

No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**JOHN DOE #1;
JUAN RAMON MORALES;
JANE DOE #2; JANE DOE #3;
IRIS ANGELINA CASTRO;
BLAKE DOE; BRENDA VILLARRUEL;
LATINO NETWORK,**

Plaintiffs-Appellees,

v.

**DONALD TRUMP, in his official capacity
as President of the United States;
U.S. DEPARTMENT OF HOMELAND
SECURITY; KEVIN MCALEENAN,
in his official capacity as Acting Secretary
of the Department of Homeland Security;
U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES;
ALEX M. AZAR II, in his official capacity
as Secretary of the Department of
Health and Human Services;
U.S. DEPARTMENT OF STATE;
MICHAEL POMPEO, in his official
capacity as Secretary of State; and
UNITED STATES OF AMERICA,**

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
Case No. 3:19-cv-01743-SI
Hon. Michael H. Simon, Judge

**BRIEF OF AMICI CURIAE STATES AND
CITIES IN SUPPORT OF PLAINTIFFS-
APPELLEES AND AFFIRMANCE**

ELLEN F. ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
MICHAEL C. KRON
Special Counsel
DEANNA J. CHANG
Senior Assistant Attorney General
Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880
Benjamin.Gutman@doj.ca.or.us
Attorneys for the State of Oregon

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
KATHLEEN BOERGERS
SARAH E. BELTON
Supervising Deputy Attorneys General
SRIVIDYA PANCHALAM
MARISSA MALOUFF
NIMROD PITSKER ELIAS
Deputy Attorneys General
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612
(510) 879-0012
Nimrod.Elias@doj.ca.gov
Attorneys for the State of California

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

The district court preliminarily enjoined Presidential Proclamation No. 9945 (Proclamation),¹ which would unilaterally reduce legal immigration to the United States by up to 375,000 individuals each year.² The Proclamation bars immigrant visa applicants who meet all of the qualifications established by Congress from receiving visas and entering the United States unless they meet an additional criterion: establishing “to the satisfaction of a consular officer,” that they either “will be covered by approved health insurance” within 30 days after entry or that they have the “financial resources to pay for reasonably foreseeable medical costs.”³ For the reasons identified by the

¹ “Presidential Proclamation on the Suspension of the Entry of Immigrants Who Will Financially Burden the United States Healthcare System” (Oct. 4, 2019), available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/> (last visited Jan. 7, 2020); *60-Day Notice of Proposed Information Collection: Public Charge Questionnaire*, 84 Fed. Reg. 58199 (Oct. 30, 2019), <https://www.federalregister.gov/documents/2019/10/24/2019-23219/60-day-notice-of-proposed-information-collection-public-charge-questionnaire> (last visited on Jan. 7, 2020); *see also* Advance Print Emergency Notice (issued Oct. 29, 2019), available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-23639.pdf> (last visited on Jan. 7, 2020).

² *See* <https://www.migrationpolicy.org/news/health-insurance-test-green-card-applicants-could-sharply-cut-future-us-legal-immigration>.

³ *See supra* n.1.

Plaintiffs and the district court, the Proclamation violates the law.

The district court's injunction should be affirmed by the Court.

The Amici States of Oregon, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia (Amici States), along with the Amici Cities of New York City, Los Angeles, Chicago, Baltimore, Philadelphia, Seattle, Oakland, San Francisco, Union City, New Jersey, and Carrboro, North Carolina, and the County of Santa Clara (together, Amici) have a strong interest in ensuring that the Proclamation does not go into effect.⁴ Many prospective immigrants will not be able to satisfy the requirements of the Proclamation and will be prohibited from entering the country. This will harm our states and cities by denying hundreds of thousands of our residents the right to unite with their spouses, children, and siblings. And it will harm

⁴ Amici States submit this brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Amici Cities received the consent of all parties to file this brief. No party's counsel authored any part of this brief, nor did anyone contribute money to fund the preparation or submission of this brief.

our economies because immigrants fill and create jobs, start businesses, pay taxes, and purchase goods and services.

The Proclamation is also likely to harm the Amici States' health insurance markets. Directing immigrants to purchase health insurance that does not comply with the Patient Protection and Affordable Care Act (ACA) will likely lead to a less healthy risk pool for those left in the ACA-compliant marketplaces, resulting in premium increases, higher uninsured rates, and increased uncompensated care costs. Amici respectfully urge this Court to affirm the district court's preliminary injunction because it is preventing irreparable harm to our economies and marketplaces, and to the families and communities that reside within our borders.

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).

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017).

Crafting an injunction is an “exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Id.* (citing *Winter*, 555 U.S. at 20, 24).

For the reasons outlined in the district court’s preliminary injunction order and in the Plaintiffs’ Answering Brief, the Proclamation is unlawful. Amici focus on the equities, public interest, and nationwide harm that will occur if the preliminary injunction is not upheld. All of those factors strongly favor affirmance of the preliminary injunction.

First, the Proclamation is not in the public interest because it will separate families, as individuals will not be able to obtain visas and join awaiting family members in our country. Reuniting families is more than just a humanitarian imperative; Congress intended for our immigration laws to facilitate family reunification, which has broad social benefits for our neighborhoods, communities, and society. Family separation will cause economic, social, and psychological harm to individuals and groups across the country.

Second, preventing prospective immigrants from entering the country will injure states and cities across the nation because immigrants are vital to the economic, civic, and social fabric of our communities. Immigrants

enrich our country's social and cultural life, inject new ideas into our intellectual fabric, and make important contributions in science, technology, sports, and many other fields. Immigrants also bolster national, state, and local economies by paying taxes, starting businesses, and consuming goods and services. Immigrants are valuable contributors to the communities where they reside and critical to Amici's long-term prosperity.

