrants make to state and local economies as consumers, taxpayers, and job creators. To the extent that applicants can afford them, the Rule’s exorbitant fee increases will also redirect money that would otherwise be spent in state economies. The Rule estimates that it will cause applicants to pay \$41.4 million in additional fees

on an annual basis. 85 Fed. Reg. 82,791. That significant sum will be diverted from local businesses – nearly all of which are in dire need of revenue to survive the COVID-19 pandemic – and will deprive state and local governments of the taxes they need to mitigate substantial budget shortfalls.

And those who cannot afford the fee increases may outnumber those who can. According to EOIR, at least 36% of applicants in 2018—when fee levels were far lower than those in the Rule—sought fee waivers. 85 Fed. Reg. 82,785. As fees increase dramatically, so too will the number of those unable to afford them. Immigrants’ access to the applications and appeals impacted by the Rule is critical to their ongoing contribution to the States’ economies. Employment authorization, gained through lawful status or through interim work authorization, provides access to higher paying jobs, labor rights, and other legal protections without fear of deportation.<sup>34</sup> Legal status also connects immigrants with the licenses, permits, insurance, and credit necessary to start businesses.<sup>35</sup> Research has shown that immigrants who can transition to lawful status improve their earnings significantly, thereby reducing the need to access state-funded social services and increasing tax revenue.<sup>36</sup> In contrast, working in the underground economy is rife with risks. Those workers will have limited income and reduced tax contributions, be vulnerable to unscrupulous employers, and have decreased opportunities to take jobs that match their skills, resulting in significant productivity loss.<sup>37</sup>

---

<sup>34</sup> Robert Lynch, et al., *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants*, Ctr. for Am. Progress, 4-6 (Mar. 20, 2013), <https://tinyurl.com/y3cqyxr>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2.

<sup>37</sup> See Cal. Emp’t Dev. Dep’t, <https://tinyurl.com/yy2pz2s4> (defining “underground economy”); Frances Ortega, et al., *Occupational Barriers and the Labor Market Penalty from Lack of Legal Status*, IZA Inst. of Labor Econ. (July 2018), <http://ftp.iza.org/dp11680.pdf>; see also Lisa Christensen Gee, et al., *Undocumented Immigrants’ State & Local Tax Contributions*, Inst. on

## B. The Rule Will Separate Families

“The Immigration and Nationality Act (‘INA’) was intended to keep families together.” *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). The INA’s legislative history “establishes that congressional concern was directed at ‘the problem of keeping families of United States citizens and immigrants united.’” *Fiallo v. Bell*, 430 U.S. 787, 806 (1977) (quoting H.R.Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957)).

The Rule strikes at the heart of this policy by imposing financial barriers to immigration court processes that families depend on to remain together in the United States, including family-based relief from deportation and asylum. As a result, the Rule will increase the number of families who are separated through removal proceedings and force thousands of mixed immigrant-status households to make the untenable choice between remaining in the United States apart from their loved ones or uprooting their lives in the United States to preserve their families. These family separations will occur not because their challenges to removals were considered and rejected, but because the immigrant’s inability to pay thwarted their ability to seek the relief or review. The Rule’s exorbitant fee hikes, which curtail access to procedural protections and forms of relief codified in the INA, undermine the policy of family unity that the INA is designed to advance and ignore what Congress has recognized and multiple studies have confirmed: family unity benefits the economic, social, and psychological well-being of the affected individuals, while family separation results in a myriad of harms.<sup>38</sup>

---

Taxation & Econ. Policy 3 (Mar. 2017), <https://tinyurl.com/utzgeel> (estimating that undocumented immigrants would pay approximately \$2.2 billion more in state and local taxes annually if given legal status and employment authorization).

<sup>38</sup> Zoya Gubernskaya & Joanna Dreby, *U.S. Immigration Policy and the Case for Family Unity*, 5 *Journal on Migration and Human Security* 2, 423 (2017), <https://tinyurl.com/y6leyump>.

Separating family members from each other can result in negative health outcomes, including mental and behavioral health issues, which can result in lower academic achievement among children; toxic stress, which can delay brain development and cause cognitive impairment; and symptoms of post-traumatic stress disorder.<sup>39</sup> Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders such as depression, anxiety, and attention deficit hyperactivity disorder.<sup>40</sup> Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches—effects that can become chronic if left untreated.<sup>41</sup> Similarly, spousal separation can cause fear, anxiety, and depression.<sup>42</sup>

These effects are of special concern today because the COVID-19 pandemic has unleashed a “shadow pandemic of psychological and societal injuries,” including widespread depression and anxiety.<sup>43</sup> In a recent poll, nearly half of adults in the United States reported experiencing mental distress over the virus.<sup>44</sup> Mental health harms associated with the pandemic have been especially severe for front-line and essential workers.<sup>45</sup> Denying families the ability to reunite in the midst of

---

<sup>39</sup> Colleen K. Vesely, Ph.D., et al, *Immigrant Families across the Life Course: Policy Impacts on Physical and Mental Health* (2019) <https://tinyurl.com/y4n2tg92>.

