

No. 19-56417

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AL OTRO LADO, INC., ET AL.,
Plaintiffs-Appellees,

v.

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Defendants-Appellants.

**On Appeal from the United States District Court
for the Southern District of California**
No. 3:17-cv-02366-BAS-KSC

**AMICUS BRIEF OF THE STATES OF CALIFORNIA, 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**

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
SUSAN SLAGER
Supervising Deputy Attorney General
VILMA PALMA-SOLANA
JAMES F. ZAHRADKA II
R. ERANDI ZAMORA-GRAZIANO
MARISSA MALOUFF (SBN 316046)
Deputy Attorneys General
300 S. Spring Street, 13th Floor
Los Angeles, CA 90013-1230
Telephone: (213) 269-6467
Email: Marissa.Malouff@doj.ca.gov
*Attorneys for Amicus Curiae State of
California*

(Additional counsel listed on signature page)

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INTRODUCTION AND INTERESTS OF THE AMICI STATES

The district court properly issued a preliminary injunction blocking the U.S. Department of Homeland Security (“DHS”) from applying the Interim Final Rule: Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003 & 1208) (“Third Country Transit Rule” or “the Rule”), to the provisional class of “all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019, because of the [Federal] Government’s metering policy, and who continue to seek access to the U.S. asylum process” (“provisional class members”).¹ The Third Country Transit Rule, with limited exceptions, bars asylum to any applicant who transited through a third country but did not apply for humanitarian protection there. By its terms, the Rule only applies to individuals who entered, attempted to enter, or arrived in the United States after its effective date of July 16, 2019. Barring asylum to the provisional class members—who, but for Defendants’ unlawful metering policy, would have entered the United States

¹ “Metering” refers to a waitlist system that forces asylum seekers to wait in Mexico until U.S. Customs and Border Protection (“CBP”) decides to process them. It is an aspect of the “turnback policy,” a formal internal policy mandating lower-level officials to directly or constructively turnback asylum seekers at the border, based on pretextual assertions that ports of entry lack capacity to process asylum seekers.

prior to the Rule’s effective date—is unlawful and against the public interest, and the preliminary injunction should remain in place.

The Amici States of California, 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, have a strong interest in ensuring that asylum remains available to those in need of protection, such as the provisional class members. Every year the States welcome thousands of asylees and potential asylees. In 2018, approximately 11,188 individuals in removal proceedings were granted asylum by immigration courts in the States (“defensive asylum”).² And according to the most recent data available, the States constituted six of the top ten states of residence for individuals who applied for and were granted asylum by U.S. Citizenship and Immigration Services (“affirmative asylum”).³ As border states, California and New Mexico have a particular interest in this case because several thousand asylum seekers, including many of the provisional class

² U.S. Dep’t of Justice, Exec. Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018* 28, <https://tinyurl.com/EOIRyearbook>.

³ Nadwa Mossaad, Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* 11 tbl.13 (Mar. 2019), <https://tinyurl.com/MossaadStats>.

members, have been turned away due to metering at the states' southern borders.⁴

But illegally blocking the provisional class from asylum also has an impact well beyond the border states, because studies show that after asylum seekers cross the border they relocate to states across the country.⁵

Barring the provisional class members from asylum will harm the States in multiple ways: (1) by preventing otherwise-eligible asylum seekers who could become valuable members of the States' communities from entering or staying in the country; (2) by foreclosing the opportunity for humanitarian relief and incentivizing provisional class members to enter without inspection and remain in the shadows without the legal status for which they otherwise may be eligible; and (3) by forcing provisional class members to request asylum in Mexico, inflicting further trauma and thereby increasing their eventual need for state-funded services.

⁴ Per the Declaration of Nicole Ramos in support of Plaintiffs' Motion for Provisional Class Certification, there are approximately 10,000 applicants on the waitlist in Tijuana alone. Pls.' Mot. for Provisional Class Certification, Ex. 26 ¶ 11; *Human Smuggling at the U.S.-Mexico Border: Hearing Before the S. Homeland Sec. and Governmental Affairs Comm.*, 116th Cong., C-SPAN (June 26, 2019), <https://tinyurl.com/HoweTestimony> (testimony of Randy Howe, the Executive Director of CBP's Office of Field Operations, affirming that metering happens across ports of entry).

⁵ Nick Miroff & Tim Meko, *A Snapshot of Where Migrants Go After Release into the United States*, WASH. POST (Apr. 12, 2019), <https://tinyurl.com/WhereMigrantsGo> (showing that, in one study, asylum seekers released by CBP in El Paso went to 42 other states).

ARGUMENT

In determining whether to issue a preliminary injunction, the court considers: (1) whether the moving party is “likely to succeed on the merits,” (2) whether the moving party is “likely to suffer irreparable harm in the absence of preliminary relief,” (3) if “the balance of equities tips in [their] favor,” and (4) whether “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).⁶

This case raises a compelling question of simple fairness: whether those who arrived at the United States border prior to the Rule’s implementation can now be blocked from asylum under the Rule because—due only to their abiding by Defendants’ unlawful practices—they crossed the border after the Rule’s effective date. For the reasons explained by the Plaintiffs, the answer is no: applying this Rule to the provisional class is unlawful. The States focus on the public interest and equities at issue here, and argue that the harms to the public interest reinforce the need for a preliminary injunction.

