

Nos. 18-17274, 18-17436

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

EAST BAY SANCTUARY COVENANT, *et al.*,
Plaintiffs and Appellees,

v.

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

**On Appeal from the United States District Court
for the Northern District of California**

No. 3:18-cv-06810-JST
Hon. Jon S. Tigar, Judge

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

The district court properly enjoined defendants from implementing the rule at issue here, which prohibits individuals fleeing persecution from applying for asylum if they have entered the United States between ports of entry. Amici States¹ write to emphasize the harm that rule will cause them and the corresponding compelling public interest favoring the preliminary injunction.

The Amici States include six of the top ten states of residence of asylees—individuals who are legally present in the United States due to their credible fear of persecution or torture if forced to return to their home countries.² Amici States have welcomed over 68 percent of the total asylees entering the United States.³ The States invest significant resources to provide education, health care, and other services to asylum-seekers and asylees, helping to meet their basic needs and enabling them to transition into communities in the States. Those investments often take the form of state funding to not-for-profit agencies (like the plaintiff

¹ The Amici States are California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

² Nadwa Mossad and Ryan Baugh, *Refugees and Asylees: 2017*, DHS Off. of Immigration Statistics 11 (Mar. 2019), <https://tinyurl.com/Mossad-Baugh>.

³ *Id.*

organizations) to provide legal, employment, educational, and financial assistance.⁴

Amici States also assist asylum-seekers with critical access to language assistance and health care, including mental health services for individuals who have suffered torture and other trauma.⁵ Many of these state-funded organizations assist undocumented unaccompanied minors, who often have asylum claims.⁶

⁴ See, e.g., CDSS, *Immigration Services Contractors*, <https://tinyurl.com/Cal-DSS-ISC>; Mayor's Off. of Community Affairs, *FY 2019 Immigrant Justice Legal Services Grant*, <https://tinyurl.com/DC-IJLSG>; FY 2019 Final Budget, 2018 Mass. Acts 154, <https://tinyurl.com/Mass-FY19>; Va. Dep't of Soc. Servs., *Va. Refugee Resettlement Prog. Manual* (Nov. 1, 2018), <https://tinyurl.com/y4rxke6q>; Va. Dep't of Soc. Servs., *More Refugee Services*, <https://dss.virginia.gov/family/ons/more.cgi>; N.M. Ctr. on L. and Poverty, *Emergency Services for Immigrants*, <https://tinyurl.com/y63a98o5>; N.Y. State, Off. of Temporary and Disability Assistance, Refugee Servs., *Overview*, <https://otda.ny.gov/programs/bria/>; Jano Tantongco, *State Budget Maintains Liberty Defense Project, Free Legal Help for Immigrants*, Long Island Wins (Apr. 5, 2018), <https://tinyurl.com/y2cxqz43>.

⁵ See Off. of Refugee and Immig. Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018*, <https://tinyurl.com/y528prka>; Ill. Refugee Resettlement Prog., *FY 2017 Annual Report*, <https://tinyurl.com/y44vzxx8>; Ill. Dep't of Hum. Servs., *Bureau of Refugee and Immigrant Servs.*, <https://tinyurl.com/y3ed43xs>; Ill. Dep't of Hum. Servs., *Ill. Welcoming Centers, Brochure*, <https://tinyurl.com/y6o453sr>; N.M. Dep't of Pub. Health, *Off. of Border Health*, <https://nmhealth.org/about/asd/ohe/obh/>; FY 2019 Budget Detail, 2018 N.J. Sess. Law Serv. Ch. 53, p. B-199, <https://tinyurl.com/y4j2386n>.

⁶ See CDSS, *Unaccompanied Undocumented Minors Legal Services Funding Contractor Referral List* (FY2017-18), <https://tinyurl.com/ILS-contractors> (including Al Otro Lado, EBSC, and CARECEN-LA). CDSS, *Immigration Services Program Update* (March 2018) (noting that CDSS provided almost \$3 million for these services in FY 2018-19). Michigan has two programs for children, including the largest state program for Unaccompanied Refugee Minors

Amici States thus have a significant interest in the Interim Final Rule: Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims (the “Rule”), 83 Fed. Reg. 55934, which prohibits individuals fleeing persecution from applying for asylum if they have entered the United States between ports of entry. Other unlawful policies of this Administration have forced thousands of migrants to wait to assert their asylum claims at ports of entry, generating inhumane conditions on the Mexican side of the border. The Rule would force asylum seekers—already traumatized due to the violence and fear that drove them from their home countries—to languish at the border in those adverse conditions. This will cause them additional trauma, increasing asylum seekers’ need for state-funded services when they ultimately enter the United States. Additionally, the Rule will inflict these harms without the States or the public having a chance to comment on it, because defendants issued it in violation of their notice-and-comment obligations under the Administrative Procedure Act (APA).