Third, immigrants who manage to satisfy the Proclamation will generally be unable to access the comprehensive and affordable health coverage that they are legally entitled to under the ACA, because the Proclamation does not consider the subsidized health plans offered through the ACA's exchanges as qualifying coverage.⁵ Instead, the Proclamation will burden recent immigrants with non-comprehensive insurance plans that will likely leave them underinsured and exposed to uncovered medical expenses. Directing immigrants to purchase substandard coverage, which several Amici States have outlawed because that coverage does not offer the

⁵ While the Proclamation does not impose a legal bar on purchasing subsidized health insurance after immigrants arrive in the United States, it effectively precludes that outcome for a period of time because such plans do not meet its requirements. To satisfy the Proclamation, most immigrants would need to purchase minimal health insurance for their first year in the country and would, as a practical matter, be confined to that plan for a year unless they could afford to pay for comprehensive insurance on top of their visa-procuring insurance.

ACA's consumer protections, is also likely to harm the Amici States' health insurance markets. Diverting immigrants from the ACA-compliant market will likely lead to a less healthy risk pool, resulting in premium increases across the market. Higher premiums inevitably lead to higher uninsured rates, which then increase the same uncompensated care costs that the Proclamation allegedly addresses.

I. IMMIGRANTS ARE VITAL TO THE ECONOMIC, CIVIC, AND SOCIAL FABRIC OF AMICI

A. The Proclamation Will Result in the Separation of Families

Congress prioritized family reunification when it established the current immigration system. “The Immigration and Nationality Act (‘INA’) was intended to keep families together.” *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005). The INA’s legislative history “establishes that congressional concern was directed at ‘the problem of keeping families of United States citizens and immigrants united.’” *Fiallo v. Bell*, 430 U.S. 787, 806 (1977) (quoting H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957)). During the debates surrounding the INA of 1965, Senator Edward Kennedy affirmed that “[r]eunification of families is to be the foremost consideration.” S. Rep. No.748, 89th Cong., 1st Sess., 12 (Sept. 15, 1965) (Judiciary Rep.) (Sen. Kennedy).

The importance Congress placed upon family reunification is demonstrated by the numeric limits, and visa allotments, set by the INA of 1965 and refined by amendments to the INA in 1990.⁶ INA, Pub. L. No. 89-236, 79 Stat. 911; INA of 1990, Pub. L. No. 101-649, 104 Stat. 497. Unlike other visa categories, there is no limit on the number of immediate relatives of U.S. citizens, such as spouses, unmarried children under the age of 21, and parents, who can immigrate to the United States. 8 U.S.C. § 1151(b). Other family preference visas, such as those for adult children, siblings, and relatives of Legal Permanent Residents, are capped at 480,000 per year (with a statutory minimum of 226,000), as compared to 140,000 annual employment visas. 8 U.S.C. § 1151(c)-(d).

Approximately 483,000 newly arrived individuals received visas as an immediate relative of a U.S. citizen or under family-sponsored visa preferences in 2017 (the most recent year for which data is available).⁷

In that same year, an estimated 148,621 individuals obtained lawful

⁶ Zoya Gubernskaya & Joanna Dreby, *U.S. Immigration Policy and the Case for Family Unity*, 5 *Journal on Migration and Human Security* 2, 418 (2017), <https://tinyurl.com/JMHSSStudy>.

⁷ U.S. Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics*, Table 6 New Arrivals (Table 6), <https://tinyurl.com/y4svmcxk> (last visited Oct. 30, 2019), <https://www.dhs.gov/immigration-statistics/yearbook/2017/table6>.

permanent residence as immediate relatives of U.S. citizens or through family-sponsored preferences in California; the number was 107,259 in New York, 28,030 in Massachusetts, 16,552 in Maryland, 15,867 in Washington, 9,143 in Nevada, 5,533 in Oregon, and 1,551 in Delaware.⁸

The Proclamation drastically curbs the family-based immigration system that Congress created—and has maintained—for decades. Initial estimates are that as many as 65% of recently arrived green card holders would not have been granted a visa under the Proclamation’s criteria.⁹ If allowed to take effect, the Proclamation will, contrary to the intent of Congress, likely deny hundreds of thousands of U.S. citizens and lawful permanent residents each year the right to be united with their loved ones, including spouses, siblings, and adult children.¹⁰ Minor children too

⁸ See *Profiles on Lawful Permanent Residents: 2017 State, Persons Obtaining Lawful Permanent Resident Status During Fiscal Year 2017 by State/Territory of Residence and Selected Characteristics*, <https://www.dhs.gov/profiles-lawful-permanent-residents-2017-state>. These figures include both new arrivals and individuals adjusting status because DHS combines those categories when breaking out class of admission.

⁹ Julia Gelatt & Mark Greenberg, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*, Migration Policy Institute (October 2019), <https://tinyurl.com/GelattMPI>.

¹⁰ The Proclamation’s requirements apply to applicants for all family-based immigrant visas besides children under the age of 18, children of U.S. citizens under the age of 21, and parents of U.S. citizens if they establish to

could be separated from their non-citizen parents who cannot comply with the Proclamation's requirements. *See* District Court Docket No. 1 at ¶¶ 185, 189.