⁶ The Plaintiffs alternatively seek an injunction under the All Writs Act, 28 U.S.C. § 1651, which the States do not address in this brief.

I. APPLYING THE RULE TO THE PROVISIONAL CLASS HARMS THE PUBLIC INTEREST IN PROVIDING SAFE AND ACCESSIBLE PROCEDURES TO APPLY FOR ASYLUM

Giving asylum seekers a safe haven from persecution is an essential value of the United States. In adopting the Refugee Act of 1980, which established the present asylum system, Congress codified “one of the oldest themes in America’s history—welcoming homeless refugees to our shores.” S. Rep. No. 96-256, at 1 (1979).

In departing from these core principles, the Rule inflicts unnecessary peril and trauma on a class of at least 26,000 asylum seekers, including parents with infants; unaccompanied minors; and lesbian, gay, bisexual, transgender, and queer migrants (LGBTQ). Pls.’ Mot. for Provisional Class Certification 14, Ex. 26 ¶¶ 8-10; Pls.’ Mot. for Prelim. Inj., Ex. 17 ¶ 4. Most of the provisional class members fled the Northern Triangle countries of Honduras, El Salvador, and Guatemala—some of the most dangerous countries in the world, with conditions “akin to the conditions found in the deadliest armed conflicts in the world today.”⁷ Second

⁷ Medecins Sans Frontieres, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* (May 2017), <https://tinyurl.com/MSF-N-Triangle> (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).

Am. Compl. ¶ 40. Others have made arduous journeys to flee political oppression and persecution in countries like Cameroon, Uganda, and Cuba.⁸ Pls.' Mot. for Prelim. Inj., Exs. 7, 14, 15, 16. Once they reached the United States border and legally requested protection, they were subject to Defendants' metering policy, under which they have been forced to languish in dangerous conditions outside of the ports of entry before CBP will begin to process their claims.

Subjecting the provisional class members to the Rule will expose them to additional trauma and danger. The Rule makes it all but impossible to obtain asylum unless the provisional class members first seek asylum in Mexico. But that leaves the provisional class members with an excruciating choice: (1) go through the asylum process in Mexico to remain eligible for asylum in the United States, which will prolong their time in dangerous conditions without any material prospect of obtaining asylum there; (2) forego the process in Mexico, and pursue the alternative forms of protection here (i.e., withholding of removal and protection under the Convention Against Torture), which are extremely difficult to obtain and not adequate substitutes for asylum; or (3) give up the attempt to seek protection

⁸ Molly O'Toole et al., *Facing Trump's Asylum Limits, Refugees from as Far as Africa Languish in a Mexican Camp*, L.A. TIMES (July 8, 2019), <https://tinyurl.com/OTooleandCole>.

entirely and try to enter the United States undetected through a dangerous trek and reside here without any legal status.

A. The Provisional Class Members Cannot Reliably and Safely Seek Protection in Mexico

The Rule requires the provisional class members to seek protection in Mexico, or any other country that they transited through en route to the border, before their asylum claims are considered in the United States. *See* 84 Fed. Reg. at 33,830. But Mexico is not equipped to provide such protection. Additionally, forcing the provisional class members to claim asylum in Mexico will prolong their already lengthy stays in unsafe conditions, resulting in their further traumatization and putting their lives at risk.

1. The Provisional Class Members Cannot Receive Humanitarian Protection in Mexico

The Mexican asylum system is dangerously inadequate. As recently as 2018, the National Human Rights Commission in Mexico issued “an urgent call to the federal government warning of the possible collapse of the refugee protection system.”⁹ The crisis has not improved: the agency that oversees the asylum system, the Mexican Commission for Refugee Assistance (“COMAR”), is processing an unprecedented surge of applications as it faces its lowest funding in

⁹ Human Rights First, *Mexico: Still Not Safe for Refugees and Migrants* (Mar. 2018), <https://tinyurl.com/HRFFactSheetMex>.

seven years.¹⁰ COMAR very recently opened offices at the border, but these offices are woefully understaffed.¹¹ Pls.’ Mot. for Provisional Class Certification, Ex. 44 ¶¶ 26-28. For example, only two staff members work at the Tijuana office, neither of whom are authorized to decide cases on their own. *Id.* at ¶ 27. Because COMAR still has no presence in several border areas with large asylum-seeking populations, such as Mexicali, asylum seekers are required to travel long and potentially dangerous routes to have their cases heard.¹² *See id.* at ¶ 28. Once they apply for asylum, migrants are often detained by immigration authorities.¹³ Then they face extremely lengthy delays in the processing of their applications.¹⁴ The provisional class members who go through this time-consuming process in Mexico

¹⁰ Lizbeth Diaz & Delphine Schrank, *Mexico’s Refugee Agency Turns to U.N. Amid Asylum Surge, Funding Cuts*, REUTERS (May 21, 2019), <https://tinyurl.com/DiazReuters>.

