

No. 19-5272

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

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O.A., *et al.*,

*Plaintiffs and Appellees,*

V.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

*Defendants and Appellants.*

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**On Appeal from the United States District  
Court for the District of Columbia**

No. 1:18-CV-2718

Hon. Randolph D. Moss, Judge

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**AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA,  
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,  
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,  
NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON,  
PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA,  
WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF  
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

(A) **Parties and Amici.** All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants, Doc. No. 1843376, with the exception of the following amici: (1) The signatories to this brief; (2) Peter Keisler, Carter Phillips, Stuart Gerson, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein; and (3) City of Chicago, City of New York, City of Oakland and County of Los Angeles.

(B) **Rulings under Review.** References to the rulings at issue appear in the Brief for Appellants, Doc. No. 1843376.

(C) **Related Cases.** References to related cases appear in the Brief for Appellants, Doc. No. 1843376.

Dated: August 3, 2020

/s/ James F. Zahradka II  
JAMES F. ZAHRADKA II

## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities.....	ii
Glossary .....	x
Statutes and Regulations.....	x
Introduction and Interest of Amici States.....	1
Argument .....	4
I.    Defendants’ Policies Trap Asylum Seekers at the Border While Effectively Refusing to Accept Their Applications.....	4
II.   The Rule Will Exacerbate Inhumane Border Conditions and Cause Additional Trauma to Already Vulnerable Migrants and Their Families.	8
III.  The States Will Be Harmed by the Effects of the Rule. ....	14
IV.  The Rule’s Issuance Violated Notice-and-Comment Requirements Ensuring the Public’s Right to Raise Issues Regarding Proposed Agency Action.....	22
Conclusion .....	27

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>CASES</b>	
<i>Al Otro Lado, Inc. v. Nielsen</i>	
327 F. Supp. 3d 1284 (S.D. Cal. 2018) .....	5
<i>Am. Fed’n of Gov’t Emps. v. Block</i>	
655 F.2d 1153 (D.C. Cir. 1981) .....	23
<i>Barr v. E. Bay Sanctuary Covenant</i>	
140 S. Ct. 3 (2019) .....	8
<i>Chrysler Corp. v. Brown</i>	
441 U.S. 281 (1979) .....	22
<i>E. Bay Sanctuary Covenant v. Barr</i>	
No. 19-16487, 2020 WL 3637585 (9th Cir. July 6, 2020).....	7, 8
<i>E. Bay Sanctuary Covenant v. Trump</i>	
349 F. Supp. 3d 838 (N.D. Cal. 2018).....	10, 22
<i>E. Bay Sanctuary Covenant v. Trump</i>	
354 F. Supp. 3d 1094 (N.D. Cal. 2018) .....	26
<i>E. Bay Sanctuary Covenant v. Trump</i>	
932 F.3d 742 (9th Cir. 2018).....	4, 22, 24, 25, 26
<i>Innovation Law Lab v. McAleenan</i>	
951 F.3d 1073 (9th Cir. 2020).....	7
<i>Innovation Law Lab v. Nielsen</i>	
366 F. Supp. 3d 1110 (N.D. Cal. 2019) .....	7
<i>Int’l Union, United Mine Workers of Am. v. Mine Safety &amp; Health</i>	
<i>Admin.</i>	
407 F.3d 1250 (D.C. Cir. 2005) .....	26
<i>State of N.J., Dep’t of Env’tl. Prot. v. U.S. Env’tl. Prot. Agency</i>	
626 F.2d 1038 (D.C. Cir. 1980) .....	23
<i>Wolf v. Innovation Law Lab</i>	
140 S. Ct. 1564 (2020) .....	7

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<b>STATUTES</b>	
United States Code, Title 5	
§ 553(c).....	26
§ 553(d).....	23
United States Code, Title 8	
§ 1158(a)(1).....	4
Commonwealth of Mass., FY 2020 Final Budget, 2019 Mass. Acts 41 .....	2
St. of N.J., FY 2020 Budget Detail, 2019 N.J. Sess. Law Serv. Ch. 150.....	2
Wash. Laws of 2019, ch. 415, § 129(21) (May 21, 2019) .....	19
<b>COURT RULES</b>	
Federal Rules of Appellate Procedure,	
Rule 29(a)(2).....	1
<b>REGULATORY MATERIALS</b>	
83 Federal Register	
55934 .....	23
55950 .....	23, 24
55950-51 .....	25
<b>OTHER AUTHORITIES</b>	
Allen Keller et al., <i>Pre-Migration Trauma Exposure and Mental Health</i> <i>Functioning among Central American Migrants Arriving at the US</i> <i>Border</i> (Jan. 10, 2017).....	13
Am. Immig. Lawyers Assoc., <i>Policy Brief: “Remain in Mexico” Plan</i> <i>Sows Chaos, Puts Asylum Seekers at Risk</i> (Feb. 1, 2019).....	7
Amnesty International, <i>USA: “You Don’t Have Any Rights Here”</i> (Oct. 2018).....	5
Anna Gorman, <i>Medical Clinics That Treat Refugees Help Determine the</i> <i>Case for Asylum</i> , NPR (July 10, 2018) .....	20

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Beth Fertig, <i>Unaccompanied Minors Have Tougher Time Winning Asylum</i> , WNYC (June 6, 2018).....	15
Cal. Dep’t Pub. Health, <i>Office of Refugee Health</i> .....	20
Cal. Dep’t Soc. Servs., <i>Immigration Services Contractors</i> .....	2
Cal. Dep’t Soc. Servs., <i>Immigration Services Program Update</i> (March 2019).....	3
Cal. Dep’t Soc. Servs., <i>Services for Refugees, Asylees, and Trafficking Victims</i> .....	16
Cal. Dep’t Soc. Servs., <i>Unaccompanied Undocumented Minors Legal Services Funding Contractor Referral List</i> (FY 2018-19).....	3
Camilo Montoya-Galvez, <i>Lawmakers Condemn “Horrific” Conditions Faced by Asylum-Seekers Returned to Mexico</i> , CBS News (Jan. 17, 2020).....	10
Capital Area Immigrants’ Rights Coalition, <i>Mayor Bowser Announces \$2.5 Million to Fund Legal Representation for DC Immigrant Residents, Including Those Detained by ICE</i> (Sept. 24, 2019).....	1
Capital Area Immigrants’ Rights Coalition, <i>Prince George’s County [MD] Council Increases Funding for Immigrant Services and Language Access (ISLA) Program to \$300,000</i> (May 30, 2019).....	2
Catherine E. Shoichet and Leyla Santiago, <i>The Tear Gas is Gone. But in This Shelter at the Border, the Situation Is Getting Worse</i> , CNN (Nov. 29, 2018).....	8
Christine Murray, <i>Ailing Central American Migrants in Dire Conditions Dig in at U.S. Border</i> , Reuters (Nov. 28, 2018).....	9
City of Baltimore, <i>Safe City Baltimore Immigration Education &amp; Defense Fund</i> .....	2
Community Legal Aid Society [Del.], <i>Immigration</i> .....	2

