

December 30, 2020

ATTORNEY GENERAL RAOUL OPPOSES 'DEATH TO ASYLUM' RULE

Chicago — Attorney General Kwame Raoul today joined a coalition of 22 attorneys general in [two amicus briefs](#) in support of two separate challenges to a federal rule that guts major aspects of the existing asylum system and effectively eliminates the meaningful right to apply for protection in the United States. By severely restricting asylum eligibility and abolishing certain procedural protections, the so-called “death to asylum” rule will result in the deportation of bona fide asylum-seekers who are certain to face persecution or torture in their home countries.

“The federal government’s new standards will divide families, many of whom have already sacrificed so much to flee political and economic instability,” Raoul said. “I am committed to fighting these discriminatory anti-immigrant policies that put vulnerable people at risk.”

Set to go in effect on Jan. 11, the final rule will make it nearly impossible for people to successfully obtain humanitarian relief in the United States. These consequences will fall hardest on survivors of trauma, and victims of gender, gang and homophobic violence. The rule threatens to do so through a wide range of artificial and arbitrary new barriers. For example, the rule creates a list of adverse discretionary factors that would provide a basis for unilaterally denying even meritorious asylum applications. These discretionary factors include barring asylum-seekers who do not enter with inspection through a port of entry or who do not seek protection from a third country through which they have traveled, even if seeking asylum in the third country is dangerous or unfeasible. In addition, the rule inexplicably applies many of these same discretionary factors to unaccompanied children, making them more likely to be denied asylum and undermining critical safeguards for minors. Ultimately, the rule will make it all but impossible for asylum-seekers to secure protection.

In the amicus briefs, Raoul and the coalition argue, among other things, that the rule will:

- Undermine our country’s and the states’ commitment to being a safe haven for asylees fleeing persecution by upending the current asylum system and increasing family separation.
- Hinder enforcement of legal protections and criminal laws by pushing those who might otherwise seek asylum into the shadows where they are more vulnerable to exploitation.
- Burden state programs, leading to an increased need for legal representation to navigate the extremely complex asylum process made even more complex by this rule, as well as medical and mental health services.
- Harm the states’ economies and workforces, robbing them of essential workers and their contributions to local businesses.

Joining Raoul in filing the briefs are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington.

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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13
 14 **PANGEA LEGAL SERVICES, et al.,**
 Plaintiffs,
 15
 16 **v.**
 17 **U.S. DEPARTMENT OF HOMELAND**
SECURITY, et al,
 18
 Defendants.

Case No. 3:20-cv-09253-JD

**UNOPPOSED MOTION FOR LEAVE TO
 FILE BRIEF OF AMICI CURIAE
 STATES IN SUPPORT OF PLAINTIFFS’
 MOTION FOR A PRELIMINARY
 INJUNCTION, TEMPORARY
 RESTRAINING ORDER AND ORDER
 TO SHOW CAUSE**

Judge: Honorable James Donato
 Hearing Date: January 7, 2021
 Action Filed: December 21, 2020

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1 The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine,
 2 Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York,
 3 Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of
 4 Columbia (States or *Amici* States) respectfully request and move for leave to appear as *amici*
 5 *curiae* and file the proposed *amicus curiae* brief, attached hereto as Exhibit A, in support of
 6 Plaintiffs’ motion for a preliminary injunction, and temporary restraining order and order to
 7 show cause, set to be heard on January 7, 2021.¹ Plaintiffs and Defendants consent to the States’
 8 request. A proposed order is attached.

9 **I. STANDARD FOR MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE**

10 District courts may consider amicus briefs from non-parties with unique information or
 11 perspectives that are useful or otherwise desirable to the court. *See NGV Gaming, Ltd. v.*
 12 *Upstream Point Molate, LLC*, 355 F. Supp. 2d. 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v.*
 13 *Norton*, 246 F. Supp. 2d. 59, 62 (D.D.C. 2003) and *Ryan v. Commodity Futures Trading Comm’n*,
 14 125 F.3d 1062, 1064 (7th Cir. 1997)). “The ‘classic role’ of amicus curiae is to assist a court in a
 15 case of public interest by ‘supplementing the efforts of counsel,’” and “generally courts have
 16 ‘exercised great liberality’ in permitting amicus briefs.” *Cal. v. U.S. Dep’t of the Interior*, 381 F.
 17 Supp. 3d 1153, 1163–64 (N.D. Cal. 2019) (quoting *Miller-Wohl Co. v. Comm’r of Labor &*
 18 *Indust.*, 694 F.2d 203, 204 (9th Cir. 1982); *Woodfin Suite Hotels, LLC v. City of Emeryville*, No.
 19 C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007)).

20 While there are no strict prerequisites to qualify for amicus status, “[d]istrict courts
 21 frequently welcome amicus briefs from non-parties . . . if the amicus has unique information or
 22 perspective that can help the court beyond the help that the lawyers from the parties are able to
 23 provide.” *Sonoma Falls Developers, L.L.C. v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919,
 24 925 (N.D.Cal. 2003) (internal quotation marks and citation omitted). In addition, participation of
 25

26 _____
 27 ¹ The States are separately filing a Motion for Leave to File a Brief as Amici Curiae in the
 28 related matter, *Immigration Equality, et al., v. U.S. Department of Homeland Security, et al.*,
 4:20-cv-09258-JD. The proposed amicus briefs in both matters make similar arguments, with
 variations based on the Plaintiffs’ pleadings.

1 amicus curiae may be appropriate where the legal issues in a case have potential ramifications
2 beyond the parties directly involved. *Id.*

3 **II. INTEREST AND IDENTITY OF AMICI CURIAE**

4 Every year, *Amici* States welcome thousands of asylum seekers into our borders. In 2017-
5 2019, *Amici* States constituted six of the top ten states of residence for individuals whose
6 affirmative asylum applications were granted.² Combined, these six States were home to 60.7
7 percent of the total number of individuals granted affirmative asylum applications in the United
8 States.³ In fiscal year (FY) 2019, immigration courts in the States issued approximately 41,910
9 asylum decisions.⁴

10 The rule at issue here, *Procedures for Asylum and Withholding of Removal; Credible Fear*
11 *and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (the Rule), introduces a litany of provisions
12 that will dramatically transform the asylum system into an unrecognizable process in which few
13 asylum seekers will attain protection. These changes will harm thousands of current and future
14 States' residents, resulting in many bona fide asylum seekers being denied protection and ordered
15 removed; or alternatively, many asylum seekers being deterred from filing an application at all.
16 As government entities, the States have a unique interest in ensuring that the United States
17 continues to be a safe-haven for refugees, a congressionally-established principle which this Rule
18 undermines. The States also have an interest in keeping families together—which as explained in
19 the attached brief, is made more difficult under the Rule.

20 Additionally, the States' law enforcement interests are impacted by this Rule. As more
21 asylum seekers are forced into the shadows because they are deterred from applying for or are
22 denied relief, the States' ability to enforce criminal, labor, and civil rights laws is hindered.
23 Furthermore, the States have a strong interest in supporting immigrants, including asylum
24 seekers, residing in their geographical boundaries. In furtherance of the States' interest, they have
25 carefully crafted systems that function to welcome and deliver essential services to immigrants.

26 ² Ryan Baugh, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow*
27 *Report: Refugees and Asylees: 2019* tbl. 13 (Sept. 2020), <https://tinyurl.com/BaughFlowReport>.

28 ³ *Id.*

⁴ TRAC Immigration, Asylum Decisions,
<https://trac.syr.edu/phptools/immigration/asylum/>.

1 As set forth in greater detail in the attached brief, the States have made significant financial
2 investments in these programs and services, and have created state departments responsible for
3 administering them. These systems, in turn, have resulted in thriving immigrant communities that
4 strengthen the social fabric and economies of communities throughout the States. By making
5 asylum much more difficult to attain, and in fact, attaching great risks to filing asylum
6 applications through the expansion of grounds upon which an application may be found frivolous,
7 the Rule stands to upend this progress and undermine the States' programs and investments.

8 Finally, the States have an interest in the success of their economies, tax bases, and
9 communities—all of which benefit from the contributions of asylum seekers targeted by this
10 Rule. Indeed, immigrants' contributions have never been more evident than during the COVID-
11 19 pandemic, as immigrants comprise a significant portion of the nation's essential workforce.
12 By preventing asylum seekers from obtaining lawful status, and potentially resulting in increased
13 deportations, the Rule negatively impacts the States' communities, economies, and tax revenue.
14 For these reasons, *Amici* States are particularly well-suited to provide this Court with a unique
15 perspective on the Rule's impact on the public interest.

16 **III. PROPOSED *AMICUS CURIAE* BRIEF'S RELEVANCE AND AID TO THE** 17 **COURT**

18 The proposed *amicus curiae* brief focuses on the public interests at stake, and in particular,
19 provides this Court with a perspective on how this broad, omnibus Rule could harm the States and
20 their residents if not enjoined. The proposed brief begins with a discussion of the Rule's gravest
21 potential effects—namely, that many of the States' most vulnerable residents could be denied
22 protection and families could be separated. These two outcomes are contrary to the States'
23 interests, which embrace the American principles of providing refugees a home and family unity.
24 The brief also explains how the States' enforcement of criminal laws, and labor and civil rights
25 protections will be imperiled by the Rule because more asylum seekers will be forced to live in
26 the shadows without immigration status, making them less likely to file complaints or otherwise
27 raise abuses with authorities. Further, the Rule's provisions related to withdrawal of purportedly
28 frivolous applications will make it more difficult for State agencies to prevent unscrupulous

1 immigration preparers. The proposed brief also explains how State-funded programs may be
2 impacted by the Rule. Particularly, and in light of the complexities the Rule introduces into the
3 asylum application process, State-funded legal service providers will need to devote additional
4 time and resources for each case, and divert resources to re-strategizing their approaches to
5 representing clients, revising their training, and re-allocating staff time. The States' healthcare
6 programs may also be strained as more asylum seekers go without legal status and fear obtaining
7 healthcare. Finally, the brief discusses how the States' economies and communities benefit
8 greatly from asylum seekers. In sum, the brief will provide the Court with a perspective on *Amici*
9 States' interests and the ways in which the Rule harms those interests, that only the States
10 themselves can provide.

11 **CONCLUSION**

12 For the foregoing reasons, *Amici* States respectfully requests this Court's leave to appear
13 as *amici curiae* and deem the proposed amicus brief filed. Motion.

14 Dated: December 29, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the Northern District of California by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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16 **U.S. DEPARTMENT OF**
 17 **HOMELAND SECURITY, et al.,**

18 Defendants.

Case No. 3:20-cv-09253-JD

**[PROPOSED] BRIEF OF AMICI
 CURIAE STATES IN SUPPORT OF
 PLAINTIFFS' MOTION FOR A
 PRELIMINARY INJUNCTION,
 TEMPORARY RESTRAINING ORDER
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INTRODUCTION AND STATEMENT OF INTEREST

The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia (States or *Amici* States) submit this brief in support of Plaintiffs' motion for preliminary injunction, and temporary restraining order and order to show cause, to enjoin the final rule published by the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (US DOJ) (together, the Defendants): *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (the Rule).