¹¹ Ana Campoy, *The Key Reason Why Central Americans Don’t Want Asylum in Mexico*, QUARTZ (Nov. 28, 2018), <https://tinyurl.com/CampoyQuartz> (describing that COMAR only had four offices, and none near the northern border as of November 2018).

¹² *See* Kate Morrissey, *Asylum Seekers Forced to ‘Remain in’ Mexicali Face Long Journey to Court Hearings*, SAN DIEGO UNION-TRIBUNE (May 15, 2019), <https://tinyurl.com/MorrisseyUnionTribune> (discussing the 100 mile trip between Mexicali and Tijuana).

¹³ Global Detention Project, *Mexico Immigration Detention Profile* (June 2013), <https://tinyurl.com/GlobalDetentionProject>; Associated Press, *Overcrowding, Abuse Seen at Mexico Migrant Detention Center*, KTLA (June 17, 2019), <https://tinyurl.com/APkta>.

¹⁴ Human Rights First, *supra* note 9.

will likely risk losing their spot on the metering waitlist to enter the United States, especially if they are detained.

Worse yet, going through the Mexican asylum process will be futile for most of the provisional class members. At the outset, many will be barred from protection because Mexico has a 30-day filing deadline for asylum applications.¹⁵ The provisional class members have, by definition, been waiting in Mexico since prior to July 16, 2019—well over 30 days—and cannot meet this deadline. As Plaintiffs note, while a waiver can be sought, it is difficult to obtain without private counsel and most class members lack the financial means to pay for such counsel. Pls.’ Mot. for Provisional Class Certification 19.

Even those who are able to overcome the filing deadline will still struggle to obtain protection in Mexico. For example, in 2017, only 9% of Honduran and 14.2% of Salvadoran applicants were granted protection in Mexico.¹⁶ Children are denied protection on nearly a categorical basis—in recent years, Mexico granted

¹⁵ Human Rights Watch, *Closed Doors: Mexico’s Failure to Protect Central American Refugee and Migrant Children* (Mar. 31, 2016), <https://tinyurl.com/hrwmigrationreport>.

¹⁶ Human Rights First, *supra* note 9.

refugee status to less than 1% of the unaccompanied children it apprehended.¹⁷

And Central American LGBTQ applicants are often coerced by Mexican officials to accept “voluntary return” to countries where they will face persecution, in lieu of fighting their cases.¹⁸

Once the provisional class members are denied asylum in Mexico, they will likely be deported to their home countries. *See* Pls.’ Reply in Supp. of Mot. for Provisional Class Certification 3-4. To seek the United States’ protection, they would be required to again make the dangerous trek to the United States border. For many, this may not be possible, given the cost and difficulty of that journey.¹⁹ In practice, that means that the Rule may also preclude those who are denied protection in Mexico from ever claiming asylum here.

¹⁷ Human Rights Watch, *Submission to the Committee on Economic, Social and Cultural Rights Concerning Mexico* 2 (Feb. 2018), <https://tinyurl.com/HRW-Submission>.

¹⁸ Amnesty Int’l, *No Safe Place: Salvadorans, Guatemalans and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity* 23 (Nov. 2017), <https://tinyurl.com/AmIntl-LGBT>.

¹⁹ Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, Amnesty Int’l, <https://tinyurl.com/AmIntDangerousJourney> (last visited Feb. 7, 2020).

2. While Waiting in Mexico, the Provisional Class Members Are Being Subjected to Dangerous and Inhumane Conditions

Applying this Rule to the provisional class members will further endanger their health and safety. The provisional class members have already been subject to inhumane living circumstances at the border due to Defendants' metering policy. Requiring them to seek protection in Mexico will prolong their exposure to squalid conditions and increase their risk for persecution. The provisional class members will face these harms regardless of whether they remain near the ports of entry where they have been residing or whether they are detained by the Mexican government upon their applications for asylum.

a. The Provisional Class Members' Living Conditions Are Inhumane

Media reports have extensively documented the deplorable conditions outside of the ports of entry where the provisional class members were metered. On the California border, thousands of immigrants, many with young children, were forced to stay in a makeshift camp at a sports complex, 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.²⁰ The unsanitary

²⁰ Catherine E. Shoichet & 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/Shoichet>; Sarah Kinoshian, *Migrants at Mexico Border Face an*

conditions “raised 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.”²¹

A visit to Matamoros, Mexico (on the Texas border) by a congressional delegation in January revealed “squalid conditions” and a “lack of medical care, drinkable water and overall security.”²² Media reports from December 2019 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, even as temperatures drop below freezing.”²³ These conditions have led to fecal contamination in the makeshift camps 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

Uncertain Future on Their Own, THE GUARDIAN (Dec. 1, 2018), <https://tinyurl.com/Kinosian>.