The district court correctly ruled that the public interest thus strongly favors preliminary injunctive relief here. In doing so, it properly took into account the harm the Rule would cause the States as entities responsible for integrating asylum

(URM), providing foster care services for eligible minors granted asylee/refugee status before coming to the United States. *See* Mich. Dep’t of Heath & Hum. Servs., *Refugee Assistance & Services*, <https://tinyurl.com/y2ey3u3c>.

seekers into their populations, as well as the importance of providing notice and an opportunity to comment on such a dramatic and consequential shift in immigration policy. This Court should therefore uphold the nationwide injunction entered by the district court pending a final adjudication of the merits.

ARGUMENT

The district court acted squarely within its broad discretion in granting a preliminary injunction.⁷ In particular, the court properly exercised its discretion in finding that the public interest favored an injunction in this case. ER 2; *see also Winter v. National Res. Def. Council*, 555 U.S. 7, 20 (2008) (preliminary injunction appropriate where plaintiffs show likelihood of success on the merits; likelihood of irreparable harm absent preliminary relief; “that the balance of equities tips in [their] favor”; and that “an injunction is in the public interest.”). Preliminary injunctive relief is in the public interest here not only because of the harm that the Rule will cause to affected individuals, the States, and their fiscs, but also because of the States’ and the public’s crucial interests in receiving notice and an opportunity to comment on defendants’ proposed action—interests defendants impermissibly cast aside here.

⁷ *See Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 493 (9th Cir. 2018) *petition for cert. filed*, No. 18-587 (U.S. Nov. 5, 2018) (noting abuse of discretion standard for review of preliminary injunction).

I. THE DISTRICT COURT CORRECTLY HELD THAT AN INJUNCTION WAS IN THE PUBLIC INTEREST GIVEN THE SERIOUS HARM THE RULE WILL INFLICT ON INDIVIDUALS, FAMILIES, AND THE AMICI STATES

Winter's "public interest" factor is particularly important in cases where, as here, the impact of an injunction reaches beyond the parties and potentially carries public consequences. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20). In such cases, courts consider the hardship to third parties, including "indirect hardship," as part of the public interest analysis. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008).

This Court has thus consistently taken into account the kinds of interests asserted by Amici States here—for example, interests related to public health—when assessing the propriety of a preliminary injunction. *See, e.g., Stormans*, 586 F.3d at 1139 (discussing potential impact on "health of state residents") (quotation marks omitted); *Golden Gate Rest. Ass'n*, 512 F.3d at 1126 (discussing municipality's "overall health care expenses"). These and other crucial interests of the Amici States are integral to the public-interest analysis in this case.

A. Defendants' Policies Trap Asylum Seekers at the Border While Effectively Refusing to Accept Their Applications.

The Rule will cause serious harm to individuals, States, and the public both on its own terms and as part of a larger scheme of related—and likewise deeply problematic—federal policies. Those existing policies have choked off the flow of

migrants through ports of entry, creating a massive backlog of people waiting to exercise their right to claim asylum. The interplay of these unsustainable, cruel, and ineffective policies with defendants' decision to force asylum seekers to apply at ports of entry will worsen the inhumane situation for those affected, inflicting harm that ultimately redounds to the States.

As the federal government pushes asylum-seekers to ports of entry, it is simultaneously making it difficult or impossible for them to actually apply for asylum there. The Department of Homeland Security (DHS) publicly acknowledges that it has been using a "metering" or "queue management" policy, which amounts to a de facto denial of many applicants' right to apply for asylum.⁸ A September 2018 report from the DHS Office of Inspector General (OIG) confirmed that "CBP was regulating the flow of asylum-seekers at ports of entry through 'metering'" since at least 2016.⁹ OIG described the process as follows: "When metering, CBP officers stand at the international line out in the middle of the footbridges" and turn asylum-seekers away before they can cross onto U.S.

⁸ Amnesty International, *USA: "You Don't Have Any Rights Here"* (Oct. 2018), <https://tinyurl.com/Amnesy-rights>; *Secretary Nielsen Talks Immigration, Relationship with Trump*, Fox News (May 15, 2018), <https://tinyurl.com/Fox-Nielsen>.