The Proclamation will result in prolonged or permanent family separations that will have a devastating impact on the welfare of our residents. Multiple studies demonstrate that family reunification benefits the economic, social, and psychological well-being of the affected individuals, while family separation results in myriad harms.¹¹ Separating family members from each other can result in negative health outcomes, including: (1) mental and behavioral health issues, which can lower academic achievement among children; (2) toxic stress, which can delay brain development and cause cognitive impairment; and (3) symptoms of post-traumatic stress disorder.¹² Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders

the satisfaction of the consular officer that their health will not impose a substantial burden on the U.S. health system.

¹¹ Zoya Gubernskaya & Joanna Dreby, *US Immigration Policy and the Case for Family Unity*, 5 *Journal on Migration and Human Security* 2, 423 (2017), <https://tinyurl.com/JMHSSstudy>.

¹² Colleen K. Vesely, Ph.D., et al, *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health* (2019) <https://tinyurl.com/NCFRpolicybrief>.

such as depression, anxiety, and attention deficit hyperactivity disorder.¹³ Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches, which can become chronic if left untreated.¹⁴ Similarly, spousal separation can cause fear, anxiety, and depression.¹⁵ Prolonging family separation inflicts psychological harm on individuals who cannot reunite with their loved ones.

These harms are not limited to those directly affected. Amici will feel the impact of such harms on our residents. Intact families provide crucial social support, which strengthens not only the family unit, but the neighborhood, community, and civic society. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”). The Select Commission on Immigration and Refugee Policy, a congressionally appointed commission tasked with studying immigration policy, expounded upon the necessity of family reunification in 1981:

¹³ Allison Abrams, *LCSW-R, Damage of Separating Families*, PSYCHOLOGY TODAY (June 22, 2018), <https://tinyurl.com/AbramsSeparation>,

¹⁴ *Id.*

¹⁵ Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, Reuters (Feb. 29, 2019), <https://tinyurl.com/TorbatiReuters> (describing a U.S. citizen’s plight to obtain a visa for his wife, and that their separation was causing them both to “break down psychologically”).

[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.¹⁶

Denying families the ability to reunite with their loved ones contradicts the foundations of our immigration system and will irreparably harm our families, neighborhoods, and communities.

B. Immigrants Are Key Contributors to Amici’s Economies

In Amici’s experience, the advantages of immigration are profound and reciprocal. Not only do immigrants benefit from the opportunities associated with living in the United States, but cities, states, and the country as a whole also gain immensely from immigrants’ contributions to our communities. From the outset, immigrants have enriched our country’s social and cultural life, injecting new ideas into our intellectual fabric, offering path-breaking contributions in science, technology, and other fields, and ultimately making our diverse communities more desirable places

¹⁶ Human Rights Watch, *US: Statement to the House Judiciary Committee on “The Separation of Nuclear Families under US Immigration Law”* (March 14, 2013), <https://tinyurl.com/HRWFamilySeparation> (quoting US Select Committee on Immigration and Refugee Policy, “U.S. Immigration Policy and the National Interest,” 1981).

to live.¹⁷ The Proclamation strikes at this fundamental component of the American experience. And by imposing unreasonable and unlawful barriers to immigration, the Proclamation will decrease the number of immigrants who enter the country legally under the criteria set by Congress. That will cause substantial economic harm to Amici, including by diminishing revenue collection, dampening small business creation, and reducing employment in key sectors of the economy.

Immigrants contribute to national, state, and local economies in many ways, including by paying taxes, starting businesses, participating in state and local labor forces, and consuming goods and services. Nationally, immigrants pay over \$405.4 billion in taxes, and immigrant-owned companies employ over 7.9 million workers.¹⁸

At the state level, in 2014, immigrant-led households in California paid over \$26 billion in state and local taxes and exercised almost \$240 billion in

¹⁷ Darrell M. West, *The Costs and Benefits of Immigration*, Political Science Quarterly, vol. 126, no. 3, Fall 2011, at 437-41, available at www.jstor.org/stable/23056953.

¹⁸ New Am. Econ., *Immigrants and the economy in: United States of America*, (Nov. 5, 2019), <https://www.newamericaneconomy.org/locations/national/>.

spending power;¹⁹ in Oregon in 2014, immigrant-led households paid \$736.6 million in state and local taxes, and accounted for \$7.4 billion in spending power;²⁰ immigrant-led households in Massachusetts in 2014 paid \$3 billion in state and local taxes and accounted for \$27.3 billion in spending power;²¹ 22% of Hawaii's business owners were foreign-born in 2010,²² and in 2014, immigrants contributed \$668.5 million in state and local taxes in Hawaii;²³ in Connecticut, immigrants paid \$5.9 billion in taxes, had a spending power of \$14.5 billion, and employed over 95,000 people;²⁴ and in Illinois, immigrants paid \$20.4 billion in taxes, had a spending power of \$47.8 billion, and immigrant-owned firms employed 390,685 individuals and conducted \$63.9 billion in sales.²⁵

¹⁹ See Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017), <https://tinyurl.com/CAP-Immigrants-in-CA>.

²⁰ See <https://www.americanimmigrationcouncil.org/research/immigrants-oregon>.

²¹ Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (Oct. 5, 2017), <https://tinyurl.com/AIC-Imm-MA>.

²² Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), <https://tinyurl.com/Imm-Business-Owners>.

²³ New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016), <https://tinyurl.com/HI-Immigration-Economy>.

²⁴ New Am. Econ., *Immigrants and the Economy in Connecticut*, <https://tinyurl.com/CT-Immigration-Economy> (last visited July 24, 2019).