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Cristina Rendon, <i>Salvadorian Woman Nervously Awaits Contact from Son Seeking Asylum at US-Mexico Border</i> , Fox KTVU (Nov. 26, 2018).....	14
Cty. of L.A., Dep’t of Soc. Services, <i>Refugee Employment Program</i> .....	16
D.C. Mayor’s Off. of Cmty. Affairs, <i>FY 2019 Immigrant Justice Legal Services Grant</i> .....	2
Dep’t of Homeland Sec., <i>Migrant Protection Protocols</i> (Jan. 24, 2019) .....	6
Dep’t of Homeland Sec., Office of Inspector General, <i>Special Review - Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy</i> (Sept. 27, 2018) .....	5
Elliot Spagat, <i>AP Finds 13,000 Asylum Seekers on Border Wait Lists</i> , Associated Press (May 9, 2019).....	6
Elliot Spagat, <i>More Caravan Migrants Arrive in Tijuana, Brace for Long Stay</i> , Associated Press (Nov. 15, 2018) .....	13
Fairfax Cty. [VA], <i>Report of Actions of the Fairfax County Board of Supervisors</i> (Jan. 22, 2019) .....	2
Farida Jhabvala Romero, <i>Salvadoran Teen from Migrant Caravan Reunites with Mother in Bay Area</i> , KQED (Mar. 10, 2019).....	14
Fox News, <i>Secretary Nielsen Talks Immigration, Relationship with Trump</i> (May 15, 2018) .....	5
Ill. Dep’t of Hum. Servs., <i>Ill. Welcoming Center</i> .....	2
Ill. Refugee Resettlement Prog., <i>FY 2018 Annual Report</i> .....	2
J.D. Long-García, <i>One Year Later, How Has Trump’s ‘Remain in Mexico’ Policy Affected Asylum Seekers?</i> , America Magazine (Jan. 30, 2020).....	16
Jewish Family Services of Del., <i>Refugee Integration Support Effort (RISE)</i> .....	2

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Josiah Heyman & Jeremy Slack, <i>Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death</i> , Ctr. for Migration Studies (June 25, 2018).....	10, 18
Kavitha Cardoza, <i>How Schools Are Responding to Migrant Children</i> , Education Week (Apr. 9, 2019).....	16
Leah McDonald, <i>Mayor of Tijuana Said the \$30,000-a-Day Funding to Assist with Caravan of 6,000 Central American migrants Is About to Run Out</i> , Daily Mail (Nov. 28, 2018).....	9
Lisa Fernandez & Candice Nguyen, <i>Oakland Human Rights Clinic Provides Rare, Forensic Medical Evidence for Tortured Asylum Seekers</i> , KTVU (Oct. 11, 2018) .....	20
Max Rivlin-Nadler, <i>Asylum-Seeker Sent Back to Mexico Is Killed in Tijuana</i> , KPBS (Dec. 13, 2019) .....	11
Medecins Sans Frontieres, <i>Forced to Flee Central American’s Northern Triangle: A Neglected Humanitarian Crisis</i> (May 2017).....	12
Medecins Sans Frontieres, <i>US Must Include Asylum Seekers in COVID-19 Response, Rather Than Shut Border</i> (Mar. 27, 2020).....	15
Mich. Dep’t of Heath & Hum. Servs., <i>Refugee Assistance &amp; Services</i> .....	3
Mich. Dep’t of Heath & Hum. Servs., <i>Refugee Assistance</i> .....	17
Molly Hennessy-Fiske, <i>For Transgender Migrants Fleeing Death Threats, Asylum in the U.S. Is a Crapshoot</i> , L.A. Times (Oct. 29, 2019).....	12
Molly Hennessy-Fiske, <i>Why and How Are Asylum Seekers Entering the U.S.?</i> , L.A. Times (Nov. 22, 2018) .....	13
Monica Campbell, <i>This Teen Migrated to the US Border to Escape Gangs. He Hopes to Join His Mom in the US</i> , PRI (Feb. 7, 2019).....	14
N.J. 101.5, <i>Murphy OKs \$3.1M for Immigrants Facing Deportation--\$1M Boost</i> .....	19



**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
N.J. Dept. of Human Servs., <i>Murphy Administration Restores N.J.’s Role in Refugee Resettlement</i> .....	17
N.M. Ctr. on Law & Poverty, <i>Emergency Services for Immigrants</i> (Oct. 15, 2013).....	2
N.M. Dep’t of Pub. Health, <i>Off. of Border Health</i> .....	2
N.Y. St., Div. of Budget, <i>Governor Cuomo Announces Highlights of the FY 2020 State Budget</i> .....	19
N.Y. St., Off. of Temp. & Disability Assist., <i>Refugee Services Provider Directory</i> .....	21
N.Y. St., Off. of Temp. & Disability Assist., Refugee Servs., <i>Overview</i> .....	2, 17
N.Y. St., Off. of Temp. & Disability Assist., Refugee Servs., <i>Programs and Services</i> .....	17
Nadwa Mossad, <i>Refugees and Asylees: 2018</i> , DHS Off. of Immigration Statistics 10 (Oct. 2019) .....	1
Nick Miroff, <i>Under Trump Border Rules, U.S. Has Granted Refuge to Just Two People Since Late March, Records Show</i> , Wash. Post (May 13, 2020).....	15
Nicole Narea, <i>The Abandoned Asylum Seekers on the US-Mexico Border</i> , Vox (Dec. 20, 2019).....	10
Robert Moore, “ <i>If the Police Aren’t Safe Here, What About Us?</i> ” <i>Asylum Seekers Fear “Remain in Mexico” Policy</i> , Texas Monthly (Feb. 7, 2019).....	7
Salvador Rivera, <i>2nd Year Running, Tijuana Named ‘Most Violent City in The World’</i> , Border Report (June 2, 2020) .....	11-12
Sarah Kinosian & Joshua Partlow, <i>LGBT Asylum Seekers Are First to Reach the U.S. Border from the Caravan. Now They Wait</i> , Wash. Post (Nov. 13, 2018).....	12

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Sarah Kinoshian et al., <i>Mexico Begins Moving Caravan Migrants to New Shelter but Faces Mistrust</i> , Wash. Post (Nov. 30, 2018).....	9
Sarah Kinoshian, “ <i>They’re Playing with Our Lives</i> ” <i>Say the First Migrants Returned under New Mexico Policy</i> , PRI (Feb. 5, 2019).....	7
Sarah Kinoshian, <i>Migrants at Mexico Border Face an Uncertain Future on Their Own</i> , The Guardian (Dec. 1, 2018) .....	8-9
SF-CAIRS (the SF Refugee Forum), <i>Refugee &amp; Asylee Benefits</i> .....	16
St. of New York, <i>Governor Cuomo and Legislative Leaders Announces 2020 Enacted Budget Includes \$10 Million to Support Expansion of the Liberty Defense Project</i> , (Apr. 5, 2019).....	2
U. of Cal. Hastings Coll. of the L., <i>Center for Gender and Refugee Studies</i> .....	18
U. of Cal., Irvine Sch. of L., <i>Immigrants’ Rights Clinic</i> .....	19
U. of Cal.-Davis Sch. of L., <i>Immigration Law Clinic</i> .....	18
U.S. Dep’t of State, <i>Mexico Map</i> .....	11
U.S. Dep’t of State, <i>Mexico Travel Advisory</i> (Dec. 17, 2019).....	11
U.S. News & World Report, <i>Coronavirus Case in Refugee Camp at US Border Raises Alarm</i> (June 30, 2020) .....	3, 10
UC San Diego Ctr. for U.S.-Mexican Studies & U. of Tex. at Austin Robert Strauss Ctr. for Int’l Security and L., <i>Metering Update</i> (May 2020).....	6
UNICEF, <i>Statement on Situation of Migrant Children at Mexico-U.S. Border</i> (Nov. 28, 2018) .....	9
UNLV William S. Boyd School of Law, <i>UNLV Immigration Clinic</i> .....	19
Va. Dep’t of Soc. Servs., <i>More Refugee Services</i> .....	2
Va. Dep’t of Soc. Servs., <i>Va. Refugee Resettlement Prog. Manual</i> (Nov. 1, 2018).....	2