²¹ Sarah Kinosian et al., *Mexico Begins Moving Caravan Migrants to New Shelter but Faces Mistrust*, WASH. POST (Nov. 30, 2018), <https://tinyurl.com/Kinosian-shelter>.

²² Camilo Montoya-Galvez, *Lawmakers Condemn “Horrific” Conditions Faced by Asylum-Seekers Returned to Mexico*, CBS NEWS (Jan. 17, 2020), <https://tinyurl.com/Montoya-Galvez>.

²³ Nicole Narea, *The Abandoned Asylum Seekers on the US-Mexico Border*, VOX (Dec. 20, 2019), <https://tinyurl.com/NareaVox>.

are concerns it will spread throughout the camps.”²⁴ The provisional class members should not be forced to remain in these conditions so that they can go through a futile asylum process in which they are almost certain to lose.

Conditions in the Mexican detention centers that hold asylum seekers are similarly poor. Detention centers are becoming “increasingly squalid and overcrowded,” with some facilities holding up to four times their capacity.²⁵ There are reports of overflowing toilets, lights left on all night, sparse water and food, and limited healthcare.²⁶ In light of these conditions, human rights organizations have criticized Mexican detention centers as “substandard.”²⁷

b. The Provisional Class Members Are at Risk for Persecution

In addition to adverse physical conditions, the provisional class members are at increased risk of crime, exploitation, and persecution as they await the adjudication of their cases in Mexico. Migrants in Mexico are often victimized by criminal groups and, in some cases, by the police, immigration officers, and

²⁴ *Id.*

²⁵ Delphine Schrank, *Migrants Describe Overcrowded Mexican Detention Centers as Trump Ratchets Up Pressure*, REUTERS (June 23, 2019), <https://tinyurl.com/SchrankReuters>.

²⁶ *Id.*

²⁷ Associated Press, *supra* note 13.

customs officials.²⁸ Criminal groups are known to kidnap migrants to extort money from their relatives or force them into carrying out crimes.²⁹ Further, Central American gangs, which are the reason many migrants flee to the United States in the first place, have a significant presence in Mexico.³⁰ As an example, in 2011 in Tamaulipas, 193 migrants were murdered, and police officers were reportedly involved.³¹ More recently, in July 2019, Mexican authorities opened fire on a group of migrants, killing a Central American man who was traveling with his 8-year-old daughter.³² And as of January 2020, there were 816 reports of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers who were forced to remain in Mexico because of Defendants' other restrictive

²⁸ U.S. Dep't of State, Bureau of Democracy, H.R. & Lab., *Mexico 2018 Human Rights Report* 19 (Mar. 2019) [hereinafter *State Dep't – Mexico 2018*], <https://tinyurl.com/StateDeptMex2018>; see also U.S. Dep't of State, Bureau of Democracy, H.R. & Lab., *Mexico 2017 Human Rights Report* 1 (Apr. 20, 2018), <https://tinyurl.com/StateDeptMex2017> (“Organized criminal groups also were implicated in numerous killings, acting with impunity and at times in league with corrupt federal, state, local, and security officials.”).

²⁹ *State Dep't – Mexico 2018*, *supra* note 28, at 20.

³⁰ *Id.* at 19.

³¹ Human Rights First, *Dangerous Territory: Mexico Still Not Safe for Refugees* 3 (July 2017), <https://tinyurl.com/HRW-Mexico-NotSafe>.

³² Amnesty Int'l, *Mexico: Death During Police Operation Raises Serious Questions About Worsening Treatment of Migrants* (Aug. 1, 2019), <https://tinyurl.com/AmIntAug2019>.

program, the “Migrant Protection Protocols.”³³ Migrant detention centers offer asylum seekers little reprieve from these dangers, as officers with the National Migration Institute—known as one of Mexico’s most corrupt institutions—frequently extort detainees.³⁴

The situation is especially dire for the provisional class members who are particularly vulnerable, such as unaccompanied children, women, and LGBTQ persons. It was reported that as of April 2018, more than 6,600 children were recorded missing in Mexico.³⁵ Additionally, the U.N. High Commissioner for Refugees (“UNHCR”) has expressed concern about the prevalence of discrimination against children who are migrants, indigenous, or LGBTQ.³⁶

Conditions for women in Mexico are similarly perilous. Migrant women are sometimes sold by smugglers to human trafficking operations or forced to engage in sex work to “pay” for their trips.³⁷ Those detained by immigration authorities

³³ Human Rights First, *Delivered to Danger* (Jan. 21, 2020), <https://tinyurl.com/HRFMpp>.

³⁴ Associated Press, *supra* note 13.

³⁵ David Agren, *More than 6,600 Children Have Gone Missing in Mexico*, THE GUARDIAN (Oct. 5, 2019), <https://tinyurl.com/Agren-Guardian>.

³⁶ United Nations High Comm’r for Refugees, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report: Universal Periodic Review: Mexico 14* (July 2018), <https://tinyurl.com/UNHCRMexico2018>.