The Rule introduces a litany of provisions that will dramatically transform the asylum system into an unrecognizable process in which only a narrow few can attain protection. These changes will have an incalculable impact on thousands of current and future State residents.¹ *Amici* States are home to at least 60.7 percent of the total number of individuals granted affirmative asylum in the United States in fiscal year (FY) 2019.² In FY 2019, immigration courts in the States issued approximately 41,910 asylum decisions.³

In harming current and future residents, the Rule harms the States. Specifically, the Rule: (1) undermines the States' interests by denying protection to those in need and increasing family separations; (2) pushes putative asylees into the shadows, impairing the States' ability to enforce criminal, labor, and civil rights laws; (3) burdens State-funded programs, including legal services and healthcare; and (4) deprives the States of asylum seekers' contributions, which are integral to

¹ The States are concerned that aspects of the Rule will apply to current residents with pending applications. The Rule states it will not apply retroactively, except as to provisions that "codif[y] existing law." 85 Fed. Reg. 80,380. But US DOJ guidance states that "many parts of the rule merely incorporate established principles of existing statutory or case law into the regulations." Director James R. McHenry III, Exec. Office of Immigration Review, *Guidance Regarding New Regulations Governing Procedures For Asylum And Withholding Of Removal And Credible Fear And Reasonable Fear Reviews* (Dec. 11, 2020), <https://tinyurl.com/EOIRAsy>.

² Ryan Baugh, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2019* tbl. 13 (Sept. 2020), <https://tinyurl.com/BaughFlowReport>.

³ TRAC Immigration, *Asylum Decisions* (Nov. 2020), <https://tinyurl.com/TRACfy2019>

1 the States’ social fabric and economy, particularly during the COVID-19 pandemic.⁴ Thus, a
2 temporary restraining order and preliminary injunction will benefit the public interest.

3 ARGUMENT

4 I. THE RULE UNDERMINES THE STATES’ INTERESTS BY DEPRIVING ASYLUM SEEKERS 5 OF PROTECTION AND INCREASING FAMILY SEPARATIONS.

6 A. The Rule Undermines the States’ Interest in Providing Refuge to 7 Asylum Seekers.

8 The purpose of the Refugee Act of 1980, which established the present asylum system, was
9 to codify “one of the oldest themes in America’s history—welcoming homeless refugees to our
10 shores.” S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. The *Amici*
11 States have a profound interest in upholding this fundamental American tenet—especially where,
12 as here, the Federal Government fails to do so.

13 The Rule’s changes to the asylum system are numerous and varied, but each change shares
14 a common thread—making humanitarian protection more difficult to obtain. Among several
15 restrictive and punitive provisions, the Rule codifies that the Attorney General “will not” grant
16 asylum if nine negative discretionary factors are present, unless the applicant can meet the high
17 bar of establishing “extraordinary circumstances”⁵ or prove by “clear and convincing evidence[]
18 that the denial of asylum would result in [an] exceptional and extremely unusual hardship.” 85
19 Fed. Reg. 80,396-97. Even if the applicant makes this showing, the application can still be denied
20 on discretion “depending on the gravity” underlying the application of the negative discretionary
21 factor. *Id.* at 80,397. The Rule further provides “significant[]” adverse discretionary factors that
22 adjudicators “shall” consider. *Id.* at 80,396. The Rule allows immigration judges to pretermite
23 asylum claims before the applicant has had an opportunity for a full hearing. *Id.* at 80,280. And it
24 expands the circumstances under which an application can be deemed frivolous, thereby barring

25 ⁴ The States note that twenty-three States’ Attorneys General, including many of the
26 signatories to this brief, submitted a comment letter expressing concerns about the Rule’s
27 potential impacts on the States’ interest in family unity, law enforcement, State-funded programs,
28 and the States’ economies and workforce during COVID-19. Comment on FR Doc # 2020-12575,
<https://tinyurl.com/AGscomment>. The Rule makes no mention of the States’ unique concerns.

⁵ The Rule does not define extraordinary circumstances but describes the term as
encompassing “those involving national security or foreign policy considerations,” indicating an
extremely high standard that will not apply in the vast majority of cases. 85 Fed. Reg. 80,397.

1 the applicant from immigration benefits in the future, *id.* at 80, 279. 8 U.S.C. § 1158(d)(6)
 2 (frivolous asylum application consequences). The burden of these new barriers will fall hardest
 3 on the States' most vulnerable residents, depriving many otherwise eligible applicants from
 4 protection.

5 While recognizing that several components of the Rule are bound to have the same result,
 6 the States highlight how the Rule's discretionary factors will effectively block bona fide asylum
 7 seekers from relief in three ways by: (1) applying to asylum seekers who did not seek protection
 8 in a third country, even if it would be dangerous or futile to do so; (2) rendering the filing of an
 9 application after one-year of unlawful presence to be a negative factor, potentially denying relief
 10 to those who failed to file due to trauma; and (3) applying to unaccompanied children.

11 **1. The Rule Effectively Requires Applicants to File for Protection**
 12 **in Third Countries, Disregarding Their Safety.**

13 The Rule considers an applicant's failure to apply for humanitarian protection in at least
 14 one country through which they transited to be a significant adverse discretionary factor—
 15 ignoring that for many applicants, such an application would be infeasible and unsafe. 85 Fed.
 16 Reg. 80,282. In addition, the Rule treats as negative factors that will result in denial: (1) an
 17 applicant's failure to apply for humanitarian protection in a country where they were present for
 18 14-days, and (2) an applicant's failure to apply for humanitarian protection in at least one country
 19 transited through if they transited through two or more countries. *Id.*

20 The Rule exempts individuals from these adverse discretionary factors if they passed
 21 through countries that are not party to refugee-related agreements and protocols. *Id.* at fn. 7. The
 22 exemption, however, is based on a false premise that countries that are signatories to refugee-
 23 related agreements and protocols provide asylum seekers with the actual ability to safely seek
 24 protection. In fact, the vast majority of countries, including those with severely repressive
 25 governments, are signatories to these agreements and protocols.⁶ For instance, while China is a

26 _____
 27 ⁶ A total of 151 countries are parties to the 1967 Protocol and 1951 Convention. United
 28 Nations High Commissioner of Refugees, *States Parties to the 1951 Convention relating to the
 Status of Refugees and the 1967 Protocol* (April 2015), <https://tinyurl.com/unhcrsign>.

1 signatory to a refugee-related agreement, it is also oppressive to religious minorities and conducts
 2 “mass arbitrary detention” of Uighur Muslims and members of other Muslim groups.⁷ Yet, under
 3 the Rule, asylum seekers who have a layover in China en route to the United States would be
 4 expected to apply for protection there, even if they would be at risk of persecution.

5 Most commonly, the Rule will compel the thousands of Central American asylum seekers
 6 who apply for protection in the United States each year to first seek protection in Mexico in order
 7 to avoid a discretionary denial.⁸ But, seeking asylum in Mexico is not feasible or safe for many
 8 people. This reality, borne out in the Federal Government’s own administrative record, led a
 9 federal court to preliminarily enjoin Defendants’ third country transit asylum bar. *E. Bay*
 10 *Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 953 (N.D. Cal.), *aff’d*, 964 F.3d 832 (9th Cir.
 11 2020) (“[T]he administrative record fails to support the conclusion that asylum in Mexico is a
 12 ‘feasible alternative.’”).

13 At the outset, there are several barriers to protection in Mexico, such as an untenable 30-
 14 day filing deadline.⁹ Beyond that, asylum seekers would be at an increased risk of crime,
 15 exploitation, and persecution as they await the adjudication of their cases in Mexico. As an
 16 example of these dangers, as of January 2020, there were 816 reports of murder, rape, torture,
 17 kidnapping, and other violent assaults against asylum seekers who were forced to remain in
 18 Mexico during the pendency of their asylum cases because of Defendants’ restrictive program,
 19 the “Migrant Protection Protocols.”¹⁰ Asylum seekers placed in migrant detention centers receive
 20 little reprieve, as officers with the National Migration Institute frequently extort detainees.¹¹ The
 21 situation would be especially dire for migrant women, who are often subject to harassment and

22 ⁷ U.S. Dep’t of State, *Human Rights Report – China 2019 2-3*,
 23 <https://tinyurl.com/DeptStch>; U.S. Dep’t of State, *2019 Report on International Religious*
 24 *Freedom: China (Includes Tibet, Xinjiang, Hong Kong, and Macau) 2*,
 25 <https://tinyurl.com/DOSIRF>.

26 ⁸ Baugh, *supra* note 2 at tbls. 6a, 6b.

27 ⁹ Human Rights Watch, *Closed Doors: Mexico’s Failure to Protect Central American*
 28 *Refugee and Migrant Children* (Mar. 31, 2016), <https://tinyurl.com/HRWClosedDoorsMexico>;
 Refugees Int’l, *A New Path Forward: Strengthening the Protection Landscape in Mexico* (Nov.
 12, 2020), <https://tinyurl.com/RefIntl2>.

¹⁰ Human Rights First, *Delivered to Danger* (Jan. 21, 2020), <https://tinyurl.com/HRFMpp>.

¹¹ Associated Press, *Overcrowding, Abuse Seen at Mexico Migrant Detention Center*,
 KTLA (June 17, 2019), <https://tinyurl.com/APkta>.

1 abuse in Mexican immigration detention centers.¹² Similarly, Lesbian, Gay, Bisexual,
2 Transgender, and Queer (LGBTQ) asylum seekers in detention suffer “discrimination, sexual
3 harassment and even aggression from the other detainees or the [center] staff.”¹³

4 In practice, the Rule’s discretionary factors will force many asylum seekers to make the
5 excruciating choice to either apply for relief in a third country—where they may face danger or
6 even persecution—or forgo that process and risk their claim being denied in the United States.

7 **2. By Making One Year of Unlawful Presence a Negative Factor,**
8 **the Rule Will Seriously Harm Trauma Victims.**

9 Under the Rule, applicants who apply for asylum after one year of unlawful presence in the
10 United States will ordinarily be denied on discretionary grounds. As Plaintiffs adeptly argue, this
11 provision is at tension with the statutory one-year filing deadline for asylum applications. The
12 statutory deadline exempts applicants from filing their application within one year if they
13 establish either exceptional circumstances related to their ability to timely file, such as physical or
14 mental illness, or that there are changed conditions effecting their eligibility for relief. 8 U.S.C. §
15 1158(a)(2)(D). But these exemptions do not expressly apply to the Rule’s unlawful presence
16 discretionary factor, and, as Defendants recognize, there will be some applicants who overcome
17 the one-year filing deadline just to have their applications denied on discretion for failing to file
18 within one year.¹⁴

19 This unfair outcome may befall victims suffering from post-traumatic stress disorder
20 (PTSD), as it is well-recognized that PTSD can hinder an applicant’s ability to file a timely
21 asylum application. *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004). PTSD is

22 _____
23 ¹² Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*,
United Nations Univ. (May 4, 2016), <https://tinyurl.com/FleuryMay2016>.

24 ¹³ Amnesty Int’l, *No Safe Place: Salvadorans, Guatemalans and Hondurans Seeking*
Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity 22 (Nov. 2017),
25 <https://tinyurl.com/AmIn17> (quoting the Citizens’ Council of the National Migration Institute).