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Wash. Dep't of Health, <i>Refugee Health Program, Provider Resources</i> .....	21
Wash. Dep't of Soc. & Health Servs., Off. of Refugee and Immig. Assistance, Econ. Servs. Admin., <i>Briefing Book for State Fiscal Year</i> <i>2019</i> .....	2, 17
Wash. Dep't of Soc. & Health Servs., <i>Plan for Refugee Assistance</i> <i>Program, 2015</i> .....	21
White House, <i>Remarks by President Trump After Meeting with</i> <i>Congressional Leadership on Border Security</i> (Jan. 4, 2019).....	18
White House, <i>Remarks by President Trump on the Humanitarian Crisis</i> <i>on Our Southern Border and the Shutdown</i> (Jan. 19, 2019).....	18

## **GLOSSARY**

- CDSS: California Department of Social Services
- CBP: U.S. Customs and Border Protection
- MPP: Migrant Protection Protocols
- CAIR: Capital Area Immigrants' Rights Coalition

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are contained in the Statutory Addendum filed by Appellants, Doc. No. 1843378.

## INTRODUCTION AND INTEREST OF AMICI STATES

The district court properly vacated the rule at issue here, which prohibits individuals fleeing persecution from applying for asylum if they have entered the United States between ports of entry. The 22 States signatory to this brief<sup>1</sup> write to emphasize the harm that rule will cause.

Amici States include six of the top ten states of residence of asylees— individuals legally present in the United States due to their credible fear of persecution or torture if forced to return to their home countries.<sup>2</sup> In 2018, the most recent year reported, Amici States welcomed over 54 percent of the total asylees entering the United States.<sup>3</sup> The States invest significant resources to provide education, health care, and other services to asylum-seekers and asylees, helping to meet their basic needs and enabling them to transition into communities in the States. Those investments often take the form of state funding to not-for-profit agencies (like the plaintiff organizations)<sup>4</sup> to provide legal, employment, educational, and

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<sup>1</sup> California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia (Amici States or States). Amici States file this brief under the authority of Federal Rules of Appellate Procedure, Rule 29(a)(2).

<sup>2</sup> Nadwa Mossad, *Refugees and Asylees: 2018*, DHS Off. of Immigration Statistics 10 (Oct. 2019), <https://tinyurl.com/ybg9w54j>.

<sup>3</sup> *Id.*

<sup>4</sup> *See, e.g.*, Capital Area Immigrants' Rights Coalition (CAIR), *Mayor Bowser Announces \$2.5 Million to Fund Legal Representation for DC Immigrant Residents*,

financial assistance.<sup>5</sup> Amici States also assist asylum-seekers with critical access to language assistance and health care, including mental health services for individuals who have suffered torture and other trauma.<sup>6</sup> Many of these state-funded

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*Including Those Detained by ICE* (Sept. 24, 2019), <https://tinyurl.com/y5uascah>; City of Baltimore, *Safe City Baltimore Immigration Education & Defense Fund* <https://tinyurl.com/yyzu4zav> (listing deportation defense provided by CAIR among city-funded services); CAIR, *Prince George's County [MD] Council Increases Funding for Immigrant Services and Language Access (ISLA) Program to \$300,000* (May 30, 2019), <https://tinyurl.com/y6dk3p3a>; Fairfax Cty. [VA], *Report of Actions of the Fairfax County Board of Supervisors* (Jan. 22, 2019), <https://tinyurl.com/y3ss4q4j> (approving \$200,000 for CAIR and other non-profits to provide legal assistance to immigrants in enforcement actions).

<sup>5</sup> See generally, e.g., Cal. Dep't Soc. Servs. (CDSS), *Immigration Services Contractors*, <https://tinyurl.com/ybzyzwtj>; D.C. Mayor's Off. of Cmty. Affairs, *FY 2019 Immigrant Justice Legal Services Grant*, <https://tinyurl.com/DC-IJLSG>; FY 2020 Final Budget, 2019 Mass. Acts 41, <https://tinyurl.com/Mass-FY20>; Va. Dep't of Soc. Servs., *Va. Refugee Resettlement Prog. Manual* (Nov. 1, 2018), <https://tinyurl.com/y4rxke6q>; Va. Dep't of Soc. Servs., *More Refugee Services*, <https://dss.virginia.gov/family/ons/more.cgi>; N.M. Ctr. on Law & Poverty, *Emergency Services for Immigrants* (Oct. 15, 2013), <https://tinyurl.com/y63a98o5>; N.Y. State, Off. of Temporary and Disability Assistance, *Refugee Servs., Overview*, <https://otda.ny.gov/programs/bria/>; *Governor Cuomo and Legislative Leaders Announces 2020 Enacted Budget Includes \$10 Million to Support Expansion of the Liberty Defense Project*, State of New York (Apr. 5, 2019), <https://tinyurl.com/y6pq2w73>; Jewish Family Services of Del., *Refugee Integration Support Effort (RISE)*, <https://www.jfsdelaware.org/family-support/refugees/>; Community Legal Aid Society [Del.], *Immigration*, <http://www.declasi.org/poverty-law-program/immigration/>.

<sup>6</sup> See Wash. Dep't of Soc. & Health Servs., Off. of Refugee and Immig. Assistance, Econ. Servs. Admin., *Briefing Book for State Fiscal Year 2019*, <https://tinyurl.com/ycfdpnr>; Ill. Refugee Resettlement Prog., *FY 2018 Annual Report*, <https://tinyurl.com/ycycrnnu>; Ill. Dep't of Hum. Servs., *Ill. Welcoming Center*, <https://tinyurl.com/y3ed43xs>; N.M. Dep't of Pub. Health, *Off. of Border Health*, <https://nmhealth.org/about/asd/ohe/obh/>; FY 2020 Budget Detail, 2019 N.J. Sess. Law Serv. Ch. 150, p. B-204, <https://tinyurl.com/yxw256og>.

organizations assist undocumented unaccompanied minors, who often have asylum claims.<sup>7</sup>

Amici States thus have a significant interest in the Interim Final Rule at issue here, which prohibits individuals fleeing persecution from applying for asylum if they have entered the United States other than at ports of entry. Other unlawful policies of this Administration have forced thousands of migrants to wait in migrant camps to assert their asylum claims at ports of entry, generating “squalid conditions” on the Mexican side of the border.<sup>8</sup> This Rule would force already traumatized asylum seekers to languish at the border in those adverse conditions, which have only worsened as a result of the COVID-19 pandemic, heightening their trauma, and increasing asylum seekers’ need for state-funded services when they ultimately enter the United States. Additionally, the Rule will inflict these harms without the States or the public having a chance to comment, because defendants issued it in violation of their notice-and-comment obligations under the Administrative Procedure Act (APA).

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<sup>7</sup> See CDSS, *Unaccompanied Undocumented Minors Legal Services Funding Contractor Referral List* (FY 2018-19), <https://tinyurl.com/yb4xpo3t>; CDSS, *Immigration Services Program Update* (March 2019); <https://tinyurl.com/rtg4avp> Mich. Dep’t of Health & Hum. Servs., *Refugee Assistance & Services*, <https://tinyurl.com/y2ey3u3c>.