³⁷ Human Rights First, *supra* note 9, at 4.

are vulnerable to harassment and abuse.³⁸ As of 2017, Mexico ranked sixth in femicide, globally.³⁹ And between January and July of 2019, 1,812 women were murdered in Mexico—or approximately 10 a day—making it the second-most dangerous country for women in Latin America.⁴⁰

LGBTQ migrants also face special dangers in Mexico, as homophobic and transphobic violence is widespread. According to an Amnesty International report, two-thirds of LGBTQ Central American asylum seekers reported suffering sexual violence while transiting through Mexico.⁴¹ Mexican law enforcement officers intimidate, threaten, and commit violence against LGBTQ individuals. For instance, two police officers were arrested in connection with the kidnapping,

³⁸ Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*, United Nations University (May 4, 2016), <https://tinyurl.com/FleuryMay2016>.

³⁹ United Nations Office on Drugs & Crime, *Statistics and Data: Global Study on Homicide – Homicide Data By Country, Female Homicide Rate* (2019), https://dataunodc.un.org/GSH_app; Kate Linthicum, *Why Mexico Is Giving Out Half a Million Rape Whistles to Female Subway Riders*, L.A. TIMES (Oct. 23, 2016), <https://tinyurl.com/Linthicum-LATimes>.

⁴⁰ Luis Gomez Romero, *Mexican Women Are Angry About Rape, Murder and Government Neglect—and They Want the World to Know*, PRI (Aug. 21, 2019), <https://tinyurl.com/RomeroPRI>.

⁴¹ Amnesty Int'l, *supra* note 18, at 7 (citing the UNHCR).

torture, and execution of a young gay couple.⁴² In addition to these harrowing types of violence, there is rampant anti-LGBTQ discrimination despite the existence of some anti-discrimination laws.⁴³ Mexican immigration detention is a particularly hostile environment for to LGBTQ migrants. Detainees suffer “discrimination, sexual harassment and even aggression from the other detainees or the [center] staff.”⁴⁴

In light of the dangerous conditions in Mexico, requiring the provisional class members to seek asylum in that country before they may apply in the United States is untenable—and, in fact, may result in persecution.

⁴² Austrian Ctr. for Country of Origin and Asylum Research and Documentation, *Mexico: Sexual Orientation and Gender Identity (SOGI)* 20 (May 31, 2017), <https://tinyurl.com/AustriaReportLGBTQ>.

⁴³ Immigration & Refugee Bd. of Canada, *Mexico: Situation of Sexual Minorities, Including in Mexico City; Protection and Support Services Offered by the State and Civil Society (2015-July 2017)* (Feb. 16, 2018), <https://tinyurl.com/ImmBdCanadaReportLGBTQ>; Immigration & Refugee Bd. of Canada, *Mexico: Societal Norms on Gender Identity Expressions, Including in Indigenous Communities (2016-May 2018)* (May 25, 2018), <https://tinyurl.com/ImmBdCanadaReport>.

⁴⁴ Amnesty Int’l, *supra* note 18, at 22 (quoting the Citizens’ Council of the National Migration Institute).

B. Alternative Forms of Immigration Relief Do Not Provide Adequate Protections

As the dangers described above illustrate, there are valid reasons why bona fide asylum seekers, and especially the most vulnerable ones, would forego the asylum process in Mexico. Many provisional class members who cannot safely access asylum in Mexico will now be denied asylum under the Rule, regardless of the strength of their claims. As set forth below, contrary to Defendants' assertions, the availability of alternative forms of relief under the Rule—withholding of removal and protection under the Convention Against Torture (CAT)—does little to mitigate the harm to the provisional class members who are denied asylum. *See* Appellants' Opening Br. 1, 19.

First, many will be denied withholding of removal and CAT protection, and become subject to removal, because these forms of relief have much higher standards than asylum. *See* 8 U.S.C. § 1231(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *INS v. Stevic*, 467 U.S. 407, 424 (1984). In 2018, less than 5% of CAT claims and only 6% of withholding of removal claims were granted,⁴⁵ whereas approximately 35% of asylum claims were granted.⁴⁶ Thus, there is a

⁴⁵ U.S. Dep't of Just., *supra* note 2.

⁴⁶ *Id.* at 27 fig. 23.

high risk that the provisional class members who pursue these forms of relief will be removed and sent back to face persecution.

Second, the few provisional class members who are granted these alternative forms of relief may face additional trauma because, unlike asylum, neither withholding of removal or CAT offers any protection to an applicant's children or spouse. *See* 8 U.S.C. § 1158(b)(3)(A); *see also* 84 Fed. Reg. at 33,832 (listing benefits of asylum). The Rule therefore results in absurd situations where a parent is granted protection, but the child who does not have a separate claim is ordered removed. Thus, even in obtaining this relief, “[t]he result is an almost impossible choice: live in safety while separated from one’s family and their perilous life a world away, or join them in their peril and risk the probability of death or imprisonment.” *Haniffa v. Gonzales*, 165 F. App’x 28, 29 (2d Cir. 2006).