26 ¹⁴ It does not appear that an applicant’s showing of an exceptional circumstance impairing
27 their ability to file an asylum application under 8 U.S.C. § 1158(a)(2)(D) would be an
28 “extraordinary circumstance” to rebut this discretionary factor. Defendants recognize that there
will be some applicants who meet the statutory filing deadline, but to whom the discretionary
factor will apply. 85 Fed. Reg. 80,355. In response to this concern, Defendants only state that
adjudicators can “consider those circumstances in accordance with the [R]ule.” *Id.*

1 highly prevalent among victims of domestic violence, childhood abuse, and hate crimes.¹⁵ This
2 discretionary factor will be yet another obstacle to these applicants' ability to receive relief.

3 **3. Most Discretionary Factors Apply to Unaccompanied Children.**

4 Although Defendants exempted children from the Rule's unlawful entry discretionary
5 factor, all other discretionary factors will apply to unaccompanied children, thereby making them
6 more likely to be denied asylum. Congress expressly recognized the vulnerabilities of
7 unaccompanied children and their unique need for protection in the William Wilberforce
8 Trafficking Victims Protection Reauthorization Act of 2008. Pub. L. No. 110-457, 122 Stat. 5044
9 (TVPRA). Under the TVPRA, children are exempted from certain statutory bars to asylum, such
10 as the safe third country agreement bar and the one-year filing deadline. 8 U.S.C. § 1158(a)(2)(E);
11 8 C.F.R. § 208.4(a)(5)(i). Children are also entitled to first present their asylum claims during
12 non-adversarial interviews at the U.S. Citizenship and Immigration Services (USCIS) Asylum
13 Office with officers trained in "child-sensitive and trauma informed interview techniques,"
14 instead of adversarial immigration court proceedings. *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409
15 F. Supp. 3d 367, 372 (D. Md. 2019).

16 Yet, the Rule subjects unaccompanied children to discretionary denials of asylum for
17 minor, but common, issues—including filing an application one year after entry, or after passing
18 through a third country without applying for relief, rendering the statutory protections previously
19 enacted by Congress irrelevant. With asylum off the table, these unaccompanied children will be
20 forced to present claims for withholding of removal and protection under Convention Against
21 Torture (CAT), which can only be granted by an immigration court. 8 C.F.R. § 208.16. As
22 Congress recognized in enacting the TVPRA, immigration court is not the proper venue for
23 children to present their claims, partly because those proceedings subject unaccompanied children
24 to cross-examination about the worst moments of their lives. *See J.O.P.*, 409 F. Supp. 3d at 372
25 (citing 8 U.S.C. §§ 1158, 1232(d)).

26 _____
27 ¹⁵ Guila Ferrari & Gene Feder, et al., *Psychological advocacy towards healing (PATH): A*
28 *randomized controlled trial of a psychological intervention in a domestic violence service setting*,
PLOS ONE (2018), <https://tinyurl.com/psychdv>; Int'l Soc'y for Traumatic Stress Studies, *Global*
Perspectives on the Trauma of Hate-Based Violence, <https://tinyurl.com/traumaviolence>.

1 In all, these discretionary factors, like several other provisions of the Rule, will prevent
 2 asylum seekers—particularly those vulnerable to abuse—from obtaining asylum. Defendants
 3 justify these obstacles to relief by reasoning that asylum is a discretionary benefit. 85 Fed. Reg.
 4 80,282. But discretion should not be used as a cudgel to block all but the lucky few from asylum,
 5 as it would be under the Rule. Such a result is contrary to the founding principles of the United
 6 States asylum system, the States’ interests, and the public interest. *Leiva-Perez v. Holder*, 640
 7 F.3d 962, 971 (9th Cir. 2011) (per curiam) (“deliver[ing] [asylum seekers] into the hands of their
 8 persecutors” is against the public interest).

9 **B. The Rule Undermines the States’ Interest in Family Unity.**

10 The Rule will result in the denial of protection, and subsequent deportation, for many of
 11 those who will be or are currently seeking asylum in the States. These deportations will have the
 12 consequence not just of putting an applicant at risk for persecution, but also separating them from
 13 their family members who reside in the United States.¹⁶ Moreover, with asylum out of reach due
 14 to the Rule’s discretionary factors and expanded bars to relief, withholding of removal and
 15 protection under CAT will be the only forms of relief available for many applicants. Unlike
 16 asylum, neither withholding of removal nor CAT offers any protection to an applicant’s children
 17 or spouse. *See* 8 U.S.C. § 1158(b)(3)(A). The Rule could thus result in absurd situations where a
 18 parent is granted protection, but their child who does not have a separate claim is ordered
 19 removed. “The result is an almost impossible choice: live in safety while separated from one’s
 20 family and their perilous life a world away, or join them in their peril and risk the probability of
 21 death or imprisonment.” *See Haniffa v. Gonzales*, 165 F. App’x 28, 29 (2d Cir. 2006).

22 The separation of asylum seekers from their family members will harm the States, which
 23 benefit from family units that provide stability and support for their members, as well as
 24 irreplaceable care and nurturing of children. *See, e.g., Moore v. City of East Cleveland*, 431 U.S.

25 _____
 26 ¹⁶ *See* Office of Refugee Resettlement, U.S. Dep’t of Health and Human Services (HHS),
 27 *Unaccompanied Alien Children Released to Sponsors by State* (Sept. 27, 2019),
 28 <https://tinyurl.com/ORRuac> (in FY 2019, over 8,000 unaccompanied children were released to
 sponsors residing in California); HHS, *Frequently Asked Questions Regarding Unaccompanied
 Alien Children*, <https://tinyurl.com/HHSuac> (last visited Dec. 21, 2020) (explaining that sponsors
 generally must be parents or close relatives).

1 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most
 2 cherished values, moral and cultural.”). The Select Commission on Immigration and Refugee
 3 Policy, a congressionally appointed commission tasked with studying immigration policy,
 4 expounded upon the necessity of family reunification in 1981:

5 “Reunification . . . serves the national interest not only through the humaneness of the
 6 policy itself, but also through the promotion of the public order and wellbeing of the
 7 nation. Psychologically and socially, the reunion of family members . . . promotes the
 health and welfare of the United States.”¹⁷

8 Indeed, family unity is the basis of the modern immigration system. *Solis-Espinoza v. Gonzales*,
 9 401 F.3d 1090, 1094 (9th Cir. 2005) (“The Immigration and Nationality Act (‘INA’) was
 10 intended to keep families together.”).

11 Because family units are a bulwark of support for all their members, separating families
 12 will further traumatize and endanger asylum seekers. Family separation can result in: irregular
 13 sleep patterns, which can lower academic achievement among children; toxic stress, which can
 14 delay brain development and cause cognitive impairment; symptoms of PTSD; and a greater risk
 15 of developing mental health disorders such as depression and anxiety.¹⁸ Trauma can also have
 16 negative physical effects on children, such as loss of appetite, stomachaches, and headaches,
 17 which can become chronic if left untreated.¹⁹

18 The Rule’s likely effect of increasing asylum denials will devastate asylum seekers and
 19 their families, with impacts that will extend to their communities and to the States.

20 **II. THE RULE HINDERS THE STATES’ ABILITY TO ENFORCE THEIR OWN LAWS.**

21 The numerous barriers to asylum implemented by the Rule are likely to result in a chilling
 22 effect on asylum applications—especially because the Rule greatly intensifies the risk of filing an
 23 application by expanding the ways in which an application can be deemed frivolous, a label that

24 ¹⁷ Human Rights Watch, *US: Statement to the House Judiciary Committee on “The*
 25 *Separation of Nuclear Families under US Immigration Law”* (Mar. 14, 2013),
<https://tinyurl.com/HRWFamilySeparation> (quoting US Select Committee on Immigration and
 26 Refugee Policy, “U.S. Immigration Policy and the National Interest,” 1981).

27 ¹⁸ Colleen K. Vesely, Ph.D., et al., *Immigrant Families Across the Life Course: Policy*
Impacts on Physical and Mental Health, Nat’l Council on Family Relations (2019)
<https://tinyurl.com/NCFRpolicybrief>.

28 ¹⁹ Allison Abrams, *LCSW-R, Damage of Separating Families*, Psych. Today (June 22,
 2018), <https://tinyurl.com/AbramsSeparation>.

1 results in a permanent ban on most immigration relief. As a result, fewer people will file for
2 asylum and more will remain undocumented. The States will be harmed because undocumented
3 immigrants are less likely to report crime or cooperate in state investigations of crime; and more
4 likely to enter into the underground economy, and therefore less likely to report ongoing labor
5 and civil rights violations. Consequently, the Rule interferes with the States' ability to enforce
6 their penal, labor, and civil rights laws. The States have a fundamental interest in being able to
7 enforce their own laws. *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989).
8 When rulemaking impinges on that ability, the States suffer an injury. *New Motor Vehicle Bd. of*
9 *Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

10 **A. Asylum Seekers Who Remain Undocumented as a Result of the Rule**
11 **Will Be Deterred from Cooperating with Law Enforcement.**

12 Undocumented individuals are less inclined to cooperate with law enforcement or provide
13 helpful information when they are a victim of a crime, for fear of engaging with state actors and
14 becoming subject to deportation.²⁰ The disincentive to assist law enforcement will make it more
15 difficult for States to enforce their penal laws, and puts immigrants at risk of being victims of
16 crime themselves.

17 The States' law enforcement interest in eradicating "notario fraud" under consumer
18 protection and criminal laws is particularly undermined by the Rule. Notario fraud refers to
19 immigration scams promulgated by individuals who represent themselves as immigration
20 attorneys, but are not licensed as an attorney or as an authorized non-attorney for immigration
21 purposes. For example, because asylum seekers at risk of having their application deemed
22 frivolous may opt to withdraw their application with prejudice and be deported, 85 Fed. Reg.
23 80,280, 80,398-99, fewer asylum seekers will have an opportunity to file an ineffective assistance
24 of counsel claim or otherwise alert authorities of a fraudulent scheme being conducted by the
25 unscrupulous preparer, and the States may never find out. Therefore, the Rule obstructs the
26 States' interest in and ability to discipline fraudulent preparers.

27 _____
28 ²⁰ See e.g., ACLU, *Freezing Out Justice* 1-5 (May 3, 2018),
<https://tinyurl.com/ACLUfreeze>.