<sup>8</sup> See, e.g., U.S. News & World Report, *Coronavirus Case in Refugee Camp at US Border Raises Alarm* (June 30, 2020), <https://tinyurl.com/y9edv8ky>.

## ARGUMENT

The district court correctly vacated the Rule as contrary to 8 U.S.C. § 1158(a)(1), recognizing the harms that the Rule imposed on the individual and organizational plaintiffs. App. 133, 175-77, 179-81. In addition to these harms, the Rule will also injure the States and their fiscs. Finally, the States' and the public's crucial interests in receiving notice of, and an opportunity to comment on, defendants' proposed action have also been harmed by defendants' failure to comply with the APA's notice and comment requirements.

### **I. DEFENDANTS' POLICIES TRAP ASYLUM SEEKERS AT THE BORDER WHILE EFFECTIVELY REFUSING TO ACCEPT THEIR APPLICATIONS.**

The Rule will cause serious harm to individuals, States, and the public both on its own terms and as part of a larger scheme of related—and deeply problematic—federal policies. Those policies have bottlenecked the flow of migrants through ports of entry, creating a massive backlog of potential asylees. The interplay of these unsustainable, cruel, and ineffective policies with the instant Rule will only worsen the inhumane situation at the border, inflicting harm that ultimately redounds to the States.

As the Ninth Circuit has recognized, when the federal government pushes asylum-seekers to ports of entry, it makes it difficult or impossible for them to actually apply for asylum there. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (*EBSC II*) (noting “evidence in the record suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to



lawful entry by turning them away upon their arrival at our ports of entry”). The Department of Homeland Security (DHS) has publicly acknowledged that it uses a “metering” or “queue management” policy, which amounts to a de facto denial of many applicants’ right to apply for asylum.<sup>9</sup> A September 2018 report from the DHS Office of Inspector General confirmed that since 2016, Customs and Border Protection (CBP) was “regulating the flow of asylum-seekers at ports of entry through ‘metering’”—a policy under which CBP officers turn asylum-seekers away before they can cross onto U.S. soil—claiming that there is no space available.<sup>10</sup> In a lawsuit challenging the policy, the plaintiffs allege a number of illegal practices at the San Ysidro port of entry, including “falsely informing [asylum seekers] that the U.S. is no longer providing asylum, that President Trump signed a new law ending asylum, that a law providing asylum to Central Americans ended, that Mexican citizens are not eligible for asylum, and that the U.S. is no longer accepting mothers with children for asylum,” as well as “intimidat[ing] asylum seekers by threatening to take away their children if they do not renounce a claim for asylum and to deport the asylum seekers.” *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1291

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<sup>9</sup> Amnesty International, *USA: “You Don’t Have Any Rights Here”* (Oct. 2018), <https://tinyurl.com/Amnesty-rights>; Fox News, *Secretary Nielsen Talks Immigration, Relationship with Trump* (May 15, 2018), <https://tinyurl.com/yag57qyq>.

<sup>10</sup> DHS Office of Inspector General, *Special Review - Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy* (Sept. 27, 2018), <https://tinyurl.com/yyxfy44w>.

Experts estimate that there are approximately 14,400 migrants stranded at 11 main border cities in Mexico waiting to seek asylum, nearly two-thirds of whom are in Tijuana.<sup>11</sup> Since March 2020, CBP has stopped processing asylum seekers at ports of entry due to COVID-19, further exacerbating the backlog.<sup>12</sup> These desperate conditions have led to tragedy; for example, a Honduran family on the list tried to swim across the Rio Grande, resulting in the deaths of the father and three of his children, including a baby.<sup>13</sup>

Further, in January 2019, defendants began implementing a program—originally known as “Remain in Mexico,” and since renamed the “Migrant Protection Protocols” (MPP)—under which some asylum seekers crossing the southern border are returned to Mexico for the duration of their asylum proceedings.<sup>14</sup> This policy resulted in more individuals suffering for longer periods in dangerous and inhumane

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<sup>11</sup> See UC San Diego Ctr. for U.S.-Mexican Studies & U. of Tex. at Austin Robert Strauss Ctr. for Int’l Security and L., *Metering Update* (May 2020), <https://tinyurl.com/y9sulzmx>.

<sup>12</sup> *Id.*

<sup>13</sup> Elliot Spagat, *AP Finds 13,000 Asylum Seekers on Border Wait Lists*, Associated Press (May 9, 2019), <https://apnews.com/f79eb1d8c5484e41833a84007b4c7458>.

<sup>14</sup> See DHS, *Migrant Protection Protocols* (Jan. 24, 2019), <https://tinyurl.com/DHS-remain>.

conditions at the border.<sup>15</sup> The policy has also been the subject of federal litigation, with a district court enjoining the policy in April 2019, *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), an order upheld by the Ninth Circuit. *Innovation Law Lab v. McAleenan*, 951 F.3d 1073 (9th Cir. 2020). As the Ninth Circuit noted, “[u]ncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.” *Id.* at 1093.<sup>16</sup>

Finally, Defendants’ unlawful rule denying asylum to migrants arriving at the border with Mexico unless they have first applied and been denied asylum in Mexico creates further difficulties and dangers for asylum seekers. The Ninth Circuit upheld a district court order enjoining that rule, stating that it posed a threat to the “public interest in not returning refugees to their persecutors or to a country where they would be endangered.” *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL

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<sup>15</sup> See, e.g., Am. Immig. Lawyers Assoc., *Policy Brief: “Remain in Mexico” Plan Sows Chaos, Puts Asylum Seekers at Risk* (Feb. 1, 2019), <https://tinyurl.com/AILA-Remain>; Robert Moore, “If the Police Aren’t Safe Here, What About Us?” *Asylum Seekers Fear “Remain in Mexico” Policy*, Texas Monthly (Feb. 7, 2019), <https://tinyurl.com/Tex-Mo-Juarez>; Sarah Kinoshian, “They’re Playing with Our Lives” *Say the First Migrants Returned under New Mexico Policy*, PRI (Feb. 5, 2019) (describing Tijuana as one of the world’s deadliest cities), <https://tinyurl.com/y4ax2b2c>.

<sup>16</sup> Due to an earlier Supreme Court stay, this policy remains in effect pending the final outcome of the appeal. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

3637585, at \*17 (9th Cir. July 6, 2020) (internal citations and punctuation omitted).<sup>17</sup>

In that case, the court was particularly concerned that the rule at issue could cause “potentially meritorious asylum claims [to] be ‘channeled’ away from the United State[s] and into Mexico.” *Id.*

This Rule is part of a mosaic of restrictive and punitive policies targeting asylum seekers. The cumulative effect of these policies has been to undermine the efficacy, efficiency, and fairness of the asylum system—to the grave detriment of asylum seekers and, in turn, the Amici States.