⁹ OIG, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018), <https://tinyurl.com/OIG-separation>.

soil, claiming that there is no space available. *Id.* at 6. CBP instructs officers to “inform individuals that the port is currently at capacity and that they will be permitted to enter once there is sufficient space and resources to process them.” *Id.* Legal representatives who accompanied asylum-seekers to ports of entry from 2017 to the present have witnessed dozens of people being turned away repeatedly, as documented in a lawsuit filed in July 2017.¹⁰ Plaintiffs in that case allege a number of illegal practices at the San Ysidro port of entry, including “falsely representing to individuals that asylum is no longer available in the United States, that asylum seekers need permission from the Mexican government to seek asylum, or that asylum seekers must apply at other locations.” *Id.* Some asylum-seekers were even “threatened and falsely told that if they did not abandon their effort to obtain asylum, they would lose custody of their children.” *Id.*

As of December 2018, more than 5,000 asylum seekers were on a waitlist at the port of entry at Tijuana, Mexico, with an estimated wait time of 12 weeks.¹¹ Recent media reports show that approximately 13,000 individuals are on these lists

¹⁰ *Al Otro Lado v. Kelly*, Center for Constitutional Rights, <https://tinyurl.com/AOL-Kelly> (discussing *Al Otro Lado, Inc. v. Nielsen*, No. 17-cv-2366 (S.D. Cal., filed July 12, 2017)).

¹¹ Stephanie Leutert, et al., *Asylum Processing and Waitlists at the U.S.-Mexico Border* (December 2018), <https://tinyurl.com/y9gcx5mr>.

at the eight ports of entry across the southern border.¹² Though aware that the Rule would substantially increase the number of asylum-seekers at the ports of entry, and despite increases in Border Patrol agents assigned to the southwest border over the past several years,¹³ agents at the San Ysidro port of entry continue to process only 20-80 individuals a day.¹⁴

The backlog of individuals is not restricted to the California border; in early February 2019, an estimated 2,000 asylum seekers arrived in the Mexican city of Piedras Negras to seek asylum at the Eagle Pass, Texas port of entry.¹⁵ But a CBP processing rate of 0-15 individuals a day at Eagle Pass could lead to an approximate wait time of 5 to 6 months for these migrants.¹⁶ These desperate conditions have led to tragedy; for example, a Honduran family on the list recently

¹² Elliot Spagat, et al., *For Thousands of Asylum Seekers, All They Can Do Is Wait*, Associated Press (May 9, 2019), <https://tinyurl.com/y528hd22>.

¹³ CBP, *Border Patrol Agent Nationwide Staffing by Fiscal Year*, <https://tinyurl.com/y4w4qrso> (last visited April 30, 2019).

¹⁴ UC San Diego Ctr. for U.S.-Mexican Studies & U. of Tex. at Austin Robert Strauss Ctr. for International Security and L., *Metering Update* (February 2019), <https://tinyurl.com/y5y6c7tl>.

¹⁵ *Id.*

¹⁶ *Id.* at 3.

tried to swim across the Rio Grande, resulting in the deaths of the father and three of his children, including a baby.¹⁷

Further, in January 2019, defendants began implementing a program—originally known as “Remain in Mexico,” and since renamed the “Migrant Protection Protocols” (MPP)—under which some asylum seekers crossing the southern border are returned to Mexico for the duration of their asylum proceedings.¹⁸ This policy will result in more individuals languishing for longer periods in dangerous and inhumane conditions at the border.¹⁹ The policy has also been the subject of federal litigation, with a district court enjoining the policy in April 2019²⁰ (an order currently stayed by the Ninth Circuit²¹).

¹⁷ Spagat, *supra* note 12.

¹⁸ See DHS, *Migrant Protection Protocols* (Jan. 24, 2019), <https://tinyurl.com/DHS-remain>.

¹⁹ See, e.g., Am. Immig. Lawyers Assoc., *Policy Brief: “Remain in Mexico” Plan Sows Chaos, Puts Asylum Seekers at Risk* (Dec. 21, 2018), <https://tinyurl.com/AILA-Remain>; Robert Moore, “If the Police Aren’t Safe Here, What About Us?” *Asylum Seekers Fear “Remain in Mexico” Policy*, Texas Monthly (Feb. 7, 2019), <https://tinyurl.com/Tex-Mo-Juarez>; Sarah Kinosian, “They’re playing with our lives” *Say the First Migrants Returned Under New Mexico Policy*, PRI (Feb. 5, 2019) (describing the border city of Tijuana as one of the world’s deadliest, with a record 2,518 killings on record in the year 2018), <https://tinyurl.com/y4ax2b2c>.

²⁰ *Innovation Law Lab v. Nielsen*, No. 19-cv-00807, 2019 WL 1516783, at *1 (N.D. Cal. Apr. 8, 2019).

²¹ *Innovation Law Lab v. McAleenan*, No. 19-15716, 2019 WL 2005745 (9th Cir. May 7, 2019); cf. *id.* at *4 (Fletcher, J. concurring) (noting that motions panel ruled

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

B. The Rule Will Exacerbate Inhumane Border Conditions and Cause Additional Trauma to Already Vulnerable Migrants and their Families.

