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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION

13 **PANGEA LEGAL SERVICES, et al.,**

14 Plaintiffs,

15 v.

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  
 AND ORDER TO SHOW CAUSE**

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

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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.<sup>1</sup> *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.<sup>2</sup> In FY 2019, immigration courts in the States issued approximately 41,910 asylum decisions.<sup>3</sup>

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

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<sup>1</sup> 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>.

<sup>2</sup> 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>.

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



1 the States’ social fabric and economy, particularly during the COVID-19 pandemic.<sup>4</sup> 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”<sup>5</sup> 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 <sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup> For instance, while China is a

26 \_\_\_\_\_  
 27 <sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup> Asylum seekers placed in migrant detention centers receive  
 20 little reprieve, as officers with the National Migration Institute frequently extort detainees.<sup>11</sup> The  
 21 situation would be especially dire for migrant women, who are often subject to harassment and

22 <sup>7</sup> 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 <sup>8</sup> Baugh, *supra* note 2 at tbls. 6a, 6b.

27 <sup>9</sup> 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>.

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

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

1 abuse in Mexican immigration detention centers.<sup>12</sup> 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.”<sup>13</sup>

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.<sup>14</sup>

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

24 <sup>13</sup> 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 <sup>14</sup> 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.<sup>15</sup> 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 <sup>15</sup> 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.<sup>16</sup> 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 <sup>16</sup> *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.”<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup>

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 <sup>17</sup> 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 <sup>18</sup> 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 <sup>19</sup> 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.<sup>20</sup> 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 <sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

22  
 23  
 24  
 25                  <sup>21</sup> 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                  <sup>22</sup> Human Rights Watch, “*At Least Let Them Work*,” *supra* note 21.

28                  <sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> For asylum seekers who are detained, 18 percent prevail when represented, while only  
 19 three percent prevail when not represented.<sup>27</sup> 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 <sup>24</sup> Cal. Dep't of Soc. Serv. (CDSS), *Immigration Servs. Funding*,  
 26 <https://tinyurl.com/CDSSImm>.

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

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

<sup>27</sup> *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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> The States

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

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

<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> These costs will put additional pressure on  
 8 strained public hospitals, which often pay for the care of uninsured patients.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

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

21 <sup>32</sup> Stacey McMorrow, et al., *Determinants of Receipt of Recommended Preventive*  
*Services: Implications for the Affordable Care Act*, AM. J. PUB. HEALTH (Dec. 2014),  
 22 <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  
 (May 1, 2003), <https://tinyurl.com/DeVoePublicHealth>.

23 <sup>33</sup> 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  
 24 hospital care to the remaining uninsured in the communities they serve).

25 <sup>34</sup> 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 <sup>35</sup> 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  
 deportation when using the emergency department.).

28 <sup>36</sup> *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.<sup>37</sup>  
 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.<sup>38</sup>
- 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.<sup>39</sup> Also,  
 15 immigrant-owned businesses generated \$63.9 billion in sales in Illinois in 2018.<sup>40</sup>
- 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.<sup>41</sup>

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.<sup>42</sup>

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

24 <sup>38</sup> *Id.* at 4-5.

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

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

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

27 <sup>42</sup> *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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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 <sup>43</sup> Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax*  
 25 *Contributions* 3 (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

26 <sup>44</sup> *Id.*

27 <sup>45</sup> *Id.*

28 <sup>46</sup> 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>.

<sup>47</sup> 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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