## **II. THE RULE WILL EXACERBATE INHUMANE BORDER CONDITIONS AND CAUSE ADDITIONAL TRAUMA TO ALREADY VULNERABLE MIGRANTS AND THEIR FAMILIES.**

The Rule, which forces migrants to remain at the southern border while they attempt to enter the United States, inflicts significant trauma on migrants. Media reports have extensively documented the inhumane conditions outside ports of entry. At the California border, thousands of immigrants, many with young children, were forced to stay in a makeshift camp at a sports complex, at a shelter at an abandoned concert venue in one of the most dangerous parts of Tijuana, and on plastic tarps in the streets waiting to be processed by CBP.<sup>18</sup> The unsanitary conditions “raised

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<sup>17</sup> Like the MPP policy, due to an earlier Supreme Court stay, this policy remains in effect pending the final outcome of the appeal. *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

<sup>18</sup> Catherine E. Shoichet and Leyla Santiago, *The Tear Gas is Gone. But in This Shelter at the Border, the Situation Is Getting Worse*, CNN (Nov. 29, 2018), <https://tinyurl.com/ybqnyrw3>; Sarah Kinoshian, *Migrants at Mexico Border Face an*

concerns among aid workers and humanitarian organizations that the migrants, packed into a space intended for half their number, are susceptible to outbreaks of disease.”<sup>19</sup> Many migrants developed respiratory infections, and health officials also reported multiple cases of lice and chicken pox.<sup>20</sup> Children waiting at the border are becoming ill and missing school, and families are not receiving basic health and social services, including mental health treatment.<sup>21</sup> Local authorities lack sufficient resources to help immigrants for prolonged periods and have called on humanitarian organizations for assistance.<sup>22</sup>

Conditions have not improved over time. A visit to Matamoros, Mexico (on the Texas border) by a congressional delegation in January revealed “squalid

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*Uncertain Future on Their Own*, The Guardian (Dec. 1, 2018), <https://tinyurl.com/yicszotby>.

<sup>19</sup> Sarah Kinoshian et al., *Mexico Begins Moving Caravan Migrants to New Shelter but Faces Mistrust*, Wash. Post (Nov. 30, 2018), <https://tinyurl.com/y CFRWJ4E>.

<sup>20</sup> Christine Murray, *Ailing Central American Migrants in Dire Conditions Dig in at U.S. Border*, Reuters (Nov. 28, 2018), <https://tinyurl.com/y37xav8l>.

<sup>21</sup> UNICEF, *Statement on Situation of Migrant Children at Mexico-U.S. Border* (Nov. 28, 2018), <https://tinyurl.com/y9qzkclh> (noting “limited access to many of the essential services [children] need for their wellbeing, including nutrition, education, psychosocial support and healthcare”).

<sup>22</sup> Leah McDonald, *Mayor of Tijuana Said the \$30,000-a-Day Funding to Assist with Caravan of 6,000 Central American migrants Is About to Run Out*, Daily Mail (Nov. 28, 2018), <https://tinyurl.com/yb6o2cco>.

conditions” and a “lack of medical care, drinkable water and overall security.”<sup>23</sup>

Media reports indicate that for over 5,000 migrants, “only colorful tents and tarps, some held up by only sticks and stones, stand between them and the elements.”<sup>24</sup> The makeshift camps have been plagued by fecal contamination due to a lack of toilets, “raising concerns about E. coli infections. Migrants have no access to running water, leading to poor hygiene and the contraction of rashes and funguses. As flu season ramps up, there are concerns it will spread throughout the camps.”<sup>25</sup> Indeed, recent reports indicate that COVID-19 has begun to spread among inhabitants of the camps, where residents continue to “live in squalid conditions: Most sleep in tents or underneath tarps, and there’s little access to running water.”<sup>26</sup>

In addition to the physical squalor, vulnerable adults and children face greatly increased risks of crime and exploitation as they wait at the border.<sup>27</sup> See *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 866 (N.D. Cal. 2018) (“*EBSC*

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<sup>23</sup> Camilo Montoya-Galvez, *Lawmakers Condemn “Horrible” Conditions Faced by Asylum-Seekers Returned to Mexico*, CBS News (Jan. 17, 2020), <https://tinyurl.com/sdw74wq>.

<sup>24</sup> Nicole Narea, *The Abandoned Asylum Seekers on the US-Mexico Border*, Vox (Dec. 20, 2019), <https://tinyurl.com/t7auqx8>.

<sup>25</sup> *Id.*

<sup>26</sup> *Coronavirus Case in Refugee Camp*, *supra* note 8.

<sup>27</sup> Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Studies (June 25, 2018), <https://tinyurl.com/y6pjdtaa>.

*I*) (discussing “the extensive record evidence of the danger experienced by asylum seekers waiting to cross”), *stay denied*, 909 F.3d 1219 (9th Cir. 2018), *stay denied*, 139 S. Ct. 782 (2018). Thousands of migrants camped at the border are “at risk for extortion, kidnapping, and rape at the hands of cartels and other criminal actors.”<sup>28</sup> The U.S. Department of State’s own travel advisories warn Americans considering travel to Mexico to “[e]xercise increased caution” because “[v]iolent crime—such as homicide, kidnapping, carjacking, and robbery—is widespread.”<sup>29</sup> A number of Mexican states where would-be asylum seekers are waiting are regarded as dangerous by the State Department, and designated “Reconsider Travel” or “Do Not Travel” areas.<sup>30</sup> Indeed, U.S. government employees are forbidden from driving “from the U.S.-Mexico border to or from the interior parts of Mexico.”<sup>31</sup> Tragically, multiple asylum seekers—including two young Honduran migrants and a Salvadoran man who was sent back to Mexico under the Administration’s “Remain in Mexico” policy—have been murdered in Tijuana, which is experiencing a record number of homicides.<sup>32</sup> And some LGBTQ immigrants face threats of harassment and violence,

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<sup>28</sup> Narea, *supra* note 24.

<sup>29</sup> U.S. Dep’t of State, *Mexico Travel Advisory* (Dec. 17, 2019), <https://tinyurl.com/y4853eyd>.

<sup>30</sup> U.S. Dep’t of State, *Mexico Map*, <https://tinyurl.com/St-Dept-Mex-Map>.

<sup>31</sup> *Mexico Travel Advisory*, *supra* note 29.

<sup>32</sup> Max Rivlin-Nadler, *Asylum-Seeker Sent Back to Mexico Is Killed in Tijuana*, KPBS (Dec. 13, 2019), <https://tinyurl.com/y9s9xjm6>; Salvador Rivera,

including murder.<sup>33</sup>

The trauma described above will only compound the trauma that asylum seekers have suffered both in their home countries and en route to the border. The vast majority of individuals affected by the Rule are from Central America's "Northern Triangle" countries: Guatemala, Honduras, and El Salvador. App. 50. As set forth in detail in the First Amended Complaint and in third-party reports, the Northern Triangle is one of the most violent regions in the world, with conditions "akin to the conditions found in the deadliest armed conflicts in the world today."<sup>34</sup> Asylum seekers from this region flee from extremely dangerous circumstances, most commonly murders of family members, threats to life or limb, extortion, and

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*2nd Year Running, Tijuana Named 'Most Violent City in The World',* Border Report (June 2, 2020), <https://tinyurl.com/ydfnvwh7>.

<sup>33</sup> Molly Hennessy-Fiske, *For Transgender Migrants Fleeing Death Threats, Asylum in the U.S. Is a Crapshoot*, L.A. Times (Oct. 29, 2019), <https://tinyurl.com/y9jzjb8c>; Sarah Kinosian & Joshua Partlow, *LGBT Asylum Seekers Are First to Reach the U.S. Border from the Caravan. Now They Wait*, Wash. Post (Nov. 13, 2018), <https://tinyurl.com/y9kthrg5>.