1 **B. The Rule Will Deter Asylum Seekers from Reporting Significant**
 2 **Labor and Civil Rights Abuses.**

3 States' labor and civil rights laws, which protect their residents from wage theft,
 4 exploitation, and discrimination at work, are also threatened by the Rule. *See generally*, Cal. Gov.
 5 Code §§ 12900-12996 (Fair Employment and Housing Act); Cal. Bus. & Prof. Code §§ 17200
 6 (Unfair Competition Law), *et seq.*; Cal. Lab. Code §§ 200-889, 1171-1206 (wage and working
 7 conditions provisions) 1200; D.C. Code § 32-1301, *et seq.* (Wage Payment and Collection Law);
 8 D.C. Code § 32-1331.01, *et seq.* (Workplace Fraud Act); D.C. Code § 32-1001, *et seq.* (Minimum
 9 Wage Revision Act); D.C. Code § 32-531.01, *et seq.* (Sick and Safe Leave Act); D.C. Code § 2-
 10 220.01, *et seq.* (Living Wage Act); N.J. Stat. Ann. §§ 34:11-56a to -56a38 (minimum wage
 11 provisions); N.J. Stat. Ann. §§ 10:5-1, *et seq.* (Law Against Discrimination); N.Y. Labor Law
 12 Articles 5 (hours of labor), 6 (payment of wages), 19 (minimum wage standards), and 19-A
 13 (minimum wage standards for farm workers); N.Y. Workers' Comp. Law § 17. These laws are
 14 enforced without respect to immigration status, but effective enforcement relies on employees'
 15 ability and willingness to report violations. Despite the significant labor and civil rights abuses
 16 that befall unauthorized workers, fear of reprisal and deportation often inhibits unauthorized
 17 workers from reporting such violations.²¹ Asylum seekers in particular fail to report labor
 18 violations—including working weeks without pay and enduring physical abuse at work—because
 19 they fear immigration consequences.²² A study in Chicago found that, of the immigrant workers
 20 who have suffered a workplace injury and report it to their employer, 23 percent reported being
 21 either immediately fired or threatened with deportation.²³

22
 23
 24
 25 ²¹ Human Rights Watch, “*At Least Let Them Work*” *The Denial of Work Authorization*
 26 *and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013),
 27 <https://tinyurl.com/yx9vp5wf>; Daniel Costa, *California leads the way*, Econ. Policy Inst. (Mar.
 28 22, 2018), <https://tinyurl.com/CostaEPI>.

27 ²² Human Rights Watch, “*At Least Let Them Work*,” *supra* note 21.

28 ²³ Douglas D. Heckathorn, et al., *Unregulated work in Chicago: The Breakdown of*
Workplace Protections in the Low-Wage Labor Market 18, Ctr. for Urban Econ. Dev., Univ. of
 Ill. at Chicago (2010), available for download at: <https://tinyurl.com/UChicagoHeckathorn>.

1 In placing barriers within the asylum process, the Rule will have a chilling effect on asylum
 2 applications, which will in turn, have a chilling effect on applicants reporting abuses or engaging
 3 with law enforcement. The Rule thus directly harms the States' ability to enforce its laws.

4 **III. THE RULE BURDENS THE STATES' PROGRAMS, MANY OF WHICH ARE DESIGNED**
 5 **TO SUPPORT IMMIGRANTS.**

6 The Rule will burden the very programs in which the States have invested, because these
 7 programs will need to shift resources to respond the Rule's effects on asylum seekers.

8 First, many States have invested in legal organizations which provide services to
 9 immigrant populations. For example, in FY 2019-2020, the California Department of Social
 10 Services allocated almost \$45 million to administer the Immigration Services Funding program,
 11 which provides funding to organizations that represent asylum seekers, including Plaintiffs
 12 Pangea Legal Services and Catholic Legal Immigration Network, Inc.²⁴ In FY 2020, the District
 13 of Columbia (District) authorized \$2.5 million for Immigrant Justice Legal Services, a grant
 14 program to organizations that offer legal services to asylum seekers.²⁵ Such legal services are
 15 critical in light of data comparing the success of asylum seekers with and without counsel: asylum
 16 seekers who are not detained and have legal representation in immigration court proceedings
 17 prevail in 74 percent of their cases; those without representation prevail only 13 percent of the
 18 time.²⁶ For asylum seekers who are detained, 18 percent prevail when represented, while only
 19 three percent prevail when not represented.²⁷ The Rule's new pretermission and frivolous
 20 provisions make obtaining counsel even more imperative for asylum applicants who need
 21 representation to navigate the complex asylum system and avoid the serious consequences of
 22 having their case pretermitted or deemed frivolous. Further, the Rule's expanded bars and
 23 discretionary factors will reduce the number of immigrants who are eligible for asylum, forcing
 24 them to pursue more difficult forms of relief, and which may require legal expertise to claim. The

25 ²⁴ Cal. Dep't of Soc. Serv. (CDSS), *Immigration Servs. Funding*,
 26 <https://tinyurl.com/CDSSImm>.

27 ²⁵ Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal
 28 Services Grant Program (July 12, 2019), <https://tinyurl.com/BowserAnn>.

²⁶ Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87
 FORDHAM L. REV. 485, 486 (2018).

²⁷ *Id.*

1 urgent need for legal services arising from the Rule's creation of a near unrecognizable asylum
 2 process will place increased need for counsel on legal organizations already managing existing
 3 caseloads.

4 Beyond the increased need for representation, the Rule will require legal organizations to
 5 change their approach to asylum cases because of the new discretionary factors, altered eligibility
 6 standards, and expanded bars to relief. These changes will frustrate the missions of such
 7 organizations in the States and require the allocation of additional time and resources for each
 8 case. Organizations will need to divert considerable resources to re-strategizing their approaches
 9 to representing clients, revising their training, and re-allocating staff time. As a result, the number
 10 of cases these organizations can take will decrease at a time when there will be increased need for
 11 counsel for State residents. Because their funding is based, in part, on the number of cases
 12 handled per year, and the number of clients they anticipate serving, the Rule will imperil the
 13 organizations' sustainability. Compl. ¶ 351. Harms to these organizations redound to their
 14 funders, including the States, whose priorities and funding decisions will also bear the impact of
 15 the Rule.

16 Second, the Rule will place a heavy burden on the States' medical and mental health
 17 programs. For example, the DC Healthcare Alliance Program is a District-funded program
 18 designed to provide medical assistance to District residents who are not eligible for Medicaid,
 19 such as asylum seekers.²⁸ Additionally, California, New York, the District of Columbia, Illinois,
 20 Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income
 21 children regardless of immigration status.²⁹ The added trauma that asylum seekers will suffer, due
 22 to the uncertainty surrounding their legal status given the Rule's obstacles to obtaining asylum,
 23 will likely cause long-term negative health impacts. Long-term stress can contribute to serious
 24 health problems including heart disease, diabetes, and a weakened immune system.³⁰ The States

25 ²⁸ D.C. Dep't of Health Care Finance, *DC Healthcare Alliance Program*,
 26 <https://dhcf.dc.gov/service/health-care-alliance>.

27 ²⁹ Immigrant Eligibility for Health Care Programs in the United States, Nat'l Conf. St.
 28 Legis. (Oct. 19, 2017), <https://tinyurl.com/ImmElig>.

³⁰ See *5 Things You Should Know About Stress*, Nat'l Inst. Mental Health,
<https://tinyurl.com/StressNIMH> (last visited Dec. 22, 2020).

1 will need to allocate or re-allocate resources to identify, assess, and treat asylum seekers.³¹

2 Moreover, because of the Rule’s likely effect of depriving otherwise eligible asylum
 3 seekers of legal status, fewer people will have work-permits and thus, employer-sponsored health
 4 insurance. Many of these applicants cannot qualify for federal government-sponsored insurance
 5 due to their immigration status and may be required to rely on State-funded health services. 8
 6 U.S.C. § 1611. Furthermore, the uninsured have restricted access to preventative services, which
 7 results in greater healthcare costs in the long term.³² These costs will put additional pressure on
 8 strained public hospitals, which often pay for the care of uninsured patients.³³ Lower insured rates
 9 also harm public health at large, because the uninsured are less likely to receive vaccinations,
 10 which prevent the spread of infectious diseases throughout the community—a concern especially
 11 relevant as the States contend with COVID-19.³⁴

12 Additionally, undocumented asylum seekers will be more fearful to obtain routine
 13 healthcare because they are afraid of potential immigration consequences for seeking care.³⁵ This
 14 harms the States’ initiatives expanding healthcare to as many people as possible, particularly
 15 during COVID-19, because the States recognize healthcare for all residents is better for the
 16 overall health of our communities. However, when individuals are afraid to get routine
 17 healthcare, state healthcare systems are tasked with addressing acute medical conditions, and
 18 scarce emergency room resources are burdened with the aftermath of preventable conditions.³⁶

19 ³¹ Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for*
 20 *Asylum*, NPR (July 10, 2018), <https://tinyurl.com/Gorman-NPR>.

21 ³² Stacey McMorrow, et al., *Determinants of Receipt of Recommended Preventive*
 22 *Services: Implications for the Affordable Care Act*, AM. J. PUB. HEALTH (Dec. 2014),
 23 <https://tinyurl.com/McMorrowPublicHealth>; Jennifer E. DeVoe, et al., *Receipt of Preventive Care*
 24 *Among Adults: Insurance Status and Usual Source of Care*, 93 AM. J. PUB. HEALTH 5, 786-791
 25 (May 1, 2003), <https://tinyurl.com/DeVoePublicHealth>.

26 ³³ Cal. Ass’n of Pub. Hosps. & Health Sys., *About California’s Public Health Care*
 27 *Systems*, <https://tinyurl.com/y68c6m87> (public hospitals in California account for 40 percent of
 28 hospital care to the remaining uninsured in the communities they serve).

³⁴ Peng-jun Lu, et al., *Impact of health insurance status on vaccination coverage among*
 29 *adult populations*, 48 AM. J. PREV. MED. 647–661 (Apr. 15, 2015), <https://tinyurl.com/y5es4yt4>.

³⁵ Shamsheer Samra, et al., *Undocumented Patients in the Emergency Department:*
 30 *Challenges and Opportunities*, 20 WEST J. EMERGENCY MED. 791, 792 (Sept. 2019),
 31 <https://tinyurl.com/UndocPatients> (One in eight undocumented Latinx immigrants fears
 32 deportation when using the emergency department.).

³⁶ *Id.*

1 **IV. ASYLEES AND ASYLUM SEEKERS ARE VITAL TO THE SUCCESS OF THE STATES’**
 2 **ECONOMIES AND THE PROSPERITY AND HEALTH OF THE STATES’ COMMUNITIES.**

3 Immigrants, including asylum seekers, are the backbone of States’ workforce and economy.
 4 By depriving putative asylees of protection, the Rule will also deprive *Amici* States of their
 5 entrepreneurship and significant contributions to the States’ communities.

6 The following are just three examples of immigrant contributions to the States’ economies:

- 7 • **California:** In California, there are 6.6 million immigrants in the State’s workforce.³⁷
 8 In 2018, immigrant business owners accounted for over 38 percent of all Californian
 9 entrepreneurs and generated almost \$24.5 billion in business income, and immigrant-
 10 led households in California paid over \$38.9 billion in state and local taxes and
 11 exercised almost \$290.9 billion in spending power.³⁸
- 12 • **Illinois:** Immigrants also play a big role in the economy of Illinois. In 2016,
 13 Immigrants in Chicago alone contributed \$1.6 billion to the state’s economy through
 14 taxes and helped create or preserve 25,664 local manufacturing jobs.³⁹ Also,
 15 immigrant-owned businesses generated \$63.9 billion in sales in Illinois in 2018.⁴⁰
- 16 • **New York:** In New York, 2.8 million immigrant workers comprised 28 percent of the
 17 labor force in 2018. Immigrant-led households in New York paid \$35.4 billion in
 18 federal taxes and \$21.8 billion in state and local taxes in 2018.⁴¹

19 Asylum seekers also contribute to the States through increased tax revenue and increased
 20 purchasing power. A draft 2017 report by HHS found that over the past decade, refugees,
 21 including asylees, contributed \$63 billion more in tax revenue than they cost in public benefits.⁴²

22 _____
 23 ³⁷ Am. Immigration Council, *Immigrants in California 2* (June 2020),
<https://tinyurl.com/AIC-ImmCA>.

³⁸ *Id.* at 4-5.