²⁵ New Am. Econ., *Immigrants and the Economy in Illinois*, <https://tinyurl.com/yy2ykqr8> (last visited February 3, 2020).

In 2014, immigrant-led households in Maine paid over \$116.2 million in state and local taxes and exercised almost \$953.9 million in spending power.²⁶ In Michigan, immigrants 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.²⁷ In Washington, immigrant-led households paid \$5.7 billion in federal taxes, \$2.4 billion in state and local taxes, and had \$22.8 billion in spending power in 2014.²⁸ In Maryland, immigrant-led households paid \$3.1 billion in state and local taxes, represented almost a fifth of small business owners, and exercised \$24.6 billion in spending power.²⁹ In 2014, immigrant-led households in Minnesota earned \$12.2 billion, had \$8.9 billion in spending power, paid \$2.2 billion in federal taxes, and paid \$1.1 billion in state and local taxes.³⁰

²⁶ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-maine>.

²⁷ New Am. Econ., *Immigrants and the Economy in Michigan*, <https://www.newamericaneconomy.org/locations/michigan/> (last visited November 11, 2019).

²⁸ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>.

²⁹ Am. Immigration Council, *Immigrants in Maryland* 4 (Oct. 16, 2017), <https://tinyurl.com/AIC-Imm-MD>.

³⁰ See <http://research.newamericaneconomy.org/wp-content/uploads/2017/02/nae-mn-report.pdf>.

These contributions are also evident in Amici Cities. For example, in 2017, New York City's immigrants contributed \$228 billion to New York City's Gross Domestic Product (GDP), or about 25.8% of New York City's total GDP.³¹ Immigrants own half of New York City's businesses, and create jobs and provide essential goods and services.³² Baltimore is home to over 4,500 immigrant entrepreneurs, and one out of every five entrepreneurs is an immigrant.³³ Immigrants paid almost \$100 million in income taxes to Baltimore in 2017.³⁴ In the Philadelphia metropolitan area, immigrants earned \$26.8 billion and paid a combined \$7.4 billion in federal, state, and local taxes.³⁵ Immigrant households in the Seattle metropolitan area pay \$9.3 billion in federal, state, and local taxes annually.³⁶ In Chicago, immigrants earned \$17 billion and paid \$6 billion in taxes in 2016.³⁷

³¹ New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City (Mar. 2019) at 21, available at https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

³² *Id.*

³³ Baltimore City Mayor's Office, Office of Immigrant Affairs, *The Economic Impacts of Immigrant Entrepreneurship* (2019), at 2.

³⁴ *Id.* at 5.

³⁵ See <https://www.newamericaneconomy.org/city/philadelphia/>.

³⁶ See <https://www.newamericaneconomy.org/city/seattle/>.

³⁷ *See*

<https://www.chicago.gov/content/dam/city/depts/mayor/Office%20of%20New%20Americans/PDFs/2018%20ONA%20Annual%20Report.pdf> at 4.

Immigrants also represent 36% of entrepreneurs in Chicago, despite making up just 20.7% of the total population.³⁸ And in Los Angeles in 2014, immigrants contributed \$232.9 billion to the county's GDP, paid \$27.4 billion in federal, state, and local taxes, and made up 43.2% of the employed labor force (despite being just 34.6% of the population).³⁹

Immigrants also disproportionately fill positions in important sectors of the economy. In California, immigrants make up over one-third of California's workforce, fill over two-thirds of the jobs in California's agricultural sectors and 45.6% of manufacturing positions, are 43% of the state's construction workers, and are 41% of workers in computer and mathematical sciences.⁴⁰ In Oregon, immigrants accounted for 12.8% of the total workforce in 2015, 39.5% of workers in the farming, fishing and forestry sector, nearly 20% of workers in manufacturing positions, and 18.4% of accommodation and food service workers.⁴¹ Similarly, in 2015,

³⁸ *Id.*

³⁹ See <https://research.newamericaneconomy.org/report/new-americans-in-los-angeles/>.

⁴⁰ Am. Immigr. Council, *Immigrants in California* (Oct. 4, 2017), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf.

⁴¹ See <https://www.americanimmigrationcouncil.org/research/immigrants-oregon>.

immigrants made up 27.8% of the labor force in New York;⁴² 20% of the labor force in Massachusetts;⁴³ 19.6% of the labor force in Maryland;⁴⁴ nearly 18% of the labor force in the District of Columbia;⁴⁵ and 17.2% of the work force in Washington.⁴⁶ That same year, in Delaware, immigrants accounted for 11.9% of the total workforce, 27.9% of workers in computer and mathematical sciences, 25.8% of workers in life, physical, and social sciences, and 21.1% of workers in architecture and engineering.⁴⁷ And immigrants in Illinois are 27.4% of workers in computer and mathematical sciences and 24.3% of workers in life, physical, and social sciences.⁴⁸

⁴² See <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york>.

⁴³ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-massachusetts>.

⁴⁴ Am. Immigration Council, *Immigrants in Maryland 2* (Oct. 16, 2017), <https://tinyurl.com/AIC-Imm-MD>.

⁴⁵ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington-dc>.

⁴⁶ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>.

⁴⁷ See <https://www.americanimmigrationcouncil.org/research/immigrants-in-delaware>.

⁴⁸ See https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_illinois.pdf.