<sup>34</sup> Medecins Sans Frontieres, *Forced to Flee Central American's Northern Triangle: A Neglected Humanitarian Crisis* (May 2017), <https://tinyurl.com/y6pxmlp6> (stating that the level of violence suffered by Northern Triangle residents is comparable to that in war zones, and noting that homicidal violence in this region has led to higher numbers of civilian casualties than anywhere else in the world, including countries with armed conflicts or war); see App. 50-52.



domestic violence.<sup>35</sup> Immigrants escaping this violence face additional threats during their journey north. Along the route through Mexico and to the United States, immigrants suffer physical violence, abduction, theft, extortion, torture, and rape, often perpetrated by gangs and other criminal organizations.<sup>36</sup> Unsurprisingly, these experiences have caused high rates of serious mental health issues among asylum seekers, including anxiety, post-traumatic stress, and major depressive disorders.<sup>37</sup>

Finally, the harm from the Rule extends to residents of the States who suffer the anguish of uncertainty as their asylum-seeking relatives are in limbo at the border. Many Central American asylum seekers have relatives across the Nation, including in Los Angeles, New York, and Washington.<sup>38</sup> For example, a Honduran family with three young children hoped to reunite with family in Los Angeles, joining a caravan to flee gang threats of violence.<sup>39</sup> A San Francisco Bay Area mother, who for months had been anxiously awaiting the fate of her 15-year-old son after Mexican authorities detained him with other minors as they attempted to apply

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<sup>35</sup> Allen Keller et al., *Pre-Migration Trauma Exposure and Mental Health Functioning among Central American Migrants Arriving at the US Border*, 12 PloS one e0168692 (Jan. 10, 2017), <https://tinyurl.com/y7gamqhp>.

<sup>36</sup> See Medecins Sans Frontieres, *supra* note 34 at 4-5, 11-12.

<sup>37</sup> *Id.* at 168-69; Keller, *supra* note 35.

<sup>38</sup> See, e.g., Molly Hennessy-Fiske, *Why and How Are Asylum Seekers Entering the U.S.?*, L.A. Times (Nov. 22, 2018), <https://tinyurl.com/y33pej4c>.

<sup>39</sup> Elliot Spagat, *More Caravan Migrants Arrive in Tijuana, Brace for Long Stay*, Associated Press (Nov. 15, 2018), <https://tinyurl.com/ya3l3oge>.

for asylum, was finally reunited with him last year.<sup>40</sup> But he is emotionally scarred by his experiences, to the point that his mother plans to seek psychological care for him.<sup>41</sup> These State residents are being harmed by the federal government's actions, and the States have a significant interest in preventing further harms of this nature.

### III. THE STATES WILL BE HARMED BY THE EFFECTS OF THE RULE.

Every year, the States welcome thousands of traumatized asylum seekers into their communities. The States provide or fund a number of social services to help these individuals realize their potential in their new country. The additional mental and physical health harms caused by defendants' policies will make the need for these services even more acute and challenging to meet.

The Amici States have taken in the majority of total asylees entering the United States over the past several years.<sup>42</sup> Historically, thousands of individuals with positive "credible fear" determinations, including children, resettle in California annually, joining California's communities and living, working, and raising their families there; while these numbers have been drastically reduced due to the Trump

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<sup>40</sup> Cristina Rendon, *Salvadorian Woman Nervously Awaits Contact from Son Seeking Asylum at US-Mexico Border*, Fox KTVU (Nov. 26, 2018), <https://tinyurl.com/yxjxqz89>; Monica Campbell, *This Teen Migrated to the US Border to Escape Gangs. He Hopes to Join His Mom in the US*, PRI (Feb. 7, 2019), <https://tinyurl.com/y4dxl0le>; Farida Jhabvala Romero, *Salvadoran Teen from Migrant Caravan Reunites with Mother in Bay Area*, KQED (Mar. 10, 2019), <https://tinyurl.com/y9sz9ezw>.

<sup>41</sup> Romero, *supra* note 40.

<sup>42</sup> See Mossad, *supra* note 2 at 10.

Administration's policies<sup>43</sup>—and, more recently, the COVID-19 pandemic<sup>44</sup>—the Amici States' interest in ensuring that these asylum seekers are treated humanely is undiminished.<sup>45</sup>

The States, their local jurisdictions, and State-based non-governmental organizations will bear much of the costs of assisting victims of the unnecessary trauma caused by defendants' policies. Among other services, the States' public health care systems will need to address the increased health care needs of immigrants who have not had access to preventative care, vaccinations, and other necessary medical services as they waited at the border; these deficiencies are particularly concerning in light of the ongoing COVID-19 pandemic, which makes such measures even more critical.<sup>46</sup> Similarly, the States' public schools will face greater challenges in educating students who have suffered trauma and needlessly

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<sup>43</sup> Beth Fertig, *Unaccompanied Minors Have Tougher Time Winning Asylum*, WNYC (June 6, 2018), <https://tinyurl.com/yaogmppy>.

<sup>44</sup> *See, e.g.*, Nick Miroff, *Under Trump Border Rules, U.S. Has Granted Refuge to Just Two People Since Late March, Records Show*, Wash. Post (May 13, 2020), <https://tinyurl.com/y8zb9dgl>.

<sup>45</sup> Mossad, *supra* note 2. California received, on average, over 40 percent of the total number of individuals granted asylum from 2016-2018, by far the most of any state. Collectively, Amici States Illinois, New York, New Jersey, Pennsylvania, and Washington received, on average, over 21 percent each year during this period. *See id.*

<sup>46</sup> *See, e.g.*, Medecins Sans Frontieres, *US Must Include Asylum Seekers in COVID-19 Response, Rather Than Shut Border* (Mar. 27, 2020), <https://tinyurl.com/ybfhw8e>.

missed months of schooling.<sup>47</sup>

Further, the States have invested in specialized services to assist asylees, and those services will be strained by the increased need caused by defendants' policies. For example, California has various forms of assistance at the state and county level for asylees and refugees, including programs that provide cash assistance and employment services and integration and language assistance for refugee students, as well as services for elders, unaccompanied minors, and victims of human trafficking.<sup>48</sup> One of Washington's state social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes,

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<sup>47</sup> See, e.g., J.D. Long-García, *One Year Later, How Has Trump's 'Remain in Mexico' Policy Affected Asylum Seekers?*, America Magazine (Jan. 30, 2020) (discussing study showing that “[m]ost children cannot continue their education while they await their court hearing in Mexico”); Kavitha Cardoza, *How Schools Are Responding to Migrant Children*, Education Week (Apr. 9, 2019), <https://tinyurl.com/y84sx9wv> (describing “large gaps” in migrants’ schooling, how trauma can cause various forms of “acting out” by students, and lack of funding for public schools to educate migrant children).