24 ³⁹ New Am. Econ., *New Americans in Chicago 1*, 4 (Nov. 2018),
<https://tinyurl.com/Immigrants-Chicago>.

25 ⁴⁰ New Am. Econ., *The Contributions of New Americans in Illinois* (2018),
<https://tinyurl.com/2018Illinois>.

26 ⁴¹ Am. Immigration Council, *Immigrants in New York 2*, 4 (June 2020),
<https://tinyurl.com/Immigrants-in-NY>.

27 ⁴² *Rejected Report Shows Revenue Brought in by Refugees*, N.Y. TIMES
 28 (Sept. 19, 2017), <https://tinyurl.com/2017DraftReport>.

1 Further, undocumented immigrants residing in the States pay approximately \$7.6 billion in state
 2 and local taxes annually.⁴³ Although unauthorized workers pay taxes, tax revenue increases when
 3 immigrants can legally work, and the States could stand to lose substantial revenue as a result of
 4 the Rule. For example, in Massachusetts, undocumented immigrants pay an average of \$184.6
 5 million in state and local taxes each year, an amount that would increase to \$240.8 million if they
 6 had legal status and work authorization.⁴⁴ Similarly, undocumented immigrants in New Mexico
 7 would have paid in excess of \$8 million more in taxes in 2017 if they had full legal status.⁴⁵

8 The vital role that immigrants, including asylum seekers, play in the States' economies
 9 and communities is particularly pronounced in the context of COVID-19. Immigrants comprise
 10 18 percent of the labor force deemed "essential," including 16 percent of health care workers, 31
 11 percent of agricultural and farm workers, 26 percent of wholesale grocery workers, 18 percent of
 12 essential retail workers (restaurants, grocery stores, gas stations, pharmacies, etc.), 24 percent of
 13 construction workers, and 19 percent of workers providing service to maintain safety, sanitation,
 14 and operations of essential businesses.⁴⁶ Notably, of the approximate 3 million immigrant-owned
 15 businesses that were active in February 2020 across the country, about 80 percent were in
 16 "essential" industries, the majority of which have been able to continue operation.⁴⁷ Even during
 17 a global health pandemic, immigrants continue to provide essential services, such as health care,
 18 as well as create employment opportunities to the States and their residents.

19 By adding hurdles to obtaining asylum, the Rule impedes asylum seekers from obtaining
 20 legal status, thereby significantly lowering the tax revenue, economic contributions, and essential
 21 services that the States receive from asylum seekers participating in the economy.

22 CONCLUSION

23 For the foregoing reasons, *Amici* States request this Court to grant Plaintiffs' Motion.

24 ⁴³ Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax*
 25 *Contributions* 3 (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

26 ⁴⁴ *Id.*

27 ⁴⁵ *Id.*

28 ⁴⁶ Donald Kerwin, et al., *US Foreign-Born Essential Workers by Status and State, and the*
Global Pandemic, CMS Report 8-12 (May 2020), <https://tinyurl.com/SMCPandemic>.

⁴⁷ Robert Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-
 Stage Losses from the April 2020 Current Population Survey*, Stanford Inst. for Econ. Policy
 Research 8 (May 2020), <https://tinyurl.com/SIEPRCovid>.

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13
 14 **IMMIGRATION EQUALITY, et al.,**
 Plaintiffs,
 15
 16 **v.**
 17 **U.S. DEPARTMENT OF HOMELAND**
SECURITY, et al,
 18 Defendants.

Case No. 3:20-cv-09258-JD

**UNOPPOSED MOTION FOR LEAVE TO
 FILE A BRIEF OF AMICI CURIAE
 STATES IN SUPPORT OF PLAINTIFFS’
 MOTION FOR A PRELIMINARY
 INJUNCTION, TEMPORARY
 RESTRAINING ORDER, AND STAY
 UNDER 5 U.S.C. § 705**

Judge: Honorable James Donato
 Hearing Date: January 7, 2021
 Action Filed: December 21, 2020

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1 The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine,
 2 Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York,
 3 Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of
 4 Columbia (States or *Amici* States) respectfully request and move for leave to appear as *amici*
 5 *curiae* and file the proposed *amicus curiae* brief, attached hereto as Exhibit A, in support of
 6 Plaintiffs’ motion for a preliminary injunction, temporary restraining order and stay under 5
 7 U.S.C. § 705, set to be heard on January 7, 2021.¹ Plaintiffs and Defendants consent to the States’
 8 request. A proposed order is attached.

9 **I. STANDARD FOR MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE**

10 District courts may consider amicus briefs from non-parties with unique information or
 11 perspectives that are useful or otherwise desirable to the court. *See NGV Gaming, Ltd. v.*
 12 *Upstream Point Molate, LLC*, 355 F. Supp. 2d. 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v.*
 13 *Norton*, 246 F. Supp. 2d. 59, 62 (D.D.C. 2003) and *Ryan v. Commodity Futures Trading Comm’n*,
 14 125 F.3d 1062, 1064 (7th Cir. 1997)). “The ‘classic role’ of amicus curiae is to assist a court in a
 15 case of public interest by ‘supplementing the efforts of counsel,’” and “generally courts have
 16 ‘exercised great liberality’ in permitting amicus briefs.” *Cal. v. U.S. Dep’t of the Interior*, 381 F.
 17 Supp. 3d 1153, 1163–64 (N.D. Cal. 2019) (quoting *Miller-Wohl Co. v. Comm’r of Labor &*
 18 *Indust.*, 694 F.2d 203, 204 (9th Cir. 1982); *Woodfin Suite Hotels, LLC v. City of Emeryville*, No.
 19 C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007)).

20 While there are no strict prerequisites to qualify for amicus status, “[d]istrict courts
 21 frequently welcome amicus briefs from non-parties . . . if the amicus has unique information or
 22 perspective that can help the court beyond the help that the lawyers from the parties are able to
 23 provide.” *Sonoma Falls Developers, L.L.C. v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919,
 24 925 (N.D. Cal. 2003) (internal quotation marks and citation omitted). In addition, participation of
 25

26 _____
 27 ¹The States are separately filing a Motion for Leave to File a Brief as Amici Curiae in the
 28 related matter, *Pangea Legal Services, et al., v. U.S. Department of Homeland Security, et al.*,
 3:20-cv-09253-JD. The proposed amicus briefs in both matters make similar arguments, with
 variations based on the Plaintiffs’ pleadings.

1 amicus curiae may be appropriate where the legal issues in a case have potential ramifications
2 beyond the parties directly involved. *Id.*

3 **II. INTEREST AND IDENTITY OF AMICI CURIAE**

4 Every year, *Amici* States welcome thousands of asylum seekers into our borders. In 2017-
5 2019, *Amici* States constituted six of the top ten states of residence for individuals whose
6 affirmative asylum applications were granted.² Combined, these six States were home to 60.7
7 percent of the total number of individuals granted affirmative asylum applications in the United
8 States.³ In fiscal year (FY) 2019, immigration courts in the States issued approximately 41,910
9 asylum decisions.⁴

10 The rule at issue here, *Procedures for Asylum and Withholding of Removal; Credible Fear*
11 *and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (the Rule), introduces a litany of provisions
12 that will dramatically transform the asylum system into an unrecognizable process in which few
13 asylum seekers will attain protection. These changes will harm thousands of current and future
14 States' residents, resulting in many bona fide asylum seekers being denied protection and ordered
15 removed; or alternatively, many asylum seekers being deterred from filing an application at all.
16 As government entities, the States have a unique interest in ensuring that the United States
17 continues to be a safe-haven for refugees, a congressionally-established principle which this Rule
18 undermines. The States also have an interest in keeping families together—which as explained in
19 the attached brief, is made more difficult under the Rule.

20 Additionally, the States' law enforcement interests are impacted by this Rule. As more
21 asylum seekers are forced into the shadows because they are deterred from applying for or are
22 denied relief, the States' ability to enforce criminal, labor, and civil rights laws is hindered.
23 Furthermore, the States have a strong interest in supporting immigrants, including asylum
24 seekers, residing in their geographical boundaries. In furtherance of the States' interest, they have
25 carefully crafted systems that function to welcome and deliver essential services to immigrants.

26 ² Ryan Baugh, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow*
27 *Report: Refugees and Asylees: 2019* tbl. 13 (Sept. 2020), <https://tinyurl.com/BaughFlowReport>.

28 ³ *Id.*

⁴ TRAC Immigration, Asylum Decisions,
<https://trac.syr.edu/phptools/immigration/asylum/>.

1 As set forth in greater detail in the attached brief, the States have made significant financial
2 investments in these programs and services, and have created state departments responsible for
3 administering them. These systems, in turn, have resulted in thriving immigrant communities that
4 strengthen the social fabric and economies of communities throughout the States. By making
5 asylum much more difficult to attain, the Rule stands to upend this progress and undermine the
6 States' programs and investments.

7 Finally, the States have an interest in the success of their economies, tax bases, and
8 communities—all of which benefit from the contributions of asylum seekers targeted by this
9 Rule. Indeed, immigrants' contributions have never been more evident than during the COVID-
10 19 pandemic, as immigrants comprise a significant portion of the nation's essential workforce.
11 By preventing asylum seekers from obtaining status, and potentially resulting in increased
12 deportations, the Rule negatively impacts the States' communities, economies, and tax revenue.
13 For these reasons, *Amici* States are particularly well-suited to provide this Court with a unique
14 perspective on the Rule's impact on the public interest.

15 **III. PROPOSED *AMICUS CURIAE* BRIEF'S RELEVANCE AND AID TO THE** 16 **COURT**

17 The proposed *amicus curiae* brief focuses on the public interests at stake, and in particular,
18 provides this Court with a perspective on how this broad, omnibus Rule could harm the States and
19 their residents if not enjoined. The proposed brief begins with a discussion of the Rule's gravest
20 potential effects—namely, that many of the States' most vulnerable residents could be denied
21 protection and families could be separated. These two outcomes are contrary to the States'
22 interests, which prize the American principles of providing refugees a home and family unity.
23 The brief also explains how the States' enforcement of criminal laws, and labor and civil rights
24 protections will be imperiled by the Rule because more asylum seekers will be forced to live in
25 the shadows without immigration status, making them less likely to file complaints or otherwise
26 raise abuses with authorities. The proposed brief also explains how State-funded programs may
27 be impacted by the Rule. Particularly, and in light of the complexities the Rule introduces into
28 the asylum application process, State-funded legal service providers will need to devote

1 additional time and resources for each case, and divert resources to re-strategizing their
2 approaches to representing clients, revising their training, and re-allocating staff time. The
3 States' healthcare programs may also be strained as more asylum seekers go without legal status
4 and fear obtaining healthcare. Finally, the brief discusses how the States' economies and
5 communities benefit greatly from asylum seekers. In sum, the brief will provide the Court with a
6 perspective on *Amici* States' interests and the ways in which the Rule harms those interests, that
7 only the States themselves can provide.

8 **CONCLUSION**

9 For the foregoing reasons, *Amici* States respectfully requests this Court's leave to appear
10 as *amici curiae* and deem the proposed amicus brief filed.