Similarly, immigrants in New York City have a labor force participation rate of 64.9%, equaling that of New Yorkers overall.⁴⁹ Immigrants comprise nearly half (44%) of New York City's workforce.⁵⁰ Almost 27% of immigrant New Yorkers work in fields that provide critical services to other New Yorkers, such as education, health, and human services, and immigrants comprise 44% of the total workforce in those industries.⁵¹ Philadelphia's foreign-born residents made up about 19% of the city's civilian labor force, and were 26% of the workers in both construction and manufacturing.⁵²

Amici's interests weigh heavily against unreasonable and unlawful barriers to immigration, such as the Proclamation. Such barriers decrease the number of immigrants who enter the country legally under the criteria set by Congress, hinder the reunification of families—thereby harming our communities—and negatively impact our states and cities by preventing the entry of individuals who contribute positively to our workforces and grow our economies.

⁴⁹ New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City (Mar. 2019), at 19.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See https://www.pewtrusts.org/-/media/assets/2018/06/pri_philadelphias_immigrants.pdf at 17-18.

II. THE PROCLAMATION IS LIKELY TO ADVERSELY AFFECT HEALTH INSURANCE MARKETS

A. The Proclamation Undermines Congress’s Objective of Providing Lawfully Present Immigrants With Access to Comprehensive and Affordable Coverage

The ACA was enacted by Congress in 2010. Pub. L. 111-148 (Mar. 23, 2010). It is a landmark law that made affordable health coverage available to millions of individuals and sharply reduced the number of people without health insurance.⁵³ It authorized the creation of local, state-based marketplaces presenting affordable insurance coverage choices for consumers in order to “increase the number of Americans covered by health insurance and decrease the cost of health care.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). The state-based marketplaces—also known as exchanges—“allow[] people to compare and purchase insurance plans.” *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). To purchase health insurance through an exchange, a person must prove that they: (1) reside in a U.S. state or territory; and (2) are “lawfully present.” 42 U.S.C. § 18032(f)(1)(A)(ii); 45 C.F.R. § 155.305(a)(1)-(3). For individuals purchasing health insurance through the ACA’s exchanges,

⁵³ See <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-many-people-are-uninsured/>

Congress also provided premium tax credits to help offset the cost of insurance.⁵⁴ 26 U.S.C. § 36B. On a sliding scale, those with incomes up to 400% of the federal poverty line qualify for a tax credit. *See* 26 U.S.C. § 36B(b)(3)(A)(i). And Congress extended those tax credits to any taxpayer who “is an alien lawfully present in the United States . . .” *Id.* at § 36B(c)(1)(B)(ii).

Providing lawfully present immigrants with access to affordable and comprehensive health insurance was a deliberate decision by Congress, one that proved transformational for immigrant communities across the country.⁵⁵ At the time, the Congressional Budget Office predicted that this provision would result in the share of legal, non-elderly residents with health

⁵⁴ In addition to providing tax credits to offset the cost of insurance premiums, Congress also sought to lower individuals’ out-of-pocket costs when using their health insurance. 42 U.S.C. § 18071(b), (c)(2), (f)(2). The ACA requires insurers to provide cost-sharing reductions for copayments (for medical visits and prescription drugs), coinsurance, and deductibles—the out-of-pocket costs consumers face when seeking care. *Id.* In October 2017, however, the Trump administration ceased reimbursing insurers for those cost-sharing reduction payments. *See* <https://www.hhs.gov/about/news/2017/10/12/trump-administration-takes-action-abide-law-constitution-discontinue-csr-payments.html>.

⁵⁵ In this respect, the ACA was intentionally broader than other federal programs such as Medicaid or CHIP, which impose a five-year waiting period before legal immigrants qualify to receive benefits. *See* <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>.

insurance rising to around 94%,⁵⁶ a fact cited favorably by the ACA’s supporters during the Senate’s deliberations. See 155 Cong. Rec. 31991 (2009) (Statement of Sen. Tim Johnson, South Dakota) (“CBO also projects that this bill will result in health care coverage for more than 94 percent of legal residents in our Nation.”).⁵⁷ The ACA, therefore, expressly permits legal immigrants to purchase health insurance through the exchanges and to receive the premium tax credits for which they qualify. 26 U.S.C. § 36B(c)(1)(B)(ii). But the Proclamation disallows any health plan that utilizes premium tax credits.⁵⁸

In theory, the Proclamation considers an unsubsidized health plan purchased through an exchange as qualifying coverage. But even that

⁵⁶ See <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/41423-hr-3590-senate.pdf> at 8-9.

⁵⁷ Available at <https://www.congress.gov/congressional-record/2009/12/16/senate-section/article/s13295-1>.

⁵⁸ When listing various types of “approved health insurance,” the Proclamation includes “an *unsubsidized* health plan offered in the individual market within a State.” But the Proclamation does not define what “unsubsidized” means. This limitation could include not only federal tax credits, but state subsidies as well. In California, for example, individuals with incomes between 400% and 600% of the federal poverty line are eligible for state-funded subsidies to offset the cost of their insurance premiums. An estimated 235,000 middle-income Californians are expected to save an average of 23% on their insurance premiums in 2020 under this new program. See https://www.coveredca.com/news/pdfs/State_Subsidy_and_Mandate_Fact_Sheet.pdf.

promise may be illusory for prospective legal immigrants because the Proclamation creates a potential Catch-22. Under the ACA, immigrants cannot utilize the ACA's exchanges (whether or not they receive tax credits) without establishing their residency and lawful presence. 42 U.S.C.

§ 18032(f)(1)(A)(ii); 45 C.F.R. § 155.305(a)(1)-(3). The Proclamation, however, precludes immigrants from obtaining residency and establishing their lawful presence (even if they otherwise meet all of the INA's requirements) without first demonstrating that they will have unsubsidized health insurance. That result cannot be squared with Congress's decision to provide access to the ACA's marketplaces—and to offer financial assistance for health insurance premiums to those with qualifying incomes—to all individuals who are lawfully present in the country. 26 U.S.C.