Third, the provisional class members granted withholding of removal and CAT are in a constant state of limbo because they cannot obtain permanent residency and are at risk of removal to a third country.⁴⁷ This uncertainty is exactly what Congress intended to eliminate in adopting the Refugee Act of 1980 and setting forth the framework for asylum. S. Rep. No. 96-256, at 9 (1979)

⁴⁷ U.S. Dep’t of Just., Exec. Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections 6* (Jan. 15, 2009), <https://tinyurl.com/EOIR-FactSheet>.

(explaining that the Act was meant to remedy the fact that previous “practice ha[d] often left the refugee in uncertainty as to his own situation and ha[d] sometimes made it more difficult for him to secure employment and enjoy . . . other rights.”).

C. Applying the Rule to the Provisional Class Members Discourages Them from Safely Seeking Asylum

By making asylum out of reach for the provisional class members, the Rule discourages them from continuing to seek protection at ports of entry and affirmatively raising their claims. The provisional class members have already been suffering for several months in dangerous conditions in Mexico, relying on Defendants’ promise that if they waited at a port of entry—in Defendants’ view, sought asylum the “right” way—they would have an opportunity to seek asylum in the United States.⁴⁸ But now, the prospect of asylum is illusory at best, unless they pursue protection in Mexico—a process that is simply infeasible or unsafe for those who need protection the most. *See supra* Part I (A). Simply put, after having

⁴⁸ Dara Lind, *Asylum-Seekers Who Followed Trump Rule Now Don’t Qualify Because of New Trump Rule*, PROPUBLICA (July 22, 2019), <https://tinyurl.com/Lind-ProPublica> (“The Trump administration has long said that there’s a right way to seek asylum in the United States: Come to an official port of entry at the border, then invoke the right under U.S. law to humanitarian protection.”); Adam Isacson et al., “*Come Back Later*”: *Challenges for Asylum Seekers Waiting at Ports of Entry*, Advocacy for Human Rights to the Americas (Aug. 2, 2018), <https://tinyurl.com/IsacsonMetering> (quoting former Secretary Nielsen tweet stating that, “[y]ou are not breaking the law by seeking asylum at a port of entry”).

been metered for extended periods, the provisional class members now have no reason to keep waiting because their cases are destined to fail.

What will result from this scenario is predictable: many provisional class members in desperate situations will choose to make a harrowing trek into the United States between ports of entry. Indeed, according to Defendant DHS' own Inspector General, dangerous crossings have become more commonplace due to Defendants' metering policy.⁴⁹ We have seen the heartbreaking result. For example, in June 2019, a Salvadoran father and his infant daughter drowned trying to cross the Rio Grande River after waiting two months in Mexico for the opportunity to ask for asylum due to Defendants' metering policy.⁵⁰ Nine people drowned trying to cross near the El Paso canals in June 2019 alone.⁵¹ Applying the Rule to the provisional class will mean that the frequency of these dangerous entries—and the tragedies that accompany them—will increase. And, without the availability of asylum, many of those fortunate enough to survive the journey into the United States will be relegated to a life in the shadows without legal status.

⁴⁹ Office of Inspector Gen., DHS, OIG-18-84, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (2018), <https://tinyurl.com/OIGdhs>.

⁵⁰ Daniella Silva, *Family of Salvadoran Migrant Dad, Child Who Drowned Say He 'Loved His Daughter So Much'*, NBC NEWS (June 26, 2019), <https://tinyurl.com/Silva-NBCNews>.

⁵¹ Riane Roldan, *June Has Been a Deadly Month for Migrants Crossing the Border into Texas*, TEX. TRIB. (June 28, 2019), <https://tinyurl.com/Rolden-TeXTribune>.

In short, applying this Rule to the provisional class members—all of whom have sought asylum the “right” way at ports of entry—will unnecessarily harm them. This mistreatment is contrary to the public interest.

II. APPLYING THE RULE TO THE PROVISIONAL CLASS MEMBERS HARMS THE STATES’ ECONOMIES AND REQUIRES THEM TO SPEND MORE ON STATE-FUNDED SERVICES

The district court’s preliminary injunction also serves the public interest because applying the Rule to the provisional class substantially harms the States in multiple ways: (1) the Rule deprives the States of the valuable economic contributions of would-be asylees; and (2) the States’ agencies and nonprofits will need to divert resources to meet an increased demand for health, education, and other services to assist the provisional class members who have been traumatized while applying for protection in Mexico.

A. Applying the Rule to the Provisional Class Will Harm the States’ Economies

Immigrants, including asylees and asylum seekers like the provisional class members, are vital to the States’ workforces and economic success. As only a few examples of these contributions, in 2014, immigrant-led households in California paid over \$26 billion in state and local taxes and exercised almost \$240 billion in

spending power.⁵² In Massachusetts, immigrants comprise 20% of the state's workforce and immigrant-led households paid \$3 billion in state and local taxes in 2014.⁵³ Approximately, 22% of Hawaii's business owners are foreign-born,⁵⁴ and in 2014, immigrants contributed \$668.5 million in state and local taxes.⁵⁵ And in Michigan, immigrants make up just under 10% of the state's workforce, pay approximately \$6.7 billion in state and local taxes, have a spending power of \$18.2 billion, and comprise close to 34,000 of the state's entrepreneurs.⁵⁶

The States' interests therefore weigh heavily against policies, such as Defendants' application of the Rule to the provisional class, that present significant hurdles to the safe arrival and integration of potential asylees. By preventing the provisional class members, many of whom may be otherwise eligible for asylum, from entering or staying in the country, the Rule deprives the States of the

⁵² See Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017), <https://tinyurl.com/CAP-Immigrants-in-CA>.