<sup>48</sup> See CDSS, *Services for Refugees, Asylees, and Trafficking Victims*, <https://www.cdss.ca.gov/Refugee-Services>; *Refugee & Asylee Benefits*, SF-CAIRS (the SF Refugee Forum), <http://sf-cairs.org/refugee-asylee-benefits>; Cty. of L.A., Dep't of Soc. Services, *Refugee Employment Program*, <https://dpss.lacounty.gov/en/jobs/rep.html>.

and other comprehensive support services.<sup>49</sup> Michigan provides cash and medical assistance programs through its Department of Health and Human Services, as well as employment services, integration services, education services, language services, health-related services, and elderly services through private agencies.<sup>50</sup> Similarly, in New York, Refugee Services—part of the State’s Office of Temporary and Disability Assistance—provides targeted assistance for refugees and their families, unaccompanied minors, and victims of human trafficking.<sup>51</sup> These services include temporary cash assistance, health care screenings and medical services, and employment programs.<sup>52</sup> In New Jersey, under the Department of Human Services, the State in partnership with refugee social services agencies provides healthcare and temporary financial assistance to refugees, asylees and their families as well as other integration services in employment, English language training and education.<sup>53</sup>

If the Rule is allowed to go into effect, the beneficiaries of these services will,

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<sup>49</sup> See Wash. Dep’t of Soc. & Health Servs., Off. of Refugee and Immig. Assistance, Econ. Servs. Admin., *Briefing Book for State Fiscal Year 2019*, <https://tinyurl.com/ycfdpnr>.

<sup>50</sup> See Mich. Dep’t of Heath & Hum. Servs., *Refugee Assistance*, <https://tinyurl.com/y9q662ms>.

<sup>51</sup> See N.Y. St., Off. of Temp. & Disability Assist., Refugee Servs., *Overview*, <https://otda.ny.gov/programs/bria/>.

<sup>52</sup> See N.Y. St., Off. of Temp. & Disability Assist., Refugee Servs., *Programs and Services*, <https://otda.ny.gov/programs/bria/programs.asp>.

<sup>53</sup> See N.J. Dept. of Human Servs., *Murphy Administration Restores N.J.’s Role in Refugee Resettlement*, <https://tinyurl.com/yycly6r>.

in many cases, predictably require more (or more intensive) services once their asylum applications are belatedly processed, as they will have spent weeks or months languishing at the border. Despite the federal government's claims that its actions will reduce human trafficking,<sup>54</sup> international experts have found that policies such as the Rule make migrants significantly *more* vulnerable to these kinds of abuses,<sup>55</sup> increasing the need for state programs.

In addition, recognizing the importance of proper legal guidance during immigration proceedings, Amici States fund a number of non-profit legal service organizations that provide free or low-cost legal services for asylees and refugees. For example, California funds dozens of such organizations to provide services including assisting applicants for asylum other immigration remedies, as well as removal defense, and its public universities provide such services as well.<sup>56</sup>

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<sup>54</sup> See, e.g., White House, *Remarks by President Trump on the Humanitarian Crisis on Our Southern Border and the Shutdown* (Jan. 19, 2019), <https://tinyurl.com/y7gdj6s8> (“Our plan includes critical measures to protect migrant children from exploitation and abuse”); White House, *Remarks by President Trump After Meeting with Congressional Leadership on Border Security* (Jan. 4, 2019), <https://tinyurl.com/ybvonwbt> (claiming that current border conditions allow human trafficking of women and children, including “traffickers having three and four women with tape on their mouths and tied up”).

<sup>55</sup> See Heyman, *supra* note 27 (“Blockaded asylum seekers in northern Mexican border cities, bottled up in those sites with few or no resources or connections, are particularly vulnerable to labor, sexual, and other trafficking.”).

<sup>56</sup> See *Immigration Services Contractors*, *supra* note 5; U. of Cal.-Davis Sch. of L., *Immigration Law Clinic*, <https://tinyurl.com/yde2udzy>; U. of Cal. Hastings Coll. of the L., *Center for Gender and Refugee Studies*, <https://cgrs.uchastings.edu>;

Washington allocated \$1.5 million from its general fund for FY 2019, and again for FY 2021, to legal services organizations serving asylum seekers and other migrant populations in the state.<sup>57</sup> New Jersey has also allocated money to fund legal services providers who assist immigrants in detention and removal proceedings since FY 2019. The FY 2020 budget included \$3.1 million for legal representation.<sup>58</sup> Among other programs, New York funds the Liberty Defense Project, a State-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.<sup>59</sup> The University of Nevada, in Reno and Las Vegas, provides aid to refugee families, as does the UNLV School of Law's Immigration Clinic, which provides deportation defense services to families and unaccompanied children seeking asylum.<sup>60</sup>

By categorically barring asylum for every individual who enters the country without inspection at the southern border, the Rule will frustrate these organizations' missions in a number of ways, including reducing their client bases and ability to

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U. of Cal., Irvine Sch. of L., *Immigrants' Rights Clinic*,  
<https://tinyurl.com/y8eh82cu>.

<sup>57</sup> See Wash. Laws of 2019, ch. 415, § 129(21) (May 21, 2019),  
<https://tinyurl.com/yazs4u6x>.

<sup>58</sup> See N.J. 101.5, *Murphy OKs \$3.1M for Immigrants Facing Deportation--\$1M Boost*, <https://tinyurl.com/y4o2chqr>.

<sup>59</sup> See N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2020 State Budget*, <https://tinyurl.com/yco8o3m3>.

<sup>60</sup> UNLV William S. Boyd School of Law, *UNLV Immigration Clinic*,  
<https://tinyurl.com/y4ckoxhk>.

access and serve their potential clients, as well as making asylum proceedings significantly more complex and challenging. App. 69-79. The Rule and the Proclamation will also cause them to divert considerable resources towards analyzing and interpreting the new policy, overhauling their databases, preparing new informational and advocacy materials, and creating complicated new resources and procedures to assist clients with their claims. *Id.* Harms to these and similar organizations in turn impact their funders, including the States and their political subdivisions, whose priorities and funding decisions are adversely affected as well.

Relatedly, the need for Amici States' agencies'<sup>61</sup> resources to support impacted local health agencies, providers, and resettlement agencies to administer assessments and deliver other health services to newly arrived refugees, asylees, victims of severe forms of human trafficking, and other eligible entrants will increase. For example, the Highland Human Rights Clinic in Oakland, California (operated by the Alameda County Health System), conducts approximately 85 health assessments of asylees annually.<sup>62</sup> The vast majority of these patients require mental health referrals, due to years of abuse and trauma.<sup>63</sup> Their needs will only increase

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<sup>61</sup> See, e.g., Cal. Dep't Pub. Health, *Office of Refugee Health*, <https://tinyurl.com/y45lf5ty>.

<sup>62</sup> Lisa Fernandez & Candice Nguyen, *Oakland Human Rights Clinic Provides Rare, Forensic Medical Evidence for Tortured Asylum Seekers*, KTVU (Oct. 11, 2018), <https://tinyurl.com/y5eoqlrr>.

<sup>63</sup> Anna Gorman, *Medical Clinics That Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), <https://tinyurl.com/yyooqsjm>.



due to the additional trauma they will endure while forced to wait in dangerous, unhealthy conditions at the border because of the Rule.

Other Amici States also provide such support and will face increased need. Washington funds a State Refugee Coordinator to ensure that state agencies collaborate with local partners including clinicians, community-based organizations, health coalitions, and voluntary agencies to address refugee health issues.<sup>64</sup> In addition, the Washington State Refugee Health Promotion Project is a collaboration between state agencies, health providers, and resettlement agencies such as Seattle Children's Hospital and Lutheran Community Services Northwest to improve health outcomes and enable successful resettlement for refugee populations.<sup>65</sup> In New Jersey, the Department of Human Services funds a State Refugee Health Coordinator who works with the resettlement agencies to ensure refugees and asylees get health care and mental health screenings and get connected to treatment and care.<sup>66</sup> In New York, the Office of Temporary and Disability Assistance supports numerous organizations that provide health care services to refugees and asylees, including care for post-traumatic stress syndrome and depression.<sup>67</sup>

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<sup>64</sup> See Wash. Dep't of Soc. & Health Servs., *Plan for Refugee Assistance Program*, 2015 8, <https://tinyurl.com/yxmd2st3>.