§ 36B(b)(3)(A)(i).

B. The Proclamation Directs Immigrants to Purchase Health Insurance That Does Not Comply With the ACA, Which Will Increase Amici States' Regulatory Burdens

The Proclamation does more than simply make it difficult for immigrants to access the comprehensive and affordable coverage to which they are legally entitled. Most immigrants subject to the Proclamation (family and diversity-based immigrants) will need to purchase minimal insurance coverage that will leave them underinsured and at *greater* risk of

incurring higher out-of-pocket medical costs, relative to immigrants with ACA-compliant plans purchased through an exchange. Without comprehensive health coverage, individuals may face steep medical costs for emergency room visits or even for routine tests. These higher costs could result in uncompensated care, which refers to medical goods and services for which neither an insurer nor the patient reimburses the provider.⁵⁹ The ACA made great strides in reducing uncompensated care,⁶⁰ benefitting patients, hospitals, and state and local jurisdictions, which pick up a portion of the tab for those costs.⁶¹ The Proclamation threatens to reverse some of these gains.

1. The Proclamation rests on the false premise that recent immigrants' uncompensated care costs significantly burden our healthcare system

The Proclamation assumes that legal immigrants financially burden our healthcare system by incurring uncompensated care costs that are passed on

⁵⁹ See <https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage>.

⁶⁰ In California, for example, uncompensated costs dropped from over \$3 billion in 2013 to \$1.44 billion in 2016, a decline of over 50% in just three years. See <https://www.chcf.org/blog/uncompensated-hospital-care-costs-in-california-continued-to-decline-in-2016/>.

⁶¹ *Id.*

to American taxpayers.⁶² But the Proclamation does not provide evidence supporting such an assertion.⁶³ In fact, the data tell a very different story. Immigrants' overall healthcare expenditures are generally one-half to two-thirds those of U.S. born individuals, across all age groups.⁶⁴ And that number is even lower for recent, uninsured immigrants: that group incurs annual medical expenditures that are less than one-fifth of the average medical expenditures for insured, non-recent immigrants.⁶⁵ Further, most uninsured people—regardless of immigration status—do not receive health services for free or at reduced charge; in 2015, only 27% of uninsured adults reported receiving free or reduced-cost care.⁶⁶ On the whole, recent

⁶² See <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/>.

⁶³ *Id.*

⁶⁴ See October 22, 2019 letter from the American Medical Association to President Trump, available at <https://searchf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2019-10-22-Letter-to-Trump-re-Presidential-Proclamation.pdf>.

⁶⁵ See <https://www.healthaffairs.org/doi/10.1377/hblog20191217.16090/full/>. “Recent” is defined as having been in the United States for less than five years. *Id.*

⁶⁶ See <https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-what-are-the-financial-implications-of-lacking-insu/>.

immigrants incur less than one-tenth of 1% of total medical expenditures in the United States.⁶⁷ The Proclamation's factual premise is simply not supported by evidence.

2. Forcing immigrants to purchase non-ACA compliant coverage will leave them underinsured and exposed to uncovered medical expenses

Even taking the Proclamation's stated goal of reducing uncompensated care costs at face value, the Proclamation is likely to be counterproductive because it directs immigrants away from comprehensive insurance that will actually cover necessary benefits such as prescription drugs, hospital stays, and other medical expenses. Instead, the Proclamation effectively requires immigrants to purchase non-ACA compliant plans such as short-term, limited duration insurance (STLDI), visitor's health insurance, or travel insurance.⁶⁸ These minimal insurance plans do not comply with the ACA,

⁶⁷ *Id.*

⁶⁸ Travel insurance is designed for people visiting the United States, not for people intending to move here permanently. It is very limited insurance, often analogous to fixed indemnity coverage, which pays a fixed dollar amount for every covered service, regardless of the actual cost of the service. These plans do not provide protection to immigrants for their foreseeable health needs. *See Palanker Comments Immigrant Health Insurance Coverage at 3-4*, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0266>.

will leave immigrants underinsured, and are likely to lead to the uncompensated care costs that the Proclamation professes to address.⁶⁹

STLTI is non-comprehensive coverage that does not need to comply with the ACA's consumer protections. This type of insurance is intended to fill temporary gaps in coverage when an individual is transitioning between insurance plans. In August 2018, however, the U.S. Department of Health and Human Services finalized a rule to greatly expand the use of short-term insurance.⁷⁰ Previously limited to three months by federal law, STLTI can now last up to 36 months with renewals.⁷¹ STLTI does not need to cover all ten essential health benefits,⁷² or abide by the ACA's prohibitions on annual

⁶⁹ As discussed above, *see supra* at II.A, immigrants cannot purchase insurance through the exchanges from abroad. And as the district court recognized, other options ostensibly made available to immigrants under the Proclamation are effectively foreclosed too: Medicare requires five years of residency in the United States; TRICARE plans are only available to members of the military; family member plans only cover spouses and children under age 27; employer plans will typically not be available to family and diversity immigrants prior to their arrival; and catastrophic plans require residency in the United States. District Court Docket No. 33 at 8-9.

⁷⁰ See <https://www.cms.gov/CCIIO/Resources/Files/Downloads/downloads/CMS-9924-F-STLTI-Final-Rule.pdf>.

⁷¹ *Id.* at 12.