The targets of these harmful federal policies—asylum seekers—are individuals fleeing from extremely dangerous conditions in their countries of origin. Thousands come from the Northern Triangle in Central America (made up of Guatemala, Honduras, and El Salvador), which is one of the most violent regions in the world. Conditions there are akin to those “found in the deadliest armed conflicts in the world today,” as the federal government’s own record shows.²² Asylum seekers from this region often face exceptional hazards in their

based on “severely limited” briefing and expedited oral argument; characterizing defendants’ merits arguments as “baseless” and MPP as “illegal policy that will, if sustained, require bona fide asylum applicants to wait in Mexico for years while their applications are adjudicated.”).

²² Medecins Sans Frontieres, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* (May 2017) (documenting the reasons for leaving home countries and noting that the violence suffered by people in Northern Triangle is comparable to that in war zones) 4-6, SER 48-49; SER 47 (noting that homicidal violence in this region has led to significantly more civilian casualties than in any other countries, including countries with armed conflicts or war), <https://tinyurl.com/y5cqyeb6>.

countries of origin, most commonly murders of family members, threats to life or limb, extortion, and domestic violence.²³

As they flee this violence, asylum seekers face additional threats during their journey north. Along the route through Mexico to the United States, migrants are injured and traumatized by violence, abduction, theft, extortion, torture, and rape perpetrated by gangs and other criminal organizations.²⁴ Unsurprisingly, these experiences have caused high rates of serious mental health issues among asylum seekers, including anxiety, post-traumatic stress, and major depressive disorders.²⁵

And asylum seekers face still more trauma once they make it to the border and are forced to wait for extended periods to enter the United States. Media reports have extensively documented the inhumane conditions outside ports of entry. The images and stories are grim, as thousands of immigrants, many with young children, have been 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

²³ Allen Keller, et al., *Pre-Migration Trauma Exposure and Mental Health Functioning among Central American Migrants Arriving at the US Border*, 12 PLoS one e0168692 (Jan. 10, 2017), <https://tinyurl.com/Keller-Trauma>.

²⁴ See Medecins Sans Frontieres, *supra* note 22 at 4-5, 11-12.

²⁵ *Id.* at 168-69; Keller, *supra* note 23.

Tijuana, and on plastic tarps in the streets waiting to be processed by CBP.²⁶ The unsanitary conditions “have 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.”²⁷ Many migrants have developed respiratory infections, and health officials also reported multiple cases of lice and chicken pox.²⁸ Children languishing at the border are becoming ill and not attending school, and families are not receiving basic health and social services, including mental health treatment.²⁹ Local authorities lack sufficient resources to help immigrants for prolonged periods and have called on humanitarian

²⁶ Catherine E. Shoichet and Leyla Santiago, *The Tear Gas is Gone. But in This Shelter at the Border, the Situation Is Getting Worse*, CNN (Nov. 29, 2018), <https://tinyurl.com/Shoichet>; Sarah Kinosian, *Migrants at Mexico Border Face an Uncertain Future on Their Own*, The Guardian (Dec. 1, 2018), <https://tinyurl.com/Kinosian>.

²⁷ 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>.

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

²⁹ *Statement on Situation of Migrant Children at Mexico-U.S. Border*, UNICEF (Nov. 28, 2018), <https://tinyurl.com/UNICEF-border> (noting “limited access to many of the essential services [children] need for their wellbeing, including nutrition, education, psychosocial support and healthcare”).

organizations for assistance.³⁰ Indeed, Amnesty International reported that one of the few shelters available to migrants near Tijuana (the abandoned concert hall) closed with virtually no notice, leaving former residents to wander around outside with no place to go.³¹

In addition to adverse physical conditions, vulnerable adults and children are exposed to greatly increased risks of crime and exploitation as they wait at the border.³² The district court recognized as much in granting plaintiffs' motion for a temporary restraining order, emphasizing "the extensive record evidence of the danger experienced by asylum seekers waiting to cross in compliance with the Rule." ER 120. A number of Mexican states on the border where would-be asylum seekers are waiting are regarded as dangerous by the State Department, designated "Reconsider Travel" or "Do Not Travel" areas.³³ Indeed, U.S. government employees are forbidden from driving "from the U.S.-Mexico border to or from the

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

³¹ D. Parvaz, *The Pentagon Just Doesn't See Trump's Border Wall as an Emergency*, ThinkProgress (Jan. 30, 2019), <https://tinyurl.com/Parvaz-Wall>.

³² Josiah Heyman and Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Studies (June 25, 2018), <https://tinyurl.com/Heyman-Slack>.