11 Dated: December 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of for the Northern District of California by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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 14 **IMMIGRATION EQUALITY, et al.,**
 Plaintiffs,
 15
 16 v.
 17 **U.S. DEPARTMENT OF**
HOMELAND SECURITY, et al.,
 18 **Defendants.**

Case No. 3:20-cv-09258-JD

**[PROPOSED] BRIEF OF AMICI
 CURIAE STATES IN SUPPORT OF
 PLAINTIFFS' MOTION FOR A
 TEMPORARY RESTRAINING ORDER,
 PRELIMINARY INJUNCTION, AND
 STAY UNDER 5 U.S.C. § 705**

Judge: Honorable James Donato
 Hearing Date: January 7, 2021
 Action Filed: December 21, 2020

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1 the States’ social fabric and economy, particularly during the COVID-19 pandemic.⁴ Thus, a
2 temporary restraining order and preliminary injunction will benefit the public interest.

3 ARGUMENT

4 I. THE RULE UNDERMINES THE STATES’ INTERESTS BY DEPRIVING ASYLUM SEEKERS 5 OF PROTECTION AND INCREASING FAMILY SEPARATIONS.

6 A. The Rule Undermines the States’ Interest in Providing Refuge to 7 Asylum Seekers.

8 The purpose of the Refugee Act of 1980, which established the present asylum system, was
9 to codify “one of the oldest themes in America’s history—welcoming homeless refugees to our
10 shores.” S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. The *Amici*
11 States have a profound interest in upholding this fundamental American tenet—especially where,
12 as here, the Federal Government fails to do so.

13 The Rule’s changes to the asylum system are numerous and varied, but each change shares
14 a common thread—making humanitarian protection more difficult to obtain. Among several
15 restrictive and punitive provisions, the Rule codifies that the Attorney General “will not” grant
16 asylum if nine negative discretionary factors are present, unless the applicant can meet the high
17 bar of establishing “extraordinary circumstances”⁵ or prove by “clear and convincing evidence[]
18 that the denial of asylum would result in [an] exceptional and extremely unusual hardship.” 85
19 Fed. Reg. 80,396-97. Even if the applicant makes this showing, the application can still be denied
20 on discretion “depending on the gravity” underlying the application of the negative discretionary
21 factor. *Id.* at 80,397. The Rule further provides “significant[]” adverse discretionary factors that
22 adjudicators “shall” consider. *Id.* at 80,396. The Rule also narrows the grounds upon which an
23 applicant can be granted asylum, and allows immigration judges to pretermite asylum claims
24 before the applicant has had an opportunity for a full hearing. *Id.* at 80,280, 80,395. The burden of

25 ⁴ The States note that twenty-three States’ Attorneys General, including many of the
26 signatories to this brief, submitted a comment letter expressing concerns about the Rule’s
27 potential impacts on the States’ interest in family unity, law enforcement, State-funded programs,
28 and the States’ economies and workforce during COVID-19. Comment on FR Doc # 2020-12575,
<https://tinyurl.com/AGscomment>. The Rule makes no mention of the States’ unique concerns.

⁵ The Rule does not define extraordinary circumstances but describes the term as
encompassing “those involving national security or foreign policy considerations,” indicating an
extremely high standard that will not apply in the vast majority of cases. 85 Fed. Reg. 80,397.

1 these new barriers will fall hardest on the States’ most vulnerable residents, depriving many
2 otherwise eligible applicants from protection.

3 While recognizing that several components of the Rule are bound to have the same result,
4 the States highlight how the Rule’s discretionary factors will effectively block bona fide asylum
5 seekers from relief in three ways by: (1) applying to asylum seekers who did not seek protection
6 in a third country, even if it would be dangerous or futile to do so; (2) rendering the filing of an
7 application after one-year of unlawful presence to be a negative factor, potentially denying relief
8 to those who failed to file due to trauma; and (3) applying to unaccompanied children.

9 **1. The Rule Effectively Requires Applicants to File for Protection**
10 **in Third Countries, Disregarding Their Safety.**

11 The Rule considers an applicant’s failure to apply for humanitarian protection in at least
12 one country through which they transited to be a significant adverse discretionary factor—
13 ignoring that for many applicants, such an application would be infeasible and unsafe. 85 Fed.
14 Reg. 80,282. In addition, the Rule treats as negative factors that will result in denial: (1) an
15 applicant’s failure to apply for humanitarian protection in a country where they were present for
16 14-days, and (2) an applicant’s failure to apply for humanitarian protection in at least one country
17 transited through if they transited through two or more countries. *Id.*

18 The Rule exempts individuals from these adverse discretionary factors if they passed
19 through countries that are not party to refugee-related agreements and protocols. *Id.* at fn. 7. The
20 exemption, however, is based on a false premise that countries that are signatories to refugee-
21 related agreements and protocols provide asylum seekers with the actual ability to safely seek
22 protection. In fact, the vast majority of countries, including those with severely repressive
23 governments, are signatories to these agreements and protocols.⁶ For instance, while China is a
24 signatory to a refugee-related agreement, it is also oppressive to religious minorities and conducts
25 “mass arbitrary detention” of Uighur Muslims and members of other Muslim groups.⁷ Yet, under

26 ⁶ A total of 151 countries are parties to the 1967 Protocol and 1951 Convention. United
27 Nations High Commissioner of Refugees, *States Parties to the 1951 Convention relating to the*
Status of Refugees and the 1967 Protocol (April 2015), <https://tinyurl.com/unhcrsign>.

28 ⁷ U.S. Dep’t of State, *Human Rights Report – China 2019* 2-3,

1 the Rule, asylum seekers who have a layover in China en route to the United States would be
2 expected to apply for protection there, even if they would be at risk of persecution.

3 Most commonly, the Rule will compel the thousands of Central American asylum seekers
4 who apply for protection in the United States each year to first seek protection in Mexico in order
5 to avoid a discretionary denial.⁸ But, seeking asylum in Mexico is not feasible or safe for many
6 people. This reality, borne out in the Federal Government’s own administrative record, led a
7 federal court to preliminarily enjoin Defendants’ third country transit asylum bar. *E. Bay*
8 *Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 953 (N.D. Cal.), aff’d, 964 F.3d 832 (9th Cir.
9 2020) (“[T]he administrative record fails to support the conclusion that asylum in Mexico is a
10 ‘feasible alternative.’”).

11 At the outset, there are several barriers to protection in Mexico, such as an untenable 30-
12 day filing deadline.⁹ Beyond that, asylum seekers would be at an increased risk of crime,
13 exploitation, and persecution as they await the adjudication of their cases in Mexico. As an
14 example of these dangers, as of January 2020, there were 816 reports of murder, rape, torture,
15 kidnapping, and other violent assaults against asylum seekers who were forced to remain in
16 Mexico during the pendency of their asylum cases because of Defendants’ restrictive program,
17 the “Migrant Protection Protocols.”¹⁰ Asylum seekers placed in migrant detention centers receive
18 little reprieve, as officers with the National Migration Institute frequently extort detainees.¹¹ The
19 situation would be especially dire for migrant women, who are often subject to harassment and
20 abuse in Mexican immigration detention centers.¹² Similarly, Lesbian, Gay, Bisexual,

21 _____
22 <https://tinyurl.com/DeptStch>; U.S. Dep’t of State, *2019 Report on International Religious*
Freedom: China (Includes Tibet, Xinjiang, Hong Kong, and Macau) 2,
23 <https://tinyurl.com/DOSIRF>.

⁸ Baugh, *supra* note 2 at tbls. 6a, 6b.

⁹ Human Rights Watch, *Closed Doors: Mexico’s Failure to Protect Central American*
24 *Refugee and Migrant Children* (Mar. 31, 2016), <https://tinyurl.com/HRWClosedDoorsMexico>;
25 *Refugees Int’l, A New Path Forward: Strengthening the Protection Landscape in Mexico* (Nov.
12, 2020), <https://tinyurl.com/RefIntl2>.

¹⁰ Human Rights First, *Delivered to Danger* (Jan. 21, 2020), <https://tinyurl.com/HRFMpp>.

¹¹ Associated Press, *Overcrowding, Abuse Seen at Mexico Migrant Detention Center*,
26 KTLA (June 17, 2019), <https://tinyurl.com/APktla>.

¹² Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*,
27 United Nations Univ. (May 4, 2016), <https://tinyurl.com/FleuryMay2016>.

1 Transgender, and Queer (LGBTQ) asylum seekers in detention suffer “discrimination, sexual
2 harassment and even aggression from the other detainees or the [center] staff.”¹³

3 In practice, the Rule’s discretionary factors will force many asylum seekers to make the
4 excruciating choice to either apply for relief in a third country—where they may face danger or
5 even persecution—or forgo that process and risk their claim being denied in the United States.

6 **2. By Making One Year of Unlawful Presence a Negative Factor,
7 the Rule Will Seriously Harm Trauma Victims.**

8 Under the Rule, applicants who apply for asylum after one year of unlawful presence in the
9 United States will ordinarily be denied on discretionary grounds. As Plaintiffs adeptly argue, this
10 provision is at tension with the statutory one-year filing deadline for asylum applications. The
11 statutory deadline exempts applicants from filing their application within one year if they
12 establish either exceptional circumstances related to their ability to timely file, such as physical or
13 mental illness, or that there are changed conditions effecting their eligibility for relief. 8 U.S.C.
14 § 1158(a)(2)(D). But these exemptions do not expressly apply to the Rule’s unlawful presence
15 discretionary factor, and, as Defendants recognize, there will be some applicants who overcome
16 the one-year filing deadline just to have their applications denied on discretion for failing to file
17 within one year.¹⁴

18 This unfair outcome may befall victims suffering from post-traumatic stress disorder
19 (PTSD), as it is well-recognized that PTSD can hinder an applicant’s ability to file a timely
20 asylum application. *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004). PTSD is
21 highly prevalent among victims of domestic violence, childhood abuse, and hate crimes.¹⁵ This
22 discretionary factor will be yet another obstacle to these applicants’ ability to receive relief.

23 ¹³ Amnesty Int’l, *No Safe Place: Salvadorans, Guatemalans and Hondurans Seeking*
24 *Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity* 22 (Nov. 2017),
<https://tinyurl.com/AmIn17> (quoting the Citizens’ Council of the National Migration Institute).

25 ¹⁴ It does not appear that an applicant’s showing of an exceptional circumstance impairing
26 their ability to file an asylum application under 8 U.S.C. § 1158(a)(2)(D) would be an
27 “extraordinary circumstance” to rebut this discretionary factor. Defendants recognize that there
28 will be some applicants who meet the statutory filing deadline, but to whom the discretionary
factor will apply. 85 Fed. Reg. 80,355. In response to this concern, Defendants only state that
adjudicators can “consider those circumstances in accordance with the [R]ule.” *Id.*

¹⁵ Guila Ferrari & Gene Feder, et al., *Psychological advocacy towards healing (PATH): A*

3. Most Discretionary Factors Apply to Unaccompanied Children.

Although Defendants exempted children from the Rule’s unlawful entry discretionary factor, all other discretionary factors will apply to unaccompanied children, thereby making them more likely to be denied asylum. Congress expressly recognized the vulnerabilities of unaccompanied children and their unique need for protection in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Pub. L. No. 110-457, 122 Stat. 5044 (TVPRA). Under the TVPRA, children are exempted from certain statutory bars to asylum, such as the safe third country agreement bar and the one-year filing deadline. 8 U.S.C. § 1158(a)(2)(E); 8 C.F.R. § 208.4(a)(5)(i). Children are also entitled to first present their asylum claims during non-adversarial interviews at the U.S. Citizenship and Immigration Services (USCIS) Asylum Office with officers trained in “child-sensitive and trauma informed interview techniques,” instead of adversarial immigration court proceedings. *J.O.P. v. U.S. Dep’t of Homeland Sec.*, 409 F. Supp. 3d 367, 372 (D. Md. 2019).