⁷² The ACA requires all health plans to cover: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic

and lifetime benefit limits.⁷³ STLDI plans typically involve medical underwriting⁷⁴ and thus exclude coverage of preexisting health conditions or charge exorbitant premiums to cover such conditions.⁷⁵ One recent analysis found that 43% of STLDI did not cover mental health services, 62% did not cover substance abuse treatment, 71% did not cover outpatient prescription drugs, and 100% did not cover maternity care.⁷⁶ Immigrants forced to purchase such plans to obtain a visa will experience uncovered medical expenses that they would have avoided if they could have procured ACA-compliant insurance coverage from the outset.

In light of their limited coverage and lack of consumer protections, several Amici States with large immigrant populations, such as California

disease management; and (10) pediatric services, including oral and vision care. 42 U.S.C. § 18022(b)(1).

⁷³ See

https://www.urban.org/sites/default/files/updated_estimates_of_the_potential_impact_of_stld_policies_final.pdf.

⁷⁴ Medical underwriting is the process through which a health insurer examines an individual's medical history to decide whether to offer that person health insurance.

⁷⁵ See <https://ccf.georgetown.edu/2018/07/30/coverage-that-doesnt-count-how-the-short-term-limited-duration-rule-could-lead-to-underinsurance/>.

⁷⁶ See <https://www.kff.org/health-reform/press-release/analysis-most-short-term-health-plans-dont-cover-drug-treatment-or-prescription-drugs-and-none-cover-maternity-care/>.

and New York, have banned STLDI plans.⁷⁷ Many other states, such as Oregon, Colorado, Maryland, and New Mexico, and the District of Columbia, have restricted such plans to three or six months in length, with no extensions or renewals permitted.⁷⁸ Such plans do not meet the Proclamation's 364 day coverage requirement. STLDI, therefore, may not be a viable insurance option both because of the limited nature of that temporary coverage, and given the significant restrictions on where immigrants can purchase such coverage.

Furthermore, if the Proclamation goes into effect, potential immigrants will likely be subjected to deceptive marketing and fraudulent health insurance products. Amici States may have to increase their regulatory oversight to protect consumers from fraud and abuse.⁷⁹ Experts see the Proclamation "as an opportunity for those looking to prey on people applying for visas by either fraudulently selling what they claim to be is an insurance product or by selling subpar insurance products without disclosing

⁷⁷ See https://www.commonwealthfund.org/sites/default/files/2019-05/Palanker_states_step_up_short_term_plans_Appendices.pdf.

⁷⁸ *Id.*

⁷⁹ See <https://www.commonwealthfund.org/blog/2019/seeing-fraud-and-misleading-marketing-states-warn-consumers-about-alternative-health>.

the limitations of the plan.”⁸⁰ Moreover, insurance products created to comply with the Proclamation may involve policy holders outside the United States, and thus will be beyond the reach of state insurance regulators altogether.⁸¹ The proliferation of non-ACA compliant insurance to satisfy the Proclamation could impair the Amici States’ ability to properly regulate the individual insurance market, harm the risk pool of those markets, and increase uncompensated care costs.

C. Directing Immigrants to Purchase Non-ACA Compliant Coverage Will Likely Increase Uncompensated Care Costs and Harm Insurance Markets

Directing immigrants to purchase insurance that does not comply with the ACA’s consumer protections leaves those individuals exposed to uncovered medical expenses when undergoing routine medical services such as participating in counseling sessions, filling a prescription, or seeking treatment for a preexisting health condition. And when neither the insurer nor the patient pays for that care, the result is uncompensated care costs that are borne by medical providers (such as hospitals and clinics) and by federal, state, and local governments. Overall, approximately 65% of

⁸⁰ District Court Docket No. 57, ¶ 37.

⁸¹ *Id.* at ¶ 38.

uncompensated care costs are offset by government funds, and 36.5% of that governmental funding comes from state and local governments like Amici.⁸²

Because of the ACA's comprehensive coverage reforms, state and local governments have saved billions of dollars in reduced uncompensated care costs. In 2013, before the ACA's major provisions went into effect, state and local governments spent approximately \$19.8 billion on uncompensated care.⁸³ By 2015, when the ACA was fully implemented, nationwide hospital uncompensated care costs fell by about 30% on average, and in Medicaid expansion states that figure was roughly 50%.⁸⁴ State and local government budgets benefitted greatly as a result.⁸⁵ But directing thousands of immigrants to purchase non-ACA compliant insurance threatens to increase those uncompensated care costs, harming state and local budgets in the process.

The Proclamation is also likely to harm Amici States' health insurance markets by negatively impacting the overall risk pool in each state. One of

⁸² See <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1068> at 812-13.

⁸³ See <https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/view/print/>.

⁸⁴ See <https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage>.

⁸⁵ *Id.*

the ACA's key innovations was requiring insurers to treat all enrollees in the individual insurance market as "members of a single risk pool." 42 U.S.C. § 18032(c)(1). Such pooling allows insurance premiums to reflect the average level of risk of the entire market, rather than the cost of enrollees in a particular plan. But to function properly, a unified risk pool requires a mix of individuals who have greater and lesser healthcare needs.

Immigrants are generally healthier than non-immigrants.⁸⁶

By diverting immigrants away from the individual market's single risk pool and into STLDI-type plans, the Proclamation is likely to make that risk pool less healthy, leading to increased insurance premiums for citizens and non-citizens alike. Indeed, the American Medical Association has warned that "the expansion of STLDI will ultimately undermine the individual insurance market and create an uneven playing field by luring away healthy consumers, thereby damaging the risk pool and driving up premiums for consumers left in the ACA-compliant market."⁸⁷

⁸⁶ See, e.g., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5316478/> (Immigrants are often healthier than native-born populations in areas such as mortality, heart and circulatory disease, and obesity).