<sup>40</sup> Allison Abrams, LCSW-R, *Damage of Separating Families*, Psychology Today (June 22, 2018), <https://tinyurl.com/yxewfr9k>.

<sup>41</sup> *Id.*

<sup>42</sup> Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, Reuters (Feb. 29, 2019) <https://tinyurl.com/y2tsgon7>.

<sup>43</sup> William Wan, *The coronavirus pandemic is pushing America into a mental health crisis*, Washington Post (May 4, 2020), <https://tinyurl.com/yct4l5ru>.

<sup>44</sup> Nirita Panchal, *The implications of COVID-19 for Mental Health and Substance Use*, Kaiser Family Foundation (Apr. 21, 2020), <https://tinyurl.com/yeyzk7nv>.

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

this unprecedented global uncertainty exacerbates the mental health harms caused by the pandemic and deprives Amici's residents of much needed sources of social support.<sup>46</sup>

The States also will feel the impact of such harms on their residents. Intact families strengthen not only the family unit, but the neighborhood, community, and civic society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”). “[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.”<sup>47</sup> Absent a stay or a preliminary injunction, the Rule will exact a tremendous human toll on our residents and communities before its questionable legality can be determined by this Court.

### **C. The Rule Undermines State Programs and Enforcement of State Laws**

In light of the many socioeconomic contributions that immigrants confer on our communities and families, Amici States commit substantial resources and programming to ensure that the government does not err by deporting individuals who have valid defenses or bases for relief. For example, California and the District of Columbia have enacted programs designed to support a number of non-profit legal service organizations, which provide free or low-cost legal services for immigrants. *See e.g.* Cal. Welf. & Inst. Code §§ 13300-303; D.C. Code § 4-1901. New Jersey's 2020-2021 budget includes \$6.2 million for the provision of legal services to immigrants

---

<sup>46</sup> Faith Ozbay et al., *Social support and resilience to stress*, *Psychiatry* 35-40 (2007), <https://tinyurl.com/n77ja2b>.

<sup>47</sup> *Final Report of the Select Commission on Immigration and Refugee Policy* at 112 (Mar. 1981).

facing detention or deportation.<sup>48</sup> These programs provide immigration-oriented legal services, including legal services to assist immigrants in applying for asylum; VAWA, U, and T visas available to victims of crime; providing removal defense, and delivering legal training, education and outreach.<sup>49</sup> These types of state investments show the high value Amici States place on ensuring that immigrants who are legally entitled to stay in the United States can remain.

California also supports programs designed to help the most vulnerable immigrant population—unaccompanied children. Unaccompanied immigrant children experience sharply disparate immigration court outcomes based on whether they have an attorney.<sup>50</sup> “As of 2014, more than 80% of children who showed up to court unrepresented were deported .... For children who appeared in court with legal representation, only 12% were deported.”<sup>51</sup> To help close this gap, California devotes program funding to qualified nonprofit legal service organizations—including plaintiffs KIND and CLSEPA—to provide legal services and representation for unaccompanied undocumented children in proceedings related to asylum, Special Immigrant Juvenile Status (SIJS) and other affirmative remedies.<sup>52</sup> But the Rule’s fee hikes and newly

---

<sup>48</sup> See Appropriations Handbook, State of New Jersey, Fiscal Year 2020-2021, page B-125 (“In addition to the amount appropriated for Legal Services of New Jersey, \$6,200,000, subject to the approval of the Director of the Division of Budget and Accounting based on actual and anticipated caseloads, shall be made available by the Department of Human Services to one or more organizations qualified to provide such assistance, as determined by the Commissioner of Human Services for the provision of legal assistance to individuals facing detention or deportation based on their immigration status.”), <https://tinyurl.com/y7y72jvl>.

<sup>49</sup> See Cal. Dep’t. of Soc. Servs. (CDSS), Immigration Servs., <https://tinyurl.com/y4zaxm4m>; CDSS, Immigration Servs. Funding Award Announcement, FY2019-20 (Feb. 14, 2020), <https://tinyurl.com/y3f6j2ob>.

<sup>50</sup> Msyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, *The Atlantic* (Aug. 21, 2018), <https://tinyurl.com/ybrz78zz>.