³³ U.S. Dep't of State, *Mexico Map*, <https://tinyurl.com/St-Dept-Mex-Map>.

interior parts of Mexico.”³⁴ Tragically, in late 2018, two young Honduran migrants were murdered in Tijuana, which is experiencing a record number of homicides.³⁵ And LGBTQ migrants in particular are at risk from threats of harassment and violence as they await entry into United States.³⁶

The Rule enhances the danger to migrants awaiting entry by creating delays which—in conjunction with the other policies discussed above—are in many cases on the order of months.³⁷ Such lengthy waits in these inhumane conditions will only exacerbate the harms these individuals face and increase the amount and intensity of social services the States will be required to provide to them when they enter the United States, as discussed below.

Finally, the delays caused by the Rule harm residents of the Amici States who have family members waiting to enter the country and must suffer the anguish of uncertainty as their asylum-seeking relatives are in limbo at the border. Many

³⁴ U.S. Dep’t of State, *Mexico Travel Advisory* (Nov. 15, 2018), <https://tinyurl.com/St-Dept-Mex>.

³⁵ Mary Beth Sheridan, *While Washington Focuses on the Wall, Mexico Fears Its Own Border Crisis*, Wash. Post (Dec. 28, 2018), <https://tinyurl.com/Sheridan-Border>.

³⁶ Sarah Kinoshian & Joshua Partlow, *LGBT Asylum Seekers Are First to Reach the U.S. Border from the Caravan. Now They Wait.*, Wash. Post (Nov. 13, 2018), <https://tinyurl.com/Kinoshian-Partlow>.

³⁷ See Spagat, *supra* note 12.

Central American asylum seekers have relatives across the country, including Los Angeles, New York, and Washington.³⁸ These include the Los Angeles family members of a Honduran family with three young children who joined a caravan to flee gang threats of violence,³⁹ and a San Francisco mother, anxiously awaiting the fate of her 15-year-old son, who was detained by Mexican authorities with other minors as they attempted to apply for asylum.⁴⁰ These residents of the States are being harmed by the federal government's actions.

C. The States will be harmed by the effects of the Rule.

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

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

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

⁴⁰ Cristina Rendon, *Salvadorian Woman Nervously Awaits Contact from Son Seeking Asylum at US-Mexico Border*, Fox KTVU (Nov. 26, 2018), <https://tinyurl.com/Rendon-KTVU>; Monica Campbell, *This Teen Migrated to the US Border to Escape Gangs. He Hopes to Join His Mom in the US*, PRI (Feb. 7, 2019), <https://tinyurl.com/y4dxl0le>.

The Amici States have taken in the majority of total asylees entering the United States over the past several years.⁴¹ In the 2017 fiscal year, almost 15,000 accompanied children (those arriving with their families) received positive credible fear determinations and were released from federal custody, many in Amici States.⁴² And in FY 2019, 15,188 unaccompanied children were released from federal custody to adult sponsors in Amici States, nearly 50% percent of the total.⁴³ Historically, a high percentage of these children have had viable claims for asylum, although that percentage has dropped under the Trump Administration.⁴⁴

The States, their local jurisdictions, and non-governmental organizations based in the States will accordingly bear most of the burden of assisting the victims of the unnecessary trauma caused by defendants' policies. Among other services,

⁴¹ Nadwa Mossad and Ryan Baugh, *Refugees and Asylees: 2017*, DHS Off. of Immigration Statistics (March 2019), <https://tinyurl.com/Mossad-Baugh>. California received over 40 percent of the total number of individuals granted asylum from 2015-2017, by far the most of any state. Collectively, Amici States New York, New Jersey, Virginia, Washington, and Illinois received over 22 percent during this period.

⁴² *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45519 (proposed Sept. 7, 2018).

⁴³ *Unaccompanied Alien Children Released to Sponsors by State*, Off. of Refugee Resettlement (last updated Apr. 25, 2019), <https://tinyurl.com/UAC-state>.

⁴⁴ Beth Fertig, *Unaccompanied Minors Have Tougher Time Winning Asylum*, WNYC (June 6, 2018), <https://tinyurl.com/Fertig-WNYC>.

the States' public health care systems will need to address the increased health care needs of immigrants who have not had access to preventative care, vaccinations, and other necessary medical care as they waited at the border. Similarly, the States' public schools will face greater challenges in educating students who have been traumatized and needlessly missed months of schooling while waiting at the border.⁴⁵

Further, the States have invested in specialized services to assist asylees, and those services will be taxed by the increased need caused by defendants' policies. For example, California has various forms of assistance for certain eligible asylees and refugees, including programs that provide cash assistance and employment services, as well as services for unaccompanied minors and victims of human trafficking.⁴⁶ Program benefits and services are typically administered at the local level by county social services departments, or through county contracts with local non-profit service providers to deliver direct services, including services for elders;

⁴⁵ See Compl., *Washington v. United States*, No. 18-cv-1979 (S.D. Cal. June 26, 2018) ¶¶ 229 (citing *Plyler v. Doe*, 457 U.S. 202 (1982), which requires states to provide free public education to children regardless of immigration status, as well as “various statutory obligations to provide particularized services to high needs students, such as through the Individuals with Disabilities Education Act (IDEA)”), 230 (citing research showing that “experience of trauma may severely undercut a child’s ability to learn and function in the classroom”).