Yet, the Rule subjects unaccompanied children to discretionary denials of asylum for minor, but common, issues—including filing an application one year after entry, or after passing through a third country without applying for relief, rendering the statutory protections previously enacted by Congress irrelevant. With asylum off the table, these unaccompanied children will be forced to present claims for withholding of removal and protection under Convention Against Torture (CAT), which can only be granted by an immigration court. 8 C.F.R. § 208.16. As Congress recognized in enacting the TVPRA, immigration court is not the proper venue for children to present their claims, partly because those proceedings subject unaccompanied children to cross-examination about the worst moments of their lives. *See J.O.P.*, 409 F. Supp. 3d at 372 (citing 8 U.S.C. §§ 1158, 1232(d)).

In all, these discretionary factors, like several other provisions of the Rule, will prevent asylum seekers—particularly those vulnerable to abuse—from obtaining asylum. Defendants justify these obstacles to relief by reasoning that asylum is a discretionary benefit. 85 Fed. Reg.

randomized controlled trial of a psychological intervention in a domestic violence service setting, *PLOS ONE* (2018), <https://tinyurl.com/psychdv>; Int’l Soc’y for Traumatic Stress Studies, *Global Perspectives on the Trauma of Hate-Based Violence*, <https://tinyurl.com/traumaviolence>.

1 80,282. But discretion should not be used as a cudgel to block all but the lucky few from asylum,
2 as it would be under the Rule. Such a result is contrary to the founding principles of the United
3 States asylum system, the States' interests, and the public interest. *Leiva-Perez v. Holder*, 640
4 F.3d 962, 971 (9th Cir. 2011) (per curiam) (“deliver[ing] [asylum seekers] into the hands of their
5 persecutors” is against the public interest).

6 **B. The Rule Undermines the States' Interest in Family Unity.**

7 The Rule will result in the denial of protection, and subsequent deportation, for many of
8 those who will be or are currently seeking asylum in the States. These deportations will have the
9 consequence not just of putting an applicant at risk for persecution, but also separating them from
10 their family members who reside in the United States.¹⁶ Moreover, with asylum out of reach due
11 to the Rule's discretionary factors and expanded bars to relief, withholding of removal and
12 protection under CAT will be the only forms of relief available for many applicants. Unlike
13 asylum, neither withholding of removal nor CAT offers any protection to an applicant's children
14 or spouse. *See* 8 U.S.C. § 1158(b)(3)(A). The Rule could thus result in absurd situations where a
15 parent is granted protection, but their child who does not have a separate claim is ordered
16 removed. “The result is an almost impossible choice: live in safety while separated from one's
17 family and their perilous life a world away, or join them in their peril and risk the probability of
18 death or imprisonment.” *See Haniffa v. Gonzales*, 165 F. App'x 28, 29 (2d Cir. 2006).

19 The separation of asylum seekers from their family members will harm the States, which
20 benefit from family units that provide stability and support for their members, as well as
21 irreplaceable care and nurturing of children. *See, e.g., Moore v. City of East Cleveland*, 431 U.S.
22 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most
23 cherished values, moral and cultural.”). The Select Commission on Immigration and Refugee
24 Policy, a congressionally appointed commission tasked with studying immigration policy,

25 ¹⁶ *See* Office of Refugee Resettlement, U.S. Dep't of Health and Human Services (HHS),
26 *Unaccompanied Alien Children Released to Sponsors by State* (Sept. 27, 2019),
27 <https://tinyurl.com/ORRuac> (in FY 2019, over 8,000 unaccompanied children were released to
28 sponsors residing in California); HHS, *Frequently Asked Questions Regarding Unaccompanied
Alien Children*, <https://tinyurl.com/HHSuac> (last visited Dec. 21, 2020) (explaining that sponsors
generally must be parents or close relatives).

1 expounded upon the necessity of family reunification in 1981:

2 “Reunification . . . serves the national interest not only through the humaneness of the
3 policy itself, but also through the promotion of the public order and wellbeing of the
4 nation. Psychologically and socially, the reunion of family members . . . promotes the
5 health and welfare of the United States.”¹⁷

6 Indeed, family unity is the basis of the modern immigration system. *Solis-Espinoza v. Gonzales*,
7 401 F.3d 1090, 1094 (9th Cir. 2005) (“The Immigration and Nationality Act (‘INA’) was
8 intended to keep families together.”).

9 Because family units are a bulwark of support for all their members, separating families
10 will further traumatize and endanger asylum seekers. Family separation can result in: irregular
11 sleep patterns, which can lower academic achievement among children; toxic stress, which can
12 delay brain development and cause cognitive impairment; symptoms of PTSD; and a greater risk
13 of developing mental health disorders such as depression and anxiety.¹⁸ Trauma can also have
14 negative physical effects on children, such as loss of appetite, stomachaches, and headaches,
15 which can become chronic if left untreated.¹⁹

16 The Rule’s likely effect of increasing asylum denials will devastate asylum seekers and
17 their families, with impacts that will extend to their communities and to the States.

18 **II. THE RULE HINDERS THE STATES’ ABILITY TO ENFORCE THEIR OWN LAWS.**

19 The numerous barriers to asylum implemented by the Rule are likely to result in a chilling
20 effect on asylum applications. As a result, fewer people will file for asylum and more will remain
21 undocumented. The States will be harmed because undocumented immigrants are less likely to
22 report crime or cooperate in state investigations of crime; and more likely to enter into the
23 underground economy, and therefore less likely to report ongoing labor and civil rights violations.
24 Consequently, the Rule interferes with the States’ ability to enforce their penal, labor, and civil

25 ¹⁷ Human Rights Watch, *US: Statement to the House Judiciary Committee on “The
26 Separation of Nuclear Families under US Immigration Law”* (Mar. 14, 2013),
27 <https://tinyurl.com/HRWFamilySeparation> (quoting US Select Committee on Immigration and
28 Refugee Policy, “U.S. Immigration Policy and the National Interest,” 1981).

¹⁸ Colleen K. Vesely, Ph.D., et al., *Immigrant Families Across the Life Course: Policy
Impacts on Physical and Mental Health*, Nat’l Council on Family Relations (2019)
<https://tinyurl.com/NCFRpolicybrief>.

¹⁹ Allison Abrams, *LCSW-R, Damage of Separating Families*, Psych. Today (June 22,
2018), <https://tinyurl.com/AbramsSeparation>.

1 rights laws. The States have a fundamental interest in being able to enforce their own laws.
 2 *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989). When rulemaking impinges
 3 on that ability, the States suffer an injury. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*,
 4 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

5 First, Undocumented individuals are less inclined to cooperate with law enforcement or
 6 provide helpful information when they are a victim of a crime, for fear of engaging with state
 7 actors and becoming subject to deportation.²⁰ The disincentive to assist law enforcement will
 8 make it more difficult for States to enforce their penal laws, and puts immigrants at risk of being
 9 victims of crime themselves.

10 Second, States' labor and civil rights laws, which protect their residents from wage theft,
 11 exploitation, and discrimination at work, are also threatened by the Rule. *See generally*, Cal. Gov.
 12 Code §§ 12900-12996 (Fair Employment and Housing Act); Cal. Bus. & Prof. Code §§ 17200
 13 (Unfair Competition Law), *et seq.*; Cal. Lab. Code §§ 200-889, 1171-1206 (wage and working
 14 conditions provisions) 1200; D.C. Code § 32-1301, *et seq.* (Wage Payment and Collection Law);
 15 D.C. Code § 32-1331.01, *et seq.* (Workplace Fraud Act); D.C. Code § 32-1001, *et seq.* (Minimum
 16 Wage Revision Act); D.C. Code § 32-531.01, *et seq.* (Sick and Safe Leave Act); D.C. Code § 2-
 17 220.01, *et seq.* (Living Wage Act); N.J. Stat. Ann. §§ 34:11-56a to -56a38 (minimum wage
 18 provisions); N.J. Stat. Ann. §§ 10:5-1, *et seq.* (Law Against Discrimination); N.Y. Labor Law
 19 Articles 5 (hours of labor), 6 (payment of wages), 19 (minimum wage standards), and 19-A
 20 (minimum wage standards for farm workers); N.Y. Workers' Comp. Law § 17. These laws are
 21 enforced without respect to immigration status, but effective enforcement relies on employees'
 22 ability and willingness to report violations. Despite the significant labor and civil rights abuses
 23 that befall unauthorized workers, fear of reprisal and deportation often inhibits unauthorized
 24 workers from reporting such violations.²¹ Asylum seekers in particular fail to report labor

25 ²⁰ *See e.g.*, ACLU, *Freezing Out Justice* 1-5 (May 3, 2018),
 26 <https://tinyurl.com/ACLUfreeze>.

27 ²¹ Human Rights Watch, "*At Least Let Them Work*" *The Denial of Work Authorization*
 28 *and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013),
<https://tinyurl.com/yx9vp5wf>; Daniel Costa, *California leads the way*, Econ. Policy Inst. (Mar.
 22, 2018), <https://tinyurl.com/CostaEPI>.

1 violations—including working weeks without pay and enduring physical abuse at work—because
 2 they fear immigration consequences.²² A study in Chicago found that, of the immigrant workers
 3 who have suffered a workplace injury and report it to their employer, 23 percent reported being
 4 either immediately fired or threatened with deportation.²³

5 In placing barriers within the asylum process, the Rule will have a chilling effect on asylum
 6 applications, which will in turn, have a chilling effect on applicants reporting abuses or engaging
 7 with law enforcement. The Rule thus directly harms the States’ ability to enforce its laws.

8 **III. THE RULE BURDENS THE STATES’ PROGRAMS, MANY OF WHICH ARE DESIGNED**
 9 **TO SUPPORT IMMIGRANTS.**

10 The Rule will burden the very programs in which the States have invested, because these
 11 programs will need to shift resources to respond the Rule’s effects on asylum seekers.

12 First, many States have invested in legal organizations which provide services to
 13 immigrant populations. For example, in FY 2019-2020, the California Department of Social
 14 Services allocated almost \$45 million to administer the Immigration Services Funding program,
 15 which provides funding to organizations that represent asylum seekers.²⁴ In FY 2020, the District
 16 of Columbia (District) authorized \$2.5 million for Immigrant Justice Legal Services, a grant
 17 program to organizations that offer legal services to asylum seekers.²⁵ Such legal services are
 18 critical in light of data comparing the success of asylum seekers with and without counsel: asylum
 19 seekers who are not detained and have legal representation in immigration court proceedings
 20 prevail in 74 percent of their cases; those without representation prevail only 13 percent of the
 21 time.²⁶ For asylum seekers who are detained, 18 percent prevail when represented, while only
 22 three percent prevail when not represented.²⁷ The Rule’s new pretermission provisions make

23 ²² Human Rights Watch, “*At Least Let Them Work*,” *supra* note 21.