<sup>51</sup> *Id.* Most of this vulnerable population, who are fleeing violence from their home countries, and are forced to pay considerable funds to traffickers or even on transportation to and from immigration court, are unable to afford an attorney. *Id.*

<sup>52</sup> CDSS, Immigration Servs., Unaccompanied Undocumented Minors, <https://tinyurl.com/yhbc9q55>; CDSS, Immigration Servs. UUM Legal Services Funding Award Announcement, FY2020-21 & 2021-22 (Nov. 6, 2020), <https://tinyurl.com/ybyxew19>.

imposed asylum fee will undermine California’s policy of ensuring that the most vulnerable immigrants have fair access to legal protections in immigration court by making applying for such protections prohibitively expensive.

In addition, under the Refugee Act, Amici States use federal grants to fund counties and private agencies, supporting refugee resettlement through a variety of services including cash aid, nutrition assistance, and employment and language training. *See* 8 U.S.C. § 1522.<sup>53</sup> Despite decreases in the number of refugees, and therefore refugee-related appropriations, Congress appropriated \$207,201,000 in FY 2019 to be administered by the Office of Refugee Resettlement (ORR) for refugee services.<sup>54</sup> The Rule’s financial barriers to asylum and securing their immigration status cut directly against the goal of ORR’s programs, to “provide people in need with critical resources to assist them in becoming integrated members of American society.”<sup>55</sup>

While Amici States appreciate an adjudicative agency’s need to recoup its administrative costs, it is irrational to set fees so high that they become prohibitive and cause adverse consequences, as they do here, by subverting a review system that is designed to catch errors in the deportation process, and protect individuals fleeing torture and persecution. The resulting adverse consequences harm the States by reducing the number of people who can maintain or obtain legal status and are thereby not fully able to participate in the States’ economies and civil society.

---

<sup>53</sup> Cal. State Plan for Refugee Assistance & Servs. (Federal FY 2019) (Aug. 13, 2018), <https://tinyurl.com/yxfug4uh>.

<sup>54</sup> Cal. Dep’t. of Health & Human Servs., Fiscal Year 2020 Administration for Children and Families Justification of Estimates for Appropriations Committees, 31, <https://tinyurl.com/y23g6k5s>.

<sup>55</sup> Office of Refugee Resettlement, <https://www.acf.hhs.gov/orr/about/what-we-do>.

The Rule will also place additional stress on state law enforcement agencies and undermine States' abilities to regulate the practice of law through their state disciplinary systems. Public comments submitted in opposition to the proposed Rule noted that increased fees are likely to limit the ability of applicants to work with qualified legal service providers, forcing "applicants to seek the services of fraudulent notarios in place of licensed counsel." *See* 85 Fed. Reg. 82,774. Predatory lending and immigration consultant fraud are serious problems in immigrant communities, and can be difficult for state and local law enforcement and oversight agencies to address due to low reporting rates. *See Viridiana v. Holder*, 646 F.3d 1230, 1237-39 (9th Cir. 2011) (describing immigration consultant fraud sufficient to excuse late filing of asylum claim).<sup>56</sup>

Aware of abusive business practices that prey on low-income immigrant communities, Amici States have enacted laws to protect against such practices and enforced them in state courts. *See, e.g.*, Cal. Bus. & Prof. Code § 22440 (Immigration Consultants Act (ICA)); *People v. Salcido*, 34 Cal. App. 5th 1092 (2019), *as modified* (May 13, 2019) (showing enforcement action under ICA); New York State Immigrant Assistance Services Law, N.Y. Gen. Bus. Law §§ 460-a – 460-k (McKinney) (GBL Article 28-C) (prohibiting and penalizing conduct associated with notario fraud). The Rule will place additional pressure on Amici State law enforcement to guard against such practices, even as it undercuts the immigration integration services Amici States have invested in providing.

The Rule's fee increases will also undermine States' attorney disciplinary bodies' efforts to enforce standards governing the practice of law. Under the 1988 BIA decision, *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), a motion to reopen based on ineffective assistance of

---

<sup>56</sup> Lorelei Laird, *Underreporting Makes Notario Fraud Difficult to Fight*, ABA Journal (May 1, 2018), <https://tinyurl.com/yabph52z>; *Predators at the Door*, Editorial, N.Y. TIMES (Sept. 25, 2002), <https://tinyurl.com/y4nsqwfg>.

counsel must indicate that the attorney’s conduct which forms the basis of the ineffective assistance claim was reported to the state agency responsible for attorney discipline or good reason why such a report was not made. *See Matter of Melgar*, 28 I&N Dec. 169, 170-71 (providing examples of death or disbarment as valid reasons for not reporting attorney malpractice) (BIA 2020). Such mandatory reporting requirements are critical for state bar disciplinary authorities to identify the unauthorized practice of immigration law, such as notario fraud, and discipline attorneys who fail to uphold professional standards.<sup>57</sup>

The loss of *Lozada* complaints that will flow from fewer immigrants being able to afford fees to file motions to reopen based on ineffective assistance of counsel claims will undermine Amici States’ efforts to identify and discipline attorney misconduct and regulate the practice of law within their jurisdictions.

### CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for a stay, or in the alternative, for a preliminary injunction should be granted.

---

<sup>57</sup> *See e.g.* 2019 State Bar of California Annual Discipline Report at 9-12 (Apr. 30, 2020) (describing outreach efforts and receipt of 427 immigration attorney complaints from the public), <https://tinyurl.com/ycu7zg23>; 2018 State Bar of California Annual Discipline Report Appendix D (Apr. 30, 2019) (describing outreach and education efforts and that “vast majority of all cases are initiated by complaints from the public), <https://tinyurl.com/y899kfn4>.

Dated: December 31, 2020

Respectfully Submitted,

XAVIER BECERRA  
*Attorney General State of California*  
MICHAEL L. NEWMAN  
Senior Assistant Attorney General  
NANCY A. BENINATI  
Supervising Deputy Attorney General  
WILLIAM H. DOWNER  
Deputy Attorney General

---

WILLIAM H. DOWNER  
Deputy Attorney General  
*Attorneys for the State of California*

KARL A. RACINE  
*Attorney General for the District of Columbia*  
KATHLEEN KONOPKA  
Deputy Attorney General  
BRENDAN B. DOWNES  
Assistant Attorney General

/s/ Kathleen Konopka  
KATHLEEN KONOPKA  
D.C. Bar No. 495297  
*Attorneys for the District of Columbia*



On behalf of:

KARL A. RACINE  
Attorney General  
District of Columbia  
400 6th St., NW, Suite 8100  
Washington, DC 20001

XAVIER BECERRA  
Attorney General  
State of California  
P.O. Box 944255  
Sacramento, CA 94244

WILLIAM TONG  
Attorney General  
State of Connecticut  
165 Capitol Ave.  
Hartford, CT 06106

KATHLEEN JENNINGS  
Attorney General  
State of Delaware  
820 North French St.  
Wilmington, DE 19801

CLARE E. CONNORS  
Attorney General  
State of Hawaii  
425 Queen St.  
Honolulu, HI 96813

KWAME RAOUL  
Attorney General  
State of Illinois  
100 West Randolph St., 12th Floor  
Chicago, IL 60601

AARON FREY  
Attorney General  
State of Maine  
109 Sewall St.  
Augusta, ME 04330

BRIAN E. FROSH  
Attorney General  
State of Maryland  
200 Saint Paul Place  
Baltimore, MD 21202

MAURA HEALEY  
Attorney General  
Commonwealth of Massachusetts  
1 Ashburton Place, 20<sup>th</sup> Floor  
Boston, MA 02108

DANA NESSEL  
Attorney General  
State of Michigan  
525 W. Ottawa St.  
Lansing, MI 48909

KEITH ELLISON  
Attorney General  
State of Minnesota  
75 Rev. Dr. Martin Luther King Jr. Blvd  
St. Paul, MN 55155

AARON FORD  
Attorney General  
State of Nevada  
100 North Carson St.  
Carson City, NV

GURBIR S. GREWAL  
Attorney General  
State of New Jersey  
25 Market St.  
Trenton, NJ 08625

LETITIA JAMES  
Attorney General  
State of New York  
28 Liberty St.  
New York, NY 10005

PETER F. NERONHA  
Attorney General  
State of Rhode Island  
150 South Main Street  
Providence, RI 02903

MARK R. HERRING  
Attorney General  
Commonwealth of Virginia  
202 North 9<sup>th</sup> Street  
Richmond, VA 23219

HECTOR BALDERAS  
Attorney General  
State of New Mexico  
P.O. Drawer 1508  
Santa Fe, NM 87504

ELLEN F. ROSENBLUM  
Attorney General  
State of Oregon  
1156 Court St. NE  
Salem, OR 97301

THOMAS J. DONOVAN, JR.  
Attorney General  
State of Vermont  
109 State Street  
Montpelier, VT 05609

ROBERT W. FERGUSON  
Attorney General  
State of Washington  
1125 Washington St. SE, PO BOX 40100  
Olympia, WA 98504