⁴⁶ See *Services for Refugees, Asylees, and Trafficking Victims*, CDSS, <https://www.cdss.ca.gov/Refugee-Services>.

integration and language assistance for refugee students; and assistance to unaccompanied minors.⁴⁷ One of Washington's state social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.⁴⁸

Michigan provides cash and medical assistance programs through its Department of Health and Human Services, as well as employment services, integration services, education services, language services, health-related services, and elderly services through private agencies.⁴⁹ Similarly, in New York, Refugee Services—part of the State's Office of Temporary and Disability Assistance—provides targeted assistance for refugees and their families, unaccompanied minors, and victims of human trafficking.⁵⁰ These services include temporary cash assistance,

⁴⁷ *Id.*; see also *Refugee & Asylee Benefits*, SF-CAIRS (the SF Refugee Forum), <http://sf-cairs.org/refugee-asylee-benefits>; County of L.A., Dep't of Soc. Services, *Refugee Employment Program*, <https://tinyurl.com/LA-refugee>.

⁴⁸ See Off. of Refugee and Immig. Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018*, <https://tinyurl.com/y528prka>.

⁴⁹ See Mich. Dep't of Heath & Hum. Servs., *Refugee Assistance*, <https://tinyurl.com/y9q662ms>.

⁵⁰ See N.Y. St. Off. of Temp. & Disability Assist., Refugee Servs., *Overview*, <https://otda.ny.gov/programs/bria/>.

health care screenings and medical services, and employment programs.⁵¹

Additionally, New York's 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.⁵²

If the Rule is allowed to go into effect, the beneficiaries of these services will, in many cases, predictably require more (or more intensive) services once their asylum applications are belatedly processed, as they will have spent weeks or months languishing at the border. Despite the federal government's claims that its actions will reduce human trafficking,⁵³ international experts have found that

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

⁵² See N.Y. St. Off. for New Americans, *Our Mission*, <https://tinyurl.com/y5wb8dws>; see also N.Y. St. Off. for New Americans, Request for Applications, RFA #18-ONA-32, available at <https://tinyurl.com/y3oqjul6>; N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans*, <https://tinyurl.com/y3yd54sb>.

⁵³ See, e.g., White House, *Remarks by President Trump on the Humanitarian Crisis on our Southern Border and the Shutdown* (Jan. 19, 2019), <https://tinyurl.com/Trump-S-B-crisis> (“Our plan includes critical measures to protect migrant children from exploitation and abuse”); White House, *Remarks by President Trump After Meeting with Congressional Leadership on Border Security* (Jan. 4, 2019), <https://tinyurl.com/Trump-Cong-Border-Sec> (claiming that current border conditions allow human trafficking of women and children, including “traffickers having three and four women with tape on their mouths and tied up”).

policies such as the Rule make migrants significantly *more* vulnerable to these kinds of abuses,⁵⁴ increasing the need for state programs like those discussed above.

In addition, recognizing the importance of proper legal guidance during immigration proceedings, Amici States fund a number of non-profit legal service organizations that provide free or low-cost legal services for asylees and refugees. For example, California funds dozens of such organizations—including plaintiffs East Bay Sanctuary Covenant, Al Otro Lado and CARECEN-LA—to provide services including assisting applicants for asylum and those seeking other immigration remedies, as well as removal defense.⁵⁵ ER ¶¶ 79, 81-82, 84, 88, 96. California’s public universities also fund programs that provide legal assistance to refugees and migrants seeking asylum.⁵⁶ Washington allocated a million dollars from its general fund for FY 2019 to legal services organizations serving asylum

⁵⁴ See *Heyman, supra* note 32 (“Blockaded asylum seekers in northern Mexican border cities, bottled up in those sites with few or no resources or connections, are particularly vulnerable to labor, sexual, and other trafficking.”).

⁵⁵ See *Immigration Services Contractors, supra* note 4.