⁸⁷ See <https://searchf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTE%2F2019-10-22-Letter-to-Trump-re-Presidential-Proclamation.pdf>.

Immigrants are more likely to represent “favorable” insurance risk because they tend to be younger, healthier, and below-average users of healthcare goods and services when compared to the insured population at large.⁸⁸ Several studies have concluded that immigrants are net contributors to both private coverage and Medicare, paying more in insurance premiums than they receive in benefits.⁸⁹ State exchange data confirm this trend. In Massachusetts, immigrant enrollees on the state exchange have, on average, 25% lower medical claims than citizen enrollees.⁹⁰ In California, immigrant enrollees have 10% lower medical claims than citizen enrollees.⁹¹ Oregon similarly reports that “[l]awfully present immigrants in Oregon are more likely to represent ‘favorable’ insurance risk, because they are often younger, healthier, or lower-than-average users of health care services when compared to the general insured population.”⁹²

⁸⁸ See, e.g., Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

⁹² See OHIM Comments – Immigrant Health Insurance Requirement (10.31.19) at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0237>.

Fewer immigrants in the ACA-compliant market will likely lead to a less healthy risk pool, which will result in commercial market premium increases for all healthcare users (citizens and non-citizens alike).⁹³

And in some Amici States, the harm will extend beyond the individual market. Massachusetts, for example, has a “merged market” structure that combines the individual and small employer markets.⁹⁴ Individuals and small businesses in Massachusetts share a risk pool, insurance products, and premiums.⁹⁵ Both could experience premium increases from the Proclamation’s exclusion of immigrants from the ACA-compliant market.⁹⁶ And higher premiums lead to higher uninsured rates for citizens and legal residents, thereby increasing the uncompensated care burden that the Proclamation purports to address.⁹⁷

⁹³ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>; Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

⁹⁴ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0223>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Massachusetts Health Connector EO Immigrant Health Coverage Comment Letter at 3, available at <https://www.regulations.gov/>

In sum, the Proclamation will preclude hundreds of thousands of immigrants from entering the country, reuniting with their families and communities, and contributing to the economic, social, and cultural milieus of Amici. The Proclamation will likely harm Amici States' health insurance markets, increase our administrative and regulatory burdens, and impose uncompensated care costs on our fiscs.

CONCLUSION

The preliminary injunction should be affirmed.

document?D=DOS-2019-0039-0223; Covered California Comments on Immigration Proclamation – 10.31.19 at 3, available at <https://www.regulations.gov/document?D=DOS-2019-0039-0241>.

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Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General
MICHAEL C. KRON
Special Counsel
DEANNA J. CHANG
Senior Assistant Attorney General
Attorneys for Amicus Curiae
State of Oregon

XAVIER BECERRA
Attorney General of California
MICHAEL L. NEWMAN
Senior Assistant Attorney General
KATHLEEN BOERGERS
SARAH E. BELTON
Supervising Deputy Attorneys General
SRIVIDYA PANCHALAM
MARISSA MALOUFF
Deputy Attorneys General

s/Nimrod Pitsker Elias _____
NIMROD PITSKER ELIAS
Deputy Attorney General
Attorneys for Amicus Curiae
State of California

PHILIP J. WEISER
Attorney General
State of Colorado

DANA NESSEL
Attorney General
State of Michigan

KARL A. RACINE
Attorney General
District of Columbia

KEITH ELLISON
Attorney General
State of Minnesota

WILLIAM TONG
Attorney General
State of Connecticut

AARON D. FORD
Attorney General
State of Nevada

KATHLEEN JENNINGS
Attorney General
State of Delaware

GURBIR S. GREWAL
Attorney General
State of New Jersey

CLARE E. CONNORS
Attorney General
State of

HECTOR BALDERAS
Attorney General
State of New Mexico

KWAME RAOUL
Attorney General
State of Illinois

LETITIA JAMES
Attorney General
State of New York

AARON M. FREY
Attorney General
State of Maine

JOSHUA H. STEIN
Attorney General
State of North Carolina

BRIAN E. FROSH
Attorney General
State of Maryland

JOSH SHAPIRO
Attorney General
State of Pennsylvania

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts

PETER F. NERONHA
Attorney General
State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

ROBERT W. FERGUSON
Attorney General
State of Washington

MARK R. HERRING
Attorney General
Commonwealth of Virginia

JOSH KAUL
Attorney General
State of Wisconsin

ANDRE M. DAVIS
City Solicitor
Baltimore, Maryland

MARCEL S. PRATT
City Solicitor
Philadelphia, Pennsylvania

NICK HERMAN
Counsel
Carrboro, North Carolina

DENNIS HERRERA
City Attorney
City and County of San Francisco

MARK A. FLESSNER
Corporation Counsel
Chicago, Illinois

JAMES R. WILLIAMS
County Counsel
County of Santa Clara, California

MICHAEL N. FEUER
Corporation Counsel
Los Angeles, California

PETER S. HOLMES
City Attorney
Seattle, Washington

BARBARA J. PARKER
City Attorney
Oakland, California

ANGELO AUTERI
Corporation Counsel
Union City, New Jersey

JAMES E. JOHNSON
Corporation Counsel
New York, New York

UNITED STATES COURT OF APPEALS
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