24 ²³ Douglas D. Heckathorn, et al., *Unregulated work in Chicago: The Breakdown of*
 25 *Workplace Protections in the Low-Wage Labor Market* 18, Ctr. for Urban Econ. Dev., Univ. of
 Ill. at Chicago (2010), available for download at: <https://tinyurl.com/UChicagoHeckathorn>.

26 ²⁴ Cal. Dep’t of Soc. Serv. (CDSS), *Immigration Servs. Funding*,
<https://tinyurl.com/CDSSImm>.

27 ²⁵ Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal
 Services Grant Program (July 12, 2019), <https://tinyurl.com/BowserAnn>.

28 ²⁶ Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87
 FORDHAM L. REV. 485, 486 (2018).

²⁷ *Id.*

1 obtaining counsel even more imperative for asylum applicants who need representation to
2 navigate the complex asylum system and avoid the serious consequences of having their case
3 pretermitted. Further, the Rule's expanded bars and discretionary factors will reduce the number
4 of immigrants who are eligible for asylum, forcing them to pursue more difficult forms of relief,
5 and which may require legal expertise to claim. The urgent need for legal services arising from
6 the Rule's creation of a near unrecognizable asylum process will place increased need for counsel
7 on legal organizations already managing existing caseloads.

8 Beyond the increased need for representation, the Rule will require legal organizations to
9 change their approach to asylum cases because of the new discretionary factors, altered eligibility
10 standards, and expanded bars to relief. These changes will frustrate the missions of such
11 organizations in the States and require the allocation of additional time and resources for each
12 case. Organizations will need to divert considerable resources to re-strategizing their approaches
13 to representing clients, revising their training, and re-allocating staff time. As a result, the number
14 of cases these organizations can take will decrease at a time when there will be increased need for
15 counsel for State residents. Because their funding is based, in part, on the number of cases
16 handled per year, and the number of clients they anticipate serving, the Rule will imperil the
17 organizations' sustainability. Compl. ¶ 365. Harms to these organizations redound to their
18 funders, including the States, whose priorities and funding decisions will also bear the impact of
19 the Rule.

20 Second, the Rule will place a heavy burden on the States' medical and mental health
21 programs. For example, the DC Healthcare Alliance Program is a District-funded program
22 designed to provide medical assistance to District residents who are not eligible for Medicaid,
23 such as asylum seekers.²⁸ Additionally, California, New York, the District of Columbia, Illinois,
24 Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income
25 children regardless of immigration status.²⁹ The added trauma that asylum seekers will suffer, due

26 ²⁸ D.C. Dep't of Health Care Finance, *DC Healthcare Alliance Program*,
27 <https://dhcf.dc.gov/service/health-care-alliance>.

28 ²⁹ Immigrant Eligibility for Health Care Programs in the United States, Nat'l Conf. St.
Legis. (Oct. 19, 2017), <https://tinyurl.com/ImmElig>.

1 to the uncertainty surrounding their legal status given the Rule’s obstacles to obtaining asylum,
 2 will likely cause long-term negative health impacts. Long-term stress can contribute to serious
 3 health problems including heart disease, diabetes, and a weakened immune system.³⁰ The States
 4 will need to allocate or re-allocate resources to identify, assess, and treat asylum seekers.³¹

5 Moreover, because of the Rule’s likely effect of depriving otherwise eligible asylum
 6 seekers of legal status, fewer people will have work-permits and thus, employer-sponsored health
 7 insurance. Many of these applicants cannot qualify for federal government-sponsored insurance
 8 due to their immigration status and may be required to rely on State-funded health services. 8
 9 U.S.C. § 1611. Furthermore, the uninsured have restricted access to preventative services, which
 10 results in greater healthcare costs in the long term.³² These costs will put additional pressure on
 11 strained public hospitals, which often pay for the care of uninsured patients.³³ Lower insured rates
 12 also harm public health at large, because the uninsured are less likely to receive vaccinations,
 13 which prevent the spread of infectious diseases throughout the community—a concern especially
 14 relevant as the States contend with COVID-19.³⁴

15 Additionally, undocumented asylum seekers will be more fearful to obtain routine
 16 healthcare because they are afraid of potential immigration consequences for seeking care.³⁵ This
 17 harms the States’ initiatives expanding healthcare to as many people as possible, particularly

18
 19 ³⁰ See *5 Things You Should Know About Stress*, Nat’l Inst. Mental Health,
<https://tinyurl.com/StressNIMH> (last visited Dec. 22, 2020).

20 ³¹ Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for*
Asylum, NPR (July 10, 2018), <https://tinyurl.com/Gorman-NPR>.

21 ³² Stacey McMorrow, et al., *Determinants of Receipt of Recommended Preventive*
Services: Implications for the Affordable Care Act, AM. J. PUB. HEALTH (Dec. 2014),
<https://tinyurl.com/McMorrowPublicHealth>; Jennifer E. DeVoe, et al., *Receipt of Preventive Care*
Among Adults: Insurance Status and Usual Source of Care, 93 AM. J. PUB. HEALTH 5, 786-791
 23 (May 1, 2003), <https://tinyurl.com/DeVoePublicHealth>.

24 ³³ Cal. Ass’n of Pub. Hosps. & Health Sys., *About California’s Public Health Care*
Systems, <https://tinyurl.com/y68c6m87> (public hospitals in California account for 40 percent of
 hospital care to the remaining uninsured in the communities they serve).

25 ³⁴ Peng-jun Lu, et al., *Impact of health insurance status on vaccination coverage among*
adult populations, 48 AM. J. PREV. MED. 647–661 (Apr. 15, 2015), <https://tinyurl.com/y5es4yt4>.

26 ³⁵ Shamsheer Samra, et al., *Undocumented Patients in the Emergency Department:*
Challenges and Opportunities, 20 WEST J. EMERGENCY MED. 791, 792 (Sept. 2019),
 27 <https://tinyurl.com/UndocPatients> (One in eight undocumented Latinx immigrants fears
 28 deportation when using the emergency department.).

1 during COVID-19, because the States recognize healthcare for all residents is better for the
 2 overall health of our communities. However, when individuals are afraid to get routine
 3 healthcare, state healthcare systems are tasked with addressing acute medical conditions, and
 4 scarce emergency room resources are burdened with the aftermath of preventable conditions.³⁶

5 **IV. ASYLEES AND ASYLUM SEEKERS ARE VITAL TO THE SUCCESS OF THE STATES’
 6 ECONOMIES AND THE PROSPERITY AND HEALTH OF THE STATES’ COMMUNITIES.**

7 Immigrants, including asylum seekers, are the backbone of States’ workforce and economy.
 8 By depriving putative asylees of protection, the Rule will also deprive *Amici* States of their
 9 entrepreneurship and significant contributions to the States’ communities.

10 The following are just three examples of immigrant contributions to the States’ economies:

- 11 • **California:** In California, there are 6.6 million immigrants in the State’s workforce.³⁷
 12 In 2018, immigrant business owners accounted for over 38 percent of all Californian
 13 entrepreneurs and generated almost \$24.5 billion in business income, and immigrant-
 14 led households in California paid over \$38.9 billion in state and local taxes and
 15 exercised almost \$290.9 billion in spending power.³⁸
- 16 • **Illinois:** Immigrants also play a big role in the economy of Illinois. In 2016,
 17 Immigrants in Chicago alone contributed \$1.6 billion to the state’s economy through
 18 taxes and helped create or preserve 25,664 local manufacturing jobs.³⁹ Also,
 19 immigrant-owned businesses generated \$63.9 billion in sales in Illinois in 2018.⁴⁰
- 20 • **New York:** In New York, 2.8 million immigrant workers comprised 28 percent of the
 21 labor force in 2018. Immigrant-led households in New York paid \$35.4 billion in
 22 federal taxes and \$21.8 billion in state and local taxes in 2018.⁴¹

23 ³⁶ *Id.*

24 ³⁷ Am. Immigration Council, *Immigrants in California 2* (June 2020),
<https://tinyurl.com/AIC-ImmCA>.

25 ³⁸ *Id.* at 4-5.

26 ³⁹ New Am. Econ., *New Americans in Chicago 1*, 4 (Nov. 2018),
<https://tinyurl.com/Immigrants-Chicago>.

27 ⁴⁰ New Am. Econ., *The Contributions of New Americans in Illinois* (2018),
<https://tinyurl.com/2018Illinois>.

28 ⁴¹ Am. Immigration Council, *Immigrants in New York 2*, 4 (June 2020),
<https://tinyurl.com/Immigrants-in-NY>.

1 Asylum seekers also contribute to the States through increased tax revenue and increased
 2 purchasing power. A draft 2017 report by HHS found that over the past decade, refugees,
 3 including asylees, contributed \$63 billion more in tax revenue than they cost in public benefits.⁴²
 4 Further, undocumented immigrants residing in the States pay approximately \$7.6 billion in state
 5 and local taxes annually.⁴³ Although unauthorized workers pay taxes, tax revenue increases when
 6 immigrants can legally work, and the States could stand to lose substantial revenue as a result of
 7 the Rule. For example, in Massachusetts, undocumented immigrants pay an average of \$184.6
 8 million in state and local taxes each year, an amount that would increase to \$240.8 million if they
 9 had legal status and work authorization.⁴⁴ Similarly, undocumented immigrants in New Mexico
 10 would have paid in excess of \$8 million more in taxes in 2017 if they had full legal status.⁴⁵

11 The vital role that immigrants, including asylum seekers, play in the States' economies
 12 and communities is particularly pronounced in the context of COVID-19. Immigrants comprise
 13 18 percent of the labor force deemed "essential," including 16 percent of health care workers, 31
 14 percent of agricultural and farm workers, 26 percent of wholesale grocery workers, 18 percent of
 15 essential retail workers (restaurants, grocery stores, gas stations, pharmacies, etc.), 24 percent of
 16 construction workers, and 19 percent of workers providing service to maintain safety, sanitation,
 17 and operations of essential businesses.⁴⁶ Notably, of the approximate 3 million immigrant-owned
 18 businesses that were active in February 2020 across the country, about 80 percent were in
 19 "essential" industries, the majority of which have been able to continue operation.⁴⁷ Even during
 20 a global health pandemic, immigrants continue to provide essential services, such as health care,
 21 as well as create employment opportunities to the States and their residents.

22
 23 ⁴² *Rejected Report Shows Revenue Brought in by Refugees*, N.Y. TIMES
 (Sept. 19, 2017), <https://tinyurl.com/2017DraftReport>.

24 ⁴³ Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax*
Contributions 3 (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

25 ⁴⁴ *Id.*

26 ⁴⁵ *Id.*

27 ⁴⁶ Donald Kerwin, et al., *US Foreign-Born Essential Workers by Status and State, and the*
Global Pandemic, CMS Report 8-12 (May 2020), <https://tinyurl.com/SMCPandemic>.

28 ⁴⁷ Robert Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-
 Stage Losses from the April 2020 Current Population Survey*, Stanford Inst. for Econ. Policy
 Research 8 (May 2020), <https://tinyurl.com/SIEPRCovid>.

1 By adding hurdles to obtaining asylum, the Rule impedes asylum seekers from obtaining
2 legal status, thereby significantly lowering the tax revenue, economic contributions, and essential
3 services that the States receive from asylum seekers participating in the economy.

4 **CONCLUSION**

5 For the foregoing reasons, *Amici* States request this Court to grant Plaintiffs' Motion.

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