⁵⁶ See, e.g., U. of Cal.-Davis Sch. of L., *Immigration Law Clinic*, <https://tinyurl.com/Davis-immig>; U. of Cal. Hastings Coll. of the L., *Center for Gender and Refugee Studies*, <https://cgrs.uchastings.edu>; U. of Cal., Irvine Sch. of L., *Immigrants’ Rights Clinic*, <https://tinyurl.com/Irvine-immig>.

seekers and other migrant populations in the state.⁵⁷ Among other programs, New York funds the Liberty Defense Project, a State-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.⁵⁸ The University of Nevada, in Reno and Las Vegas, provides aid to refugee families, as does the UNLV School of Law's Immigration Clinic, which provides deportation defense services to families and unaccompanied children seeking asylum.⁵⁹

By categorically barring asylum for every individual who enters the country without inspection at the southern border, the Rule will seriously restrict access to legal counsel, frustrate these organizations' missions and overtax their resources. ER ¶¶ 80-82, 84, 86, 89, 90, 97. It will also cause them to divert considerable resources to re-strategizing their approaches to the representation of clients and to eligibility issues, which will require revising their training and re-allocating staff time. ER ¶¶ 81-82, 83-86, 89, 98-99. Harms to these organizations in turn impact their funders, including the States, whose priorities and funding decisions are adversely affected as well.

⁵⁷ 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/yy3rduov>.

⁵⁸ See N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget*, <https://tinyurl.com/y6qv2jev>.

⁵⁹ UNLV William S. Boyd School of Law, *UNLV Immigration Clinic*, <https://tinyurl.com/y4ckoxhk>.

Relatedly, the need for Amici States' agencies' resources to support impacted local health agencies, providers, and resettlement agencies to provide assessments and other health services to newly arrived refugees, asylees, victims of severe forms of human trafficking, and other eligible entrants will increase.⁶⁰ For example, the Highland Human Rights Clinic in Oakland, California (operated by the Alameda County Health System) conducts approximately 80 to 120 health assessments of asylees annually.⁶¹ The vast majority of the patients need mental health referrals, due to years of abuse and trauma.⁶² These patients' needs will only increase due to the additional trauma they will endure while forced to wait in dangerous, unhealthy conditions at the border because of the Rule.

Washington funds a State Refugee Coordinator to ensure that state agencies collaborate with local partners including clinicians, community-based organizations, health coalitions, and voluntary agencies to address refugee health issues.⁶³ In addition, the Washington State Refugee Health Promotion Project is a collaboration between state agencies, health providers, and resettlement agencies

⁶⁰ CDPH, *Office of Refugee Health*, <https://tinyurl.com/CDPH-refugee>.

⁶¹ Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), <https://tinyurl.com/Gorman-NPR>.

⁶² *Id.*

⁶³ See Wash. Dep't of Soc. & Health Servs., *Plan for Refugee Assistance Program, 2015 8*, <https://tinyurl.com/yxmd2st3>.

such as Seattle Children’s Hospital and Lutheran Community Services Northwest to improve health outcomes and enable successful resettlement for refugee populations.⁶⁴ In New York, the Office of Temporary and Disability Assistance supports numerous organizations that provide health care services to refugees and asylees, including care for post-traumatic stress syndrome and depression.⁶⁵

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

II. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST BECAUSE THE RULE’S ISSUANCE VIOLATED NOTICE-AND-COMMENT RULES ENSURING THE PUBLIC’S RIGHT TO RAISE ISSUES WITH PROPOSED AGENCY ACTION

Not only will the Rule harm the States by increasing the need for services to asylees and asylum seekers within their borders, but defendants also harmed the States by violating the APA’s procedural requirements when adopting the Rule. *See* Pl.-Appellees’ Resp. Br. (ARB) 41-42.

“The notice and comment requirements are designed to ensure public participation in rulemaking.” *Paulsen v. Daniels*, 413 F.3d 999, 1004 (9th Cir.

⁶⁴ *Id.* at 6; *see also* Wash. Dep’t of Health, *Refugee Health Program, Provider Resources*, <https://tinyurl.com/y2z7q38y>.

⁶⁵ *See* N.Y. St., Off. of Temporary & Disability Assistance, *Refugee Services Provider Directory*, <https://tinyurl.com/y59wxyku>.

2005) (quoting *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992)) (ellipses and brackets omitted). As this Court stated in its prior ruling in this case, “These procedures are ‘designed to assure due deliberation’ of agency regulations and ‘foster the fairness and deliberation that should underlie a pronouncement of such force.’” *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1251 (9th Cir. 2018) (internal citations and quotation marks omitted). And as the district court simply put, it is “antithetical to the structure and purpose of the APA for an agency to implement a rule first, then seek comment later.” ER 111 (citing *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010)) (internal quotation marks omitted).