⁵³ See Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (Oct. 5, 2017), <https://tinyurl.com/AIC-Imm-MA>.

⁵⁴ Fiscal Policy Inst., *Immigrant Small Business Owners* 24 (June 2012), <https://tinyurl.com/Imm-Business-Owners>.

⁵⁵ New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016), <https://tinyurl.com/HI-Immigration-Economy>.

⁵⁶ Migration Policy Inst., *State Immigration Data Profiles*, <https://tinyurl.com/MI-Immigrant-Workforce> (last visited Feb. 6, 2020); New Am. Econ., *Immigrants and the Economy in Michigan*, <https://tinyurl.com/MI-Immigration-Economy> (last visited Feb. 6, 2020).

provisional class members' economic contributions. Further, by eliminating asylum as an option for the provisional class members, the Rule will increase the number of individuals without legal status who are unable to work legally, resulting in decreased economic contributions to the States. *See supra*, Part I (B)-(C). For example, in Massachusetts, undocumented immigrants pay an average of \$184.6 million in state and local taxes annually, an amount that would increase to \$240.8 million if they had legal status and work authorization.⁵⁷ Similarly, undocumented immigrants in New Mexico would have paid over \$8 million more in taxes in 2017 if they had had legal status.⁵⁸

B. Applying the Rule to the Provisional Class Will Cause the States to Divert Resources and Increase Demand for Health, Education, and Other Services

Recognizing the importance of proper legal guidance during immigration proceedings, several of the States fund nonprofit organizations to provide legal assistance in immigration-related matters. For example, since Fiscal Year (FY) 2015-16, California has allocated \$147 million to nonprofit legal service organizations through the Unaccompanied Undocumented Minors and Immigration

⁵⁷ Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 tbl. 1 (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

⁵⁸ *Id.*

Services Funding programs.⁵⁹ Asylum assistance has comprised 80% of the services provided through the Unaccompanied Undocumented Minors program.⁶⁰ Notably, the organizational Plaintiff, Al Otro Lado, is among those receiving funds from California.⁶¹

Similarly, Washington allocated \$1 million in FY 2019 to legal service organizations serving asylum seekers and other migrant populations.⁶² The asylum-support programs funded by New York include the Liberty Defense Project, a state-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.⁶³ The District of Columbia allocated \$2.5 million for FY 2020 to programs that provide legal services to its immigrant

⁵⁹ Cal. Dep't of Soc. Servs., *Immigration Services Program Update 1* (Mar. 2019).

⁶⁰ *Id.*

⁶¹ Cal. Dep't of Soc. Servs., *Immigration Services Contractors*, <https://tinyurl.com/Cal-DSS-ISC> (last visited Feb. 6, 2020). For FY 2018-19, the California Department of Social Services provided close to \$44 million, including \$239,320 to Al Otro Lado. Cal. Dep't of Soc. Servs., *Immigration Branch Immigration Services Funding Tentative Award Announcement* (Jan. 3, 2019), <https://tinyurl.com/CDSS-ImmigrationFunding>.

⁶² See Wash. Laws of 2018, ch. 299, § 127(65) (amending Laws of 2017, 3d Spec. Sess., ch. 1, § 128) (Mar. 27, 2018), <https://tinyurl.com/WashLaws>.

⁶³ See N.Y. State, Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018), <https://tinyurl.com/NYBudget2019>.

population, including asylum seekers.⁶⁴ New Jersey also allocated \$2.1 million in state funds in FY 2019 and FY 2020 for legal assistance to individuals in removal proceedings.⁶⁵

The Rule makes the provisional class members ineligible for asylum and forces them to pursue more difficult forms of relief. *See supra*, Part I (B). This change will frustrate the missions of legal service organizations that may serve the provisional class members, such as Al Otro Lado, and require the allocation of additional time and resources for each case. *See* Second Am. Compl. ¶¶ 18-23. These organizations may need to divert considerable resources to re-strategizing their approaches to client representation and eligibility issues, revising their training, and re-allocating staff time. Harms to these organizations redound to their funders, including the States, who may need to increase funding in order for them to support the current level of services to immigrant communities.

In addition to investing in legal services, the States also fund services to meet the mental health needs of asylees and asylum seekers. Due to the extended time that the provisional class members who comply with the Rule will be forced

⁶⁴ Gov't of D.C., Office of the Mayor, Press Release, *Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program* (July 12, 2019), <https://tinyurl.com/DC-Grant>.