<sup>65</sup> *Id.* at 6; see also Wash. Dep't of Health, *Refugee Health Program, Provider Resources*, <https://tinyurl.com/y2z7q38y>.

<sup>66</sup> N.J. Dept. of Human Servs., *supra* note 53.

<sup>67</sup> See N.Y. St., Off. of Temp. & Disability Assist., *Refugee Services Provider Directory*, <https://tinyurl.com/y59wxyku>.

All of these state-provided resources will be further impacted due to the increased harms that the Rule causes to individuals who are eventually able to present their asylum claims and enter the country.

#### **IV. THE RULE'S ISSUANCE VIOLATED NOTICE-AND-COMMENT REQUIREMENTS ENSURING THE PUBLIC'S RIGHT TO RAISE ISSUES REGARDING PROPOSED AGENCY ACTION**

Not only will the Rule harm the States by increasing the need for services to asylees and asylum seekers within their borders, but defendants also harmed the States by violating the APA's procedural requirements when adopting the Rule.

“In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). As the Ninth Circuit stated in its prior decision regarding the Rule, “These procedures are designed to assure due deliberation of agency regulations and foster the fairness and deliberation that should underlie a pronouncement of such force.” *EBSC II*, 932 F.3d at 775 (internal citations and punctuation omitted).

Defendants' decision to proceed via an Interim Final Rule, with no opportunity for comment before the Rule became effective, vitiated the APA's strictures. As the *EBSC* district court stated, is “antithetical to the structure and purpose of the APA for an agency to implement a rule first, then seek comment later.” *EBSC I*, 349 F. Supp. 3d at 860 (internal citation and punctuation omitted). This Court has similarly held

that “[p]ermitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way.” *State of N.J., Dep’t of Env’tl. Prot. v. U.S. Env’tl. Prot. Agency*, 626 F.2d 1038, 1049 (D.C. Cir. 1980). Further, this Court has instructed that, pursuant to “Congress’s expectation,” exceptions to notice and comment requirements must be “narrowly construed” and “reluctantly countenanced.” *Id.* at 1045. Thus, “use of these exceptions by administrative agencies should be limited to emergency situations,” *Am. Fed’n of Gov’t Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981), where “delay would do real harm,” not “whenever an agency finds it inconvenient to follow them.” *New Jersey*, 626 F.2d at 1046 (internal citations and punctuation omitted).

Defendants insist that their actions here fall under the good cause exemption to the APA’s notice and comment requirement because giving the States and the public an opportunity to comment on these drastic changes to federal immigration policy would have been “impracticable” and “contrary to the public interest.” Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55950 (to be codified at 8 C.F.R. pt. 208) (citing 5 U.S.C. § 553(b)(B)). Ostensibly based on that belief, defendants also dispensed with the 30-day waiting period required by 5 U.S.C. § 553(d), arguing that “immediate implementation of this rule is essential to avoid creating an incentive for aliens to seek to cross the border.” *Id.*

The Ninth Circuit correctly rejected defendants' arguments. First, the court dismissed defendants' position that courts are prohibited from "second-guess[ing]" an agency's invocation of the good cause exception, as long as the agency's reasons for doing so are "rational"; rather, the court held, the agency must make "a sufficient showing that good cause exists." *EBSC II*, 932 F.3d at 777 n.16 (citation omitted). Applying that standard to the Rule, the Ninth Circuit rejected defendants' use of the good cause exception, finding the government's inferences regarding the incentives for migrants to surge across the southern border based on the announcement of the Rule "too difficult to credit," and "only speculative" based on the evidence presented. *Id.* at 777–78. This Court should hold likewise.

The federal government also invokes the "foreign affairs" exception to the APA's procedural requirements. 83 Fed. Reg. 55950 (citing 5 U.S.C. § 553(a)(1)). However, in *EBSC*, the Ninth Circuit rejected the argument that agencies can invoke the "foreign affairs" exception in the context of *all* immigration-related regulations, and specifically rejected its application to the Rule: "[t]he foreign affairs exception would become distended if applied to an immigration enforcement agency's actions generally, even though immigration matters typically implicate foreign affairs." *EBSC II*, 932 F.3d at 775 (internal citation and punctuation omitted). The Ninth Circuit articulated a demanding standard for invoking this exception to regulations like this one: "[T]he foreign affairs exception applies in the immigration context only when ordinary application of the public rulemaking provisions will provoke

definitely undesirable international consequences,” because “it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law.” *Id.* at 775–76 (internal citations and punctuation omitted).

Although foreign relations are briefly discussed in the Rule, *see* 83 Fed. Reg. 55950-51, the federal government’s focus is on the United States’ internal interests, not international relations. Indeed, in denying the defendants’ motion for a stay of the preliminary injunction in *EBSC*, the Ninth Circuit concluded that “the connection between negotiations with Mexico and the immediate implementation of the Rule is not apparent on this record,” and accordingly held that defendants were “not likely to succeed” on this issue. *EBSC II*, 932 F.3d at 776–77.

Defendants’ failure to engage in pre-Rule notice-and-comment procedures as required by the APA deprived the States of their right to participate in the rulemaking process. As sovereigns responsible for the health, safety, and welfare of millions of people within their respective borders, Amici States have unique interests and perspectives to contribute on issues of national importance and widespread impact, particularly when such policies will cause prospective residents of our States unnecessary, substantial, and enduring harm. If the States had been provided with an opportunity to comment on the Rule before it was promulgated, they would have raised the myriad harmful impacts and unlawful aspects of the Rule discussed above

before it took effect.<sup>68</sup> The agencies would have been required to consider those comments in crafting the final regulation, *see* 5 U.S.C. § 553(c), and may have made changes to the proposed rule in response, as agencies often do. The administrative record developed through the notice-and-comment process in turn would have aided courts' review of this agency action. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also EBSC II*, 932 F.3d at 775 (noting that “notice-and-comment procedures give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review”) (internal citations and punctuation omitted). The very fact that the Amici States have filed amicus briefs in these matters buttresses the argument that defendants should have followed the notice-and-comment requirements; as the *EBSC* district court stated, “the participation of amici [including the States] in this case validates the observation that the greater the public interest in a rule, the greater reason to allow the public to participate in its formation.” *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d

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<sup>68</sup> Indeed, when the federal government began accepting comments on the Rule (after it had been promulgated), the States of California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia submitted a comment letter to the U.S. Department of Homeland Security and U.S. Department of Justice on January 8, 2019, urging them to withdraw the Rule. California has submitted more than 157 such comment letters on anticipated or proposed actions by the federal government to delay, repeal or adopt federal regulations since February 2017. Washington State has offered more than 200 comments since January 2017, Massachusetts has submitted dozens, and New York has sent hundreds.

1094, 1113 n.12 (N.D. Cal. 2018). Defendants' noncompliance with the procedural requirements of the APA thus caused significant harms to the public interest in addition to the grave injuries posed by the substance of the Rule itself.

### CONCLUSION

This Court should affirm the district court's order vacating the Rule.

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This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rules 29(a)(5) and 32(a)(7)(B) because:

1. This brief contains 6,496 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

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Dated: August 3, 2020

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