Defendants insist that their actions here fall under the good cause exemption to the APA’s notice and comment requirement because giving the States and the public an opportunity to comment on drastic changes to federal immigration policy would have been “impracticable” and “contrary to the public interest.” 83 Fed. Reg. 55950 (citing 5 U.S.C. § 553(b)(B)). Ostensibly based on that belief, defendants also dispensed with the 30-day waiting period required by 5 U.S.C. § 553(d), arguing that “immediate implementation of this rule is essential to avoid creating an incentive for aliens to seek to cross the border.” 83 Fed. Reg. 55950. In

a binding decision,⁶⁶ this Court previously rejected the government’s use of the good cause exception, finding the government’s inferences regarding the incentives for migrants to surge across the southern border based on the announcement of the Rule “too difficult to credit,” and “only speculative” based on the evidence presented. *EBSC*, 909 F.3d at 1253-54.

To bolster their rationale for invoking the good cause exception, defendants cite to an article in the Administrative Record highlighting an increase in the migration of Central American families seeking asylum at the border, which defendants argue is linked to a change in another immigration policy (not at issue here).⁶⁷ ER 20. Based on this, the district court erroneously found a “‘rational connection between the facts found and the choice made,’ to promulgate the interim rule on an emergency basis,” ER 21-22 (quoting *Valverde*, 628 F.3d at 1168).

This Court has already rejected defendants’ argument in this case that the government was required to show only a “rational” reason for invoking the good cause exception. Instead, this Court required “a sufficient showing that good cause

⁶⁶ As a published decision of this circuit that directly addresses this issue, this Court’s previous opinion constitutes binding authority, until and unless it is overruled by a “body competent to do so.” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

⁶⁷ The article cited specifically discusses the family separation policy. *See* ER 21.

exists.” *EBSC*, 909 F.3d at 1254, n.16 (quoting *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003)). Similarly, in *Evans*, this Court made clear that “notice and comment is not impracticable unless the agency cannot both follow section 553 and execute its statutory duties”; accordingly, agencies invoking the good-cause exception must show that “delay would do real harm” and that “compliance would interfere with the agency’s ability to carry out its mission.” 316 F.3d at 912 (internal citations and quotation marks omitted). As discussed in plaintiffs’ brief, ARB 43-45, defendants have failed to produce sufficient evidence to overcome this “high bar” to the good cause exception. *Valverde*, 628 F.3d at 1164.

The federal government also invokes the “foreign affairs” exception to the APA’s procedural requirements, 5 U.S.C. § 553(a)(1); 83 Fed. Reg. 55950. However, this Court has rejected the argument that agencies can invoke the “foreign affairs” exception in the context of *all* immigration-related regulations: “The foreign affairs exception would become distended if applied to [DHS] actions generally, even though immigration matters typically implicate foreign affairs. For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences.” *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (internal citations omitted); *accord EBSC*, 909 F.3d at 1252. Although foreign relations are briefly discussed in the Rule, *see* 83 Fed. Reg.

55950-51, the federal government's focus is on the United States' internal interests, not international relations. *See also* ARB 46-48 (discussing lack of support in Rule and AR for foreign policy rationale). Indeed, in denying the defendants' motion for a stay of the preliminary injunction, this Court previously concluded that the "the connection between negotiations with Mexico and the immediate implementation of the Rule is not apparent on this record," and accordingly held that defendants were "not likely to succeed" on this issue. *EBSC*, 909 F.3d at 1253.

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

aspects of the Rule discussed above before it took effect.⁶⁸ The agencies would have been required to consider those comments in crafting the final regulation, *see* 5 U.S.C. § 553(c), and may have made changes to the proposed rule in response, as agencies often do. The record developed through the notice-and-comment process in turn would have aided courts' review of this agency action. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also EBSC*, 909 F.3d at 1251 (this Court noting that "notice-and-comment procedures give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.") (internal citations and quotation marks omitted). The very fact that the Amici States have filed briefs in this matter buttresses the argument that defendants should have followed the notice-and-comment requirements here; as the district court stated, "the participation of amici in this case validates the observation that 'the greater the public interest in a rule, the greater reason to allow

⁶⁸ Indeed, when the federal government began accepting comments on the Rule (after it had been promulgated), the States of California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia submitted a comment letter to the U.S. Department of Homeland Security and U.S. Department of Justice on January 8, 2019, urging them to withdraw the Rule. California has submitted more than 60 such comment letters on anticipated or proposed actions by the federal government to delay, repeal or adopt federal regulations since February 2017. Washington State has offered more than 80 comments since January 2017, Massachusetts has submitted dozens, and New York has sent approximately 45.

the public to participate in its formation.’’ ER 18, n.2 (quoting *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996)). Defendants’ noncompliance with the procedural requirements of the APA thus caused significant harms to the public interest in addition to the grave injuries posed by the substance of the Rule itself.

CONCLUSION

The district court’s order granting a preliminary injunction should be affirmed.

Dated: May 15, 2019

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STATEMENT OF RELATED CASES

Amici Curiae are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court.

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FOR THE NINTH CIRCUIT

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