⁶⁵ *See* State of N.J., Office of Mgmt. & Budget, *The Governor's FY2020 Budget: Detailed Budget* 419 (Mar. 2019), <https://tinyurl.com/NJ2020Budget>.

to spend in Mexico pursuing asylum—on top of the already extended time the provisional class members have spent in Mexico due to metering—they are more likely to endure abuse and trauma. *See supra*, Part I (A). Consequently, the States and local jurisdictions will need to allocate additional resources to identify, assess, and treat the provisional class members.⁶⁶ For example, New York provides inpatient psychiatric services to youth.⁶⁷ As minor provisional class members may experience further trauma as result of the Rule, more youth may be in need of New York State’s inpatient services.⁶⁸ This increased demand for resources will also affect public schools in the States, which will need to offer additional mental health and early intervention services to students who have been traumatized and missed schooling while waiting in Mexico. *See generally* 20 U.S.C. § 1411 (requiring states to provide special education services to students with learning or emotional disabilities). These additional educational costs will be borne by the States.⁶⁹

⁶⁶ Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), <https://tinyurl.com/Gorman-NPR>.

⁶⁷ *See generally* Decl. of Donna M. Bradbury at 362-68 (Ex. 60), *Washington v. Trump*, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, Patrick Murphy & Jennifer Paluch, *Financing California’s Public Schools*, Pub. Policy Inst. of Cal. (Nov. 2018), <https://tinyurl.com/PPIC-CA->

Moreover, the added trauma that the provisional class members who comply with the Rule will suffer in Mexico could cause long-term negative health impacts that could increase costs for state programs. Studies have shown that long-term stress can contribute to serious physical health problems including heart disease, diabetes, and severe viral infections.⁷⁰ Once these individuals reach the United States, the States will have to address these increased healthcare needs. For example, in Illinois, asylum seekers can access state medical coverage and services by state-funded community agencies—programs that may need additional funding due to the health problems provisional class members will experience because of the Rule.⁷¹

The States have also allocated funds for specialized programs to integrate asylees, which may become increasingly strained. California, for example, provides assistance benefiting some asylees, including cash assistance, food benefits, and funding to certain school districts to improve the well-being, English-

[Schools](#) (noting 90% of funding for California public schools came from state and local sources in 2018-19).

⁷⁰ See Nat'l Inst. Mental Health, *Stress Fact Sheet* (Dec. 2016), <https://tinyurl.com/NIMH-Stress>.

⁷¹ See Ill. Dep't of Human Servs., *PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, <https://tinyurl.com/Ill-Med> (last visited Feb. 6, 2020). The list of organizations providing services to asylum seekers can be found here: <https://tinyurl.com/IllHS-Orgs>.

language proficiency, and performance of their students.⁷² The New York Office for New Americans has established neighborhood-based Opportunity Centers throughout the state to provide, among other things, English language courses and business development skills for immigrants.⁷³ One of Washington's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service providers to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.⁷⁴ Because serving people who have been traumatized is naturally more difficult than serving those who have not, the additional trauma that the Rule will inflict on the provisional class members will strain these state-supported resources.

⁷² Cal. Dep't of Soc. Servs., *Cash Assistance Program for Immigrants (CAPI)*, <https://tinyurl.com/CDSSCapi> (last visited Sept. 11, 2019); Cal. Dep't of Soc. Servs., *Trafficking and Crime Victims Assistance Program*, <https://tinyurl.com/TCVAP> (last visited Feb. 7, 2020); Cal. Dep't of Soc. Servs., *California Newcomer Education and Well-Being*, <https://tinyurl.com/CalNEWRefs> (last visited Feb. 7, 2020).

⁷³ See N.Y. St. Off. for New Ams., *Our Mission*, <https://tinyurl.com/y5wb8dws> (last visited Feb. 7, 2020); see also N.Y. St. Off. for New Ams., *Request for Applications, RFA #18-ONA-32*, <https://tinyurl.com/y3oqjul6> (last visited Feb. 7, 2020); N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans* (Dec. 18, 2019), <https://tinyurl.com/NYOfficeofNewAm>.

⁷⁴ See Office of Refugee & Immigration Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018* at 28-29 (Jan. 2019), <https://tinyurl.com/WashBriefingBook>.

CONCLUSION

For these reasons, this Court should uphold the district court's preliminary injunction.

Dated: February 11, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
SUSAN SLAGER
Supervising Deputy Attorney General
VILMA PALMA-SOLANA
JAMES F. ZAHRADKA II
R. ERANDI ZAMORA-GRAZIANO

/s/ Marissa Malouff

MARISSA MALOUFF (SBN 316046)
Deputy Attorneys General
*Attorneys for Amicus Curiae State of
California*

[Counsel listing continues on next page]

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

KARL A. RACINE
Attorney General
District of Columbia
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001

KATHLEEN JENNINGS
Attorney General
State of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801

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

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

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

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, Michigan 48909

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

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market Street, Box 080
Trenton, NJ 08625

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

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

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

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

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

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, Washington 98504-0100

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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MARISSA MALOUFF